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Faculty of Law

Journal of Law

№2, 2011

Tbilisi

UDC(ეპ) 34(051.2)
J-77

ISSN 2233-3746

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S C I E N C E

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EXTREME NECESSITY AS A REFLECTION OF TELEOLOGICAL DEFINITION FORMULA "SATURDAY FOR A MAN AND NOT A MAN FOR SATURDAY" – IN NOMO CANON

1. Introduction

Christian doctrine has profoundly impacted development of legal culture. Basic values of Christian religion have been reflected in universally recognized human rights and freedoms, as well as minimal legal prescription – criminal law. From history of law of Christian countries, including Georgia, it is obvious that issue of guilt has been thoroughly analyzed in works of clericals and clerical law documents.

The question: why Christianity and not some other religion – the answer can be found in philosophical doctrine, elaborated by Christian religion in relation to the concept of a human being and the universe. Christianity appeared to be the only religion, which has set for itself rather a difficult task, completely different from other religions – trinity dogma and issue of dual nature of Jesus Christ. Christian theology has answered questions which had never been raised by other religions: how can God be trinity in one being, be embodied son of a man, have two natures, and therefore have "double will – divine and human,[1] action of double nature– divine and human, self authority of double nature– divine and human, wisdom and knowledge – divine and human", be "completely God while being a human and at the same time – completely human while being God?"[2]

Such deep interest towards the issue of will of Jesus Christ has naturally brought clerical figures to research of issues of human intellect and free will, law, justice, crime, punishment, and therefore, problem of guilt, circumstances excluding guilt and unlawfulness. Christian doctrine has also thoroughly analyzed teleological principle. It is obvious, that society which, according to its legal development, is at the stage of impersonal declaring, is not interested in issues of guilt and extreme necessity. Such things can only be possible, when personal declaring principle is already introduced. Christianity is based on this moral-ethical principle, when behaviorist model already existing in human being projected for future situations, the very thought, idea about, readiness to commit criminal action, rather than just criminal action committed, are judged and considered sinful.

2. Importance of Teleological Definition

"Legal methodology is a set of rules, which should be considered by law administrator while interpreting law ".[3] Importance of interpretation of law by a law administrator is clearly demonstrated in

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1 *John of Damaskus*, Thorough Communication of the Orthodox Faith, Tb., 2000, 396.

2 Ibid, 411.

3 *Khubua G.*, Theory of Law, Tb., 2004, 176.

witty words of Charles Evan Hugues - the Judge of Supreme Court of USA: "We are under a constitution, but the constitution is what the judges says it is."[4]

Teleological jurisprudence is one of the most important methods of law administration. It is a distinguished instrument in law administration. Through it "a judge does not interfere in the field of political competencies of a legislator, but he/she facilitates adoption of substantially correct decision".[5]

Authors of certain textbooks of law theory completely ignore teleological definition among the methods of interpretation of provisions. In such cases place of teleological definition is partly occupied by logical, systemic and historical explanations, as well as restricted and extended definitions.[6] It is known, that "Savin distinguished grammatical, logical, historical and systemic definition of legal norm. System, established by Savin is not identical to modern devices. E.g. Savin is definitely against teleological definition of norm".[7]

Despite of such diverse evaluation, it is obvious, that while defining a specific norm it is possible to use only one - teleological method of definition instead of various other ones, which makes it an independent and unique method. It is quite natural, since "norm interpretation has subjective nature… there is no uniform system of law application. In one case a judge can rely on the will of historic legislator, and in other cases an advantage might be given to systemic or teleological method".[8]

The word "teleology" has Greek origin („Teleios" - achieved goal and "logos" – doctrine) and defines idealistic doctrine, according to which any development is realization of a predetermined goal.[9] "According to teleological jurisprudence there is always a definite aim beyond law. In the process of law administration it is essential to properly explain this goal and adopt a relevant decision. If literal content of the law contradicts with goal of the norm, a decision should be made on the basis of the goal of the norm, rather than literal meaning. Legal decision should be based on material, rather than formal correctness".[10]

Teleological explanation is not a historical explanation, since it studies "objective aim of the law "racio Legis" rather than initial will of a legislator (any ties of a law with the legislator are ceased upon adoption of a law)… aim is a basis of legal norm, if we understand aim of the law, we understand the law".[11]

Two types of teleological definition – extended and restricted are distinguished:

a) "Sometimes legal norm provides relationships, which are beyond its scope (based on the aim of the norm). In such cases literal definition of the text might contradict to the aim of the norm".[12] In such case we apply teleological reduction (restricted) definition and "the norm is not applied, if its administration can cause a result, opposite to the aim of the law. In such a case the law is given restricted interpretation according to its aim".[13] Obviously, teleological reduction requires special legitimization, since literal definition of the law is ignored by law administrator.[14] But there is objective reason for such

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4 *Chanturia L.*, Introduction to the General Part of Georgian Civil Law, Tb., 2000, 120.
5 *Khubua G.*, Theory of Law, Tb., 2004, 157.
6 *Inwkirveli G.*, Theory of Public and Law, Tb., 1993, 128, 130; *Savaneli B.,* Theory of Law, Tb., 1997, 189-190.
7 *Khubua G.*, Theory of Law, Tb., 2004, 148.
8 Ibid, 178.
9 *Chabashvili M.*, Dictionary of Foreign Words, Tb., 1989.
10 *Khubua G.*, Theory of Law, Tb., 2004, 184.
11 Ibid, 156.
12 Ibid, 156.
13 Ibid, 157.
14 Ibid, 157.

behaviour – " literal definition of the text of the norm is so general, that it definitely goes beyond the scope of the law".[15]

A clear example of teleological reduction is a case of banning use of wood materials for fencing in one of the communities of Switzerland because of scarce wood resources. "Only stone can be used as material for fencing". Later, cemetery was surrounded by metal, {rather than stone) fence. One of citizens filed a claim in the court. Plaintiff believed that metal fence around the cemetery was ugly. The court did not satisfy the claim and explained, that the aim of the norm established by the community was restriction of use of wood materials for fencing. According to the court decision, aim of the norm allowed for teleological reduction of rules, set by the community, in relation to metal fence.[16]

b) The opposite to teleological reduction is the process of teleological extension – "when the scope of the law does not cover relations, which the law clearly aims to regulate".[17] Example for the above can be seen in law of Ancient Rome: "According to the law of twelve tabulae an owner is responsible for damage incurred by its "quadrupeds" (digest, volume IX, I). After Punic wars, ostriches, brought to Italy, frequently became cause of damage. Roman praetors applied teleological extension principle and extended scope of the norm to cover "biped" ostrich".[18]

Law science shall not restrict importance of teleological explanation just to the process of norm interpretation. It can also be successfully used for the purpose of identifying valid will in the deal. This method was used in Ancient Rome. E.g. In the history of law of the Ancient Rome there is a relevant case: "A wealthy Roman citizen, who had a pregnant wife, wrote a letter before his death. The letter said: If after my death my wife gives birth to a daughter, 1/3 of my property goes to the daughter and 2/3 – to her mother. If a have a son, 2/3 of the property goes to my son and 1/3 - to his mother". After some time from the death of the person his wife gave birth to twins – a son and a daughter. The judge found it difficult to distribute property according to the will of the deceased, since the will did not imply birth of twins. The case was properly solved by the Consul, who adequately defined content of the will. He divided property in seven parts, 1/7 went to the daughter, 2/7 – to the mother and 4/7 – to the son.[19] The consul understood, that the deceased would leave twice the property we would give to his wife and the daughter would get half of the property of the mother.

3. Teleological Definition in Christian Doctrine

Christian doctrine is equally based on both Old and new Testament. From the perspective of Christian doctrine, Old Testament is mankind history of expectation of New Testament and New Testament is new moral code which has replaced and explained the old one and which has brought humanity to higher degree of evolution. In New Testament we often come across the definitions of Old Testament laws. Old Testament is considered to be prediction on New Testament, while New Testament is considered to be explanation of Old Testament. The above is confirmed by words of

15 Ibid, 158.
16 Ibid, 157.
17 Ibid, 158.
18 Ibid, 158.
19 *Nadareishvili G.*, Roman Civil Law, Tb., 2001, 157.

Jesus Christ: "Do not think, that I have come to revoke canon or prophets. I have come not to revoke, but to execute" (Matthew, 5.17).

In Old testament there is Moses canon, which regulated legal relations, binding for selected nation of Old Testament, Israeli people. One of the most important norms was keeping Sabbat. Sabbat day off was established to celebrate that God had created the universe in six days and had a rest on the seventh day. "On the sixth day God finished its work and on the seventh day he got a rest from all the job he had done. God blessed the seventh day and declared it a Holy day, since God got a rest from all he created and did" (Birth, 22-3).

Sabbat holiday was established after Israeli people came out of the desert and received canon through Moses – "celebrate Sabbat and worship it. Work for six days and do all your jobs, and the seventh day belongs to your God".

There are many episodes in New Testament where Christ cures people, prays, preaches, interprets Holy Script etc. on Saturdays. But we have to distinguish two moments here: firstly when Christ talks about the Saturday, as it is mentioned by three evangelists (Matthew, Mark and Luca) and the other one – healing at Beth-Ezdi basin, described in John's Gospel. The first one is important since it contains Christ's answer regarding breaking Sabbat holiday, the second became official grounds for starting, if we can say so, "legal persecution" of Jesus Christ by the Jews. The latter is reflected in the Gospel in the following way:

In Jerusalem there is a basin close to Sheep gate, called Betkhasda in Jewish, it has five corridors. There were lots of sick people, blind, invalids, crippled, lying there (awaiting for water movement, since from time to time God's angel would descend into the basin and moved the water. The first one to enter the basin after water started movement, would be cured, whatever disease he might have). There was a man, about 38, suffering from a disease. Jesus saw him lying and noticed he had been an invalid for a long time and asked him: to you want to be cured? The sick man answered: I have no one to help be get into the basin when the water moves. Before I get there, other people do. Jesus told him: take your bed and go. The man immediately got healed. He took his bed and walked. It was Saturday; So the Jewish told him: It is Saturday today, you can not take our bed. The man answered: " the person who healed me, told me to take my bed and walk. They asked: " who is this man, who told you to take your bed and walk? The healed man did not know who this person was, since Jesus Christ had mixed up with the crowd. Later Jesus Christ met this person in the church and told him: Now you are healed, do not sin any more, so that something worse does not happen to you". The man went and told the Jewish that Jesus was his healer. The Jewish started to persecute him because he did this on Saturday. He told them: My Father has done it so and I also do so. The Jewish intensified his persecution and started to look for him to kill him because he had not just broken Sabbat, but also had called God his father and equaled himself to God". (John, 52-18). Christ answers this accusation with Holy Script and explains, why he refers to himself as a son: "If you trusted in Moses, you would also trust in me, since he has written about myself". (John 5.46) As for the first accusation, the answer to it can be found in the episode about Sabbat mentioned in three Gospels:

"On Saturday he had to walk on grain fields, his disciples tore heads of sprouts, ground them with hands and ate. (Luca 6.1). Pharisee saw it and told him: Well, you disciples are doing what they should not be doing on Saturday. Have not you read what David did when he and people around him got

hungry? That he went into God's House and eat presenting (Eucharistic) bread, which should not have been eaten neither by himself, nor by his surrenders, but only by priests. Or have not you read in Book of Canon, that in church priests brake Sabbat, but are innocent? And I tell you that here somebody who is more that church. If You knew, what it means: I want grace rather than victim - you would not have judged the innocent. (Matthew 12.2-7) and he told them: Saturday is created for men and not men for Saturday. Therefore, man is a master over Saturday too". (Mark, 3.27-28).

This is followed by the episode of healing dry had on Saturday, where discussions on Saturday are continued: Jesus Christ goes into the Synagogue, where there is a man with a dry hand. Pharisees watch him, if Christ will heal him and break the commandment, so that they can accuse him. "And Christ told them: I want to ask you: What is permitted on Saturday, a kind deed or evil deed? Saving of a soul or ruin of a soul? (Luca, 6.9). "And he told them, if any of you had just one sheep, and if a sheep fell into the hole on Saturday, would not you take the sheep out of the hole? and a human being is somewhat better than a sheep. Therefore you can do kind deeds on Saturday". (Matthew, 12.11-12). The Pharisees immediately talked with Herodians against him, to kill him" (Mark, 3.6)

We can say with full responsibility, that teleological definition is Gospel definition – principle: Saturday for a man and not a man for Saturday". It can in a way be called the first commandment of teleology. It is known that the tradition of defining canon books of the Bible was set by Christ himself. He taught Holy Script to his disciples in this world, and after Resurrection till Ascension he fully explained the Bible: "He started from Moses, from every prophet and explained all words about him said in all scripts". (Luca, 24.27) "and he opened their mind for understanding the scripts". (Luca 24.45) Starting from the disciples, all Christian figures tried to comply with this principle through their lives and preaches and this principle became one of the most important provisions of Christian doctrine. We can say that whole Christian doctrine is an answer to the question: "what for?" (what the universe was created for? "what the human being exist for?" Why he does this or that? What is the purpose of this or that process? etc).

In the same episode we can clearly see the aim of punishment according to Christian doctrine: "I want grace and not victim"(Matthew, 12.7), it is directly related to teleological principle: "Saturday for a man not a man for Saturday**"** and prescription of Gospel, that "canon is given by Moses and grace and truth is given by Jesus Christ" (John, 1.17). While considering the aim of the punishment Christian doctrine is rather original and unique, which is also reflected types of punishment. The highest type of punishment in canonic law is depriving of blessing through not giving Holy Communion and outcasting. Here we can see the attitude of Christian doctrine towards a delinquent (sinner), as to a sick, diseased person and towards the aim of a punishment, as to the means of correcting and educating and through this curing the society, rather than to just way of paying back. This attitude originates from the Gospel – "As God loved the world so much, that gave the only son, so that the believers do not perish, and have eternal life. God did not send his son to this world for him to judge the world, but rather to save the world. Who trusts in him, will not be judged, and who does not trust, is already sentenced since he has not trusted in the name of the only son of God. What needs to be judged is that light came to the world and people started to love darkness more than light".(John, 3.16-19) At the same time Christianity is not against the principle of repaying: "Do not judge and will not be judged, as you will be judged by the same court, which you will be judging with, you will be paid back by the same means, which you will be with," (Matthew, 7.1-2) and – "treat the people the way you want to be treated" (Matthew, 7.12) Christianity puts good higher than justice. Hence we have a principle that canon is changed in the favor of

human being. A person will not be punished in case it brings better result for his or other peroples' soul, and, therefore, for the whole society. Here we get to the principle that the aim of the law is not just formal enforcement of rules. Therefore, sometimes it is possible that law provisions are not implemented in literal content, quite the other way, absolute opposite to literal interpretation of the norm, which coincides with the aim, may be considered just and fair. This is basic provision of teleology.

In chapter 36 "Against the Jews, about Saturday" of his work "Tale" John of Damascus discusses the issue of Sabbat,[20] and talks about the purpose of setting Sabbat in Moses canon and its binding power. John of Damascus provides truly teleological explanation in relation to this day and Christ's actions.

He mentions, that breaking Sabbat ("rest" in Jewish) is determined by extremely heavy penance in Moses canon, since God "had a rest" on this day and number of days increased to seven reverse and restart from the beginning. The reason for establishing Sabbat holiday was that slaves and cattle had a rest on this day, the Jewish got training in Holy Script, carried out Mass and spent Saturday in taking care of their soul, so that people who did not devote their whole life to God, dedicate to him at least small portion of it. It is true that canon forbids weakening of oneself on Saturday, But Prophet Elijah, who walked during 40 days with only eating once and on Saturdays during this forty days weakened himself through fasting and travelling, was not punished by God but was raptured to heaven instead. Besides, on the whole territory of Israel newborn boys underwent circumcision on the eighth day from the birth, regardless whether it fell on Sabbat; if livestock falls in the pit on Saturday, it is obvious, that person who helps it out is innocent, and one ignoring it – is guilty, as "canon is set for unfair people and not for just and fair ones" (1. Tim.1.9).[21]

4. Extreme Need, as Reflection of Teleological Definition in Nomo Canon

Teleological principle "Saturday for a man and not a man for Saturday has acquired an interesting direction: while considering an issue of guilt the institution of extreme need was studied in great details.

To clarify the above we can consider norm of nomo canon, which imperatively prescribes, that no livestock can be let in the church and a priest, committing the above shall be excommunicated and secular persons shall be deprived of communion:

"No one shall be entitled to taking a donkey or any other livestock into the church, even if a passenger has faced horrible winter weather and comes across the church and there is no other building despite of such heavy circumstances only he can find a shelter in the church and can not take the cattle inside the church, even if he is pretty sure, that donkey left outside would die. There is only one case when a person can take a donkey into the church – if because of the death of a donkey man will not be able to continue the trip and will also die, because script says: "Saturday is for a man", and life and safety of a man is most important. But if anyone is supposed to have let a livestock inside the church in cases other than above extremely serious circumstances, in case he is a priest, he shall be excommunicated and a secular person shall be deprived of communion".[22]

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20 *John of Damascus*, Thorough transfer of the Orthodox Faith, Tb., 2000, 455.
21 Ibid, 456.
22 *Euthymius of Athos*, Small Canon Law, Tb., 1972, 70; *Sead*, Great Canon Law, Tb., 1975, 400.

It is pretty obvious here, that in case of threat to human life the concept of guilt and even unlawfulness is removed and all this is explained with the help of Christian principle commandment of tleoelogical definition.

In the above example we have all circumstances characteristic to extreme need:

a) an action, which is considered a crime in normal circumstances, is committed in condition of extreme need[23] – taking a donkey into the church is a grave violation of canonic law, but it is done under conditions of extreme need. (But if anyone is supposed to have let a livestock inside the church in cases other than above extremely serious circumstances, in case he is s priest, he shall be excommunicated and a secular person shall be deprived of communion).[24]

b) "One of the basis of legality of actions, carried out under conditions of extreme need is impossibility to avoid danger with other means[25] – the above circumstance is mentioned – "in case there is no other house."[26]

c) Another condition for legality is balance between interest saved and damaged. Interest saved should be more important than the one damaged.[27] – Human life is more important than benefit brought by prohibiting taking livestock into the church – "life and safety of human being is most important".[28]

d) Danger shall be existing and real".[29] Besides, theoretically and practically it is very important to "specify, what is considered by the concept of existing and real, since the issue of when the right of a person to act in order to avoid the threat, is derived and when it ends. Threat is existing in case, when it already is derived and when good protected by the law is endangered by irrevocable damage or destruction, or when probability of such outcome is very realistic"[30] – in this specific case, though the donkey is still alive but probability of its death is considered to be threat which may cause seriously endanger human life, since the weather is awful and church is far from the settlement.

e) "Source of danger, created by extreme need, may be human activities, impact of natural calamities (flood, earthquake, landslide, storm, tempest, snowfall, avalanche, fire et.), attack of domestic and wild animals, dangerous insects and microorganisms, which may cause diseases of humans, plants and animals, chemical and physical processes, mechanisms of high risk, physiological and pathological processes taking place in the body of human being (starvation, disease), etc[31] – according to canon primary source of such danger is bad weather[32] and secondly the fact, that leaving a donkey outside the church will cause its death which will put its master in very difficult situation since he will not be able to reach the settlement.

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23 *Shavgulidze T., Surguladze L.*, Excepting Circumstances of the Public Danger in Criminal Law Legislation, Tb., 1988, 189. See the definition of 13th article of the Criminal Code of Belarus of 1928 year.

24 *Euthymius of Athos*, Small Canon Law, Tb., 1972, 70.

25 *Surguladze L.*, Criminal Law, Crime, Tb., 1997, 249.

26 *Euthymius of Athos*, Small Canon Law, Tb., 1972, 70.

27 *Surguladze L.*, Criminal Law, Crime, Tb., 1997, 257.

28 Great Canon Law, Tb., 1975, 401.

29 *Shavgulidze T., Surguladze L.*, Excepting Circumstances of the Public Danger in Criminal Law Legislation, Tb., 1988, 210. See: *Slutcki I.I.,* Circumstances Excluding Criminal Liability, Leningrad, 1956, 100.

30 *Shavgulidze T., Surguladze L.*, Excepting Circumstances' of the Public Danger in Criminal Law Legislation, Tb., 1988, 211. See: *Slutcki I.I.,* Circumstances Excluding Criminal Liability, Leningrad, 1956, 100.

31 *Shavgulidze T., Surguladze L.*, Excepting Circumstances of the Public Danger in Criminal Law Legislation, Tb., 1988, 199.

32 *Euthymius of Athos*, Small Canon Law, Tb., 1972, 70.

Nomo canon knows also other cases of extreme necessity, namely:

a) a clergyman is forbidden to go into an inn or a tavern to eat and he may be deprived of his title for such an action, an exception is a case, when he has to do so being on a trip in a foreign country.[33]

b) If a person is about to die, canon considers that Sacrament shall by all means be administered., since person in such a condition can not be left without "last meal". But if a person considered to be dying, after being given Communion, gets better, he/she will only be given permission to participate in paying;[34]

c) The same issue also relates to persons possessed by a devil, who can not be given Communion until they are purified, he/she can only be taught divine service. But if a person is about to die, he/she may be given Communion.[35]

d) Similarly, if a person is in great trouble or may die because of disease or some other reasons, such persons shall be given grace prior to others;[36]

e) In case is occupied by infidels and it is impossible to get there, canon obliges a bishop to gather his congregation in a house, so that "kind servants do not enter the place of evil servants, since a man purifies a place and not a place purifies a man".[37]

f) Mono Canon forbids setting a table and having a meal in a church. An exception can be made if a person being in a foreign country lodges in a church out of extreme necessity.[38]

g) Nomo Canon distinguishes plants and animals, eating of which for human being though is not forbidden, but still is not desirable (e.g. dog meat) except for cases, when a person is made to eat them out of sheer necessity. In such cases " the eather is not committing a sin".[39]

h) We can also mention a pregnant woman, who does not have to keep Easter fast, since "Fast is set for suppressing flesh, and when flesh is already suppressed and weakened, a woman eat take as much food, as she wishes".[40]

i) And finally, it should be mentioned that John of Damascus in Chapter 38 of his work "On deliberate and accidental" writes: "We should be aware that there are things in between of deliberate and accidental. They are unpleasant and disturbing for us, but we still prefer them for the fear of greater evil. Example for it can be a case, when we sometimes through all the contains of a ship for the fear of ship wreck".[41]

5. Conclusion

Teleological definition plays important role in Christian doctrine. It is present in all theological or ideological literature existing in Christian world and is considered to be a process of analysis of will and aim of legislator as well as analysis of meaning and definition of a legal norm when being administered. Teleological definition of a legal norm is the initial cause for introduction and legal formulation of the principle of extreme necessity in Christian legal mentality.

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33 Great Canon Law, Tb., 1975, 401.
34 Ibid, 73.
35 Ibid, 64.
36 Ibid, 77.
37 Great Canon Law, Tb., 1975, 401.
38 Ibid, 157.
39 Ibid, 380.
40 Ibid, 410.
41 *John of Damascus*, Thorough Transfer of the Orthodox Faith, Tb., 2000, 373.

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FALSE NARRATING

1. Introduction

Slander could be implemented in various ways, include false information of various types. False narrating also represented one of the forms of slander, which was expressed in blaming somebody in committing a crime. After clarification of content-related aspect of narrating as term, as well as action we'll be able to say what false narrating meant. Besides, on the basis of analysis of punishments provided for false narrating we'll try to clarify which – public or private-law delict the mentioned action could be referred to.

2. The Notion of False Narrating

Blaming in committing a crime, "calumny" could occur with narrator, as well as without narrator. In the Article 10 of the Law book of Vakhtang Batonishvili, which is related to the rule of taking an oath, the following is mentioned: "for accusing in one bull, if accusation is performed without narrator, one witness, chosen by the participant of the proceeding is required; is accusation is performed by narrator, the witness, chosen according to court's instruction, is required."[1] Other articles of the mentioned Law Book also prove that calumny was possible both with and without narrator (Articles 37-40).[2] If calumny is performed by a narrator, this circumstance is always specially mentioned (Article 37): "if the murderer can't be found and one person is slandered by narrator."[3] In some cases slandering with and without narrator is provided in one and the same Article (Article 39): "if duke is blamed in regard of noble person's murder, it shall be tested – if it's a calumny, it shall be proven by witness, or oath, or red-hot iron bar. And if this calumny is from narrator, and the accused have a person, whose social status equals to the narrator's social status, they shall fight with swords; otherwise he shall fight with him himself."[4]G

All cases of slandering, mentioned in historic sources or judicial practice can't be regarded as an example of slandering by narrator. As already mentioned above, if slandering was performed by a narrator, special instruction was provided about it in most cases.

"Slandering" by narrating represented more complex form of accusation in crime. The rule of selection of oath-takers (witness) proves it. If, for instance, slandering was performed without narrator, the

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1 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang VI, the texts was published, research and dictionary was attached by Prof. *Dolidze I.,* Tb., 1963, 483.

2 Ibid, 491-492.

3 Ibid, 491.

4 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang VI, the texts was published, research and dictionary was attached by Prof. *Dolidze I.,* Tb., 1963, 491.

witness, selected by the participant of proceeding was to be brought, and if such slandering was performed by narrator, "the witness, selected by court's instructions" was required (Law of Vakhtang Batonishvili, Article 10).[5] In the latter instance, the witness was to be nominated by prosecutor or plaintiff, and in the former instance the witness could be selected by defendant or respondent.[6] Removal of narrator's accusation was more difficult for the defendant.

False narrating can't be discussed without knowing the meaning of narrator. "Narrator" was "teller", "informer".[7] And as for "narrating", in David Chubinashvili's dictionary it's defined as slandering, aspersion.[8] In old Georgian Law there are terms like slandering, informing, narrating. All these terms have similar meaning. But the use of narrator as the term of slandering makes us think that it represented more "special" type of slandering. But it will be necessary to find distinctive feature between the above mentioned terms, otherwise we won't be able to delimit false narration from false informing.

In the opinion of G. Nadareishvili, if the "narrator" was a slanderer, he, at the same time, acted in the role of informer.[9] Informing is defined as slandering, accusation.[10] Informing can occur by the direct witness of crime, as well as by other person, who learnt about the crime and offender in one or another way. In our opinion, narrator represented informer, telltale, accuser, and false narrator turns into slanderer.

If we rely on the Article 236 of Vakhtang Batonishvili's Law (C manuscript), narrator provided information to the victim, getting "narrator's fees" for it, but at the same time he would undertake an obligation that if required, he would confirm the information, provided by him, to the judge. "If narrator tells something to a person and gets "narrator's fee" he has to promise that, if required, he will support him. If he fails to promise, he lies at certain extent."[11] Failure of promising by the narrator proved untruthfulness of the information provided by him. In our opinion, the Article 38 of the mentioned Law Book allows us telling it, when the case relates to slandering in murder: "if accusing by narrator…".[12] It means that not the narrator makes accusation in the court, but the victim, based on the information, provided by the narrator in advance. But the narrator, in any case, has the obligation of proving his truthfulness in the court if the accused doesn't admit the committed crime.

Necessary feature of informing is making statement to the governmental official, in the court. And narrator, as already mentioned, applied to the victim. But as for narration about "Holy abuse" and "high treason", the narrator, supposedly, should apply to the King or Prince or court. We could find more in common between narrating and informing in Greek Law (Article 331), which states: "if a man hears

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5 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang VI, the texts was published, research and dictionary was attached by Prof. *Dolidze I.,* Tb., 1963, 483.

6 *Surguladze Iv.,* From the History of Georgian State and Law, Tb., 1963, 80.

7 *Orbeliani S.S.,* Georgian Dictionary. Vol. I, prepared according to autographic lists, research and the reference list of definitions attached by *Abuladze I.,* Tb., 1991, 478; *Abuladze I.,* Dictionary of Old Georgian (materials), Tb., 1973, 241.

8 *Chubinashvili D.,* Georgian- Russian Dictionary, 2nd ed., prepared for printing and preface attached by *Shanidze A.,* Tb., 1984, 723.

9 *Nadareishvili G.,* Protection of Human Respect and Dignity According to the Monuments of Feudal Law and Materials of Court Practice, magazine "Almanac", #14, 2000, 67.

10 *Chubinashvili D.,* Georgian- Russian Dictionary, 2nd ed., prepared for printing and preface attached by *Shanidze A.,* Tb., 1984, 415.

11 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 541.

12 Ibid, 491.

some words from another person and goes and narrates, say this word to the prince of the location, it's a proper action."[13] As we can see, according to Greek Law, the narrator informed the prince, as governmental official, in this case the type of crime doesn't matter.

The fact that false narrator is the witness, providing false evidence, and it distinguishes it from the informer, who represented false informer about crime, required more exact specification. If false narrator made statement in the court, he would resemble false informer. If he applied to the victim and promised that he would speak in the court, he would more likely correspond to the witness, giving false evidence. But there are cases in old Georgian court practice, where false narrator couldn't be regarded either as false informer or false witness. In the case of horse of Manuchar Chkonia and Sisonika Melia (decision of September 13, 1818) Manuchar Chkonia blamed Sisonika Melia in false narrating.[14] According to the decision informing didn't occur, as Sisonika Melia applied to the victim directly and not to the court. He couldn't be regarded as false witness either, as he didn't give false evidence in the court either. Informing, sneaking were synonyms in old Georgian and in both cases they meant slandering. Slandering, informing would occur in the court, if one and the same term was used in regard to victim. Thus, false informer, in some cases, may bear the features of false informer, and in other case it may seem more like false witness, while in still other case it may differ from one as well as from another. It proves that we can't identify false narrating either with false informing or false witnessing and it had specific content-related meaning.

The terms narrating, narrator - were established in old Georgian law for a long period of time. They were used in the monuments of old Georgian law (this term is used in Aghbuga Law (Article 92)[15], Law Book of Vakhtang Batonishvili (Articles 37-40, 236)[16], Law of David Batonishvili (article 94)[17]; they were used in court practice, in custom law, Aghbuga Law (Article 92); narrator is mentioned in regard to finding a lost item; the monument doesn't provide possibility for definition of the notion. According to the last paragraph of this Article only one conclusion could be made - that the narrator could make "false accusation": "it should be checked properly, narrator, finder, pirate shall be together, i.e. the loser shall not make false accusation"[18]. As it is seen, narrator could provide information on crime and offender and thus [falsely] accuse a person. The term, with the same meaning, is encountered in Vakhtang Batonishvili's Law Book in the case of blaming in murder (Article 37): "the judge shall inquire how the person is blamed and what is the reason, what happened, how the victim was killed – person shall be made to tell these. And if on the basis of such interviewing and investigation it is considered, that whatever is told is true, the person shall pay that way."[19]

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13 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 204.

14 Monuments of Georgian Law, vol. VI, Court Decisions (XVIII – XIX c.c.), the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1977, 544.

15 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 461.

16 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 491-492, 541.

17 Law of David Batonishvili, the text was published, research and glossary was attached by *Purtseladze D.,* Tb., 1964, 58.

18 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 461.

19 Ibid, 491.

The Article 38 of the mentioned Law Book also speaks about false accusation in murder: "if accusation is made through narrator and the accused person has a person, whose social status equals to that of the narrator, they shall fight with swords."[20]. If we reflect on these two Articles of Vakhtang Batonishvili's Law Book, we'll notice that in both cases the basis of accusing person is the information, provided by the narrator about the offender.

In the Article 236 of manuscript B of Vakhtang Batonishvili's Law Book, the notion of narrator is more exactly formulated: "narrator means person who saw with his eyes, how something was stolen or hidden."[21] The mentioned Article focuses on the crime, directed against property; narrator in regard to blaming in theft is also mentioned in Aghbuga Law (article 92).[22] But the mentioned doesn't mean that narrating, and, consequently, false narrating, occurred only in the case of crime directed against property.

In other articles of Vakhtang Batonishvili's Law Book narrator is mentioned in regard to murder (articles 37-40),[23] "Holy abuse" and king's traitor (Article 236).[24] But what would "Holy abuse" mean? Holy meant related to the God[25]. And abuse meant something not done properly.[26] Possibly, Holy abuse meant religious crimes.

In Georgian version of Greek law several articles are dedicated to narrating. If we compare definition of narrator in Greek Law to Georgian version, we'll see that "narrator" had similar content-related loading in both monuments of law. Greek Law (Article 332) – "if anybody knows that certain man did something good or wrong, and sees, and hides for his private benefit and doesn't reveal, and that deed is known no nobody else, but the man who has done it and the man who has seen it. Whoever is the first to say that certain man has these or those goods, and goes and informs judge about it, his narration will not be reliable, but whoever knows and says, he will be the narrator."[27]

Base on the monuments of law we could be say that the narrator is the eye-witness of the crime. Other feature is also added to this definition – that the narrator informed the victim about the identity of the offender for the sake of fee and promised that if required, he would participate in legal proceedings as a witness of prosecution. While providing such definition, Giorgi Nadareishvili bases upon the Article 236 of manuscript B of Vakhtang Batonishvili's Law Book.[28]

Similar definition is provided by T. Moniava: "narrator" was the person who had seen "who stole and hid some item". He was obliged to give an evidence to judge and confront the offender, if the latter

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20 Ibid.

21 Law Book of Vakhtang VI, the text was prepared for publication, research and reference list of terms was attached by *Enukidze T.,* Tb., 1955, 112.

22 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 461.

23 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 491-492.

24 Ibid, 541.

25 *Chubinashvili D.,* Georgian- Russian Dictionary, 2nd edition, prepared for printing and preface attached by *Shanidze A.,* Tb., 1984, 1096.

26 Ibid, 1645.

27 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 205.

28 *Nadareishvili G.,* Protection of Human Respect and Dignity According to the Monuments of Feudal Law and Materials of Court Practice, magazine "Almanac", # 14, 2000, 67.

refused having committed crime. Thus, the person who was an indirect witness of the case and could give evidence only based on the information received from other people, wouldn't be regarded as narrator."[29]

On the basis of definition of narrator we could say that false narrator is a person, who states that he is the direct eye-witness of the crime and calumniates against the man who hasn't committed a crime. At the same time, false narrator promises that he will make the offender admit the crime and may take narrator's fee for information.

3. Delimitation of Narrator and Witness

Based on the definition of narrator we could say that he is the eye-witness of the crime. In the opinion of Al. Vacheishvili, narrator should mean accusing witness.[30] In our opinion, "narrator" and "witness" are not identical notions in old Georgian law. Consequently, false witness is different from false narrator. Delimitation of false narrator and false witness will make it easier to differentiate the notion of witness and narrator.

Narrator, as well as witness is mentioned in the Article 13 of Vakhtang Batonishvili's Law Book. If these both notions have identical meaning, it's not clear why the legislator had to use both terms in one article. Narrator and witness are mentioned separately in court decisions too. In relation to this issue we could propose an assumption that the "narrator" is a person, who is the eye-witness of the crime and accuses certain person. And the "witness" could be the defender of offender's interests in confirming or rejecting some fact related to crime. In the Article 13 of we can read: "but if the judge notices that somebody is a false witness or narrator, he shall be punished so that no other person wishes to do that."[31] As we can see, punishment of false witness, as well as false narrator is implied, and it excludes identity of these two notions. The same is proven by Greek Law, where separate chapter is allocated for narrating (Articles 331-335) and separate chapter – for "witnessing of witness" (Articles 336-338).[32]

According to David Batonishvili's Law, if the narrator is the eye-witness of the crime (Article 94),[33] the witness can be the person, who wasn't the eye-witness of the crime (Article 245). "But when the witness hasn't eye-witnesses the case, but found the alleged offender at suspicious place, where the crime had been committed, witnessing is not sufficient."[34]

M. Kekelia regards narrator and witness as the bearers of different procedural nature. According to his definition, "the difference between the eye-witness and "narrator" is that narrator shows more activity in exposure of the offender. Also, the eye-witness doesn't require fee, while narrator takes fee for providing

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29 *Moniava P. (T.),* Protection of Respect, Dignity and Business Reputation in Georgia (from Ancient Times to SAociet Era (including)), Tb., 2005, 76.

30 *Vacheishvili Al.,* Essays from the History of Georgian Law. Vol. II, Tb., 1948, 71.

31 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 485.

32 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 204-206.

33 Law of David Batonishvili, the text was published, research and glossary was attached by *Purtseladze D.,* Tb., 1964, 58.

34 Law of David Batonishvili, the text was published, research and glossary was attached by *Purtseladze D.,* Tb., 1964, 146.

information related to the offender or confrontation with the suspect - "narrator's fee."[35] Consequently, false narrator can take narrator's fee, unlike false witness. Bu the main thing is that the mandatory feature of false narrator is slandering of innocent person in having committed a crime, and the evidences of false witness might not be connected with slandering in having committed a crime. Besides, if the number of witnesses had to be at least two, to convince the judge (Vakhtang Batonishvili's Law Book, Article 13),[36] such requirement isn't encountered in regard to narrator and based on the court decisions we could say that slanderous accusation of one narrator was sufficient for the court to hear the case.

4. The Issue of Indictment in the Case of False Narrating

It should be interesting to clarify who accused false narrator in slandering in the court. According to the decision of 1818 (on the case of Manuchar Chkonia and Sisonika Melia) the claim was presented, curiously enough, by the person who used narrator's service and not by the person who was slandered in having committed the crime.[37] What caused such circumstances? False accusation of person in crime led to non-payment of narrator's fee by accuser."As I have obtained your letter and you have taken narrator's fee and I was feeling free to confront that man and confronted him, and when I did, you came and told me to let him alone and charged me with fee for disdain and now you aren't giving me back my horse, and I don't know what you want from me."[38] Fee for disdain meant fee for disrespect, or disrespect itself. And disrespect meant dishonoring.[39] In this case the subject of dispute is financial loss, suffered by the accuser by paying narrator's fee and fee for disdain, which he was charged in favor of the person, whom he falsely accused. As we see from the document, the person is accused in robbery not by false narrator, but by the person who lost the horse on the basis of information provided by false narrator. Thus, not the false narrator, but the accuser was charged with the payment of disdain fee.

If narrator made a statement in the court and not to the victim, false narrator was in the role of accuser, so supposedly false narrator would be charged with disdain fee. According to the Article 39 of Vakhtang Batonishvili's Law Book: "if, who knows, the narrator isn't able to pay the compensation…"[40] In this case false narrator pays the compensation for accusing in murder.

5. The Subject of False Narration

When speaking about indictment, of course, the following issue arises: who could be indicted and imposed punishment for false narration. According to the Article 187 of Vakhtang Batonishvili's Law Book: "whatever a juvenile younger than 10 years commits, shall not be regarded as evil deed com-

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35 *Kekelia M.,* Judicial Organization and Process in Georgia Prior to Joining Russia, Book II, Tb., 1981, 195.

36 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 486.

37 Monuments of Georgian Law, vol. VI, Court Decisions (XVIII – XIX c.c.), the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1977, 545.

38 Ibid, 544.

39 *Chubinashvili D.,* Georgian- Russian Dictionary, 2nd ed., prepared for printing and preface attached by *Shanidze A.,* Tb., 1984, 1264.

40 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 492.

mitted by evil man."[41] On the basis of this general norm we could say that a person couldn't be imposed responsibility for false narration if this person was younger than 10 years. But where there other requirements, which would allow limitation of the circle of the subjects of this offense? The norms, on the basis of which we would directly answer this question, are not encountered in old Georgian monuments of law. We could only judge on the basis of requirements towards narrator and draw some conclusions on this basis.

According to the Article 236 of manuscript B Vakhtang Batonishvili's Law Book: "it should be properly checked to make sure that the narrator is not an enemy, or non-Christian, telling it from hostility".[42] Thus the narrator shouldn't be non-Christian, and at the same time, shouldn't have hostile relations with the person, in regard to whom he was narrating.

Article 13 of Vakhtang Batonishvili's Law Book speaks about the responsibility of false witness and false narrator. As, in regard to determination of responsibility and imposition of punishment, the legislator sets similar requirements towards the witness and the narrator, and mentions them in one article, supposedly, the requirements set by the legislator towards the personality of the witness, should apply to the narrator. As we have already mentioned above, slandering by narrator was more complex form of accusation, so it's doubtful that the requirements applied to witness, on whom the judge had to focus, would be left without attention in regard to narrator. According to the above mentioned article, "if a man brings such witness, who believes in God, is spiritual, clever, or is a clergyman, or is knows as a righteous person and people trust him, one shall believe what he says. And if not - believing in one or two such persons is not ruled. And stating that - such man shall be trusted."[43] As we can see, focus is made on mental sanity, as well as moral and religious aspects of a person. Spirituality, according to M. Kekelia's definition, means that the man believes in life after death.[44]

Our opinion is supported by David Batonishvili's Law (article 94): "narrators shall be reliable and honest persons, in order to be trusted by honest justice."[45] If the man wasn't known as "reliable" and "honest", the information, provided by him wouldn't be taken into consideration.

Let's compare the above mentioned statements with the requirements of Greek Law towards narrator (Article 333): "a woman shall never be a narrator; and if the man was punished for being evil, he will not be believed, as well as the man who joined army and then return back as deserter. Only the man, who is true believer and doesn't have either envy or hostility towards anybody and doesn't narrate on the basis of hostility."[46] I.e. the narration of a person would be taken into consideration if: 1. the narrator was a man; 2. if the person hadn't previously committed a crime; 3. if the person hadn't revealed cowardness (hadn't deserted from army); 4. if the person was a believer; 5. if the person didn't

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41 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 527.

42 Law Book of Vakhtang VI, the text was prepared for publication, research and reference list of terms was attached by *Enukidze T.,* Tb., 1955, 112.

43 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 484-485.

44 *Kekelia M.,* Judicial Organization and Process in Georgia Prior to Joining Russia, Book II, Tb., 1981, 191.

45 Law of David Batonishvili, the text was published, research and glossary was attached by *Purtseladze D.,* Tb., 1964, 58.

46 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 205.

have either envy or hostility towards anybody; 6. if he didn't have hostile relation with the accused person. Actually, the requirements of Georgian Law didn't differ in content from provisions, formulated in Greek Law but for one circumstance. As it was already mentioned above, Greek Law prohibited woman's being a narrator. How was this issue solved in ancient Georgian Law? Based On Vakhtang Batonishvili's Law Book (Article 216), we could say that bringing woman as a witness, as well as her coming to the court wasn't accepted: "based on her story neither oath can be made nor taken something from anybody; if [she] asks man to confirm, it's a mistake". If woman claimed against woman, such claim had to be dealt by community chief. Woman was admitted to justice only if man claimed against her.[47] But in regard to the last issue, controversial information is provided in the decision related to the case of Didi Mouravi and Javakhishvili (1620) according to which it becomes obvious that calling woman to the court was considered a shame. Kaikhosro Javakhisvili sent a man to Javakhishvili, "I have problems with Mouravi, I ask you to let Mouravi's mother come to the court". In answer to it, mother of Didi Mouravi stated: "yes, he claims a lot, but how can I adjudicate him; and it isn't fitting you to let a woman come to court for adjudication."[48] But in decisions of later period we can see that women acted as witnesses in the court. Among the claims, provided in materials, published by T. Enukidze, for the History of Senior Judge Court of the Kingdom of Georgia (1755- 1760), there are many claims of a man against woman, woman against woman, also woman against man, so he concludes that by that time Article 216 of Vakhtang Batonishvili's Law Book, which stated: "if woman claims against woman, she has nothing to do in the court; community chief shall regulate the case", was no more valid. By that time woman is a full-right party at court hearing.[49]

We haven't found any proof of woman's being a narrator either in law monuments or in court practice, which enables us to assume that narrating by woman wasn't established in ancient Georgian law. Consequently, woman's responsibility for false narration was excluded.

Speaking about the requirements of court towards narrator, it's clear that if the person didn't meet these or those requirements, his accusation wouldn't be considered reliable. But as the court practice and Custom Law shows, narrator didn't apply directly to the court, but to 'he victim and would promise to give evidence in the court in the case if the offender admitted a crime. In this case taking of the narrator's moral features into consideration would rather depend on victim's reasonability. Regardless of narrator's written promise that he would expose the offender, this promise could remain unredeemed, which would provide a basis for another legal proceedings.

6. Punishments, Provided for False Narration

If the person was imposed responsibility for his physical or mental status, question arises – what sanction would apply to him for the committed action. According to the legislator's requirement, false narration would be punished strictly and stringently so that it had preventive effect on others (Law of

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47 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 537.

48 Monuments of Georgian Law, Court Decisions (XVI – XVIII c.c.), the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1972, 63.

49 *Enukidze T.,* Materials for the History of Senior Judge Court of the Kingdom of Georgia (1755 – 1760), Tb., 1964, 17.

Vakhtang Batonishvili, Article 13): "But if judge notices false witnessing or false narrating from somebody, he shall execute him badly so that nobody else ever wants to do it."[50] This is general requirement towards judges, but what kind of specific sanctions could apply to false narrators, or what circumstances the type or size of punishments depended on?

Execution meant devastation, disturbance.[51] In the opinion of Al. Vacheishvili, this word meant not property-related sanction, but it was a corporal punishment.[52] As in the Law of Vakhtang Batonishvili corporal punishments are referred to as "crippling", it made scientists suppose that "execution" might imply punishment of other content and mean devastation and disturbance of offender's house and estate.

Following the definition of the word itself, we can't say that "execution" represented crippling punishment. Besides, it's unlikely that such stringent punishment was applied in each case of false narration, disregarding the type of crime slandered by the narrator. This assumption is supported by the circumstance that in the articles of the Law of Vakhtang Batonishvili, which relate to narration concerning specific crime, crippling punishment isn't mentioned at all. This type of punishment doesn't occur in regard to false narration in court practice either. If it implied devastation of estate, it's more likely that the legislator implied property-related sanctions, the more so that in the case of false narration removal of claim with compensation and penalty was more often applied. Besides, according to the Article 26 of Vakhtang Batonishvili's Law book, false narrator had to be imposed the same punishment, as that provided for the crime, slandered by him: "if a man falsely narrates against the man and the narrator proves to be lying, the judge shall impose on him the punishment, provided for the crime, slandered by him against the true man."[53] And it excludes that always crippling punishment was applied to false narrator, as it is directly stressed that the type and size of punishment depends on the crime slandered by false narrator.

Punishment by beating is encountered in the Article 236 of Vakhtang Batonishvili's Law Book (manuscript B): "if the alleged thief doesn't admit the crime and the narrator proves to be lying, he shall be beaten, fined and dismissed."[54] In this case punishment in the form of beating was used together with fining, while falsely narrating about robbery. Beating was applied in the case of light crime.[55] In our opinion, the form of beating wouldn't be strict. When the legislator wanted to stress the strictness of punishment, like in the above stated example related to "execution", there is special indication that the judge has to "execute the offender badly".

As it was mentioned above, false narrator would be imposed the punishment, provided for the crime in committing of which he was slandering other person. Georgian Customary Law confirms that false narrator would be imposed the punishment, for which he narrated falsely.[56] The same provision is

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50 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 485.

51 *Chubinashvili D.,* Georgian-Russian Dictionary, 2nd edition, prepared for printing and preface attached by *Shanidze A.,* Tb., 1984, 960.

52 *Vacheishvili Al.,* Essays from the History of Georgian Law. Vol. I, Tb., 1946, 110-111.

53 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 542.

54 Law Book of Vakhtang VI, the text was prepared for publication, research and reference list of terms was attached by *Enukidze T.,* Tb., 1955, 112.

55 *Javakhishvili Iv.,* Compositions in Eleven Volumes, vol. VIII, Tb., 1984., 361.

56 *Kekelia M.,* Judicial Organization and Process in Georgia Prior to Joining Russia, Book II, Tb., 1981, 206.

repeated in the Law of avid Batonishvili (Article 94): "Strictness shall be applied to prevent people from false narration; the persons, who narrate falsely, shall be punished by fine in the amount for which they narrated, half of which shall be given to the person whom they slandered and half – to the King.[57]

In David Batonishvili's Law (Article 94) false narrating represents public delict, as half of the fine, imposed upon the person for false narration, belonged to the King, and the other half was given to the slandered person. Apparently, the sanction of false narrating could only be of property-related character.

Fine is mentioned in the Article 236 of Vakhtang Batonishvili's Law (manuscript B). As for the application of punishment in the case of false narrating regarding robbery, in our opinion, we can rely on the Article 154 of Vakhtang Batonishvili's Law, which relates to robbery: "if the goods or cattle were stolen from noble man or member of the gentry, he will be paid seven times the amount. If they were stolen from a peasant – two times the amount shall be given to the peasant and the rest is King's."[58] Supposedly, in the case of false narrating concerning robbery, judge had to determine the amount of the fine in accordance with this Article. Article 94 of David Batonishvili's Law[59] as well as Article 236 of Vakhtang Batonishvili's Law, manuscript C,[60] contain similar requirement, that false narrator would have to be punished, in regard of what he had narrated; but if David Batonishvili's Law provided for payment of half fine in favor of the King, the similar requirement is absent in the mentioned Article of Vakhtang Batonishvili's Law. Despite of the fact, that this circumstance is not concretely specified, we can't say that the mentioned issue would be settled similarly in any case. According to the Article 38 of the same Law Book,[61] in the case of false narrating concerning murder the whole "compensation" was to be paid to the slandered person, thus the punishment was imposed in favor of the victim and not in favor of the state, as in this case the legislator applies to composition. On the basis of the above mentioned we draw conclusion that based on Vakhtang Batonishvili's Law, all cases of false narrating cannot be considered as public law delict. As for the Article 236 of the same Law Book, manuscript B, it mentions, as we have already stated, fining together with beating: "if the alleged thief doesn't admit the crime and the narrator proves to be lying, he shall be beaten, fined and dismissed"[62] In our opinion, the provisions of the manuscripts B and C don't contradict each other, as manuscript B focuses not on punishment of false narrator in general, but in slandering in robbery in particular. If we fill the data with the both manuscripts, we could express an assumption that the legislator considered this form of slandering in robbery as public delict, and it isn't surprising as the robbery itself is considered as public delict (Vakhtang Batonishvili's Law, Article 154),[63] although not

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57 Law of David Batonishvili, the text was published, research and glossary was attached by *Purtseladze D.,* Tb., 1964, 58.

58 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 519.

59 Law of David Batonishvili, the text was published, research and glossary was attached by *Purtseladze D.,* Tb., 1964, 58.

60 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 542.

61 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 491.

62 Law Book of Vakhtang VI, the text was prepared for publication, research and reference list of terms was attached by *Enukidze T.,* Tb., 1955, 112.

63 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 519.

in each case of robbery. As for false narrating concerning other crime, the sanction depended on the crime committed by the offender. But in judicial practice we don't encounter imposition of fine in the case of false narrating concerning robbery, but the accent is made on satisfaction of private interest.[64]

T. Moniava's opinion, that if the thief wouldn't be able to pay the fine in seven-fold amount, the narrator and the thief would be handed over to the victim, seems groundless to us.[65] The use of the term "debt" itself is not acceptable in this case, as "seven-fold" to be paid by the thief, represented the form of punishment. If the thief is charged with payment of compensation by the court, the issue of narrator's responsibility in regard to the victim is not understandable, as there is no false narration. Indictment of the thief was proving the reliability of the provided information. In general, as we have already mentioned, false narrator was imposed the punishment, for which he narrated falsely. As Vakhtang Batonishvili mentions (article 150), "robbery, indeed, have many forms and is diverse."[66] Out of these diverse robberies, the legislator specifies only one case, where the thief is responsible by himself and his family (Vakhtang Batonishvili's Law, Article 151): "if the thief entered into the house where the wife and the husband are in bed together and stole weapon or clothes of the man, or something else, or the woman's jewelry and clothes, he shall compensate the stolen things in seven-fold amount, and besides, pay the compensation in the amount of half fine established for the relevant social status. If he can't afford it, the thief, together with his wife and children, cattle and property shall be handed over."[67] But in this case also, this punishment is referred to as alternative sanction. Consequently, generalization of the fact that in the case of false narrating concerning robbery the person was responsible with his own self and family, is not possible. As an exception, it could be mentioned that supposedly, in the case of slandering in the robbery of the above mentioned form false narrator could be responsible with his own self and family.

In the case of slandering in murder, "fighting with swords" could be applied. Defeat of narrator in fight with swords would prove the falseness of information, provided by him. In this case the narrator was handed over to the slandered person and at the same time he would receive the whole amount of compensation (Vakhtang Batonishvili's Law, Articles 38-40).[68] In this case, at certain extent, we deal with cumulative sanction. In Vakhtang Batonishvili's Law handing over of false narrator to the slandered person follows fighting with swords, but in our opinion, it was applied in any case, disregarding of the way the accused justified himself. It is proven by decision of the II quarter of the XVIII century, where in the case of proving of his innocence by swearing by the accused, the narrator was to be handed over to him.[69]

The same cumulative sanction is included in the next article (39) of Vakhtang Batonishvili's Law, where alternative sanction is added; if the narrator failed to pay compensation, he would be responsible not only by his own self, but the responsibility would be extended to his family: "if the narrator can't pay the

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64 Monuments of Georgian Law, vol. VI, Court Decisions (XVIII – XIX c.c.), the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1977, 545.

65 *Moniava P.(T.),* Protection of Respect, Dignity and Business Reputation in Georgia (from Ancient Times to Soviet Era (including)), Tb., 2005, 78-79.

66 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 519.

67 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 519.

68 Ibid, 491-492.

69 Monuments of Georgian Law, Court Decisions (XVI – XVIII c.c.), the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1972, 395.

compensation to the winner, the narrator shall be handed over together with his wife and children."[70] Prescription of alternative sanction was depending on social status, more exactly – financial status of the person, as it was applied in the case if false narrator couldn't afford payment of compensation.

In Vakhtang Batonishvili's Law Book, while comparing sanctions applied towards false narrator on murder, we can see that the legislator strictly approaches the mentioned action. As I. Dolidze mentions, in the case of handing over the offender would lose all personal property-related and personal rights and become a slave.[71] Application of the same punishment towards the false narrator, as towards the slandered person is maintained towards false narrating on murder, which could be seen in regard to payment of compensation.

Handing over of narrator to the innocent person, slandered by him, obviously, was applied in judicial practice too. In the decision of the 2nd quarter of the XVII c., Dvalishvili Martia and Tetra had dispute with David Kavtaradze concerning seven captives. On the basis of their claim David Kavtaradze was adjurated "by eight men chosen by the court and seven men chosen by the victim that: in the name of God's blessing and might, whatever you, Martia and Tetroa, claim, we don't know anything, from soul to heart, about your captives, we haven't either done it, or participated in it." If the accused failed to swear, he would be punished, and if he swore, it would release him from accusation. In this case "narrator would be given to him."[72] It is not seen in the mentioned decision whether any other punishment was applied towards false narrator.

Different sanction is provided by Georgian version of Greek Law (Article 335): "whoever man does narrating, big or little, and doesn't bring a sign of the lost [thing] to the owner and narrate falsely, the judge shall put four brands on the cheeks of false narrator with red-hot iron."[73] As the "sign of the lost [item] is mentioned, we can assume that the mentioned punishment was used in the case of slandering in robbery. If Georgian monuments of law provided for property-related sanctions for false narration concerning robbery, Greek law accentuated on crippling corporal punishment.

7. The Importance of Narrator's Fee in the Case of False Narration

In the case of false narrating the court, in addition to imposition of punishment, had to solve another issue, namely the issue of narrator's fee."Narrator's fee" was a certain amount, given to the narrator as a prize (Vakhtang Batonishvili's Law, Article 38): "if accusation is made through narrator and the accused have a person whose social status equaled to that of the narrator, they shall fight with swords. If the narrator wins, he shall be given both narrator's fee and compensation."[74]

Victim was obliged to pay the narrator's fee. It is mentioned in the Article 236 of Vakhtang Batonishvili's Law: "if narrator tells the man and takes narrator's fee, he shall promise that if required, he will confront."[75]

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70 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 492.

71 *Dolidze I.,* Ancient Georgian Law, Tb., 1953, 250-251.

72 Monuments of Georgian Law, Court Decisions (XVI – XVIII c.c.), the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1972, 395.

73 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 205.

74 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 491.

75 Ibid, 541.

Apparently, payment of narrator's fee was a general rule, which is always present when speaking about narrator.

The amount of narrator's fee is not determined either in law monuments of judicial practice. It is generally stated in the documents that the plaintiff paid narrator's fee. In the decision on maidservant's case between Rostom Kipiani and Khosika Kvantreshvili (1st quarter of the XIX c.) it is mentioned: "I had one maidservant, whom I gave to one sister as a marriage portion and nobody disputed. After that I gave marriage portion to other sister and again nobody disputed. And now you stole this maidservant and took her away, I was looking for her and then found with narrator's help and have spent narrator's fee."[76] This circumstance makes us think that exact amount wasn't determined for narrating, possibly the parties were determining the amount based on agreement and it would depend on victim's interest, how important the information, provided by narrator, or the lost item, was for him.[77] Lack of specification of an exact amount isn't surprising, as in old Georgian Law, purchase agreements, we can't often find an exact amount of the object of purchase, but it's generally specified that the "full price" was paid.

In Georgian version of Greek Law (Article 334) the issue of the amount of narrator's fee is settled when the case relates to the lost items. It was one eighth of the value of the item.[78] But in relation to other crimes neither the mentioned law book provides answer.

In regard to the issue of narrator's fee in the case of false narration, it's very important to establish the moment of its payment. If the narrator's fee was given to the person after establishment of reliability of information provided by him, the issue of payment of narrator's fee in regard to false narration loses interest, as the victim hadn't paid narrator's fee and thus the court would only impose a punishment on slandered. But is the victim had paid narrator's fee prior to court hearing, and it was established that false narrating occurred, it has to be determined whether the imposed punishment would "devour" the paid fee or the slandered would have to return narrator's fee in addition to punishment.

Based on the Article 236 of Vakhtang Batonishvili's Law, manuscript B, M Kekelia draws conclusion that narrator doesn't receive the narrator's fee when informing the victim about circumstance related to the case but after the offender admits the crime. In support of this opinion he cites Article 38 of the same Book ("in the narrator wins, he shall be given narrator's fee and if the narrator proves to be lying, the narrator shall be handed over with tied hands and the whole compensation."[79]) and the court decision of senior judges of Kartli and Kakheti on dispute between Tsitsishvilis about Mdzovreti castle.[80] But on the basis of the decisions related to the mentioned issue, D. Kekelia has to admit that in judicial practice I often happened conversely.

When deciding on the issue of giving narrator's fee, T. Moniava also bases only on the Article 236 of Vakhtang Batonishvili's Law, manuscript B and the content of the same Article and materials

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76 Monuments of Georgian Law, vol. VI, Court Decisions (XVIII – XIX c.c.), the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1977, 491.

77 *Kekelia M.,* Judicial Organization and Process in Georgia Prior to Joining Russia, Book II, Tb., 1981, 209.

78 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 205.

79 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 491.

80 *Kekelia M.,* Judicial Organization and Process in Georgia Prior to Joining Russia, Book II, Tb., 1981, 210.

existing in judicial practice skip his attention.[81] In the same Article, but in manuscript C, the mentioned issue is formulated differently: "when narrator tells the man and takes narrator's fee, he has to promise that if required, he will confront."[82] In regard to the mentioned issue, judicial practice confirms the provision of this Article. Narrator's fee often was given to the narrator prior to "confession" of offender, in some cases this very amount, paid in advance, used to become the subject of dispute between the victim and the narrator. But it's not excluded that the period of payment of narrator's fee depended on agreement of the parties.

M. Kekelia cites the document of 1843, which states: "Gogita, Asatiani's illegitimate son came to u and took narrator's fee in the amount of twenty four rubles and narrated on lost horse… and gave us narrator's letter on that."[83] The document cited by him better fits for proving of our opinion. On the basis of judicial practice, M. Kekelia finally arrives to the conclusion that the narrator's fee was received prior to offender's "confession". Maybe this rule didn't apply primarily but the fact can't be refused. He considers that more likely narrator took prize prior to offender's "confession" as well as after that. It depended on whether the court was considering the case or not.[84]

Based on the Article 236 of Vakhtang Batonishvili's Law Book, manuscript C, narrator receives narrator's fee prior to court hearing; in this case the crime on which the person has narrated is not specified. According to the same Article, manuscript B, narrator's fee was paid after offender's confession, but in this case it relates to misappropriation of property, robbery.[85] If we speak in regard to robbery, in opposition to this norm we could say that narrator's fee could be paid prior to offender's "confession", which is confirmed by judicial practice.[86] In confirmation of the above stated we can cite Article 249 of Vakhtang Batonishvili's Law, which relates to slandering in robbery.[87] This norm shows that the offender pays narrator's fee not to the narrator, but to the owner of the object, which makes us suppose that the victim has already paid narrator's fee to the narrator. And according to the Article 154 of the same Law Book: "narrator's fee, which will be spent by the person who lost cattle, shall be paid by the thief." The term "will be spent" which denoted future action, makes us think that the victim hadn't paid narrator's fee yet. As we see, the legislator's position is different in regard to one and the same crime, which doesn't allow us unambiguous solving of the issue. On the basis of the Article 38 of Vakhtang Batonishvili's Law Book[88] we could conclude that in the case of accusation in murder narrator's fee was paid after court hearing. Consequently, in the case of false narrating by the narrator, the court wouldn't

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81 *Moniava P. (T.),* Protection of Respect, Dignity and Business Reputation in Georgia (from Ancient Times to SAociet Era (including)), Tb., 2005, 76.

82 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 541.

83 *Kekelia M.,* Judicial Organization and Process in Georgia Prior to Joining Russia, Book II, Tb., 1981, 207-208.

84 Ibid, 211.

85 Law Book of Vakhtang VI, the text was prepared for publication, research and reference list of terms was attached by *Enukidze T.,* Tb., 1955, 112.

86 Monuments of Georgian Law, vol. VI, Court Decisions (XVIII – XIX c.c.), the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1977, 545.

87 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *Dolidze I.,* Tb., 1963, 544.

88 Monuments of Georgian Law, vol. I, Collection of Law Books of Vakhtang IV, the text was published, research and glossary was attached by Prof. *I. Dolidze,* Tb., 1963, 491.

have to solve the issue of narrator's fee, as it wasn't yet taken by the slanderer. As for other crimes, narrator's fee could be paid both prior and after hearing, it might depend on the agreement of the parties.

As we have already mentioned, the punishment, applied towards false narrator depended on the crime on which he narrated, consequently, the responsibility provided for committing of the specific crime, would apply to false narrator. In accordance with the Article 154 of Vakhtang Batonishvili's Law the thief had to pay narrator's fee in addition to seven[fold].[89] Similar provision is formulated in the Article 249: if the thief "denies and causes problem to the owner, he shall pay both seven[fold amount] and narrator's fee."[90] Thus, if the sevenfold amount paid by the thief didn't include narrator's fee, the same shall be told in regard to false narrator. False narrator had to return narrator's fee in addition to punishment - e.g. for slandering in robbery – payment of sevenfold amount of the item.

8. Conclusion

Thus, false narration, as one forms of slandering, was expressed in accusing in allegedly committing a crime. Despite of the fact that false narrating has much in common with false informing, false witnessing, it, as we have seen, differs from the former as well as from the latter. Existence of independent norms in the monuments of law, which were imposing responsibility separately for false narrating and separately for false informing, will serve as sufficient argument for not equating false narrating with false informing and consider it as separate delict. We made an attempt to draw conclusion on the basis of content-related analysis of false narrating – what the mentioned delict meant and how it differed from other cases of alleged accusation in crime. At the same time, based on the monuments of law as well as judicial practice we could say that the types of sanctions for false narrating were changing according to the type of crime, in committing of which a person was slandered. And as for the issue whether false narrating represented separate public delict, we can't unambiguously say that. In drawing our conclusion we base on Vakhtang Batonishvili's Law and court decisions. And here the picture is controversial. When speaking about false narrating related to robbery, based on applied sanction we can conclude that the mentioned delict nears public character. But when speaking about slandering in murder, the legislator applies to the system of compositions; at the same time, "handing over" might occur, besides, responsibility could be imposed on family members too. The above mentioned doesn't provide basis for referring this type of false narrating to pubic delict. In our opinion, the circumstance that false narrating is connected with the crime concerning which narrating is performed, finds certain reflection here. Article 154 of Vakhtang Batonishvili's Law which provides punishment for robbery is cites as an example proving that public origin wasn't something strange. Consequently, it's not surprising that false narrating concerning robbery is formed as public delict. As for the murder, it is completely built on the system of compositions, so in the case of false narration concerning murder the focus is made in satisfaction of personal interest. Thus, public or private nature of false narration was depending on the crime in regard of which narrating was performed. Nevertheless, on the next stage of development of Georgian law – it refers to David Batonishvili's Law – strengthening of public elements are noticed. According to his Law Book, false narrating in general – in this case no focus is made on slandering in committing some specific crime – represented public delict.

[89] Ibid, 519.
[90] Ibid, 544.

IRAKLI BURDULI[*]

ON THE ISSUES OF FINANCES OF NOTARY'S OFFICE AND REMUNERATION FOR NOTARY'S WORK

(Comment on Article 21 of Georgian Law on Notarial System)

I. Introduction

Work deals with such significant issue of notarial law as the finance of notary. Georgian Law on Notarial System was adopted long ago[1]. The legislative act was subjected to numerous amendments after the date of adoption and many of them are quite fundamental. The changes affected the provisions of Article 21 of the Law, dealing with remuneration of notary's work and finance of notary's office. Unfortunately, the very important sphere of the law, the notarial law lacks attention of Georgian scientists, while it is the sphere of interesting researches for the practitioners and theorist lawyers. There is not comment to the Law, which would at least partially fill the gap in the notarial law. Therefore, the decision was made to develop the comment to one of the specific articles of the law, to stimulate more attention to the notarial law from the side of Georgian lawyers engaged in and interested with the notarial law, at scientific level. So, we would like to offer the comment to Article 21 of the Law on Notarial System, presented in the following order: at first the general purpose of the Article and applicable legislation will be discussed (Part II), further, attention will be focused on the obligation of gaining of remuneration, concept of notarial remuneration and its paid nature; the issue of introduction of the discounts or payment of the notary's fees in installments will be considered (Part III); the last (IV) issue deals with the revenues of notary's office and key legal principles of calculation thereof, finally ending with the explanation of the concept of the "other financial contributions" of the notary. Such wording makes the Law ambiguous and therefore, the original method for its interpretation is offered. The work ends with brief conclusion.

II. General

The mentioned regulation deals with the issues of remuneration for the notary's services and its financial-material aspect. The sphere of regulation of the Article is setting of the notary's remuneration and financial relations within the notary's office. Section 1 of Article 21 provides details the activities of fulfillment of notary's actions and demand of the possible payment in relation therewith. It should be noted that together with the specified regulations of the Law on Notarial System, Georgian Law on Fess for Fulfillment of Notarial Actions should be applied. The latter legislative normative act regulates the rules of charging of fees for fulfillment of notary's actions, as well as the amount of such fees.

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[1] Adopted: Georgian Legislative Gazette, May 3, 1996, #209 (In Georgian).

Section 2 of Article 21 of the Law provides detailed advice of what is the income gained from notary's activities. First sentence of Section 2 provides legal definition of notary's revenues. Thus, the mentioned regulation sets the obligatory minimum where, with respect of gaining of the revenues, the notary has freedom of action. Though, the last sentence of Section 2 of Article 21 deals with the maximum of such revenues and the financial-material relations of the notary in general, stating that the notary's revenues[2] could comprise of various payments. Naturally, the above mentioned financial contributions shall be within the lawful legal turnover and consequently, their origin, acceptance, distribution, accumulation and any other operations should comply with Georgian legislation.

III. Obligation of "Recovery" of Payments

1. Concept of Notary's Fees

a) Paid Nature of Notary's Service

Though the notary is not regarded as public servant and[3] he is closer[4] to the persons of free profession with the substance and materially, he is equipped with certain guarantee of independence and unbiasedness in his activities. The commentator literature considers that with such guarantee nature is mostly conditioned by the paid nature of notary's activities, as he is entitled to claim from the party (parties) the remuneration provided for by the law for his services, what, on its side, "ensures the basis for economic life (subsistence – I. B.) and warrant of personal independence."[5] The last words of the first sentence of Section 1 of Article 21 of the Law on Notarial System ensure this: "providing of services is subject to remuneration". Words "subject to remuneration", in this case, mean that "paid". Hence, remuneration of notary's work is based on its paid nature. It should be also noticed that the notary, gaining remuneration within the scopes of his activities is authorized to request payment by himself only, excluding awarding of the rights of requesting of remuneration from the side of the other persons[6] employed with the notary's office[7], though this is not literally provided for by the law. The other person

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2 And in this case the income should be interpreted widely.

3 What is directly set by Section 9 of Article 3 of Georgian Law on Notarial System.

4 Such close nature was seen by German Federal Constitutional Court in the substance of notary's activities, in one of its decisions BVerfG = DNotZ (1978), 412-413, what provided basis of setting of the notary as so called „nicht besoldeter Beamter", i.e. the term "servant without salaries".

5 Decision of European Court of Human Rights of 21st March 2001 on the notarial case of Baden-Wurtenberg. reference: *Lerch K.* in: *Arndt H.*, Kommentar zum Bundesnotarordnung, 6. neu bearbeitete Auf., Carl Heymanns Verlag, 2008, §17 Rn. 3.

6 *Frenz N.* in: *Eylmann H.,Vaasen H.-D.*, Bundesnotarordnung, Kommentar, 2. Auf., Verlag C. H. Beck, 2004, §17 Rn. 6.

7 Georgian notarial practice confirms that the notary, in implementation of his activities, acts within his social medium and in this case, the provisions of the first sentence of Section 1, Article 19 of the Law on Notarial System should be taken into consideration, according to which, the notary's work place is his notary's office. I.E. the notary shall have the notary's office. Thus, it is the imperative statement of the law. Thereforem as a rule, in addition to the notary, in this notary's office (social medium) the other employees are engaged as well. In Georgia the notary's offices operate in this way. Though, certainly, this does not

may be employed with the notary's office, though in this case, he is the person working for the notary, "hired" by the notary in implementation of the notary's actions (activities). This approach is shared by the third sentence of Section 1, Article 19 of the Law on Notarial System, according to which the notary is entitled to employ the other persons in his notary's office. Thus, he (the notary) is entitled to employ and dismiss the other employees in his office. Relations between these persons and the notary are regulated by Georgian labor legislation. In addition, the notary may dispose of the revenues gained in result of fulfillment of the notarial actions based on the actions performed by these persons at his own discretion.

The case provided for by Section 1 of Article 24 of the Law on Notarial System should be different from this situation, where the alteration of the notary is considered. In this case the alternate of the notary will be entitled to request the notary's fees as he, in absence of the notary from his office, in agreement with the Chamber of Notaries of Georgia, may be assigned as the alternate person and consequently, this discretion is delegated to the latter[8].

b) Definition of the Notarial Value

The notary, as any person implementing activities oriented non-preferentially to the profits, is subject to the economic order. This means that the notary's office should have certain cost estimate, which is calculated from the aggregate value. On its side, it consists of two key parts: remuneration and costs[9].

Regarding that the notary is not a person[10] payee of the stated and guaranteed compensation from the side of the state; the remuneration is funded from the payments made by the users of his service[11]. Consequently this is the payment intended for fulfillment of notary's actions, legal definition of which is provided by Article 1 of the Law on the Fees for Fulfillment of the Notary's Actions. The mentioned norm responds to Section 1 of Article 21 of the Law on Notarial System and specifies the activity from which the remuneration is originated. This include: 1. the notarial action as such; 2. legal advice; and 3. technical service. In addition, it is notable that legal advice and technical service, directly or eventually, should be related to implementation of the notarial action. Otherwise we could consider the economic entrepreneurial category. Naturally if the notary has established the notary's office implementing various activities, including the advisory and technical activities not related to the notarial activities, such activities should automatically be excluded from the area of notarial activities and can gain the properties qualifying the actions oriented towards pure economic profits. It is not excluded that, based on its substance, the activities acquired the features of entrepreneurial activities.[12] Thus, all forms of the

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exclude that the notary shall implement all actions, consultations and other actions provided by the law personally. Though, apparently, this greatly impacts the quality and pace of the notary's actions.

8 The similar provision is provided for, by e.g. Section 41 of the German Federal Law, which deals with the notary's appointed representative. BNotO § 41.

9 *Frenz N.* in: *Eylmann H.,Vaasen H.-D.*, Bundesnotarordnung, Kommentar, 2. Auf., Verlag C. H. Beck, 2004, §17 Rn. 6.

10 As it was stated, he is not a public servant ad consequently, he is not entitled to the salaries set by the state.

11 *Schippel H.*, Bundesnotarordnung, Kommentar, 7. neu bearbeitete Auf.,Verlag Franz Vahlen 2000, §17 Rn. 1.

12 In such case the legal from should be established and this, regarding certain public-law nature of the notary's activities, would be absolutely unacceptable. For the form and substance of economic entrepreneurial activities. See e.g.: *Burduli I.,* Proprietary Relations in the Joint Stock Companies, University Publishing House, 2008, 86-88 (In Georgian).

notarial activities, whether legal advice or technical services, should necessarily be in relation with the notarial actions. This is the legal givenness of the laws[13].

Specific nature of the notarial law could show up in the fact that the form of notary's fees and the basis for its obtaining (determination and definition) is provided mostly by the legislative norms. In addition, it is notable that the notary's fee belongs to the category of public law[14] and this excludes its consideration as the right of claim within the private law.

Payment of the fees set as the remuneration of notary's work, stated in the Section 1 of Article 21 of the Law on Notarial System, should emphasize the unconditional paid nature of the notarial actions. The matter is that in implementation of the notarial actions the notary has not the right but the obligation of claiming the payment from the party according to the stated rates[15]. This is provided by the interpretation of Article 1 of the Law on Fulfillment of Notary's Actions. It is reasonable to see the imperative nature of the contents of mentioned Article, excluding exemption of the party from the notary's fees[16]. As for the amount of the fees, according to Article 2 of the same Law, the notary, with few exceptions, determines the tariffs of notary's services by himself. These exceptions are specified in Section 1 of Article 2 of the Law. According to the mentioned provision, only the law sets the fees for notary's actions for the deal, validity of which inevitably requires compliance with the notary form. In this respect, agreement between the notary and the party on different amount shall cause its invalidity[17]. In all other cases, as we have already mentioned, the notary shall be independent in financial evaluation of the actions. Therefore, the tariffs may vary with the notary's offices. Consequently, the person using the services should at liberty to select the notary's office with which he/she could make the deal.

Notary's fees are mostly calculated from the value of a transaction, i.e. based on the "value of the subject of transaction, scale of evaluation".[18] In calculation of the fees, naturally, the complexity of the notary's action, significance of provided legal advice, spent time etc. should be taken into consideration. Though, the judicial practice states[19] that, as a rule, in material and contents' respect, it should not be calculated based on complexity of the deal, spent time or efforts made.[20] Therefore, Georgian legislation shares the approach of developed countries and states, in Section 5 of Article 2 of Georgian Law on Fees for Fulfillment of Notary's Actions that for the notary's actions, fees for which are stated by this Law, only amounts specified therein shall be charged. Consequently, Section 4 of the same Article is applied only of the provisions of Section 5 are excluded. In these circumstances the notary, himself, determines the minimal and maximal remuneration, based on complexity of notary's actions, efforts made for legal advice, technical work and spent time.

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13 Article 21 of the Law on Notarial System and Article 1 of the Law on the Fees for Fulfillment of Notary's Services

14 See: BGH = DNotZ (1990), 314, 315.

15 See: e.g.: *Frenz N.* in: *Eylmann H.,Vaasen H.-D.*, Bundesnotarordnung, Kommentar, 2004, §17 Rn. 5 ff. In this respect, the idea of the obligation of claiming of the notary's remuneration should be uniform in the notarial law of Georgia, as well as many European countries (Germany, Austria, France).

16 In this respect, regarding the public-law nature of the notary's activities, the „avoidance" of payment of the charges to the state for implementation of the notary's actions would be excluded.

17 *Lerch K.* in: *Arndt H.*, Kommentar zum Bundesnotarordnung, 2008, §17 Rn. 49.

18 *Lerch K.* in: *Arndt H.*, Kommentar zum Bundesnotarordnung, 2008, §17 Rn. 7.

19 Unfortunately, no Georgian judicial practice related to these issues exist and therefore, as the measure and example the German doctrine is referred to.

20 OLG Düsseldorf = DNotZ (1991), 411.

c) Exemption from Notary's Fees, Discounts or Payment in Installments

Georgian notarial law is quite strict, with respect of obligatory nature of charging for the provided notary's services. It could be said that effective legislation does not provide for full or partial exemption from the fees[21] of a party[22], any discounts or allowing of payment in installments. This is consequence of the assessment of the law, unlike, say, from German notarial law, where this issue is dealt with in a different manner. In particular, German Federal Law on Remuneration for the Notaries there are directly specified the exemptions and discounts, which may be provided by the notary in relation with payment of the fees[23]. Moreover, in some cases, German law allows the notary, based on the existing customs or traditions, to make decision on exemption of a party from the notary's fees or charging at discounted rates at his own discretion[24]. Simply, this decision should be agreed[25] with the chamber of notaries[26].It should be noted that no strained competition within the private law should exist between the notaries with respect of the remuneration for the notary's actions and its amount. This is the principle of a notary, a person, implementing the function within the public law, to certain extent. Though, effective Georgian legislation allows competition based on market principles. Competition is excluded only for the fees exactly stated by the law. As for the other cases, this is the issue to be decided within the private autonomy of a notary. Thus, in this respect, three levels could be identified: 1. where, for validity of the deal, the notary shall be included into the process and the fee is exactly stated by the law (competition is excluded here); 2. where for the notary's actions no tariffs are stated by the law, i.e. based on complexity of the deal, provided legal advice and spent time, the notary may directly agree with the party he remuneration (apparently, in such cases the competition within the private law will take place); and 3. where the maximal limit of the remuneration is stated, while the minimal is not. Consequently, the notary may act, within the scopes of maximal limit, thus causing certain competition at the notaries' market[27].

IV. Notary's Revenues

1. Fees as the Key Principle for Calculation of the Revenues

Section 2 of Article 21 of the Law on Notarial System deals with the revenues gained from the notary's activities and calculation thereof. First sentence of Section 2, primarily, emphasizes the notary's incomes from his professional activities. According to the mentioned regulation,, the key measure of notary's income and the foundation stone for calculation of the "profit" is the fee of

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21 One could say the levy.

22 The party should imply the client, i.e. the person using the notary's services. In this work the terms party and client will be equal and hence, both of them will be used with the similar content.

23 *Frenz N.* in: *Eylmann H.,Vaasen H.-D.*, Bundesnotarordnung, Kommentar, 2004, §17 Rn. 8 ff.

24 *Lerch K.* in: *Arndt Hü.,* Kommentar zum Bundesnotarordnung, 2008, §17 Rn.

25 *Schippel H.*, Bundesnotarordnung, Kommentar, (2000), §17 Rn. 28.

26 Notarkammer.

27 The best example for this comprise the provisions of Section 2 (jointly with Section 1) of Article 18 of Georgian Law on the Fees for Fulfillment of the Notary's Actions, according to which maximal fees for notary's actions related to the entrepreneurial legal person (incorporation documentation, to be submitted for registration, amendments to the articles of association, disposal iof the participation interest etc) is GEL 1000. Consequently, the competition between notaries is within this amount of GEL 1000. No minimal limit is set.

notary's services. Notary's activities, similar to any activities of economic nature, include both, the incomes and costs. Hence, net profit is calculated by deduction of the costs for maintenance of the notary's office, the taxes provided for by the law and other necessary costs. Law sets this as the notary's income. The cost estimate and "proceeds" are calculated based on the above criteria. For example, the client applied to the notary for certain services (notary's action) and the notary accepted certain remuneration from him. After all payments provided for by the law and required otherwise, also after payment of the notary's office maintenance costs the remained amount is included into the notary's assets, comprising his income. This amount belongs to the notary. Though accumulation of the financial assets is not prohibited and the notary is entitled to spend his assets gained from his activities for the notary's office. By this, similar to the management of any economic (entrepreneurial) subject, the notary would create the material buffer[28], from where he would be able to accommodate the material assets for more effective activities. Though the notary is not an entrepreneurial subject[29] and his activities, with their form and substance, are not within the category of entrepreneurial activities, this does not exclude that he, in implementation of the financial-material activities, applied the principles of management characteristic for the entrepreneurial subject. In such cases, the notary may follow and apply such principles in his activities, if the latter will promote his successful operation. Briefly, the fact, that the notary is a subject implementing the public-law function to certain extent and is not a legal form of an entrepreneur, does not mean unacceptability of use of the corporative actions in his activities. In many cases, many LEPLs, the subjects implementing the public functions and even the state, in some cases, act in accordance with the corporative provisions and existing (self-regulative) norms. In contemporary global epoch, where the multinational and transnational corporative bodies create the climate of world economy, it is not surprising that even the state, in the process of implementation of its functions and objectives, acted based on the flexible corporative principles.

2. Other Financial Contributions

The last sentence of Section 2 of Article 21 could be regarded as the most general norm of the mentioned provision. It states that notary's revenues may include the *other financial contributions* so that the legal definition of such financial contributions is not provided by the Law. This causes certain ambiguity and allows wide interpretation of this norm.

Generally, for definition of the concept of contributions the economic-legal understanding of the contribution could be provided. Legal definition of the contribution is provided in the Law on Entrepreneurship. In particular, Section 5 of Article 3 states that in the process of implementation of the economic (entrepreneurial) activities (as at a time of its commencement, also at ant further stage thereof), certain contributions may be made, intended for the latter. Effective legislation emphasizes the material and non-material property contributions[30], as well as providing services and fulfillment of the

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[28] On the financial material buffer zone in capital company. See e.g.: *Hüffer U.*, AktG, (2008), §150 Rn. 2 ff.

[29] See: *Chanturia L., Ninidze T.,* Comment on the Law on Entrepreneurship, III, 2002, 8 (In Georgian).

[30] On monetary and non-monetary contributions e.g.: *Kraft A.* in Kölner Kommenatr zum AktG, (1988), §27 Rn. 3 ff; MünchKommAktG/*Pentz, (*2008*),* §27 Rn. 4 ff; In Georgian: *Burduli I.,* Principles of the Companies Law, 2010, 193 etc (In Georgian).

work[31]. Each of them has certain economic value, based on which the material-proprietary evaluation and calculation of the latter is possible. Consequently, according to interpretation of the mentioned provision of the notarial legislation, the contributions should imply all material and non-material goods.. Though, two points are unclear: 1. these are the words "other financial" and 2. "Notary's income may comprise". In the former case the word "financial" should be defined. What generally means "financial" and whether it is equalized with the proprietary-material definition of the contribution?! Term "financial" is the category of economic law. It should be understood within the super-concept – proprietary. Consequently, the legislation on "Notarial System" should be used for sub-concept of legal definition of the proprietary, i.e. financial is the part of material-proprietary, but more specific part thereof. Hence, the will of the legislator is, supposedly that the other financial contributions defined in the notarial law implied only contributions set in accordance with the positive principles. This, on its side, should exclude economic (though negative) categories if performing of the work and providing of service as contributions. If the legislator did not want to specify the material category of the contribution the wording of the law would not include the specification of material category of contribution, In addition, we should carefully consider the commencement of the first sentence of Section 2 of the same Article, where the attention is focused on the amount, i.e. on the financial object. It is clear that the amount implies financial assets. In this case, there is no alternative of different interpretation of the mentioned norm. Consequently, in the second sentence of Section 2 the attention should be focused on the amount, though different financial contributions.

The second issue deals with consideration of the other financial contributions (according to the text of the Law) as the notary's income. As a rule, in the economic law, the proprietary or non-material proprietary contributions provide precondition for income generation and not vice versa. In this case, certain contributions may provide basis for effectiveness of the activities[32]. Though, wording of the Law on Notarial System asserts the contrary. It states that the other financial contributions may comprise the notary's income, i.e. the legislation, in this case, focuses attention not on possible incomes resulting from the financial contributions but rather on consideration of such contributions as income a priori. And this leads to ambiguity. It is significant to note that for determination of capacity of the financial contribution its turnover ability is required[33]. Otherwise, its consideration as the category of contribution capacity would lack basis. Briefly, the financial contribution may become the source of future incomes of the activities and not vice versa. In addition, attention should be paid to the legal form of composing of these financial contributions. According to the last sentence of Section 2 of Article 21, any financial contributions permissible and not prohibited by Georgian legislation are allowed. Consequently, the structure of the norm emphasizes the legal and general nature of the contribution. Though, where the legal form is considered, it should be taken into consideration that such agreement[34] could never be

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[31] On the positive and negative principles of the objects able to be contributed from the corporative-legal Directive 2 of EU (Richtlinie 77/91/EWG von dem 13.12.1976, ABl. Nr. L. 26 v. 31.1.1977; On this Directive, in details: *Drinkuth H.*, Die Kapitalrichtlinie – Mindest- oder Höchstnorm?, Verlag Otto Schmidt, Köln 1998, 11 ff; In Georgian: *Jugeli G.,* Protection of Capital in th Joint Stock Company, 2010, 21 etc.)

[32] The best example of this is the law of the companies of capital type, where contribution is the basic precondition for selection of this legal form and profitability of activities.

[33] *Jibuti M., Koranashvili Q.,* Comment to the Law on Securities Market, 2004, 47 (In Georgian).

[34] Contribution is regarded as common civil law deal (on the legal nature of contribution to the entrepreneurial company e.g. *Burduli I.,* Principles of Companies' Law, 2010, 178 etc. Partnership. See e.g.: *Grunewald B.*,

included within the legal architecture of the entrepreneur. In such case, if the agreement on financial contribution was made, we would have the legal form of entrepreneur, what, apparently, would exclude the notary's activities. The only possibility for setting of this legal plot is the agreement on partnership. Here the legal form of Partnership[35] used in USA would be adequate. This could be seen best of all in Section 2 of Article 19 of the Law on Notarial System, stating that two or more notaries may have common notary's office and their rights and obligations relations between them and the notary's office should be regulated by the agreement between them and the notary's office. The agreement is free in its form and it can deal with the financial and material issues. The point of particular attention of this article is the issue of personal responsibility. The latter could not be regulated within the contractual freedom, as each of the notaries performs notary's actions in his own name and for the damages caused from the activities the issue of personal, individual responsibility arises. Thus, the issue such off-legal responsibility could not be regulated by the agreement. Though, according to the law statement, the internal relations (at least with respect of the responsibility) could be regulated by the agreement[36]. In other words, with respect of joint activities, two or more notaries may make the civil agreement of this type[37], what would be the formation created in result of aggregation of the certain contributions. Consequently, the mentioned (financial) contributions can become the basis for their successful activities (e.g. good office, modern technical and other equipment, advertising, highly remunerated personnel with good education, what could impact the quality of service and hence the prices etc.). As fort the specific rules for calculation of the income and "return" (which would extend the rule specified by the law), it would be the issue of internal relations and hence, for financial contributions, the attention would be focused on the social medium formed in result of agreement, comprising the unity of several notaries[38]. As the only possibility without unity of the notaries and the case was with contribution for some specific notary, the legal structure of so called stille Gesellschaft[39] could be considered, though, regarding that in such case the

Gesellschaftsrecht, 7. Auf., Mohr Siebeck 2008, 11 ff., 99, 163, 182 ff.; *Hueck G., Windbichler C.*, Gesellschaftsrecht, 21. Auf., C. H. Beck 2008, 58 f., 170 f.).

35 On the legal nature of this form (in this case only GP and not LP) See e.g.: *Kleinberger D.*, Agency, Partnerships, and LLCs, Aspen Publishers 2002, 193-212; *Gevurtz*, Corporation Law, West Group 2000, 2.

36 This situation demonstrates the positive aspect of German partnership in this respect.

37 E.g. so called Joint Venture would be established, which is the type of internal company. On differentiation of the internal and external companies. See: *Burduli I.,* Principles of Companies' Law, 2010, 122-124 (In Georgian).

38 This issue may be compared with the legal form separated in Germant in 1995 – the partnership (Partnerschaftsgesellschaft), intended for the persons of free profession only See: *Eisenhardt U.,* Gesellschaftsrecht, 13. Auf., C. H. Beck 2007, 202 ff.

39 This structure is translated directly as "non-solid company". Law on Entrepreneurship does not provide for such form. Non-solid company means the company, in which a person participates with his property (financial contribution) in the entrepreneurial activities of the "owner" of the other person (but necessarily entrepreneur) so that he is not liable for the entrepreneur's liabilities to the creditors. He simply provides "assistance" to the entrepreneur subject, participates in profits. His confidentiality is protected and he has no right to participate in the company's management. The company is managed by the owner only. So called Stiller has the right to receive information and provide control the prototype of such company could be seen in Georgian Civil Code as well (Georgian Civil Code, Art. 930-941. Though, of course, it can not be identical with the norms regulating non-solid company). On its side, the regulations dealing with the joint activities, i.e. the partnerships were introduced in Georgian Civil Code in result of reception of Section 705 (and further) of German Civil Code. Though, in Germany, to the non-solid companies the relevant norms of German Civil Code are applied. See these issues in: *Güroff G.* in: *Glanegger P., Güroff G., Nieder*

addressee of the contribution shall be the economic subject[40] only, such legal constellation is impossible. In such case the only way is the agreement on partnership.

V. Conclusion

Irrespective of public-law function of the notaries, the law provides the possibility of financial contributions for them as well. Financial contribution is sequence of the principle of positive determination of the subject able to be contributed, thus excluding performing of work and providing of services from the outset. Financial contribution cannot be the notary's income a priori. It can be only the source and stimulating factor of such income. The second case provided for by the law would be the direct explanation of the norm. In particular, in result of financial contributions the notary, naturally, may gain the other incomes as well. No one may prohibit to the notary to participate in the economic (except for the notary's) activities. In such the notary is considered as passive participant of economic activities. For example, the notary may freely participate in the entrepreneurial or non-entrepreneurial legal entity or other body as a partner or member and the contribution made by him gained revenues for him. Naturally, no one can deprive the notary of such right. Consequently, we can see such contents in the last sentence of Section 2 of Article 21 as well. And this would set the possibility of general interpretation of the mentioned norm (not in controversy with Georgian legislation).

J., Peuker M., Russ W., Stuhlfehlner U., Handelsgesetzbuch, Heidelberger Kommentar, 4. Auf., Verlag C.F. Müller, Heidelberg, 1996, 550-552; Also: *Sprau H.* in: *Palandt O. (Hrsg.),* Bürgerliches Gesetzbuch, Kommentar, 62. neubearbeitete Auf., Verlag C.H.Beck, München, 2003, 1079-1089.

[40] Though, some relevance might have to which type of legal forms – capital or partnership, it concerns.

KETEVAN IREMASHVILI[*]

THE CHARACTERISTICS OF LEGAL REGULATION OF HEALTH INSURANCE

1. Introduction

Health insurance is an integral part of daily life of human beings. Its particular importance is conditioned by existence of certain social and economic factors which are closely related to personal interests of the insured. Health is one of the most valuable objects of protection for human beings.[1] Therefore, health insurance, as an effective instrument for its assurance, bears a special importance.

Cost of health care raises in parallel with technological achievements and refinement of medical care methods.[2] Health insurance, as an effective mechanism of reimbursement of medical service expenses, plays an overtly important role in this regard. Besides, characteristics of various types of health insurance must be acknowledged, as they result in various ways of protection of the rights of insured.

The research subject of the present article is analysis of characteristics of legal regulation of health insurance.

The first chapter of the article is introducing the notion of health insurance and determins its place in the entire insurance system. The given section describes the insurance classification criteria and outlines specifics of health insurance, as an independent branch of insurance.

The second chapter of the article is dedicated to the distinction between various types of health insurance. This section deals with peculiarities of participation of the state in health insurance and legal regulation of employment-based health insurance.

The third chapter of the article emphasizes the most critical issues related to health insurance contract. This section analyses the legal nature of health insurance contract and sets the list of rights and responsibilities of parties. The guarantees of protection of insurer's rights in the frames of health insurance contract are discussed separately.

The research has been conducted on the base of legal doctrines and specific examples from the insurance practice of Georgia and the United States of AmericaScientific study methods such as analogy, induction deduction and comparison have been used during the research Along with proposed conclusions, the article raises number of issues, which, in their turn, represent a subject for future studies.

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[1] *Nomi Y.*, Medical Liability in Japanese Law, Modern Trends in Tort Law, Editor *Hondius E.*, Kluwer Law International, 1999, 29.

[2] *Jerry R.*, *Richmond D.,* Understanding Insurance Law, 4th ed., LexisNexis, 2007, 494.

2. The Notion of Health Insurance and its Place in Entire Insurance System

2.1. Health Insurance Classification Criteria

Health insurance covers expenses of medical services related to the health of the insured. Such a mechanism is widely used and differs from other types of insurance by its particular meaning. The comprehensive analysis of contents of health insurance should be started with the determination of its place in entire insurance system. With this purpose, the discussion of insurance classification criteria is recommended.

Various criteria of insurance classification are described in scientific literature. The classical method of distinction between various types of insurance is its classification by object (type of risk). In this view, personal, property and liability insurance can be differentiated.[3] Heath insurance is a type of personal insurance, as in given case object of insurance is represented by the health of insured, and therefore, insurance interest is closely associated with the personality of the insured.[4]

One of the criteria of insurance classification is based on definition of insurer's type. From this point of view, state and private insurance can be differentiated.[5] In the first case, insurer is represented by the state and in the second one – by the insurance company. Health insurance can be used in both models, considering specifics of each. The limitsof State participation in health insurance are determined according to priorities of economical and social policies of each state. Among all types of insurance, health insurance attracts most attention from the side of the state. In its turn, health insurance contract made between the insurer and the insured is based on the principles of private law.

Another classification of insurance is based on the type of marketing. In this regard, individual and so called "corporative" insurance can be differentiated. The former applies to selection of individual insurance coverage for individual subjects, and the later one – to issue of the same standard insurance policy to certain groups of individuals, viewed as one subject.[6] Health insurance can be used in both of these models. Corporative insurance is mostly used for health insurance of the employed.

One more criterion for classification the types of insurance is determination of the subject, bearing in itself the insured interest. In this regard, depending on the fact – whose interests are being primarily protected by the insurance contract – first party and third party insurance can be described. In the former case (e.g. in case of property insurance), damage occurs to the insured directly, and during the insurance of the third party (in case of liability insurance), damage occurs both to the insured and the third party. As "direct" damage (loss) is made to the third party rather than the insured, it is assumed that in such case the contract primarily protects third party's interests.[7]

All types of insurance, except liability insurance are classified as first party insurance. Third party insurance has to be distinguished from the contract, made for the benefit of the third party. For example, in case of life insurance, the insured determines the beneficiary. In this case, the benefit of the insurance

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3 Ibid, 29.

4 *Zoidze B., Ninidze T., Shengelia R., Chanturia L., Khetsuriani J (ed.),* Comments on the Civil Code, book IV, vol. II, 2001, 167 (In Georgian).

5 *Jerry R., Richmond D.,* Understanding Insurance Law, 4th ed., LexisNexis, 2007, 50.

6 Ibid, 54.

7 Ibid, 43.

goes to the third party, but as direct loss is made to the insured (his/her life is lost), life insurance is categorized as first party insurance. Health insurance represents the similar instance. Many times, the insurance company reimburses medical care expenses directly to the medical institution, instead of the insured person. In this case, too, the benefit goes to the third party, but as direct loss is made to the insured, health insurance contract is considered first party insurance, as well.[8]

2.2. Health Insurance, as an Independent Branch of Insurance

Health insurance is an independent branch of insurance, which differs from other types of insurance by number of characteristics, namely:

1) The object of insurance, human health, is a special object of protection;

2) Insurable event is often unrelated to large-scale disasters and other unusual occasions, but is associated with predictable expenses, such as immunization and health status assessment etc.

3) State plays a special role in health insurance , both as a provider of finances and as a provider of medical services;

4) The right to use medical services is being purchased in advance, in contrast with other types of insurance, when the insured buys insurance for provision of future reimbursement of the loss.[9]

Due to above-mentioned peculiarities, health insurance considerably differs from other types of insurance.

One more characteristic of health insurance is that consumer and the insurance provider possess unequal information about the insurance object. Certainly, insured has more complete information about his/her own health status compared to the insurer. Such an "inequality" creates numerous problems in health insurance .[10]

Health insurance gains particular importance in the settings of increasing costs of medical services, when health insurance virtually equals to realization of patient's right to receive medical care.[11] Due to above-mentioned, health insurance becomes more and more essential.

2.3. Health Insurance: "Social Good" or "Market Product?"

Heath insurance differs from other types of insurance as it cannot be viewed solely as an object of regulation of market economy. Health insurance also can be considered as a"social good"[12], the minimal set of benefits for society provided by the state.[13] Above-mentioned is connected with disagreement over fundamental principles of health care system.

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8 Ibid, 44.

9 Ibid, 493.

10 In such case, during assessment of insurance risks, insurer spends considerable financial resources for detection of insured with higher health-related risks; as a result, amount of insurance premium increases and high-risk insured receives limited possibility of health insurance. See: *Jerry R.*, *Richmond D.,* Understanding Insurance Law, 4th ed., LexisNexis, 2007, 487.

11 Ibid.

12 Social good.

13 *Jerry R.*, *Richmond D.,* Understanding Insurance Law, 4th ed., LexisNexis, 2007, 495.

On the one hand, health care is regarded as a "social good" and state bears responsibility for its minimal utilization . On the other hand, ability to receive medical care has to be determined by the market and not by the state. Accordingly, only financially solvent subjects can benefit from above-mentioned service. In the first case, state takes care of provision of minimal level of health care to every citizen. In the second case, insurer classifies insureds by the risk classification principle and as a result, consumers with greater risks pay more and those with less risks pay less.[14] Financially insolvent subjects remain without health insurance.

Viewing health insurance as a "social good" requires to study the specifics of state participation in health care and health insurance. In this case, it is relevant to consider priorities of social and economic policies of the state.[15]

Viewing health insurance merely as a "market product"[16] requires taking into consideration principles of market economics and contract law. As it can be seen in the next section of the article, threats related to protection of rights of the insured appear even in terms of will autonomy and contractual relationship of the parties.

Usually, when defining the purpose of health insurance, its social role is being emphasized; but it is a matter of the fact, that during purchase of health insurance, practical use of economic terms exceeds use of moral terms. As a final result, the determining factor for making decision by the consumer is amount of premium (as a product price).[17]

3. Types of Health Insurance and their Chatacteristics

3.1. State Participation in Health Insurance

3.1.1. The Legal Base of State Participation in Health Insurance

Health insurance can be offered to the consumers by various subjects, such as state, employer and insurance company.

Depending on the priorities of its economic and social policy, the state participates in provision of insurance coverage to certain groups of the society, by various means.

The idea of participation of the state in health insurance is closely related to the concept of justice. Taxation of the wealthy for the benefit of the poor usually deserves rather ambiguous appraisal. In this regard, it is reasonable to take into consideration the arguments presented in legal philosophy.

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14 Ibid, 489.

15 For example, Americans traditionally supported social solidarity idea in regards with health care. This means paying increased amount of money by relatively healthy members of the society for health insurance of less healthy members of the same society. Although, tradition of sharing health-related risks in the settings of increasing health insurance costs gets controversial assessment even in the USA. See: *Monahan A*., Health Insurance Risk Pooling and Social Solidarity: A Response to Professor *David Hyman,* Connecticut Insurance Law Journal, Spring, 2008, 1.

16 Market product.

17 *Hyman D*., *Hall M*., Two Cheers For Employment-Based Health Insurance, Yale Journal of Health Policy, Law and Ethics, Fall 2001, 3.

It is universally accepted, that concept of justice is connected with distribution of various "goods", highly valued by human beings, such as income and wealth, rights and responsibilities, influence spheres and abilities, rewards and positions. In a civilized society these "goods" are being properly distributed: according to purpose and merit.[18]

According to utilitarianism[19], justice can be achieved at the expense of assuring overall well-being and happiness.[20] By this theory, taxation of wealthy for the benefit of the poor is justified, as this results in increase of number of satisfied and happy people.

According to those, who oppose the idea of "overall happiness" of utilitarianism, this theory does not fully respect human dignity and rights.[21] In contrast, libertarianism[22] gives a priority to free market economy. The idea of state regulation is unacceptable for libertarians (even in social security sphere)[23], since in their opinion, intrusion of state in free realization of human rights can never be approved, unless it is necessitated by the need of assuring effectiveness of economy.[24] Libertarianism is against any law that obliges human beings to help others, including taxing legislation used for redistribution of the wealth. According to the above-mentioned theory, redistribution taxes are nothing more than compulsion, and even theft. It is up to the individuals to decide to help or not to help others and how to do it.[25] Otherwise, his/her right to decide the destiny of his/her own income is being violated.[26]

Discussion of the issues related to the justice requires definition of the role of the market. Is free market fair? According to libertarianism, participation of individuals in free market economy relations represents expression of their freedom. Any law, that interferes with free market economy, restricts human freedom. According to utilitarian theory, market strengthens overall well-being: when two people make an agreement, both of them benefit from it. Unless their agreement harms third party's interests, "welfare is being maximized."[27]

3.1.2. The Limits of State Participation in Health Insurance

Disagreements around the issue of health insurance are often related to the problem of the frames of intervention of the state in private market relationships[28].

Two principal arguments are used in economic theory for justification of state intrusion in market relationships. Above-mentioned arguments concern health insurance, as well. First argument is related to the redistribution of resources for their fair distribution and the second one – with correction of the gaps existing at the market.

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18 *Sandel M*., Justice (What's the Right Thing To Do?), 1st ed., Farrar, Straus and Giroux; New York, 2009, 19.
19 Founder – *Jeremy Bentham*, 1748-1832.
20 *Sandel M*., Justice (What's the Right Thing To Do?), 1st ed., Farrar, Straus and Giroux, New York, 2009, 34.
21 Ibid, 48.
22 Founders – *Friedrich A.Hayek*, 1899-1992, *Friedman M.*, 1912-2006.
23 *Sandel M*., Justice (What's the Right Thing To Do?), 1st ed., Farrar, Straus and Giroux; New York, 2009, 61.
24 Ibid, 59-60.
25 Ibid, 60-61.
26 Ibid, 62.
27 Ibid,75.
28 *Swartz K*., Justifying Government as the Backstop in Health Insurance Markets, Yale Journal of Health Policy, Law and Ethics, Fall 2001, 1.

Resource redistribution theory[29] implies transfer of goods essential for existence to those members of the society, who have certain special needs because of poverty or some other reason.[30] Parallel to the above-mentioned argument, there is no precise definition of fair distribution of resources, as it is impossible to set criteria for defining degree of human satisfaction or well-being. Something, that makes one individual happy, may not satisfy another and at all. Thus, fair distribution of resources is relative category as justice itself. Although, according to above-mentioned theory, realization of the right to receive medical services should not be dependent on financial solvency of an individual.

Correction of faults existing at the market may represent a justification for intervention of the state in market relationships. Such faults exist when market is ineffective, namely: 1) When members of the society receive more or less compared to what they spend or 2) When they cannot obtain complete benefit from their production.[31]

Opinion of the followers of "behavioral economics"[32] in regards with participation of the state in health insurance is that people can find better and more rational use of their own time instead of reading insurance contracts, and even if they read them, it is very unlikely that they may "discover" "ineffective" conditions in the contract (i.e. harmful for themselves). Therefore, followers of this opinion think that it is better for consumers when insurance conditions are defined by the state.

Followers of neoclassical economic theory make emphasize on aspects like complicity of health insurance contract and its imperfection. In this settings, mechanism of regulation should be directed towards assurance of equality between the insurer and the insured.[33]

3.2. Employment-Based Health Insurance

3.2.1. The Essence and Roots of Employment-Based Health Insurance

Along with state programs "employment-based health insurance"[34]is widely utilized. Employment-based health insurance implies offering health insurance to the employees by the employer, as certain kind of benefit[35], beside regular wages. Employer is one of the principal subjects in health insurance , along with the state.

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29 Resource redistribution theory lies in a basis of establishment of *Medicare* and *Medicaid* state programs in the USA. The state has taken over responsibility, to cover medical service expenses for the subjects included in the program, by means of redistribution of the taxes collected from the population. See: *Swartz K.*, Justifying Government as the Backstop in Health Insurance Markets, Yale Journal of Health Policy, Law and Ethics, Fall 2001, 3.

30 An example of above-mentioned is health insurance of population under poverty line and public school teachers by the government of Georgia, since 2007.

31 *Swartz K.*, Justifying Government as the Backstop in Health Insurance Markets, Yale Journal of Health Policy, Law and Ethics, Fall 2001, 3.

32 Behavioral economic framework.

33 *Swartz K.*, Justifying Government as the Backstop in Health Insurance Markets, Yale Journal of Health Policy, Law and Ethics, Fall, 2001, 4.

34 Employment-based insurance.

35 Fringe benefit.

Motivation of the employer in regards with health insurance of the employees is conditioned by several factors. First of all, employer is interested to maintain working ability of the employees. Accordingly,employers strive for their empoloyees' health protection. On the other hand, employer uses health insurance, as an attractive condition to increase work motivation of the employees.

Originally, employers did not play an important role in health insurance . Later on, they took dominating position, which was partially a natural result of historical events. Prior to World War II, offering health insurance to the employees by the employer was an exceptional event in the USA.[36] This institution began to be implemented actively during the World War II, which was conditioned by number of factors. On the one hand, by offering health insurance, as an attractive circumstance to the employees, employers assured their own competitive ability and gradually asserted their own place at the labor market. On the other hand, active use of health insurance by the employers was conditioned by "mildness" of United States taxing policy.[37] Active implementation of the institution was largely supported by the activity of professional unions, as well. During 1940-ies and 1950-ies professional unions were engaged in an intensive fight for provision of best benefits to the employees, including health insurance.

3.2.2. Problems Related to the Usage of Employment-Based Health Insurance

Various approaches to the employment-based health insurance exist. There is a general assumption that this type of insurance can hardly ensure complete insurance coverage. In this situation, choice of personal priorities is being ignored by the employer, as employment-based health insurance is mostly adjusted to the employer's interests. The latter, in its turn, is mostly motivated by the potential benefit, rather than by consideration of best interests of its employees.[38] Naturally, employers have their own motivation for usage of above-mentioned institution. Another issue is proper balance between the interests of employers and employees during the usage of health insurance.

Significant portion of the problems related with employment-based health insurance is connected with the fact that terms of the contract (e.g. volume of insurance coverage and amount of premium, rules of receiving medical care, exclusion clauses etc.) are defined by the employer instead of insured himself/herself.[39] Certainly, by offering health insurance employer tries to stimulate work motivation of the employee and is clearly interested in satisfaction of the latter. Although, it is quite uncertain if an employer can consider insurance coverage that would be fully acceptable for the employee. Several factors have to be taken into consideration in this regard.

On the one hand, by taking over representative function by the employer, its responsibility towards the employee increases. Making an arrangement on the behalf of the employee and for his/her benefit requires best consideration of the interests of the latter.

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36 *Hyman D.*, *Hall M.*, Two Cheers For Employment-Based Health Insurance, Yale Journal of Health Policy, Law and Ethics, Fall 2001, 2-3.

37 In 1954 the US congress has finally excluded employment-based health insurance from the list of the taxed incomes. Due to above-mentioned, employers would simply buy health insurance from their employees and without the need to influence them for purchase of such insurance. See: *Jerry R.*, *Richmond D.,* Understanding Insurance Law, 4th ed., LexisNexis, 2007, 493.

38 *Hyman D.*, *Hall M.*, Two Cheers For Employment-Based Health Insurance, Yale Journal of Health Policy, Law and Ethics, Fall 2001, 1-2.

39 Ibid, 4.

On the other hand, as employer pays the costs of the health insurance offered to the employee, the former is authorized to determine insurance coverage in accordance with amount of premium. According to the rules of market economy, employer pays for the product, determines its conditions and offers it to the employee. In his/her turn the employee can either accept or refuse offered conditions.

Thirdly, there is a reason why practical implementation of the above-mentioned may be impossible regardless the honesty of the employer and best consideration of employee's interests. The matter is, that priorities of the employees in regard with cost, degree and accessibility of medical care differ both in vertical plane (compared to employer's interests) and horizontal plane (compared to the interests of other insured). Obviously, people have their own priorities: some prefer to have higher salary and respectively – lower insurance coverage and others – vice versa. Some of the insured prefer certain specific type of medical care, based on their own health status (e.g. in case of chronic disease). Since health insurance package offered by the employer represents a diverse set of the rules and conditions of receiving medical care, aimed at the employees with various interests, it can be unacceptable for an individual employee and can be regarded as inappropriate expenditure.[40] Considering above-mentioned, employment-based health insurance is a favorable, but not an ideal alternative for the insured.

One more peculiarity of the discussed institution is that insurance is closely tied to the labor status of the employee. Changing or losing job would result in respective changes for the insured. Often insured may refuse new job offer if current insurance policy best suits the interests of the employee and his/her family members. Unemployed automatically lose health insurance.[41] Owing to such status, employment-based health insurance is regarded as less stable instrument of protection from health-related risks.

3.2.3. The Advantages of Employment-Based Health Insurance

Employment-based health insurance has its own advantages. Employers, in highly competitive settings of the labor market actively try to take into consideration interests and priorities of the employees. Often employers defend interests of employees in insurance lawsuits better than the insured themselves do.[42]

Employers can play an important role in improvement of quality of medical care in the frames of protection of interests of their employees. In this regard, initiatives of an employer, as of private actor can bring practical results. In the United States employers frequently use their market power to influence medical institutions to improve quality of medical services.

When demanding improvement of medical services, employers are driven by economical motivation. Accordingly, they insist on inclusion of relevant terms and conditions in the contracts with medical institutions, thus making payment for medical services somewhat dependent on their quality. The clear example of above-mentioned is union of employers[43] in the USA, which started signing contracts with medical institutions in 1995, including financial sanctions in case of failure to keep up to

40 Ibid.
41 Ibid, 5.
42 Ibid, 6.
43 Pacific Business Group on Health (PBGH).

quality of medical care (standards set by the employers). Such practice turned out to be beneficial and had a positive impact on improvement of medical services.

In order to improve medical services, employers have to openly express their attitude towards medical errors. Employers may even set their own standards of care to the medical institutions. An example can be giving priority to those medical institutions, which invest actively in reduction of medical errors. Considering above-mentioned, employers should focus on various circumstances, such as: in case of need of advanced medical care – guaranteed referral of the patients to the medical centers with best life-saving capacity; in medical institutions with intensive care units – permanent presence of highly qualified physician capable of care for critically ill patients etc.

The role of employers in the process of striving towards the improvement of medical care is undoubtedly important and deserves a relevant appraisal.

Another advantage of use of employment-based health insurance is that it allows to expand insurance coverage on unemployed individuals, as well. By this statement we have in mind family members of the employees, who otherwise would have limited possibility of obtaining health insurance.

4. The Characteristics of Legal Regulation of Health Insurance Contract

4.1. The Essence of Health Insurance Contract

4.1.1. The Legal Nature of Health Insurance Contract

Health insurance contract is mutually binding, real, non-gratuitous payment requiring agreement. Contract parties are the insurer (represented by the insurance company) and the insured (physical or legal entity). Insurance contract implies reimbursement of the loss occurred as a result of insurable event by the insurer, in exchange of the insurance premiums paid by the insured.

Health insurance contract parties have reciprocal rights and obligations. The insurer is obliged to reimburse the loss occurred as a result of insurable event and has right to request payment of premiums by the insured. The insured is obliged to pay premiums in accordance with agreed provisions and has right to request reimbursement of loss occurred from insurable event.

Insurance contract is a real contract, as it comes into force only after payment of first insurance premium and not after agreement between the parties[44]. According to Article 816 of Georgian Civil Code (hereinafter – GCC), the insurer is free from the obligation until the payment of the first or the single insurance premium by the insured.

Definition of the duration of the agreement bears particular importance in regards with insurance contract. Time and probability of occurrence of insurance event is unknown for the parties. Therefore, it is essential to clearly define the starting time of insurance period and respectively – of insurer's obligation. Occurrence of an insurable event within the insurance period does not induce any problems in terms of commencing insurer's obligation. For example, if the contract came into force on 1st March 2010 and

[44] *Zoidze B., Ninidze T., Shengelia R., Chanturia L., Khetsuriani J. (ed.),* Comments on the Civil Code, book IV, Volume II, 2001, 137 (In Georgian).

insurable event occurred on 2nd March, nothing will interfere with commencement of insurer's obligation. The problem arises, when occurrence of insurable event precedes commencement of insurer's obligation.

In regards with definition of time of commencement of insurance contract, it is interesting to observe regulation implied by the article 816 of GCC. According to the article 816 of GCC, the insurer is free from obligations until timely payment of first or single insurance premium. The contents of above-mentioned article make a clear distinction between the stages of signing the insurance contract (agreement between the parties) and its commencement, connecting contract commencement with payment of insurance premium. In case of paying insurance premium simultaneously with signing the contract, the danger associated with commencement of insurer's obligation is being excluded immediately. The problem may arise, when for example, the contract is signed on 1st March 2010, the insurable event occurs on 2nd March and it turns out that insurance premium has not been paid. Based on direct, literal explanation of the article 816 of GCC, in above-mentioned case the insurer has no legal right to request insurance remuneration from the insurer.

Although, article 816 of GCC usually does not create any problems in health insurance . The acts of signing health insurance contract and paying the premium take place simultaneously and accordingly, the point of signing the agreement and its commencement coincide in time. As a rule, the insurer hands over the insurance policy to the insured only after the payment of insurance premium. It is also possible for the parties to determine the time point of commencement of first insurance contract themselves.

The opinion has been expressed in legal literature that insurance contract belongs to the conditional contracts, as fulfillment of insurer's obligation depends on occurrence of certain condition – an insurable event. Although, it has to be taken into consideration that in case of health insurance, contract commencement and realization of rights and obligations of the parties do not depend on actualization of insurance risk.[45] As actualization of insurance risk is an unpredictable event, insurance contract may expire without occurrence of insurable event.

4.1.2. The Rights and Obligations of the parties to the Health Insurance Contract

The source of legal regulation of health insurance contract is represented by GCC, which on the one hand, defines principles of contractual relationship and on the other hand, contains the separate set of regulatory norms for insurance contract. Articles 799 to 858 determine guiding principles for insurance contracts on a general level, as well as on examples of individual types of insurance. GCC does not separately regulate health insurance contract. Accordingly, the latter is covered both by general principles of contract law, and rules determined by regulatory norms of insurance contract.

Parties of health insurance contract are the insurer, represented by the insurance company and the insured, represented by physical or legal entity. The insurer presents the terms and conditions of health insurance contract to the consumer. The latter gets acquainted with them and makes a decision to enter or not to enter the contractual relationship. By declaring preparedness for the agreement, the parties express their will to get legally bound by the contract. The contract is made between the parties on a basis of two reciprocal wills.

[45] Ibid, 108.

By entering the insurance contract, the insurer takes an obligation to cover medical care expenses related with the health of the insured in case of occurrence of an insurable event, in exchange of payment of insurance premium by the insured.

The obligations of the insurer are as follows: acquaintance of the insured with the contents of the contract; remuneration to the benefit of the insured in case of occurrence of an insurable event; providing the insured with information about potential danger to fulfillment of contract obligation. On the other hand, the obligations of the insured are as follows: paying premiums to the benefit of the insurer with predetermined periodicity, amount and form; providing information at the stage of signing the contract, during the entire insurance period and in case of occurrence of insurable events.

Health insurance contract is based on mutual trust between the parties. In case of health insurance contract, the insurance interest is connected with the health of the insured, which represents a subject of special protection. Therefore, particular importance is being attached to honest fulfillment of obligations taken over by both parties.

Insurer's obligation, to get the consumer acquainted with the contents of the contract is associated with the pre-agreement period and is particularly important both for authenticity of the insurance contract and for establishment of honest contract relationship between the parties.[46]

In current settings, insurance companies have prearranged standard contract forms for various types of insurance, including health insurance. Preparing standard policies for individual types of insurance enables insurance companies, as financial institutions, to save time and finances and ensure maximal effectiveness of financial responsibility towards the insured. Above-mentioned excludes any opportunity for the consumer, who comes to the insurance company for health insurance, to negotiate for contract conditions. The consumer gets acquainted with the contents and cost of existing insurance product and makes a decision, to buy or not to buy the certain type of health insurance. At this point, the insurer's obligation arises, to clarify the contents of the contract to the consumer in full detail, in order to exclude the potential future problem of questioning the authenticity of the will expressed by the insured at the time of signing the contract. Above-mentioned obligation, as an integral part of the pre-agreement stage makes a particular burden on the insurer. Parallel to restricting consumer's possibility to negotiate for contract conditions and mutual determination of product price, the insurer has to provide necessary and complete information for expression of the genuine will by the consumer.

The contents of the insurance contract are defined by the main obligation of the insurer, to make a reimbursement to the benefit of the insured in case of occurrence of an insurable event.[47] Above-mentioned obligation is a principal obligation of the insurer, although not unconditional one. Commen-

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46 In regards with insurance contract, the principle of *contra proferentem* is in force, which means that vague and ambiguous provisions of the contract will be explained to the benefit of the party, which has taken no part in their preparation. Thus, the insurers are under the particular burden, as they prepare conditions of so called "standard contracts" and accordingly, they are obliged to be especially attentive to clear wording of these conditions. To emphasize particularly important provisions of the contract, e.g. exclusion clauses, they may be printed in bold type or different font. See: *Cannar K.*, Essential Cases in Insurance Law, Woodhead-Faulkner, Cambridge, 1985, 13.

47 It has to be taken into consideration, that insurer's obligation, implied by the insurance contract arises only if the causal relationship can be established between the realization of the insurable event, predetermined by the parties and the loss occurred. See: *Cannar K.*, Essential Cases in Insurance Law, Woodhead-Faulkner, Cambridge, 1985, 15-16.

cement of obligation of the insurer to make an insurance reimbursement depends on occurrence of an insurable event. An insurable event is a result of actualization of the risk, uncontrolled by the parties, the probability of which is uncertain and unpredictable. Accordingly, insurer's obligation to reimburse the loss, occurred as a result of actualization of the insurance event, is conditional and relative.

There are various models of determining amount of insurance compensation. Traditionally, "first risk" and "proportional" systems can be differentiated. In the first model, "parties agree on complete compensation of the damage occurred as a result of an insurable event in the frames of insurance sum. If the damage exceeds the insurance sum, excess damage will not be compensated.~[48]. In the second model, amount of insurance compensation is calculated by multiplication of the size of the damage by the insurance sum and division by insurance estimation.[49] In health insurance, insurance company is usually obliged to reimburse the costs of medical services carried out for treatment and recovery of the insured.[50]

The insurer provides financial guarantee to the insured, according to which it has to deliver reimbursement in case of occurrence of the damage to the insured. Contract interest of the insured is represented exactly by this financial guarantee provided by the insurer. Therefore, taking into consideration the principle of contract honesty, insurance company must provide an information to the insured if its financial stability is endangered, e.g. if bankruptcy proceedings are initiated against it etc.

Main obligation of the insured, in exchange of which the insurer takes over responsibility to reimburse the loss occurred as a result of insurable event, is represented by payment of insurance premium. After purchase of health insurance policy, the insured pays insurance premiums at regular intervals (mostly by monthly payment principle).[51]

The parties agree on an amount of insurance premium, as well as payment rules and conditions. Insurance premium represents a price of "risk bearing" by the insurer. By paying insurance premium, the insured "buys peace and financial stability". On the other hand, contract interest of the insurer lies in receiving insurance premium. Payment of premium is a provision, that results in reciprocal provision from the side of the insurer.

Interrelationship of above-mentioned obligations has both legal and financial aspects. From the legal point of view, the parties in contractual relationship agree to be legally bound by reciprocal obligations. On the other hand, one of the essential preconditions for financial stability and solvency of the insurance company is attraction and proper accumulation of insurance premiums. Provision of insurance compensation can only happen on a basis of attracted premiums. Balancing the flow of attracted premiums and reimbursed claims is a part of internal management and financial policy of insurance company, as a financial institution. From the legal point of view, ensuring solvency and financial stability of the insurer is important, as an essential precondition for accomplishment of contract obligation. The insurer is interested in receiving insurance premium and avoiding insurable

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48 *Zoidze B., Ninidze T., Shengelia R., Chanturia L., Khetsuriani J. (ed.),* Comments on the Civil Code, book IV, Vol. II, 2001, 110-111 (In Georgian).

49 Ibid, 111.

50 Ibid, 112.

51 In case of the contract, made for the benefit of the third party, the relevant subject pays insurance premium to the benefit of the insured, as a beneficiary; e.g. when the employer buys health insurance policy for the employee. In remaining cases the insured themselves pay insurance premiums.

event, and the insured is interested in receiving pledged compensation from the insurer in case of occurrence of insurable event.

Articles 808 to 814 of GCC determine obligation of the insured to provide information to the insurer and define legal consequences of breaching this obligation. The obligation of providing information affects the insured at the stage of signing the contract (article 808), during its entire period of validity (article 813) and in case of occurrence of an insurable event (article 814).

Reinforcement of above-mentioned obligation by the Code intends to place contractual relationship between the parties in the frames of mutual trust, cooperation and honesty. Fulfillment of its obligation by the insurer depends on possession of accurate and complete data about the insurance object. Possession of information about the object of insurance by the insurer at the stage of signing the contract defines insurer's decisions, namely:

a) decision about the terms of the contract (this concerns mainly the amount of premium, as amount of premium should correspond to the costs of risk bearing);

b) overall decision, to sign or not to sign a contract in general.

Emergence of new information about the object of insurance during the period of validity of the contract (e.g. information about the increase of risk) determines the insurer's decision about possible change of contractual provisions and about continuation of the contractual relationship. Possession of complete information by the insurer at the stage of occurrence of insurable event determines existence of obligation of loss reimbursement. Breaching the obligation of provision of information by the insured gives a right to the insurer to terminate the contract.

Fulfilling obligation of providing information represents a certain way of expression of an adherence to the principle of honesty in insurance contract[52]. Traditionally, the burden of obligation of providing information is heavier for the insured, as the latter possesses much more data around the insurance object and existing risks, as compared to the insurer. The insurer's role is to assess the risk based on these data, determine amount of the premium and make a decision about signing the contract.[53]

The insurance company needs to possess information about the exact age and health status of the consumer at the stage of signing the contract. If, for instance, the insured conceals his/her age and existence of a serious illness, the will expressed by the insurer in regards with signing the contract will not be genuine. Information about the health status of the consumer has an essential importance for signing the contract by the insurer and correct definition of its conditions.

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52 Principle of honesty in a general sense means a promise implied at the time of signing the contract by the parties, that none of them will act in a way to violate another party's right, to receive a benefit from the given contract. *Jerry R.*, *Richmond D.,* Understanding Insurance Law, 4th ed., LexisNexis, 2007, 179. It is worthwhile to mention that principle of honesty is reflected in the insurer's obligations, as well. In US court practice in some cases obligation of honesty is viewed as insurer's obligation. Such approach is mostly characteristic for liability insurance. In those cases, when the insurer "protects" the insured from the damaged third party, it has to protect primarily interests of the insured. In the process of negotiations, the insurer should agree only to those offers, that are most beneficial for the insured. See the same source. Accordingly, US courts decide that violation of fiduciary obligation by the insurer (subordination of the interests of the insured to their own) is a dishonest act. See: *Jerry R.*, *Richmond D.,* Understanding Insurance Law, 4th ed., LexisNexis, 2007, 180.

53 *Cannar K.*, Essential Cases in Insurance Law, Woodhead-Faulkner, Cambridge, 1985, 1.

The insured must provide an information to the insurer about the circumstances that change the level of probability of risk realization during the insurance period. In case of health insurance, worsening of health status of the insured may be regarded as such a circumstance. The principle of contract honesty requires from the insured cooperation with the insurer and provision of information about respective changes.

In case of occurrence of insurable event, the insured has to notify the insurer immediately. The contract may imply certain time period for accomplishment of above-mentioned obligation. The principal idea is that insured has to use maximal effort for timely notification of the insurer.

4.1.3. The Challenges of Defining Health Insurance Coverage

4.1.3.1. The Notion of Insurance Coverage

Defining extent of insurance coverage has particular importance in the process of agreement on the conditions of health insurance contract. Insurance coverage denotes the list of medical services, expenses of which will be reimbursed by the insurance company. Insurance coverage implies exclusion clauses as well, e.g. list of medical services that are not subject to compensation from the side of the insurer. Clear and precise wording of above-mentioned conditions by the insurer and their complete and adequate comprehension by the insured are equally important.

In the settings of market economy and freedom of contract, insurance companies are not limited in their right, to determine the list of medical services, compensation for which is in their own interests. Moreover, on an example of Georgian insurance practice, most of the time, insurance companies themselves define medical institutions, where the insured is supposed to receive certain types of medical care. At a first glance, above-mentioned does not create a problem, since insurance company, as profit-oriented subject of private law, can determine itself the price and conditions for the product it sells. It is important for the consumer, to get carefully acquainted with the contents of the offered contract and make a decision on signing the contract only after thorough analysis of conditions of insurance coverage and exclusion clauses. The consumers are free in their choice. They become legally bound by contractual obligations only after signing the contract, which takes away their right to make claims regarding certain terms of the contract.

According to the agreement made between the insurer and the insured, medical care expenses related with the health of the insured will be covered. Human health, in its turn, is complex and unpredictable category and the insurer is naturally interested in precise definition of its own responsibility. The insurer cannot take over obligation to cover expenses of any kind of medical care related to the health of the insured. In such case, ensuring financial planning and control of assets and expenses by the insurer would be impossible. Therefore, precise definition of insurable events is necessary.

4.1.3.2. The Medical Necessity Concept

Although, the insurer is free to define the list of medical services and exclusion clauses in health insurance contract, there are certain criteria, that partially limit its freedom.

It is universally accepted, that in health insurance contract insurance coverage mainly implies medical care conditioned by 'medical necessity"[54]. Medical necessity is not a legal category and for clarification of its essence, it is essential to consider the practice existing in medical sphere. There are various definitions of "medical necessity" in health insurance policies. For example, according to one of the definitions given in the US legal literature, medical care conditioned by medical necessity is defined as necessary and an appropriate care, provided for treatment of health impairment and illness in accordance with general principles accepted in the US medical practice, not regarded as "experimental treatment" and not used for teaching or scientific purposes.[55]

It has to be taken into consideration that concept of medical necessity is rather difficult to define. There are certain cases though, when there is less difficulty associated with its characterization. For example, it is universally accepted that medical necessity is a broader category than just treatment of existing disease or injury. Above-mentioned means that definition of medical necessity implies preventive measures as well, e.g. vaccination. Insurance coverage of vaccination by the insurer is determined by its economical interest. Certainly, insurer prefers to cover vaccination expenses today, which are much cheaper, than treatment expenses tomorrow.

Although, in some cases definition of medical necessity is rather difficult. For example, there are frequent arguments in medical practice around the medical necessity of cosmetic surgeries. Certainly, surgical intervention that intends correction of organs, injured and deformed as a result of serious accident, is conditioned by medical necessity. But how about the case when there exists a mixed motivation for individual medical manipulation, e.g. when nose surgery is being done for improvement of nasal respiration and for cosmetic purpose at the same time?[56] In such cases demarcation between medical services within and outside medical necessity is very difficult and every single case needs to be discussed individually.

4.1.3.3.The Exclusions of Health Insurance Coverage

Similarly to medical necessity, "experimental treatment" is defined according to scientific and professional standards, too. Their precise definition has practical importance for individual insurance relationships, since the exact contents of these definitions determine fulfillment of contractual interests of the insurer and the insured in individual cases. Existence of one excludes another and vice versa.

Medical services intended for experimental treatment are usually classified as exclusion clauses in health insurance contracts. This is conditioned by the fact that costs of experimental treatment are usually high and precise calculation of their amount by the insurer in advance is impossible. If the insurers included all kinds of diseases and all types of treatments in their insurance packages, this would considerably increase their expenses, as well as expenses of the insured.[57]

Definitions of experimental treatment in health insurance policies vary. The US courts usually interpret health insurance contracts with vague definition of experimental treatment by the insurer to the

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54 Medical necessity.
55 *Jerry R., Richmond D.,* Understanding Insurance Law, 4th ed., LexisNexis, 2007, 501.
56 Ibid, 504.
57 Ibid, 498.

benefit of the insured. Accordingly, court may deny the insurer's attempt to use exclusion clause on experimental treatment, because of inadequacy and lack of detailed explanation of above-mentioned definition in insurance contract.[58]

There is a disagreement on methods of experimental treatment among medical experts, themselves. Frequently, the question of an individual method – whether it is a traditional or experimental one - is a subject of discussion. What is a judge supposed to do in such cases and which expert's conclusion should he/she trust? How the "correct" conclusion has to be chosen?[59] Obviously, the judge has to make a decision based on summarized position of representatives of the relevant sphere.

The best solution for avoiding this kind of situations is specification of concrete medical procedures in exclusions' section by the insurer, instead of listing general concepts and definitions. Such approach protects from interpretation of the contract against the insurer.[60]

Beside experimental treatment, exceptions in health insurance contracts are often represented by "preexisting condition exclusions"[61]. Above-mentioned clauses exclude insurance coverage of those diseases, which occurred (or development of which started) prior to the beginning of insurance period. Preexisting condition exclusions define the following items:

1) First of all, the medical condition itself, e.g.: disease or injury, for which the assessment of health condition of the insured, diagnostic and treatment procedures have been carried out and/or combination of symptoms, existence of which would make any reasonable person to visit a physician;

2) Time frame prior to beginning of insurance period, within which occurrence of the medical condition would be regarded as pre-existence of the latter;

3) Time frame after beginning of insurance period, within which occurrence of the medical condition would be regarded as pre-existence of the latter.[62]

Considering exclusion of preexisting medical conditions in health insurance contract serves specific purpose. Otherwise, some people would wait until worsening of health status or occurrence of certain medical condition and would purchase health insurance only afterwards. Occurrence of an insurable event should be unknown and unpredictable event for the parties. Existence of above-mentioned terms increases consumer's motivation to buy health insurance in healthy state.[63] A classic example of above-described is purchase of health insurance by the pregnant woman during pregnancy, which excludes coverage of medical expenses related with pregnancy.[64] This means that pregnancy, as a certain condition of health of the insured, should occur during the insurance period as an insurable event. According to typical insurance practice, this is the only situation, when the insurer will make a reimbursement of medical expenses related with pregnancy.

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58 Ibid, 499.
59 Ibid, 500.
60 Ibid, 501.
61 Preexisting condition exclusions.
62 *Jerry R., Richmond D.,* Understanding Insurance Law, 4th ed., LexisNexis, 2007, 495.
63 Ibid, 496.
64 Ibid, 497.

4.2. The Insured Protection Guarantees in the Health Insurance Contract

4.2.1. Health Insurance Contract, as an Agreement Reached in the Conditions of Inequality of Bargaining Power[65]

Comprehensive analysis of health insurance contract requires analyzing of those specifics , which arise during the agreement on contract terms. Namely, inequality of bargaining power of the parties at the time of agreement has to be emphasized.

Nowadays, people often lack freedom of negotiation over the terms of an agreement. Standardization of contracts in individual spheres is associated with determination of contractual terms by only one party, which takes away another party's right to change them. Above-mentioned contradicts in a certain way with the idea of freedom of agreement.[66]

In classical cases, contracts between the parties are made in the settings of equal bargaining power. Current insurance contracts virtually exclude such possibility. The insured is free to choose between the insurers and various insurance products, but after selection of a specific type of insurance, the right to negotiate over specific terms is limited. As a rule, the insurer presents a standard contract, prepared in advance to the insured for signing. Naturally, the insurer is more experienced and well-trained in understanding of contents of insurance terms, than 'inexperienced" consumer.[67],[68]

The object of insurance, implied by health insurance contract – health – belongs to the sphere of special interests of humans. Accordingly, motivation of its insurance is usually high. The interest of purchasing health insurance is especially high among those, who already experience some kind of health problems and would like to buy a health insurance. The insurer takes into consideration the high demand for this product and carefully prepares standard text of the contract.

Since the consumer is less experienced in preparing insurance contracts and interpreting their wording, there exists a danger that insurer will take an advantage of consumer's "inexperience" and will adjust contract conditions mostly to its own interests. Often important statements of the contract, such as exception clauses are presented in such a way that the insured may even miss them, unless he/she pays a special attention to them. But for authenticity of the will expressed during the agreement, it is necessary to fully understand the contents of insurance package. For example, if the section of exceptions lists certain diseases and the list ends with the words "and others" or "etc.", the insured has to understand, that above-mentioned will include any disease not covered by insurance package and not listed under the exceptions.

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65 Inequality of bargaining power.

66 The freedom of contract has not always been a legal principle. During many centuries, rights and obligations of a person were determined by his/her birth, family status, belonging to certain tribe and other signs. Legal relationships between people have changed after the basement of economy on labor distribution principle. Since then, people started to define their own personal status by entering individual contractual relationships. See: *Zweigert K*., *Kötz H*., Introduction to Comparative Law, Translated from the German by *Weir T*., 3rd revised ed., Clarendon Press. Oxford, 1998, 325.

67 *Jerry R*., *Richmond D.,* Understanding Insurance Law, 4th ed., LexisNexis, 2007, 159-160.

68 This is why the American insurance law obliges the insurer to approach precise and clear wording of the contract conditions with particular caution and honesty. Vague and ambiguous statements of the insurance contract will be interpreted against the insurer (producer of the contract). See the same source.

The freedom of contract is not an absolute category. Its existence is virtually excluded during economic and social inequality between the contract parties. In such cases, the stronger party determines the contents of the contract.[69]

In case of health insurance contract, inequality of bargaining power of the parties is often caused by clear economical priority of one party, which virtually dictates conditions of the contract to the other party. For example, because of high demand and low offer in the sphere of employment, the applicant usually lacks an opportunity to negotiate over the terms of the contract. On the other hand, the party may blindly agree to the contract conditions by other reasons, such as: lack of experience, insufficient negotiating skills, or lack of particular interests they would like to be considered in the contract conditions.[70]

As a result of industrial revolution of 19th century, parallel with production of goods and services, contract conditions underwent standardization, too. Introduction of standard contract conditions was induced by the necessity of rationalization of busyness. With standard contract conditions, the need for separate negotiations for every agreement is alleviated, which saves time and financial resources.

But busyness rationalization is not the only reason for standardization of contracts. Large companies effectively use standardized contracts for inclusion of conditions that are mostly beneficial and profitable for themselves and for maximal transfer of risks to the other party. For example, the contract may contain the price increase provision, limitation of the other party's right to terminate the contract, sanctions against the other party in case of delay of fulfillment of obligations etc. Clearly, such provisions serve unilateral interests. Owing to economic, intellectual or psychological priority of the entrepreneur, consumer has no choice but to agree to the offered conditions.[71]

It has to be taken into consideration, though, that consumers agree to proposed conditions without negotiations not just because of economic priority of the other party. Many times, due to time constraints, financial resources or other factors, it is more convenient for the consumer to agree to the standard conditions, than to start negotiations and trade for the better conditions. For example, when a person parks a car in a parking garage or buys a computer, he usually agrees to the proposed conditions not because he is forced to do so, but because inconvenience of negotiation expenses or of the search for an alternative solution outweighs the benefits gained by agreement to the proposal.[72] Entrepreneurs are very well informed about this. They take maximal advantage of such situations and offer the terms to the consumers, that are mostly beneficial for themselves.

The laws adopted in most of the European countries since 1960 were based on the idea of protection of the consumer, as of the "weaker" party, from the conditions of the contract that were adjusted to unilateral interests. For a long period of time, protection from unfair terms of busyness in Federal Republic of Germany was carried out only by the courts[73]. During such hearings, the courts mostly followed the *contra proferentem* principle, which meant that vague and ambiguous terms of the contract were interpreted to the benefit of the party, which did not participate in their formulation.

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69 Ibid, 1360.

70 *Zweigert K.*, *Kötz H.*, Introduction to Comparative Law, Translated from the German by *Weir T.*, 3rd revised ed., Clarendon Press, Oxford, 1998, 331.

71 Ibid, 334.

72 Ibid.

73 Ibid, 335.

German courts have developed guiding principles for evaluation of fairness of standard contract terms, by demarcating between various cases and certain types of contract terms. As a result, German judicial law has been developed, which had no analogue by that time, mostly owing to the German courts. In 1977, the Act for the Control of the Law of General Conditions of Business (AGBG) was adopted.[74]

Judicial systems of Austria, Switzerland, France[75], Italy[76] also consider protection of the "weaker" party of the contract from unfavorable conditions.

The issue of fairness of standard contract terms is relevant for English and American legal systems as well. In this regard, it is worthwhile to mention decision of English Appellate Court[77], which stated that the more unexpected and unfavorable the contract condition could be for the party, the more clearly and accurately should it be formulated. English courts actively followed the *contra proferentem* principle.[78] In 1977, the law on unfair terms of the contract has been adopted.

The problem of appropriateness of standard contract terms has been reviewed by EU contract law system, as well. EU Directive on Unfair Terms in Consumer Contracts was adopted on 5th April, 1993.[79] Above-mentioned directive sets a minimal threshold of protection of consumers' rights, which certainly does not restrict possibility of broadening protection frames by member states. The directive covers only those contracts, where one of the parties is represented by the consumer (i.e. a physical entity, which acts for purposes outside his/her professional, occupational or trading interests). Accordingly, the directive does not cover contracts between businessmen. Beside French legal system, such restriction is not applied in German, Austrian, Swedish and Dutch systems.[80] According to this directive, contract condition is void, if it has not been agreed between the parties and if it was formulated in advance by only one party and consumer did not have an opportunity to change its contents.[81]

4.2.2 The Concept of Quality of Medical Services in Health Insurance Contract

4.2.2.1. Threats Associated with the Protection of the Insured's Rights In Health Insurance Contract

Health insurance differs from other types of insurance by the fact that its object is particularly important and delicate. Life and health are most important interests of human beings.[82] The insured, who entrust covering of medical care expenses related to their own health to the other people, expect not simply compensation for such expenses, but adequate and quality medical care as well. This is a main motivation that makes a basis for entering contractual relationship with the insurer.

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74 Ibid, 337.
75 Ibid, 338.
76 Ibid, 339.
77 Interfoto Library Ltd. v. Stiletto Ltd. [1989].
78 *Zweigert K*., *Kötz H*., Introduction to Comparative Law, Translated from the German by *Weir T*., 3rd revised ed., Clarendon Press, Oxford, 1998, 341.
79 Ibid, 343.
80 Ibid, 344.
81 Ibid, 345.
82 *Nomi Y*., Medical Liability in Japanese Law, Modern Trends in Tort Law, Editor *Hondius E*., Kluwer Law International, 1999, 29.

Due to exceptional nature of health care insurance, receiving medical services implied by health insurance contract may result in number of unforeseen circumstances. Probability of occurrence of unpredictable outcomes is rather high in medicine. The insured under physician's supervision is not different from any usual patient and any unpredictable outcome that may happen during medical care in general, may happen with the insured, too. The insured can have numerous claims after delivery of medical services, namely: damage occurrence; dissatisfaction with quality of medical care; delayed delivery of medical services etc. To whom should the insured address these claims? How are the limits of insurance company's responsibility defined?

According to classical principles of insurance, it is supposed to compensate the damage occurred as a result of an insurable event. Existence of the risk and the damage occurred as a result of its actualization are determinants of contents of insurance contract. Compensation of damage has historically been a function of insurance. Currently, insurance is still viewed as a mechanism of remuneration. An insurance contract made between the insurer and the insured implies insurer's obligation, to cover medical care expenses for the insured. Reimbursement of the loss is a subject of agreement between the parties. Insurance company cannot take over responsibility for all unpredictable events that may occur in the process of delivery of medical services. Accordingly, responsibility of the insurance company before the insured is limited to reimbursement of medical care expenses. Although, such a simple answer to this question does not present a solution for solving those problems, that occur frequently during purchase of health insurance by the consumers.

4.2.2.2. Assurance of the Quality of Medical Services, as an Instrument of Protection othe Insured's Principal Interest

According to the practice adopted on Georgian insurance market, often health insurance contracts specify medical insitutions, where the insured should receive medical services. This means that insurance companies themselves choose "contractor" medical institutions and make an advance agreement with them on conditions of reimbursement. This results in number of problems. On one hand, this restricts patients right, defined by Georgian health care legislation, to freely choose medical institution; but this restriction is voluntary, as it results from agreement of the insured on contract conditions. The insured, expresses readiness to be legally bound by contractual conditions. Accordingly, if the insured gets acquainted with the contents of the contract carefully at the time of signing the contract, no legal problem should arise. Legitimacy of inclusion of such conditions by the insurer in health care contract is another issue.

Taking into consideration the argument, that subject of health insurance contract is limited to reimbursement of medical care expenses, the insurer should not restrict the insured in the right to choose the medical institution. By choosing the medical institution, the insured chooses quality of medical care. In such case, responsibility of the insurer is obviously limited to compensation for health care expenses. The situation changes completely, when the insurer dictates the choice of medical institution to the consumer.

In such instances, responsibility of the insurer should increase, as the latter has to approach protection of interests of the insured with particular care. Naturally, the insured has no right to request

from the insurance company compensation for the damage, induced by the medical institution. But s/he can request from the insurance company proper care for the interests of the insured. It is also natural, that insurance company should be interested in provision of quality care by the medical institution to the consumer. The "product" offered by the insurance company to the consumer is represented by medical care, which is rather complicated and complex in its nature. This is why obligation of the insurance company to take care of the interest of the insured increases. Beside legitimate necessity of taking care of the interest of the insured, quality of provided medical services is important for insurance company's image and busyness reputation.

Delivery of quality medical care to the patients by the medical institution is important for the insurer, a far as it helps to maintain consumers; on the contrary – the insured, dissatisfied with medical services, make complaints against the insurer. With purpose of provision of quality medical care to the insured by the medical institution, the insurance company has to firmly demand from the latter scrupulous fulfillment of all obligations towards the patients in general. In such cases, medical institution will be responsible for breaching its obligations towards the insurance company, as well as towards the patient. The insurance company may associate continuation of contract relationships with the medical institution with fulfillment of certain conditions.

Delivery of adequate and quality medical care is a primary obligation of any medical institution.

Medical personnel should respect patient's individuality, life and dignity; should not take advantage of patient's physiological and mental state. Medical personnel is obliged to provide appropriate and high quality medical services, not limited to disease cure only, but including prevention and rehabilitation stages, as well.[83]

Medical personnel has obligation of taking care of the patients, the frames of which are defined by the level of development of medicine in the given country at the time of treatment of the patient.[84] Obligation of showing appropriate attention to the patients is related to patient care standards. If care standard is law, it works for the benefit of the physician and if care standard is high, it works for the benefit of the patient. Standard of care is a certain rule of conduct, which is defined by medical habits of a given area and presents an accepted practice in a given specialty.[85]

In the contract with a medical institution, the insurance company may include a provision on the right to request from the medical institution compensation of the loss induced by the poor quality of the service provided to the insured.

In general, quality of medical care is a sphere of public law and its determination on contract level is impossible. In the presented case, quality of medical care should be defined by the legislation at the level of standards, and insurance company cannot be responsible for it. The fact of possession of medical practice license by the medical institution conditions some level of expectation of high-quality medical care.

Nevertheless, the insurer can set certain criteria of medical care for the medical institution, for example can include in the contract relevant financial sanctions in case of non-conformity to the

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83 Ibid, 28.

84 Ibid, 29.

85 *Boccara S.*, Medical Malpractice, Tort Law and Economics, Encyclopedia of Law and Economics, Editor *Faure M.*, 2nd ed., Vol. 1, Edward Elgar Publishing, 2009, 351.

predetermined standards. On the other hand, possession of the status of the insured does not take away consumer's right to use patients' rights, defined by Georgian health care legislation and set forth contractual, as well as legal demands to the medical institution (physician).

4.2.2.3. The Essence of Doctor-Patient Fiduciary Relationship[86]

Relationship between physician and patient belongs to the relationships, where one party entrusts significant interests to the other party and becomes dependent on the latter. Patient entrusts the most important interest – protection of life and health to the physician. Accordingly, physician's responsibility is quite high. Considering complicity of medical practice, physician has discretional rights to make a treatment decision in the process of medical care. Considering diversity and complicity of medical care, it is impossible to take into consideration all the details during determination of physician's obligations. Two aspects are important in regards with physician's discretional rights: 1) patient can demand restriction of physician's discretional rights. In this case, physician has to provide detailed information to the patient in regards with diagnosis and treatment tactics and patient will make a final decision; 2) Patient can request physician's discretional rights to be used in her/his best interest.. Otherwise, fiduciary obligation from physician's side would be violated.[87]

Fiduciary obligation between physician and patient includes physician's responsibility for careless, thoughtless action causing patients' emotional suffering[88]. In case of conflict of interests, fiduciary obligation prohibits the physician to subordinate patient's interests to his/her own, for example to conduct expensive or experimental treatment without medical necessity.[89] Fiduciary obligation demands from the physician maximal use of existing knowledge and professional skills for the benefit of the patient.[90]

4.2.2.4 The Medical Malpractice Insurance , as an Effective Tool for Sustaining the Quality of Medical Services

Physician's professional liability insurance is viewed as one of the effective tools for assurance of quality of medical care. There exists an opinion, that insurance of responsibility increases physician's motivation of careful and empathic fulfillment of one's own obligations and prevention of insurable events. By purchasing responsibility insurance, physician assures one's own financial safety in

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86 Fiduciary relationship is a legal term, defined as a relationship based on exceptional trust between the parties. Usually, in such cases, one of the parties possesses special knowledge and expertise, which causes subordinate position of the other party. See: *Garner B.*(*ed.),* Black's Law Dictionary, 8th ed., Thomson West, 2004, 1314. Fiduciary relationship requires consideration of subordinate party as a priority. In physician-patient relationship subordinate party is represented by the patient. Priority position of physician will always remain the same, that is why the law-makers impose number of obligations on physicians with purpose of protection of patient's rights. See: *Nomi Y.*, Medical Liability in Japanese Law, Modern Trends in Tort Law, Editor *Hondius E.*, Kluwer Law International, 1999, 38.

87 *Nomi Y.*, Medical Liability in Japanese Law, Modern Trends in Tort Law, Editor *Hondius E.*, Kluwer Law International, 1999, 30.

88 Ibid, 31.

89 Ibid, 32.

90 Ibid, 33.

exchange for payment of insurance premium to the insurer. Payment of premium reminds physician in a certain way about one's own responsibility.[91]

For increase of motivation of avoiding insurable events, so called *bonus-malus* mechanism is used towards physicians in insurance practice. According to above-mentioned mechanism, amount of premium changes during insurance period proportionally to physician's caring attitude towards patients, namely: in case of appropriate care from physician's side, amount of premium decreases, in case of careless behavior – it increases.[92]

To determine amount of insurance premium, the insurer may take into consideration past history of complaints towards the physician (or medical institution) and statistics of patient's damage incidents induced by the physician. In case of "favorable" history, the insurer may decrease amount of premium and vice versa, in case of "unfavorable" history – increase it.[93]

It is worthwhile to mention, that without taking into consideration tort law and liability insurance, physicians would lose motivation of providing appropriate compassion and thoughtfulness during fulfillment of their obligations, as viewed in the context of private law.[94]

It is universally accepted that liability insurance is a driving force of development of tort law. Large portion of sums received by damaged third parties comes from insurance companies. Existence of tort law, as of the mechanism of loss compensation, is mostly conditioned by existence of insurance.[95]

5. Conclusion

The comprehensive study of health insurance, as a legal conception, , requires the analysis of various types of problems. Based on the research conducted within the article,following conclusions are proposed:

1. Health insurance considerably differs from other types of insurance, since an object of its protection is related to human health. Owing to above-mentioned, the state and employers tend to express higher interest in it.

1.1. Genarally the state provides various groups of population with health insurance. Although, as the study has demonstrated, there are several limits of state participation in health insurance preconditioned by priorities of state's social and economic policies. In those settings, where taxing of the rich in favor of the poor is accepted, the state takes active part in health insurance.

1.2. Participation of the employer in health insurance of its employees is stipulated by the interests of protecting their health and increasing their work motivation. The article reflects advantages and disadvantages of employment-based health insurance. On the one hand, health insurance presents a convenient, time- and energy-efficient benefit for the employee. On the other hand, insurance coverage proposed by employer does not fully protect the employee from health-related financial risks. Besides, by losing the job the employee automatically loses health insurance.

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91 *Boccara S.*, Medical Malpractice, Tort Law and Economics, Encyclopedia of Law and Economics, Editor *Faure M.*, 2nd ed., Vol. 1, Edward Elgar Publishing, 2009, 348.

92 Ibid.

93 Ibid, 349.

94 *Wagner G.*, Tort Law and Liability Insurance, Tort Law and Economics, Encyclopedia of Law and Economics, Editor *Faure M.*, 2nd ed., Vol. 1, Edward Elgar Publishing, 2009, 385.

95 Ibid, 401.

2. Health insurance contract is a most favorable way of purchasing health insurance. With it, consumer individually decides upon one's health risks. Although, the study has demonstrated that inequality of bargaining power between the parties considerably restricts consumer's right to negotiate for individual provisions of the contract. Besides, as Georgian insurance practice has revealed there are additional threats to the insured protection. Such is a restriction of the insured in choosing the medical institutionwhich has to be balanced by assuraning the quality medical service by the insurer.

The article analyses alternatives of assuring the quality of medical services by the insurer, namely:

2.1. The article suggests to include requirement of quality of medical services in the contract, made between the insurer and medical institution. In such cases, the insurer makes an agreement with partner medical institution based on certain preconditions. Generally the insurer sets a standard of quality within the contractual provisions and determines relevant sanctions for breaching of those.

2.2. The article considers medical malpractice insurance as an effective tool of assuring the quality of medical services. Despite some disagreement around the medical malpractice concept, the article highlights its importance in increasing physician's motivation of due diligence and due care, which initially reflects to serve the goal of assuring quality medical care in the end.

EKATERINE LAPACHI[*]

PUBLIC REGISTER – THE BODY REGISTERING THE RIGHTS ON IMMOVABLE OBJECTS AND THE REFORMS IMPLEMENTED IN THIS FIELD

1. Introduction

By nowadays, legislation experienced numerous and interesting changes in regard to registration of immovable objects. The issue of origin of property, especially in regard to immovable objects, is actual and important in any country, disregarding the level of its development. Present-day Georgian legislation relates the origin of ownership towards immovable objects to registration in Public Register and attaches Constitutional importance to it. It's remarkable that as a result of reforms, implemented in this sphere the system of registration, as well as the structure and functions of the authorities, performing registration of immovable objects, has changed. In 2006 the Law of Georgia "On Registration of Rights on Immovable Objects" was adopted, in which a lot of changed were introduced till 2009 and finally on January 13, 2009 this Law was abolished by coming into force of the Law "On Public Register". The latter represents an attempt of regulation by one normative document of all issues related to the sphere of registration of rights on objects, scattered in various normative documents prior to adoption of this Law. The changes implemented in legislation in short period of time in regard to registration of immovable objects once again stress the topicality of this issue.

In juridical doctrine the research of problems of registration of immovable objects mostly has subordinated position. From the first glance it seems to be justified, as registration of rights on immovable objects represents one of the elements of legal regime of immovable objects. But it can't be denied that the system of registration of rights on immovable objects is designed and built on the doctrine on immovable property.[1]

On November 4, 1950 European Convention on Human Rights was signed in Rome, according to the Article 1 of which, each natural or legal person has the right to use his/her property peacefully. Nobody can be seized his/her property, with the exception of certain conditions provided by legislation and for public interests, provided by international legislation."[2] The right of ownership of immovable objects primarily reveals from the data of the Public Register.

From the point of view of public interests, data of registration system are very important for taxation of immovable property, and, consequently, obtaining of revenues in the state budget; planning and improvement of land tenure; control of land resources;[3] legal turnover requires firm basis. It follows

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1 *Alekseev V.,* Real Estate – Public registration and Problems of Legal Regulation, 2007, 2 (In Russian).

2 *Stankevich N.,* Proprietary Rights on Land, monograph, Grodno, 2003, 4 (In Russian).

3 *Larsson G.,* Land Registration und Cadastral Systems, UK, 1991, 11-13, reference in: *Lazarashvili L.,* Sweden System of Registration of Immovable Property, magazine "Man and Constitution", # 2, 2001, 39 (In Georgian).

from high economic importance of land ownership, thus it's very important to know who the owner of the land to be sold is. [4]

In the process of creation of new legal system legislator often applies to the experience of foreign countries. Sharing of experience of developed countries is completely acceptable. But it's necessary to take the specificity of national legal system into account.[5]

Georgian law is the follower of Roman- German law school, which, naturally, found its reflection on Georgian Property Law and accordingly, the issues of Public register and registration of right on immovable objects developed towards this direction.

2. Public Register

Development of land tenure and market of immovable property requires the relevant pre-conditions and the corresponding environment. One of the "values" of Public Register is that it provides the guarantee of stability of legal regime of immovable objects. It represents the authority, facilitating the development of property relations, which offers registration, cadastre and informational products to the participants of immovable property market, which is very important for facilitation of development of immovable property market. "Significant feature of Public Register is its public nature. It actually serves to ensuring- protection of interests of the participants of turnover."[6]

In accordance with p.1 of the Article 331 of Civil Code of Georgia (hereinafter CCG), Public Register is the unity of data on origination of rights, seizure and tax pledge/ mortgage on object and intangible property, changes in them and their termination, as well as origination of waiver of rights on immovable object and its changes.

Public Register represents legal institution, where registration of separate private-law rights is carried out.[7] Public Register is the unity of registers on origination of rights, public law limitations, tax pledge/ mortgage on immovable objects and rights on movable objects and intangible property; its structure, in its turn, includes the register of rights on immovable objects, the register of public law limitations and the register of tax pledge/ mortgage. From its part, the register of origin of rights on immovable objects is the unity of data on the right on immovable objects, obligations, related to the right of ownership of immovable objects, their changes and termination, as well as waiver of rights on immovable objects. The register of public law limitation is the unity of data on seizure, limitation of rights and prohibition of disposal, applied by court or other administrative authorities to the object or intangible property in conformity with the rule under legislation, also on origination of prohibition of registration and their changes and termination. The register of tax pledge/ mortgage is the unity of data on registration of rights on object and intangible property, changes in registered rights and their termination.[8]

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4 *Schmidt R.*, Sachenrecht II, Immobiliarsachenrecht, Kreditsicherungsrecht, Verlag Dr. Rolf Schmidt, 1. Aufl., 2004, 16.

5 *Tuzhlova- Ordanskaya E.,* Comparative Analysis of the Notion "Real Estate" based on Russian and Foreign Legislation, "Bulletin of Bashkir University", # 3, 2006, 14 (In Russian).

6 *Einsele D.,* Inhalt Schranken und Bedeutung des Offenkundigkeitsprinzips, JZ 21/1990, 361, reference: *Zoidze B.,* Georgian Proprietary Law, Tb., 2003, 363 (In Georgian).

7 *Zoidze B.,* Georgian Proprietary Law, Tb., 2003, 363 (In Georgian).

8 The Law of Georgia "On Public Register", December 19, 2008, Article 4 (In Georgian).

"The following are subject to registration in the register of rights on immovable objects: ownership, structure, burdening of the right on structure with mortgage, usufruct, servitude, mortgage, hiring, sub-hiring, rental, sub-rental, lending, leasing, rights related to usage and ownership provided by public law, obligations, related to the right of ownership of immovable object".[9]

Public Register, as public law institution, is one of the types of public register. The main function of Public Register is registration of rights on immovable objects. There are insufficient norms related on Public Register in CCG, but this insufficiency is justified by the existence of special Law "On Public Register", which regulates registration-related and procedural issues, as well as the structure of National Agency of Public Register and the issues related to services rendered by the Public Register. For ensuring of availability of services of the Agency the registration network grows gradually; at present, in addition to territorial registration services, it includes authorized users. The Agency implements its authorities directly or through its registration services and authorized persons.[10] Authorized users basically are commercial banks, immovable property agencies, notaries, law companies, measurement offices and other subjects, to whom certain functions of the Agency are delegated. On the present stage, according to the information of the Agency, this network consists of about 500 offices, referred to as front offices.[11] Registration of tax pledge/ mortgage and public law limitations, imposed by court or other administrative authorities in Public Register could be carried out on the basis of memorandum concluded between the Agency and the court or the relevant administrative authority. On the basis of memorandum the court of administrative authority is given opportunity to carry out the registration of public law limitation by its personnel. In this case the main condition is that one of the parties to public law limitation shall be the authority, holding the memorandum and it shall have the personnel with the relevant education- training.

The types of services of Public Register are: registration of immovable objects; registration of pledge/ mortgage right (with the exception of mechanical vehicles); registration of tax pledge/ mortgage; registration of private entrepreneurs and legal persons; change of land function; registration of changes of borders of forest fund; implementation of certain types of services towards tax payers provided by tax legislation on the basis of agreement concluded between the tax authority and the Agency.[12]

This is the list of services, presently rendered by Public Register; this list complies with the standards of registration system, applied in developed countries of the world, and for this reason, according to the research of 2006, Georgia was recognized as the first reformer country based on reform implemented in the sector of registration of immovable property. In 2009-2009 Georgia is on the second place in the world rating in the segment of registration of property.

[9] The Law of Georgia "On Public Register", December 19, 2008, Articles 11, 6 (In Georgian).
[10] The Law of Georgia "On Public Register", December 19, 2008, Article 3-III (In Georgian).
[11] See the webpage of National Agency of Public Register: <napr.gov.ge>.
[12] The Law of Georgia "On Public Register", December 19, 2008, Article 11-I (In Georgian).

3. The Purpose, Definition, Legal Nature of Registration of Rights on Immovable Objects

3.1 The Purpose of Registration

The purpose of registration is maintenance of sustainability of civil turnover through confirmation of rights on immovable objects and creation of guarantees from the side of the state. Social purpose is maintenance of civil turnover, protection of rights of the parties participating in transaction and those of the third parties.[13]

Public Register performs the function of the guarantee of well-ordered civil turnover. This is its basic purpose."[14]

The main purpose of existence of Land Register is creation of clear and steady basis for legal relations, related to immovable objects in order to allow obtaining of authentic and accurate information on immovable object.[15] The main objective of the Land Register is to register reliable and steady data on the owner of immovable object and rightful burden existing on it.[16]

The books for recording of registration data, as well as the documents establishing rights, as the components of uniform register, are kept forever; their destruction or removal of any document is inadmissible.[17] Consequently, data banks are kept permanently, which is very important, as it is firm guarantee of protection of the right of ownership. Presumption of authenticity and completeness applies to register data, i.e. the records in register are considered correct, unless their inaccuracy is proven (Article 312^{I} of CCG); this issue is more exactly specified by the Law of Georgia "On Public Register", which also defined the presumption of authenticity and completeness and indicates that the presumption of authenticity and completeness applies towards the data registered in Public Register, unless they are recognized invalid, null and void according to the rule under legislation (Article 5). So any person, be it natural or legal, has firm guarantee of protection of the right of ownership of immovable object since the moment of its registration in Public Register.

The purpose of registration of property rights on immovable objects is clear determination of rights on property or land. It, firstly, implies, that it should be clear who is the owner, and the scopes of other rights on the land – in particular, towards which immovable object (unit) or its part this or that right spreads. Other important purposes are facilitation of land transactions, facilitation of land-related activities, ensuring of easy availability of land-related information, facilitation of obtaining of stable state revenues (taxes). The register of immovable objects, land register and land data bank system, as well as registration processes on the whole, are valid means for achievement of this goal.[18]

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13 *Alekseev V.,* Real Estate – Public registration and Problems of Legal Regulation, 2007, 12 (In Russian).

14 *Zoidze B.,* Georgian Proprietary Law, Tb., 2003, 366 (In Georgian).

15 *Schöner H.*, *Stübe K.*, Grundbuchrecht, Band 4, Handbuch der Rechtspraxis Verlag- C-H, Beck -München, 2008, 16.

16 *Schmidt R.*, Sachenrecht II, Immobiliarsachenrecht, Kreditsicherungsrecht, Verlag Dr. Rolf Schmidt,1.Aufl., 2004, 16.

17 *Krashennikov P.,* On Registration of Rights on Immovable Property, „Law and Right", # 3 , 1999, 3 (In Russian).

18 *Lazarashvili L.,* Sweden System of Registration of Immovable Objects, magazine "Man and Constitution", #2, 2001, 43-44 (In Georgian).

The purpose of registration is protection of rights and lawful interests of the owners and holders of immovable objects, ensuring of legal, reliable civil turnover; reliable confirmation of rights on immovable object; creation of efficient mechanisms of public regulation of management of immovable property; realization of amounts received by the state budget as a result of turnover of immovable property; ensuring of security of immovable property market, by elimination of offences and crimes in this sphere by the state.[19]

3.2 Definition of Registration of Rights

Registration of rights is recording of the rights, public-legal limitation and tax pledge/ mortgage on object and intangible property, specified by the Law of Georgia "On Public Register", origination of liabilities related to ownership of immovable objects, their change or termination, abandoning of ownership towards immovable object, as well as identification data of the subject and object of rights on the object and intangible property in the relevant register, together with making decision on registration.[20] According to the proprietary law on land plot, land plot law regulates legal relations on origination, termination and modification of the right of ownership on land plot.[21]

Personal and political freedom in modern democratic state is unimaginable without economic freedom, the main expression of which is the freedom of private ownership.[22] The main manifestation of freedom of private ownership is recognition of the rights on immovable objects by the state, which is referred to as registration in legal language. "Like authority appears with the birth of human, birth of the number of rights occurs by its registration in Public Register."[23] This system of registration is introduced from German law. It represents serious guarantee of reliable and well-ordered civil turnover.[24]

The problems of registration of rights on immovable object weren't the subject of scientific research. Increase of interest towards this issue became apparent recently.

The necessity of registration shall be absolutely clear for the owner and the third parties.[25] Registration is an expensive and complex process but its necessity and essence is mostly less understandable for the owner of an object.

The system of registration of rights on immovable objects is intended for ensuring of effective influence by state on the market of immovable objects for the purpose of protection of constitutional

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19 *Alekseev V.,* Real Estate – Public registration and Problems of Legal Regulation, 2007, 12 (In Russian).

20 The Law of Georgia "On Public Register", December 19, 2008, Article 2 "h" (In Georgian).

21 *Schöner H.*, *Stüber K.*, Grundbuchrecht, Band 4, Handbuch der Rechtspraxis, Verlag- C-H, Beck, München, 2008, 11.

22 *Анисимов А., Мелихов А,.* Конституционно-правовое регулирование права частной собственности, Монография, 2009, 2.

23 *Zoidze B.,* Georgian Properietayr Law, Tb., 2003, 363 (In Georgian).

24 *Zoidze B.,* Reception of Private Law in Georgia, Tb., 2005, 260 (In Georgian).

25 *Nikonov P., Zhuravsky N.,* Real Estate – Cadastre and the World Systems of Registration of Rights on Immovable Property, analytical review, 2006, 3 (In Russian).

rights of the owner of immovable objects.[26] Economic interest of the state requires more in-depth and comprehensive study of registration system.[27]

3.3 Legal Nature of Public Registration

Special interest is drawn by legal nature of public registration of rights on immovable objects. In present-day legal literature, the issue of public registration of rights is regarded as legal document. Public registration, as a legal institute, is the unity of legal norms, regulating public relations, originating between persons and specially authorized pubic authorities in regard to recognition and confirmation of rights of ownership of immovable objects by the state. By their legal nature, these relations have administrative-legal character. "Whereas private systems deny interference of public authorities in the case of transfer of ownership, the systems of Land Registers attach new additional functions to authorities. Registration, as a rule, shall secure interests of the parties and create additional proofs on their rights. On this stage, the obligatory nature of registration serves the interests of the parties, their security and not the interests of the state. Mandatory nature of registration was later filled by obligation of public permission. Thus the institution of transfer of object-related legal ownership acquires public-legal importance and not only the interests of private persons (i.e. the interests of the parties), but also the interests of the state move to the foreground."[28]

Specially authorized public authorities, in particular, Legal Person of Public Law within the sphere of management of the Ministry of Justice – National Agency of Public Register provides legal expertise of documents, presented for registration, through its territorial services.[29] In Georgia Public Register also has the function of certification of authenticity of signatures of the parties to transaction on purchase of immovable objects. In accordance to p. II of the Article 311^1 of CCG, if the parties to transaction sign in registering authority in the presence of the authorized person, certification of authenticity of the transaction or signatures of the parties on transaction is not required for validity of transaction. Besides, public registration of rights on immovable objects is an administrative-legal decision and consequently is regarded as legal document.

4. Reform, Implemented in Georgia in the Field of Registration of Property-related Rights on Immovable Objects

Interesting reforms have been implemented in Georgia in regard to registration system. In 1998-2004 practically two registration authorities operated in Georgia – Bureau of Technical Inventory and Land Management Department. These two authorities practically performed one and the same function,

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26 *Karlin A.,* The System of Public Registration and Land Relations, "Real Estate and Investments", 2002, # 1 (10), 16 (In Russian).

27 *Emilyanova E.,* Legal Problems of Public Registration of Rights on Immovable Property and Transactions with it, Samara, 2003, 5 (In Russian).

28 *Tchanturia L.,* Ownership of Immovable Objects, Tb., 2001, 172- 173 (In Georgian).

29 *Emilyanova E.,* Legal Problems of Public Registration of Rights on Immovable Property and Transactions with it, Samara, 2003, 31 (In Russian).

but surprisingly, both registered rights on immovable property successfully. It became possible to change this rule only by 2002-2004, when Land Management Department was abolished and National Agency of Public Register was established; Bureau of Technical Inventory was also abolished. This process was quite complex and painful. Simultaneous existence of two registering agencies caused well-grounded irritation of citizens. Institutional chaos and opacity of procedures facilitated presence of corruption. Measuring cadastre works, which is integral part of property registration, were performed by the personnel of registering authorities, the performed activities were of very low quality and the amount to be paid unofficially were quite big.

As it was already mentioned, registration process and the relevant procedures prior to reform were performed in various agencies, in particular, in the Chamber of Notaries – register on seizure was maintained there; Bureau of Technical Inventory (recording- registration and measuring of apartments and land plots on urban territory), and Land Management Department of Georgia (registration and measurement of land/ immovable property); besides, Land Management Department included the functions of both land administration and land management and control, which implied a kind of conflict of interests from the viewpoint of management. Besides, registration required going to various agencies; registration procedure wasn't defined, no deadlines were established… E.g. for acquiring of ownership on residential house, one would go through minimum seven or eight divisions only in one agency – Land Management Department, which required additional time and personnel. Consequently it resulted into corruption. In 2004 quite interesting and radical reforms began in this field, like many other fields. Legislative, institutional, technological and financial reforms were carried out.

1. Legislative reform. The following laws were adopted in the framework of legislative reform: Law of Georgia "On Public Register", the Law of Georgia "On Fee for Registration Services", the Law of Georgia "On Registration of Rights on Immovable Object", Instructions on Registration of Immovable Property, approved by the Order of the Minister of Justice of Georgia. At present these normative documents are abolished and accumulated in one legislative document – the Law of Georgia "On Public Register". Simplicity and transparency of the present registration procedures is the contribution of these legislative documents; besides, introduction of registration of linear facilities and facilities under construction in Public register, was significant novelty; they weren't registered previously and it represented a big problem; the Law of "Fee for Registration Services" considered rapid registration services, which was an innovation for Georgian legislation; based on this Law, obtaining of rapid service through payment of additional fee became possible for the citizens who hurried to obtain registration service; it was one of pre-conditions for elimination of corruption.

2. Institutional reform. The following activities were carried out in the framework of institutional reform: Land Management Department was abolished (Decision #56 dated July 9, 2004 of the Government of Georgia), Technical Services of local self-government were also abolished (the same as Bureau of Technical Inventory, Resolution # 416 dated September 28, 2008 of the President of Georgia) and National Agency of Public Register, as legal person of public law within the Ministry of Justice, was established on the basis of the Law of Georgia "On Public Register". Property Registration Services were established on the basis of regional offices of State Land Management Department; these Services were centrally managed and the influence of local government was completely excluded; and Cadastre measurements were carried out by private persons in the environment of free competition. Thus,

National Agency of Public Register, established as a result of institutional reform, was handed over the archive of Bureau of Technical Inventory and seizure register from the Chamber of Notaries, which, from institutional viewpoint, created "one window principle".

3. Technological reform. As it was already mentioned, technological reform was carried out; as a result of this reform, electronic registration-information system was formed. Registration of rights on immovable objects in Public Register became possible, which facilitates systemization of register data and their accumulation in uniform data base, simplification of registration procedures and their performance in short time period, as well as continuous, permanent and momentary update of information.

4. Financial Reform. Public Register was established as self-financing organization and the fees, paid for registration became the income of the Agency, besides, as mentioned above, special fee was introduces for rapid service, which became one of the sources of funding of the Agency.

As a result of these reforms Georgia approached registration systems existing in the world's leading countries and with its registration system, became exemplary for post-Soviet countries.[30]

Based on the above stated it's obvious that the implemented reform is a positive event in Georgia's life. In accordance with the Law of Georgia "On Public Register", in regard to registration, in specific cases the registering agency is authorized to demand additional document or information, related to registration proceedings (Article 8-III of the Law on Public Register. This statement gives Public Register full freedom to require any document related to registration or stop registration proceeding for the motive of non-presentation. In the case of honest servant, it will not affect the citizen, but existence of the list of registration documents will be better for elimination of vague moments.

5. Registration Systems of the World

5.1 General Characterization of Registration Systems

For origination of the right on immovable objects different agencies carry out registration in different countries; e.g. notary performs the functions of Public Register; in Hungary the divisions of organization of land use of districts, cities, capital city perform registration of property according to location under the direction of the Minister of Organization of Land Use; in Poland – maintenance of Land Register is commissioned to district court; in Czechia – to the division of geodesy, cartography and cadastre; in Germany registration is performed by courts according to the location of immovable property; in Italy – the keeper of Land Register, etc.[31]

For manor countries, origination of ownership on land plot is characteristic after the relevant registration. According to German law, the owner's and buyer's agreement on the transfer of ownership (ceding) and registration in Land Register is required for transfer of right on land plot.[32]

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30 Policy Framework, For Sustainable Real estate markets, principles and guidance for the development of a countries real estate sector, United Nations, Geneva, 2010, IV.

31 *Chitoshvili T.,* Basic Legal Aspects of Origination of the Right on Immovable Property, Tb., 2006, 29 (In Georgian).

32 *Tchanturia L.,* Owneship of Immovable Objects, Tb., 2001, 176 (In Georgian).

The existence of Land Register is not obligatory in Spain, countries of Anglo-American law and France. They belong to the countries of private law system. In Spain, for the buyer to be considered the owner, not only conclusion of sale-purchase agreement is required but it's necessary to enter the transfer of ownership in the register of ownership. Agreement, certified by notary is the basis of such registration, but Spanish civil law doesn't know compulsory registration. Actually, major part of agricultural lands in Spain is not registered. But Spanish law still knows indirect compulsion, e.g. in the case of double sale of land plots the buyer, who is already registered, shall obtain the ownership. As for the countries of Anglo- American law, for the transfer of the right of ownership in England, contract-based origination and transfer of rights on land plots is required. The alienator shall "hand over" the signed and stamped document. The United States of America also copied the system of private handover of land plot from common law system. Written document is necessary like English law, but stamping is cancelled in many countries. Transcription registers exist in some states, where registration of transfer of rights is possible. According to French law, transfer of ownership is carried out by concluding a contract. While elaborating of Code Civil, introduction of land register was regarded as interference in private sphere of citizen's relations. Registration was announced obligatory as a result of land register reform, but constitutional importance wasn't attached to registration for obtaining of ownership. Even after this reform, French law supports the structure that the ownership on land plots shall be transferred by concluding a contract and it has effect towards the third parties too.[33]

"Registration in Land Register has constitutional significance; i.e. the right, subject to registration, shall be deemed originated, modified or terminated only from the moment of registration. Neither written (including notarial) agreements, concluded between the parties, nor payment of price by alienator to the buyer, even additional, nor real, actual transfer of immovable property (e.g. letting of buyer on the land plot) shall cause transfer of the right of ownership onto the latter. Legal consequence, set by the parties through transaction is quite remote from the moment of revelation of will; the risk of accidental loss of object stays with the alienator; besides, the latter remains the nearer of right-related burden in regard to immovable property, and the buyer is not yet authorized to keep (appropriate) the yield obtained as a result of exploitation of immovable property of fruit obtained as a result of agricultural activities."[34] All kinds of information of immovable objects are entered in the so-called "main books". Documents are accumulated in the collection of Land Register. As a result, clarity of the content of record is achieved, which is necessary condition of preservation of the record and ensuring of its reliability.[35] Private systems operate in the sphere of Roman, as well as Anglo- American law. Land Register systems established in German-language middle Europe and Australia. The systems of Land Register in Europe have common feature – registration, as well as the document (contract) expressing the will of the parties is required for transfer of the right of ownership. In accordance with Australian

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33 *Bernd E*., Übertragung des eigentums an Grundstücken nach englischem Recht. Kiel, 1968, *Hoffmann, V.* Bemd, Das Recht des Grundstükskaufs. Eine rechtsvergleichende Unterschunng J. C. B. Mohr. Tübingen, 1982,24-29, *Bärmann*, Neues französises Grundstücksrecht: AcP 155 (1956)440-441; *Sturm*, Beingt die französise Bodenregisterreform eine Annährung ab das deutsche Grundbuchrecht, in:FS Fiker (1967)459, 471, reference in: *Tchanturia L.,* Ownership of Immovable Objects, Tb., 2001, 175-177 (In Georgian).

34 *Tchetchelashvili Z.,* Proprietary Law (comparative-legal research), Tb., 2008, 172, 173 (In Georgian).

35 *Lazarevsky A.* (*ed.*), The Systems of Regulation of Rights on Immovable Property, Experience of Foreing Countries, M., 2000, 27 (In Russian).

Torrens-System, purchase of ownership goes past the will of the parties and depends only on governmental act of registration.[36]

The following common features are characteristic for European registration systems:

1. Existence of the main book;
2. Entering of records in various sections of the main book;
3. Interrelation of the main book and land cadastre in the main book;
4. Attaching of official status to registration system;
5. Interrelation of judicial system and land cadastre in the main book;
6. Decrease of registration fee following the official requirement of the government;
7. Government's responsibility and compensation of damage;
8. The form of registration document;
9. Public confirmation of transactions on immovable objects;
10. Existence of preliminary record.

5.2 Torrens System

Robert Torrens created the system of registration of property rights on immovable objects in Australia in 1925 and this system got his name. This system spread throughout Australia. Following Australian experience, it shall be necessarily mention that the part of immovable property, which originated prior to establishment of Torrens System, continues functioning based on the old rule; the owners of this type of property are authorized to register according to Torrens System, but they are not obliged, nobody forces them to register in this system. Two systems exist in parallel in Australia and thus the viewpoint, that whatever is not registered in Torrens System is necessarily the property of the state, is eliminated.[37]

According to Torrens System, who is entered in the book by the state, becomes the owner, entering of record in the book (public register), unlike Germany, is not the means, but the basis of change of property relations. According to Torrens System operating in Australia, the alienator shall draw up the so-called *memorandum of transfer.* By this document the alienator states, that he transfers his property to the buyer. Whereas according to the system of Common Law countries the ownership transfers through Deed, according to Torrens System registration is necessary element of transfer of ownership. According to this system, legal determiner of transfer of land ownership is not the will and action of the parties, but the act of public registration. Purchase of ownership occurs by registration. This purchase is independent from the authenticity of contract, obtaining of ownership though registration is final and indefeasible, unless the law directly specifies exceptions.[38]

Torrens System was carried to very many of former English colonies, e.g. in East African countries, come US states and Canada. But the most surprising circumstance is that conservative

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36 *Tchanturia L.,* Owneship of Immovable Objects, Tb., 2001, 173 (In Georgian).

37 *Nikonov P., Zhuravsky N.,* Robert Torrens System of Registration of Rights on Immovable Property, Real Estate, Cadastre and the World Systems of Registration of Rights on Immovable Property, analytical review, 2006, 2 (In Russian).

38 *Tchanturia L.,* Owneship of Immovable Objects, Tb., 2001, 178- 179 (In Georgian).

England used this experience.[39] At present Torrens System also operates in Australia, New Zealand, some of Canadian provinces. The rules and procedures of registration are different in these countries (e.g. on some territories under British jurisdiction, registration, as well as land ownership is required), but legal regulation is based on similar principles.[40]

Registration of rights on immovable objects was recognized in England as a result of great efforts. Concluding of contract required series of documents, proving the rights of the parties in regard to land ownership. So only few Englishmen managed to sell or buy land without attorney. There were several attempts of introduction of registration system, which would simplify the process of land alienation and besides, make everything more reliable. But all attempts were in vain. From Torrens Systems England took only the fact that registration is decisive for purchase of ownership and thus the contradiction, which is possible in Australia between material-legal status and the status or register, is eliminated. Substantial difference from Australia system is that according to English law, rectification of Land Register is possible, whereas in Australia it represents only rare exception.[41]

According to Torrens System, decision is made by justice authority, unlike German, where this decision is made by the court. In this aspect Georgian registration system resembles Torrens System; registration in Georgia is performed by the Legal Person of Public Law under management of the Ministry of Justice – National Agency of Public Register.

Initially introduction of Torrens System in Australia was voluntary. The persons, who voluntary came for registration of property, were registered, but in the case of purchase of immovable property from the state such registration was mandatory.[42]

Imperative registration spread in Australia, New Zealand and Canada only in regard to the land plots, issued by royal court after coming of Torrens Law into force. All land plots, which were in the ownership of private persons, could be registered voluntarily. Alienation of land plot, according to the old Common Law system, was also possible. Even at present both systems exist in these countries, but if Torrens System prevails in Australia, it is an exception in Canada.[43]

5.3 Registration System of Scandinavian Countries

"The peculiarity of Scandinavian countries is the centralized nature of the register of ownership, as well as influence of West European countries (Germany). These countries have large-scale maps of immovable property, which are created in one system of coordinates, covering the whole country, on which the registration system of immovable object is based. The registers of ownership, mainly computerized, are managed by central public registers, whereas mapping of land plots is managed on

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39 *Nikonov P., Zhuravsky N.,* Real Estate – Cadastre and the World Systems of Registration of Rights on Immovable Property, analytical review, 2006, 2 (In Russian).

40 *Lazarevsky A.* (*ed.*), The Systems of Regulation of Rights on Immovable Property, Experience of Foreing Countries, M., 2000, 26 (In Russian).

41 *Tchanturia L.,* Owneship of Immovable Objects, Tb., 2001, 179 (In Georgian).

42 *Lazarevsky A.* (*ed.*), The Systems of Regulation of Rights on Immovable Property, Experience of Foreing Countries, M., 2000, 13 (In Russian).

43 *Tchanturia L.,* Owneship of Immovable Objects, Tb., 2001, 178 (In Georgian).

province level. The main task of the land register is guaranteeing of land ownership and availability of the relevant information. Land registration system, which is well-ordered and operates properly, serves for assurance of security and performance of transaction.[44]

The responsibility related to cadastre maps in Norway is imposed on Norwegian Mapping Authority and local services. Besides, there is clear delimitation of competences between these authorities. In particular, Norwegian Mapping Authority created cadastre maps 1:5000 and 1:10000, which cover the whole country, including northern and thinly populated areas. Local services are responsible for cadastre maps in densely populated regions, The state is responsible for general system of cadastre register; there is the National Register of Immovable Objects, Addresses and Equipment in Norway it contains information on physical status of immovable objects; this Register is based on Norwegian Mapping Authority and covers the whole country. The Main Electronic Database contains information on immovable objects, legal and economic status of immovable object. This register is based on the Ministry of Justice and local courts. Cadastre in Norway is basically regulated by three laws: Land Subdivision and Registration Act, Juridical Registration Act and Land Consolidation Act.[45]

Origination, abolition and all kinds of changes in legal relations in regard to land are registered in land register by the services of land register in land register.[46]

The most successful country in formation of register of immovable objects is Sweden. The system is so perfect that the documents related to immovable things are kept since 17th century.

The land in Sweden is divided in the objects of immovable things.[47] Sweden land is divided into the entities of immovable property,[48] which exceed 4,5 million entities and all these entities are registered in the register. Each immovable object has its unique name, which serves for legal identification. Private, as well as state-owned immovable property is registered in this system. Besides, registration system includes rivers and kales. Coastal line, 300 m strip of sea and 5 lakes of Sweden belong to immovable objects and this are subject to registration.[49]

The objects of immovable things are registered in several basic registers (Register of Immovable Things, Land Register, Register of Buildings, Address Register, etc.). The Register of Immovable

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44 *Cheremshinsky G.,* Review of the Experience of Foreign Countries in Creation of Land Registration Systems, Brief Description of Some Modern Cadastre Systems (In Russian), < http://www.geo-garant.ru/cgi-bin/content.pl?p=52&nid=17>.

45 *Cheremshinsky G.,* Review of the Experience of Foreign Countries in Creation of Land Registration Systems, Brief Description of Some Modern Cadastre Systems (In Russian), <http://www.geo-garant.ru/cgi-bin/content.pl?p=52&nid=17>.

46 *Lazarashvili L.,* Sweden System of Registration of Immovable Objects, magazine "Man and Constitution", #2, 2001, 40-45 (In Georgian).

47 *Cheremshinsky G.,* Review of the Experience of Foreign Countries in Creation of Land Registration Systems, Brief Description of Some Modern Cadastre Systems (In Russian), <http://www.geo-garant.ru/cgi-bin/content.pl?p=52&nid=17>.

48 *Kobasa M.,* Real Estate in Sweden, Legislation and Comparative Analysis, Land Code of Sweden, Article 1, Minsk, 2004, 5 (In Russian).

49 *Nikonov P., Zhuravsky N.,* Robert Torrens System of Registration of Rights on Immovable Property, Real Estate, Cadastre and the World Systems of Registration of Rights on Immovable Property, analytical review, 2006, 7 (In Russian)

Things and Land Register form the main body of the database. Besides, it contains the data identical to those of tax authorities. The Register of Immovable Things is the basis of many spheres of public activities, like registration of land, burdening of immovable property with mortgage, agricultural statistics, registration of population, etc.[50]

Swedish system of registration is characterized by multi-purposefulness, availability and publicity of information; it is pubic informational system, it covers the whole country, the system is completely automated and is steady and stable, and, most importantly, it's a flexible system. Sweden is one of European countries, which could be referred to the small number of countries with well developed and advances system of registration of immovable property."[51]

The land in Sweden is divided in the objects of immovable property.[52] There are over 4,5 million entities and all these entities are registered in the register. Each immovable object has its unique name, which serves for legal identification. Private, as well as state-owned immovable property is registered in this system. Besides, registration system includes rivers and kales. Coastal line, 300 m strip of sea and 5 lakes of Sweden belong to immovable objects and this are subject to registration.[53]

Origination, abolition and all types of changes of legal relation on land is registered in land register by land register services. This system includes services which are in the structure of courts and are under administrative supervision of National Administration of Courts. The Administration, in its turn, is subordinated to the Ministry of Justice. One of the judges of District Court is at the same time the director of land register service, but part-time. The issues of registration of rights on land are in the competence of this Service.[54]

Databank of immovable property operates in Sweden, which formally contains two types of registers – Register of Immovable Objects and Register of Land Plots.[55] The Land Plot Register contains juridical and economic information on immovable property. Immovable Objects Registration Agency is responsible for accuracy of data in this Register.

Like all existing systems, Sweden system of registration of immovable objects serves for ensuring of achievement of certain goals. In their turn, these goals determine the character of activities of this system. Sweden system of registration is a steady, stable system, less depending on changes of political weather; this is quite flexible system and easily adapts to meeting of new requirements caused by technical and social development.[56]

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50 *Cheremshinsky G.,* Review of the Experience of Foreign Countries in Creation of Land Registration Systems, Brief Description of Some Modern Cadastre Systems (In Russian), <http://www.geo-garant.ru/cgi-bin/content.pl?p=52&nid=17>.

51 *Lazarashvili L.,* Sweden System of Registration of Immovable Objects, magazine "Man and Constitution", #2, 2001, 40-45 (In Georgian).

52 *Kobasa M.,* Real Estate in Sweden, Legislation and Comparative Analysis, Land Code of Sweden, Article 1, Minsk, 2004, 5 (In Russian).

53 Swedish Land and Cadastral Legislation, Landmateriverket, Stockholm, 1998, 33.

54 *Lazarashvili L.,* Sweden System of Registration of Immovable Objects, magazine "Man and Constitution", #2, 2001, 4 (In Georgian).

55 The notion of immovable object includes land plot in general, but in Sweden registration system the registers are divided based on this very principle.

56 *Lazarashvili L.,* Sweden System of Registration of Immovable Objects, magazine "Man and Constitution", #2, 2001, 40-45 (In Georgian).

5.4 Registration System of Scotland

Maintenance of official records in land-related transaction started in 1617. Registration of the right of inheritance of ownership in Scotland was the part of registration system since establishment of registration of rights in General Register (*General Register of Sassinss*) which recently was transformed into Land registration System (1979) based on the Law on Land Registration. This System gradually changes General Register.

In General Register, which was at the same time connected with territorial division of Scotland, and was maintained by local authorities of counties, records are maintained about the rights of ownership throughout the whole Scotland. If contains data about 1 500 000 private ownership of current and previous owners. The Register is not based on maps.

Land Register is the system of registration of titles and the data on limited rights are also registered here. The system is based on maps and operated in seven countries of Old Scotland.

The Register of Scotland uses large-scale maps of Topographical Service of Scotland. Immovable property in cities is registered in 1:250 maps, in villages – 1:2500, in mountainous regions and other untouched zones – 1:10000. Databases for registers are created based on totally computerized technologies; it also implies working with digital maps. Topographical Service and Land Register work together for improvement of maps; this process is the constituent part of registration process.[57]

According to Swiss legislation the application in the case of concluding of agreement on purchase of immovable objects is presented by the alienator, and in the case of court decision or primary purchase – the buyer.[58]

5.5 Registration System of Germany

As it was already mentioned, land system operates in Germany. According to this system, registration of the right of ownership has constitutional significance. According to German legislation, ownership on immovable objects, as well as land plots and rights-related burdening is subject to mandatory registration.[59] Origination of ownership on land plot only as a result of the relevant registration is characteristic for land countries. According to German law, for the transfer of ownership on land plot, the owner's and the buyer's consent on transfer (ceding) of ownership and registration in Land Register is required.[60] "Registration in Public Register is based on authentic will of the parties, reliable document of expression of which is revelation of will related to transfer of ownership, which is referred to as proprietary contract on disposal."[61]

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57 *Cheremshinsky G.,* Review of the Experience of Foreign Countries in Creation of Land Registration Systems, Brief Description of Some Modern Cadastre Systems (In Russian), <http://www.geo-garant.ru/cgi-bin/content.pl?p=52&nid=17>.

58 *Lazarevsky A.* (*ed.*), The Systems of Regulation of Rights on Immovable Property, Experience of Foreing Countries, M., 2000, 2 (In Russian).

59 *Schöner H.*, *Stüber K.*, Grundbuchrecht, Band 4, Verlag C. H. Beck, München, 2008, 17.

60 *Tchanturia L.,* Ownership of Immovable Objects, Tbilisi, 2001, 176 (In Georgian).

61 *Zoidze B.,* To Rome only through Notary's Bureau, magazine "Georgian Notariate", # 2, 2001, 89 (In Georgian).

According to German Land Law, the record, made in Land Register is the guarantee of protection of the owner's right of ownership.[62] In German patrimonial society, transfer of ownership was becoming known to people through performance of actions required for transfer of ownership, in front of common meeting. In the course of formation of contemporary states, common meetings were replaced by special authorities of state governance.[63] This fact is one more proof that the first embryos of registration system existed as early as in ancient periods.[64]

According to German law, land plot is the part of land surface, which is spatially bounded and measured, and has special number in inventory book.[65]

German Land Register may contain the records, which are closed, i.e. not everybody can view this information and it is not public.[66] Similar law acts in Georgia; the Kaw of Georgia "On Public Register" doesn't contain the mentioned provisions, but in this case the norms of Common Administrative Code, related to classified information, apply. The system of land, as perfect and consistent system, became the basis of immovable objects law for Prussia (with some exceptions), Saxony and Hamburg.[67] The whole land law in Germany is based on the principles of the system of Land Register. It means that all proprietary rights related to immovable objects requires registration in Land Register with the registration of the buyer. Besides, all changes in land plots directly reflect in it. Only registration in Land Register gives rise to the relevant legal changes.[68]

German system of land management is characterized by procedures, developed in details, determination of exact boundaries of the land owners' land, guarantees of registered rights, etc. Land-surveying cadastre systems in Germany were created in the beginning of the 19th century; new tax system was created at that time; the need of establishment of boundaries and registration of public and private ownership emerged. It became the main purpose of cadastre service. In this aspect, adoption of the Civil Code of German (*Burgerlihes Gezetzbuch*) in 1900 was very important; it represents the basis of registration of transaction and rights on immovable objects. Finally, from institutional viewpoint, the system consists of the three basic elements: management of Land Book (*Landbuch*) which maintains the register of the rights of ownership and consists of cadastre maps, documents, establishing the right of ownership and records; management of topographic photos (*Landesfermessungsant*), which includes creation of cadastre maps and preparation of documentation, also performs topographic- land survey activities for other purposes; notariate, which certifies contracts and other legal documents related to the right of ownership, transactions and limitations, and maintains register of these documents. These three independent elements are in inter-relation and control each other, which conditions high quality of data in the system. Tax turnover is the basis of

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62 *Vieweg/wener*, Sachenrecht, Garl Heymanns Verlag, KG, Köln, Berlin, bonn, München, 2006, 435.

63 *Kruse, Vinding*, Das Eigentumsrecht, Md. II, 1931, 1010-1055, reference: *Tchanturia L.,* Ownership of Immovable Objects, Tb., 2001, 178 (In Georgian).

64 *Tchanturia L.,* Ownership of Immovable Objects, Tb., 2001, 140 (In Georgian).

65 *Eckert H*., Hrsg: Bamberger/Roth, Kommentar BGB,§902,http://beckonline.beck.de/?vpath=bibdata% ckomm% 5cbeckok_zivr _19%5cbgb%5ccont%5cbeckok.bgb.p902.htm.

66 Grundbuchsordnung, 24.03.1897, § 10a (1).

67 *Schöner H.*, *Stüber K.,* Grundbuchrecht, Band 4, Handbuch der Rechtspraxis München, 2008, 10.

68 *Tchanturia L.,* Ownership of Immovable Objects, Tb., 2001, 140 (In Georgian).

creation of this system, but this function is not principal at present; greater importance is attached to securing of the right of ownership, simplification of ownership right transaction procedure. Germany has better achievements in the sphere of cadastre, than the countries of French system; it particularly relates to the data of the right of ownership. The register of the right of ownership is provided with cartographic data, which form the part of register and have legal power, provided by law in this regard. Only public institutions can perform mapping of property, also licensed specialists under control of these institutions; and registration is the direct prerogative of the state. Despite the circumstance that different authorities perform maintenance of the register of immovable property and entering of cartographic data, all data are reconciled and independence of these authorities facilitates accuracy of the reflected data, as each party is responsible for its portion.[69]

"Arising of ownership for German law has the justification, that registration in Public Register is based upon real will of the parties, reliable document of expression of which is the manifestation of will on transfer of the right of ownership, referred to as proprietary contract of disposal."[70]

"The Land Law in Germany is based on Land Register system. It means that all proprietary rights related to immovable objects require registration in Land Register. Besides, all changes of land plots directly reflect in it. The principles of "publicity" and "reliability" are unified and called the publicity-reliability principle of Land Registry; and it means that the rights, registered in the Land Register are lawful for all persons, who obtained the right of ownership on immovable object.[71] "In favor of the person, who acquires right to land plot or the right to such right, the content of the Land Register is deemed correct with the exception of the cases, where protest (*Wiederspruch*) is registered against the accuracy or the buyer knows about inaccuracy."[72] Registration of rights is also regarded as the "source, beginning of lawfulness".[73]

Registration in register causes the relevant legal change in the case of transfer of right of ownership on immovable objects. Presence of the both parties is mandatory in the process of certification of contract when transferring the right of ownership, i.e. the both parties shall attend the transfer of the right of ownership at authorized (administrative or notary) agency. In order to avoid misunderstandings and the parties to contract have clear understanding of legal consequence of transfer of the right of ownership, the authorized administrative agency provides explanation to the parties.[74]

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69 *Cheremshinsky G.,* Review of the Experience of Foreign Countries in Creation of Land Registration Systems, Brief Description of Some Modern Cadastre Systems (In Russian), <http://www.geo-garant.ru/cgi-bin/content.pl?p=52&nid=17>.

70 *Zoidze B.,* To Rome only through Notary's Bureau, magazine "Georgian Notariate", # 2, 2001, 89 (In Georgian).

71 *Pokrovsky I.,* Basic Problems of Civil Law (according to publ. of 1917), M., 1998, 200, reference in: *Emilyanova E.,* Legal Problems of Public registration of Rights on Immovable Property and the Related Transactions, 2003, 12 (In Russian).

72 *Tchetchelashvili Z.,* German Civil Code (as of March 1, 2010, translator and editor), Tb., 2010, §892 (1)) 185 (In Georgian).

73 *Shershenevich G.,* Guidebook of Russian Civil Law, according to publication of 1907, M., 1995, 149 (In Russian), reference in: *Emilyanova E.,* Legal Problems of Public registration of Rights on Immovable Property and the Related Transactions, 2003, 13 (In Russian).

74 Münchener Kommentar zum BGB §925, 5. Aufl., 2009, <http://beck-online.beck.de/?vpath=bibdata/komm/MuekoBGB_5_Band6/BGB/cont/MuekoBGB.BGB.p925.glI.gl1.htm>.

5.6 Registration System of France

French registration system belongs to the group of systems of Napoleon's countries. Development of cadastre in these countries started in the 19th century.

Modern cadastre in France is based on the Law of July 18, 1974, and in Italy – Decree # 650 of 1972. The main purpose of cadastre in the system of Napoleon's countries is ownership fees (fiscal cadastre), which doesn't have the function of juridical cadastre (or systems, directed towards protection of the right of ownership). While creating cadastre system, Emperor Napoleon took into consideration that the system would serve for legal protection of property and consequently there were attempts of attachment of juridical functions to cadastre, but this idea wasn't realized, as it was impossible to create such complicated system. With transfer of these countries to civilized market relations, in addition to cadastre register, the need of creation of special register of immovable objects emerged in these countries.[75]

The cadastre and registration issued in the countries of Napoleon's administrative system are under the jurisdiction of the Ministry of Economy and Finance. In these countries, National Register is the centralized system, which is managed directly by the state on the basis of the country's legislative base, but practical implementation of activities is carried out by municipalities, where the relevant service divisions are located. In these countries the following is registered in the registers of immovable property which is in close relation with the cadastre: proprietary rights of owners on immovable objects; legal documents (decisions on purchase-sale transactions, censes, servitutes, etc.); interests of the third parties; limitations; mortgage, credits, etc.

Registration system in France practically consists of 353 registers, which are divided into 6 groups. The Register provides for existence of Chief Registrar, who is personally responsible for the authenticity of the registered information. It is the public official of the relevant rank who, in addition to the monthly salary, receives additional remuneration. Responsible workers have created insurance fund, from which the compensation of damage occurred as a result of their mistakes is paid. The same approach is applied in Spain; here the cadastre in European sense didn't exist till 1985. Despite several attempts, European registration system wasn't created. Only since 1989, 9 years after adoption of Constitution (1978), it was possible to introduce modern European registration system. Official Spanish cadastre was established in 1845, by the Law of Cadastre was adopted only in 1906, which established the rules of performance of activities. The main purpose of the Law was creation of Land Cadastre.[76]

5.7 Registration System of the USA

The role of the government in registration of transactions on transfer of immovable objects in the USA is passive. Executive authorities register only the documents to be presented for registration.

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75 *Cheremshinsky G.,* Review of the Experience of Foreign Countries in Creation of Land Registration Systems (In Russian) <http://www.geo-garant.ru/cgi-bin/content.pl?p=52&nid=17>

76 *Cheremshinsky G.,* Review of the Experience of Foreign Countries in Creation of Land Registration Systems, Brief Description of Some Modern Cadastre Systems (In Russian), <http://www.geo-garant.ru/cgi-bin/content.pl?p=52&nid=17>.

But even such registration doesn't have obligatory character. When receiving documents, registering authority doesn't take any decision on authenticity and lawfulness of transaction. The government doesn't assume any responsibility; it is only responsible for keeping and publicity of the received contract. For obtaining of guarantee of authenticity of contract, parties to transaction apply to the services of special companies, which perform "insurance of title". On the basis of contract, concluded with the interested person, they study the history f all transaction related to this property during 30-70 years (depending on the state in which this property is located) and provide guarantee that "the title is clean". If any problem arises in regard to this property, or the party suffers damage, special companies assume responsibility and indemnify damage to the persons who insures the title (in certain limits).[77]

The system, which is quite different from European registration system, operates in the USA. The fact is interesting, that the parties-buyers of property in the USA are much more protected; the government doesn't assume any responsibility in the case of occurrence of damage, bur private companies are the guarantors, that damage may occur very seldom but if it does, they will necessarily indemnify this damage. For protection from unfair people in the case of purchase of apartment, professional builders in the USA have established time limits, during which the buyer can cancel the contract. But it negatively affects real estate turnover. So parties to contract use lawyer's services of obtain notarial certification of the contract.[78]

4.8 Registration System of England

"Out of European countries, Great Britain is especially remarkable, where cadastre in French sense doesn't exist at all. It relates to the peculiarities of "Common Law". The main system of management of land resources is the so-called Her Majesty Land Register", which, in its essence, is the register of the rights of ownership on immovable objects (or the title register). The Register was established in 1862. Present-day system is based on the Law of 1985. The territory of England and Wales is under the jurisdiction of the Royal Register. Over 15 mln owners are entered in the Register. The register is open and available for everybody. Information can be obtained in online regime from computerized register throughout the territory of England and Wales. The Register contains legal entries on sale and rental of immovable objects for the last 25 years."[79] Obligatory Torrens System is introduced in England and Wales gradually. The number of transactions concluded on the basis of this system made more than half of total number of transactions. "The main role in this system is performed by land survey service (Ordnance Survey) of Great Britain and Her Majesty Land Register or Royal register. The principal authority, maintaining survey and mapping is the National Agency of

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77 *Lazarevsky A.* (*ed.*), The Systems of Regulation of Rights on Immovable Property, Experience of Foreing Countries, M., 2000, 2 (In Russian).

78 *Lazarevsky A.* (*ed.*), The Systems of Regulation of Rights on Immovable Property, Experience of Foreing Countries, M., 2000, 24 (In Russian).

79 *Cheremshinsky G.,* Review of the Experience of Foreign Countries in Creation of Land Registration Systems, Brief Description of Some Modern Cadastre Systems (In Russian), <http://www.geo-garant.ru/ cgi-bin/ content.pl?p=52&nid=17>.

Great Britain, which is responsible for the issues of land survey and mapping and implements state policy in this sphere. The Register is subordinated to the Ministry of Justice; regional offices operate independently, on the basis of the law, but legally subordinate to the Main Registrar and don't depend on local administration. The system consists of three official registers – Land Register, Owner's Register and Register of Limitations. The theory of English Law takes into account that not the whole land in the ownership of the Crown and it can be owned or used by private persons. Besides, "complete ownership" and rent for 999 years or Leasehold exist. Primary registration of ownership is performed during transactions and thus number of immovable objects isn't registered in the system. About 20 mln units of immovable property are recorded in England and Wales, out of which about 15,7 mln are registered. Registration provides guarantee of the right of ownership, but doesn't create the guarantee of limits of the right of ownership (the so-called "general limits"), which, from the viewpoint of continental Europe, is a unique phenomenon at certain extent.[80]

6. Conclusion

New Georgian registration system, created as a result of reform completely complies with the registration standards of the developed countries of the world. Georgia have taken the experience of advanced countries into account and created high-quality registration system. It mainly bases on the principles of German registration system, but is not similar and is characterized by certain differences. It could also considered a positive innovation that certifying of alienation of immovable object by notary is no longer obligatory, although in the case of desire the parties can have the transactions related to immovable object certified by notary. Besides, cadastre activities in Georgia are carried out by private licensed surveyors and finally, the system, which have taken in the best features of registration systems of the leading countries of the world, have established in Georgia.

[80] *Cheremshinsky G.,* Review of the Experience of Foreign Countries in Creation of Land Registration Systems, Brief Description of Some Modern Cadastre Systems (In Russian), <http://www.geo-garant.ru/cgi-bin/content.pl?p=52&nid=17>.

GIORGI MAKHAROBLISHVILI *

DOGMATIC-THEORETICAL DELIMITATION OF ENTREPRENEUR SUBJECTS ON THE BASIS OF CAPITAL SOCIETIES

I. Introduction

The present article represents analysis of inter-relation of legal forms of the subjects of Georgian corporate law in dogmatic- legal sense. Delimitation of theoretical approaches on the basis of critical research reveals essential differentiating features of content and function of legal forms of Georgian entrepreneurial subjects. The problems of organizational- systemic delimitation of the existing entrepreneurial subjects become evident in Georgian Corporate Law through consideration of fundamental theories of organizational- legal forms of present- day Corporate Law.

The range of the issues to be considered includes the problem of dogmatic reference of theoretical viewpoints, formed and established in juridical doctrine (towards societies) of legal forms of entrepreneurial subjects, performing economic activities, as well as their economic- sociologic differentiation in the area of personified delimitation. The origins of economic- legal differences based on individualism shall be sought in ideological- theoretical contexts of formation of societies themselves as functioning subjects. On the other hand, the personality of capital alliances is the result of recognition of its law as individual subject; and dogmatic- theoretical disparity of entrepreneurial subjects in the primary source of their unification in two different equal legal groups, which is achieved through functional loading of quantitative features of societies.

The goal of research outlines from here: at what extent the difference of entrepreneurial subjects is delimitated on legislative level, and if such delimitation exists, how much it conforms to or shares indifferent approach of either legal or economic theories. Achievement of the set goal will reveal the defects of dualistic relation of Georgian legislator; and it would be impossible without system analysis of conceptual understanding of the bases of entrepreneurial subjects.

II. Personifies Nature of Entrepreneurial Subjects

Introduction

Division of entrepreneurial subjects in present-day corporative law follows from specific nature of their functional difference and alliances. Organizations, differing by these features are referred to the category of fundamental notions of entrepreneurial society.[1] Specific nature of organizations follows from the bases of formation of alliances. In one instance, it is conditioned by emergence of personified alliance of persons, and in the second instance – unification of capital of inter-relation of persons.

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1 *Casson M.,* Entrepreneurship Theory: Networks, History, Cheltenham, UK • Northampton, MA, USA 2010, 3.

Functional difference of entrepreneurial subjects manifests in achievement of essentially one and the same goal (profit, benefit) through various legal ways[2] and characterization of mechanism of implementation of these mechanisms. And as a result of functional and personified differentiation of entrepreneurial subjects two different types of unification outlines - partnership and capital society.[3] The mentioned division is known to Anglo- American, as well as to Continental law system. In Georgian reality, like other countries covered by these two systems of law,[4] delimitation of organizational – legal forms of entrepreneurial subjects are regulated on legislative level. Legislative regulation on the example of the USA in regard to Georgian legislation shall be defined as inter-delimitation of entrepreneurial subjects on the basis of normative acts in the USA, which, in its turn, doesn't mean that legal forms of all entrepreneurial subjects (organizational forms of societies, defined in p.1 of the Article 2 of the Law "On Entrepreneurs" are implied) are left beyond the boundaries of regulation, but it is classical model of regulatory deficiency, which could one of the reasons of lack of delimitation of entrepreneurial subjects. Nevertheless, in our case, conditional delimitation of these two different legal forms are covered by one act – Law on Entrepreneurs.[5] The following issue is interesting: to what extent could unification of the two conceptually dissocialized types of society in one normative act be considered as the action directed towards the formation the kind of "uniform" corporative- legal act?! Is it just the achievement of the legislator or unsuccessful attempt of implementation of the idea of developed of single legislative act?! The latter issued are related just to the problem of dogmatic delimitation of entrepreneurial societies, which leads us towards conceptual contradiction, the basic cause of which is the unification of entrepreneurial subjects having different concepts in one normative act.

1. Personal Bases of Partnership-type Societies

Present-day economy has significant impact on corporative law. Development of market relations conditions diversity of organizational- legal forms performing economic activities[6], starting with closed-

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2 Organizational - legal forms of entrepreneurial societies are implied.

3 In general, partnership and capital societies are regarded as single entrepreneurial society, profit-oriented entrepreneurial subject, which is covered by the Theory of Society (the same as the "Firm Theory"). The fundament of this theory was laid as a result of economic development and economic analysis of such development, for which the primary provision is the consideration of economic essence of entrepreneur. It conditioned consideration of capital and partnership societies in one profile – under the status of entrepreneur. *Biondi Y., Canziani A., Kirat T.,* The Firm as an Entity Implications for Economics, accounting and the law, the Taylor & Francis e-Library, 2008; *Sautet F.,* An Entrepreneurial Theory of the Firm, Routledge, the Taylor & Francis Group, London and New York, 2003.

4 German Corporate law is worth mentioning specially among the countries included in the system of continental law; and from Anglo- American law system - the USA and UK Law of Companies, as in the first instance the obligation of minimum authorized capital stock is provided, and in the second instance – broad statutory autonomy, i.e. the so-called self-regulation norms. The latter provides the possibility of seeing the difference of systemic approaches as early as in the beginning of formation.

5 The Law of Georgia "On Entrepreneurs", 1994, Bulletin of the Parliament of Georgia, # 21- 22.

6 Against the background of present-day market relations, delimitation of legal forms of profit-oriented subjects became prominent, on the one hand, as an entrepreneurial subject, performing profit-oriented activities, and, on the other hand, the society having organizational form, activities of which is not pre-

type private societies, through partnership-type societies owned by the partners and ending with corporations owned by large investors.[7] Partnership-type society represents kind of result of development of social culture and law.[8] The trend of implementation of joint entrepreneurial activities in the form of partnership was maintained since ancient times[9]. The institution of personal responsibility, characteristic for partnership and the existence of the right of representation of the society by partners to the third parties, characteristic for partnership is the remnant element of the past in present-day corporative law.[10] The law recognizes partnership-type society but it's not the creature of the law.[11] Aspiration of a man towards formation of partnership in consolidation with specific nature of partnership remains a complex issue for law and economy. The problem is in the legal nature of partnership-type societies. The legal nature includes the basis of creation of society and the issue of delimitation- unity between this basis and society. And the basis could be one: existence of mutually coincidence will of the future partners.[12] The will, revealed by the partners[13] and the partner shall be considered in unity as the basis of establishment of partnership-type society, as the partner's will represents the basis of establishment of the society and in the established partnership the partner acts as the subject- establisher of the society.[14] It's the society established on the basis of desire/ will,[15] the primary principle of functioning of which is partner's being in society. And mandatory nature of person's entering as a partner conditions personification of such

dominantly profit-oriented. In American Law, corporations and enterprises are differentiated, where the latter includes the former, i.e. entrepreneurial activities include economic activities of profit-oriented as well as other subjects of law (e.g. non-profit oriented society). The "enterprise" is the entity, which has selected one of the organizational- legal forms determined by the legislation, for performance of activities. Compare: *Tchanturia L., Ninidze T.,* Comments to the Law on Entrepreneurs, 3rd ed., Tb., 2002, 12-14; See: *Duruigbo E.,* Avoiding a Limited Future for the De Facto LLC and LLc by Estoppel, 12 U. Pa. J. Bus. L. 1013, 2010, 8, 19-24. On difference, see: <http://www.ehow.com/info_7810404_difference-between-corporation-enterprise. html>, [last updated on 12.07.2011]. Compare: *Tsertsvadze G.,* The Notion of Enterprise in Private Law, magazine « Law », 2002, 58- 60. In Georgian law, economic activity is defined by the Tax Code of Georgia, which includes entrepreneurial activities. See: p.1 of the Article 9 of the Tax Code of Georgia. See: *Veblen T.*, Theory Of Business Enterprise, Transaction Publishers, USA, 1978, 24–79. In regard to enterprise and entrepreneurial society and entrepreneurial activity see: *Burduli I.,* Fundamentals of Joint Stock Law, volume I, Institution of Corporative, Banking and Economic Law, TSU, the Faculty of Law, Tb., 2010, 118-122.

7 *Levin J., Tadelis S.,* A Theory of Partnerships, Standford Law School, working paper 244, 2002, 1.

8 *Borden B.*, Aggregate-Plus Theory of Partnership Taxation, 43 Ga. L. Rev. 717, 2009, 1.

9 *Udovitch A.*, Partnership and Profit in Medieval Islam, 1970, 7-8; *Hansmann H., Kraakman R, Squire R.*, Law and the Rise of the Firm, 119 Harv. L. Rev. 1333, 1399-1401, 2006.

10 *Gregory W., Hurst T.,* Agency and Partnership and Other Forms of Business Associations, Cases and Materials, USA, 1994, 362.

11 *Rutledge T.,* Symposium-Limited Liability Companies At 20: External Entities and Internal Aggregates: A Deconstructionist Conundrum, 42 Suffolk U. L. Rev. 655, 2009, 2, 15.

12 *Meyer M.,* Formation and Nature of Partnership, 45.Tul. L. Rev. 331, 1971, 1-2.

13 Compare: *Orts E.,* Shirking and Sharking: A Legal Theory of the Firm, 16. Yale. L. & Pol'y Rev. 265, 1998, 4-5.

14 Person can act as the partner (p.1 of the Article 20 of the Law "On Entrepreneurs"), and in accordance with p.p. 1 and 3 of the Article 34, the person can be natural, as well as juridical person. American Partnership Law includes the similar regulation. See: Uniform Partnership Act (UPA), 1914, §2; *Schneeman A.,* The Law of Corporations and Other Business Organizations, 5th ed., 2008, 53-55.

15 I.e. partnership is established on the basis of agreement between the parties. *French D., Mayson S., & Ryan C.,* Company Law, Oxford University Press, 26th ed., 2009-2010, 9-11. Compare: *Meyer M.,* Formation and Nature of Partnership, 45.Tul. L. Rev. 331, 1971, 3-4.

society. Besides, entrepreneurial subjects, where two or more persons are consolidated, are considered as a kind of alliance of organized business activities.[16] Partners can act on behalf of other partners, as well as the society and represent the society in relations with the third persons.[17] But dichotomy of society and partners hampers proper understanding of functional idea of partnership. The problem lies in perception of the society and partners, as one subject, on the one hand, and their separated legal-economic nature, on the other hand. Consequently, legal theories, supporting each position were developed in juridical doctrine – the so-called Aggregate Theory and Entity Theory. Each of them refers to differentiation of relations of society, property of the society and partners of the society.[18] In accordance with the Aggregate Theory[19], the partnership-type society represents unity of partners. Partnership is not considered as entrepreneurial subject performing entrepreneurial activities separately – it's the unity of partners.[20] According to this theory, the partners of partnership-type society are responsible for the obligations of the society straight, directly, with all their property, jointly and severally.[21] As a result, in the case of formation of society joint property and enterprise used to be created on the basis of unification of the partners' property, business activities of which is the tangible property jointly owned not by one, but by all partners.[22] And in the case of arising of liability, the responsibility would refer to the partners' personal property. In this case the property of the partnership would actually remain "outside of responsibility".[23] Entrepreneurial subject[24] used to be present, the idea of which, as a society[25], as well as the issue of taxation[26] referred to the area of partially

16 *Orts E.,* A Legal Theory of the Firm, 16. Yale. L. & Pol'y Rev. 265, 1998, 3.

17 *Schneeman A.,* The Law of Corporations, 5th ed., 2008, 59.

18 In regard to brief review of judicial practice of Aggregate and Entity Theories see: *Laning D.,* Partnerships – Aggregate Theory of Partnerships Used To Deny Employee Recovery Under Partnership's General Liability Policy, Cumb. L. Rev., 1977-1978, 991-1000.

19 *Kleinberger D.,* The Closely Held Business Through the Entityaggregate Prism, 40. Wake Forest L.Rev. 827, 2005, 6.

20 *Schneeman A.,* The Law of Corporations, 5th ed., 2008, 58. Original: According to aggregate theory a partnership is the totality of the partners rather than a separate entity.

21 This ruling of legislative level was noticeable in the USA UPA provisions, but in addition to Aggregate Theory, the traces of Entity Theory were present in this uniform act, e.g. acting as defendant or plaintiff on person's own behalf, placement in separated regime of taxation, etc. Generally about these theories, see: *Kleinberger D.,* Agency, Partnerships, and LLCs, examples and explanations, Aspen Publisher, New York, 2002, 199; *Schneeman A.,* The Law of Corporations, 5th ed., 2008, 58; *Kleinberger D.,* The Closely Held Business Through the Entity aggregate Prism, 40. Wake Forest L.Rev. 827, 2005, 3-7.

22 *Schneeman A.,* The Law of Corporations, 5th ed., 2008, 53.

23 If we consider that partnership is viewed as partners' ownership (entity) and not as individual subject according to this theory, it follows that in the case of arising of liability the partners' property will be imposed responsibility only fictitiously, as it, originally, is viewed as partners' ownership, and if the partner is responsible "with all his property", isn't the property of partnership society part of the property, owned by him?!

24 In the US legislation, partnership-type societies don't belong to entrepreneurial subject having the status of legal person, and they, mostly, are not registered in authorized governmental agency. These societies are equaled to legal persons through fiction. Having their own name, they can act as plaintiff and defendant in relation to the third parties. Compare: *Meyer M.,* Formation and Nature of Partnership, 45.Tul. L. Rev. 331, 1971, 7-19.

25 It was conditioned by dualistic approach while reflecting aggregate and entity theories on legislative level: it actually offered hybrid variant to entrepreneurial subjects, having taken into account the features, characteristic for the first, as well as for the second theory. See: *Hurst G.,* Agency and Partnership, USA, 1994, 396-398.

unregulated issues.[27] The law policy is changeable. Existential theoretical approach of allows solving of the issue, which lies in the Theory of Entity[28]. Changed approach was reflected on legislative level. Partnership was regarded as individual subject, delimitated from its partners.[29] But none of the above mentioned theories interfered with dogmatic understanding of personified nature of partnership. The stage of formation is determined by partners' will, and the will, manifested by them turns out to be placed within the boundaries of legislative regulation. Theoretical delimitation obtains particular significance on the stage of operation of the established partnership, which is clearly reflected in the content of responsibility in the case of inter-relation of the property of society and the property of partners. Unilateral advantage of any of the theories is not discussed in law doctrine. There are several questions, according to which it's possible to determine whether the partnership belongs to aggregate-type or entity-type society: can the society act on its own behalf in relations?! Can it own a property?! In the case of liability, shall the creditor demand indemnification from the property of the society or the partners' property first?! If any of the partners dies, the society, formed with the partner, who joined instead of him, shall be regarded as a new society or shall the entity remain the same society?!

All of these questions are equally significant. In our case, most attention is attracted by the question concerning the addressee of responsibility. If we consider society as entity-type society, in the case of responsibility the creditor, for the purpose of executions, shall first apply to the property of the society, and if it proves to be insufficient – to the partners of the society.[30]

The Law on Entrepreneurs provides for approach, almost similar to UPA in regard to formation of partnership.[31] In particular, in the case of establishment of society with joint responsibility manifestation of inter-coincident wills of several persons is required. But, unlike US Uniform Act, it doesn't provide for legislative delimitation between the partnership and its partner. One of the ways out could be found on the basis of definition of the Law,[32] which reveals in the section of partners' responsibility. While speaking about responsibility of the partners of society with joint responsibility "… with all their

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26 *Borden B.*, Aggregate-plus Theory of Partnership Taxation, 43 Ga. L. Rev. 717, 2009, 2-17.

27 Whether the partnership shall be taxed like corporation. Double taxation regime is implied. Besides there is an option for unregistered entrepreneurial subjects to be either in double or direct taxation regime through the so-called "check-the-box". See: *Field H.,* Checking in on "Check-The-Box", 42.Loy. L. A. L. Rev. 451, 2009, 2-53; *Hamilton R.,* The Law of Corporations, 5th ed, 2000, 32- 36; *Yale E.,* Defining "Partnership" for Federal Tax Purposes, Tax notes, May 9, 2011, 589-606. Available at: <http://ssrn.com/abstract=1833736> [last updated 12.07.2011].

28 See original: "According to Entity Theory a partnership is an entity separate from its partners, much like a corporations".

29 The revised version of the Unified Act directly provided for; according to its p. 201 (Revised Uniform Partnership Act (RUPA)): "A partnership is an entity distinct from its partners". On the history of origination-formation of RUPA, see: *Kleinberger D.,* Agency, Partnerships, and LLCs, New York, 2002, 190-193.

30 *Schneeman A.,* The Law of Corporations, 5th ed., 2008, 58-59.

31 Although, establishment of partnership in the USA, as a rule, doesn't require registration unlike Georgia, as the pre-condition of being considered as entrepreneurial subject is registration in the Register of Entrepreneurs and Bib-entrepreneurial Legal Persons; p.1 of the Article 4 of the Law on Entrepreneurs.

32 According to the comment to the Law "On Entrepreneurs", definition of the society with joint responsibility meets the characteristics of Aggregate Theory. *Chanturia L., Ninidze T.,* Comment to the Law on Entrepreneurs, Tb., 2002, 228.

property, straightly and directly"[33], the influence of Aggregate Theory is obvious – like UPA, the creditor of society with joint responsibility is actually obliged to apply with the request of fulfillment of liability directly to the partner.[34] But, like UPA, the Law on Entrepreneurs still can't provide sharp delimitation and offers dualistic approach, which again reveals in the context of responsibility. An in reality it's nonsense: two different approaches reveal in one context of society – responsibility. In particular, the Law on Entrepreneurs imperatively determines application of payment on property of the society on the stage of application of payment on partner's property.[35] By this reservation the legislator, on the one hand, tries to delimit the partner's property from the property of the society[36], and on the other hand, introduces principal issue of Entity Theory – concerning the property subject to execution of responsibility. But this ruling is so vague that it's impossible to guess the exact will of legislator: whether he wanted to delimit the property of the society from the partner's property and thus specify the content of p.1 of the Article 24 of the Tax Code of Georgia on entrepreneurial level,[37] or marking of the target of creditor's primary demand.[38] And it contradicts p.1 of the Article 20 – direct responsibility shall be determined for application of execution directly to the partner's property, separately from the property of the society, and the last, third paragraph establishes inverse variant – first the property of the society and then the partner's property.

Briefly, in Georgian reality, like the USA legislation, personal origin of partnership[39] is not hampered[40] by the lack of clear delimitation of property of the partnership and its partners[41]. The

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33 In opposition to it, p.1 of the Article 44 of the Law on Entrepreneurs can be cited, where the object of responsibility of capital society is referred to – LLC is responsible to creditors with all its property, the property of the society and thus the issue of responsibility of the society and the members of the society is unambiguously delimited. Consequently, the partners shall not be responsible in the case of responsibility of the society (but in exceptional case, provided for by p.6 of the Article 3). See: *Burduli I.,* Authorized Capital Stock and its Functions, in the book: Theoretical and Practical Issues of Modern Corporate law, Tinatin Tsereteli Institute of the State and Law, Tb., 2009, 235-261.

34 P.1 of the Article 20 of the Law on Entrepreneurs.

35 P.3 of the Article 20 of the Law on Entrepreneurs.

36 As for p.1 of the Article 24 of the Civil Code of Georgia, there is also an attempt of implementation of the policy of existence of "... own property".

37 Georgian Corporate law places entrepreneurial subjects (with the exception of private entrepreneur) into the definition of legal persons (p. 3 of the Article 2 of the Law on Entrepreneurs), thus automatically delimiting the property of the society and the partners' property, but p. 1 of the Article 24 of the Tax Code of Georgia refers to the signs, qualifying the forms of capital societies rather than partnership-type societies. See: *Kiria A.,* The System of Corporate law in Georgia, in the book: Collection of Articles in Corporate Law, editor *Burduli I.,* Tb., 2011, 12. As a result, the boundary between the property of the society and partner's property for partnership societies in Georgian reality remains conditional, although in the US Law, in addition to corporations, other entrepreneurial subjects are also recognized and equaled (in most cases) with legal persons through fiction. Entity Theory serves just to independence of partnership society and its property from partners and delimits them from each other.

38 And it will be the property of the society with joint responsibility.

39 i.e. partnership is associated with its members. See: *Burduli I.,* Fundamentals of Joint Stock Law, vol. I., Tb., 2010, 110-117.

40 Maneuvering of theoretical approaches impacts not only responsibility, but the basis of responsibility. The issue refers to fiduciary obligations in partnership-type society. UPA, like RUPA, provides for fiduciary obligations of partners of society towards society, as well as partners. See: *Schneeman A.,* The Law of Corporations, 5th ed., 2008, 58; *Harris L.*, A Critical Theory of Private Equity, 35. Del. J. Corp. L. 259, 3-

problem in regard to these issues arises in the case of responsibility, which is beyond the scope of research. The above provided analysis represents interim, but essential link, leading to full-value result of dogmatic delimitation in regard to partnership-type capital society.

2. Personal Principles of Capital Societies

Capital society refers to the categories, opposite to personal societies. With the development of capitalist relations, the former obtained great significance. Modern economic relations became one of the factors determining their functioning and idea. But the analysis of component elements of functioning[42] would be impossible without consideration of the origins of formation- establishment of its foundation – subject of functioning - fundamental element of capital society. The object of research in this regard is the actions required for establishment of Limited Liability Company and Joint Stock Company.

The present paragraph could be explained in two directions based on its content. First – if we review specific bases of formation of capital societies, we refer to and analyze personal- individual origins of establishment of societies of this type, which depends on individual actions of the future partners. Second – if we consider capital entrepreneurial subject as separate person of legal relations, we'll automatically refer not to personal origins of establishment of these societies, but individual competence and capabilities of the established society, representing separate subject of law in civil law relations. The present paragraph will be dedicated to the analysis of the first one, and the second will be considered in the next chapter.[43]

Establishment of capital society is divided into several directions. Manifestation of the will of establishing partners is required for the establishment of capital society, which shall be formulated n the form of statutes. It was considered as unification of persons having common goals, unified in certain structure, which was acting under the common (single) name.[44] But while defining entrepreneurial

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6. The Law on Entrepreneurs in regard to partnerships says nothing about fiduciary obligations (manager's responsibility isn't implied in this case), but in general part, in particular, p.8 of the Article 3 doesn't define the basis for intended abuse of authorities of the dominant partner, but this basis can't be other than infringement of obligation of partner's loyalty towards society, and this ruling of the Law imposes responsibility onto dominant partner towards other partners, thus actually making indirect reservation on existence of fiduciary obligation towards partner. The mentioned "problem" is one more example of confirmation of personal origins of partnership society. Consequently, its' wide specification isn't required.

41 But the Comment to the Law on Entrepreneurs provides for delimitation between them, which, actually contradicts the above definition of the Law. See: *Tchanturia L., Ninize L.,* Comment to the Law on Entrepreneurs, Tb., 2002, 229.

42 This composition could be defined as the destination, role, goals and legal actions and economic activities for their implementation. The former (legal) implies achievement of the set goals and destinations through organizational- legal form selected as a result of proper implementation of corporative management, and the latter – social welfare achieved through the implemented management activities, which, in its turn, includes welfare of the participants of the society (shareholders) as well as the stakeholders.

43 In both cases the issues of establishment of capital society, i.e. primary establishment will be referred to and not the creation of society on the basis of reorganization, *Burduli I.,* Fundamentals of Joint Stock Law, Tb., 2010, 391 and the subsequent.

44 *McBride D.*, The Model Business Corporation Act at Sixty: General Corporation Laws: History and Economics, 74_Law_&_Contemp Prob._1, 2011, 2.

society,[45] the scientists' opinion was divided into three main parts. Traditionally, shareholder of the society was considered as the owner of corporation, who owned it.[46] Later, more progressively thinking scientists of corporative law explained the status of shareholders in broader way and said that they represented one of the stakeholders related to the enterprise. And finally, the position of the so-called "counter-activists"[47] was formed, according to which corporation can not be in anybody's ownership, as it's the creature of metaphorical agreement.[48] The latter theory[49] was considered by the economists,[50] according to which shareholders are one of multiple factors of components of enterprise, linked by complex network of explicit and implicit contracts.[51] The concept of consideration of corporation as contract-based creature[52] has its specific explanation. It is not a concept and can't be explained in direct meaning. Generally, contract means agreement. In law, it's legally secured and feasible promise. It's clear, that "contract-based association"[53] and society, established on its basis doesn't mean either association of contracts or unity of legally secured and feasible promises. On the contrary, it is the agreement, achieved through the manifestation of coincident (multilateral) will.[54] Briefly, the essence of this consent is that corporation is not considered as the subject within the ownership of participants.

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45 It was related to capital society, in particular, corporations.

46 *Bainbridge S.,* Director Primacy: The Means and Ends of Corporate Governance, 97 Nw. U. L. Rev. 547, 563-64 in: *Colombo R.*, Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership, 34 Iowa J. Corp. L. 247, 2008, 20.

47 Out of them, *Michael Jensen and William Makling* shall be noted, who created their famous work in 1976: The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure, Journal of Financial Economics, October, 1976, Vol. 3, No. 4, 305-360. Their theory was based on rejection of the theory of *Ronald Coass.* The latter developed the theory, according to which internal relations of society were characterized by authoritarian nature, as opposed to *Michael Jensen and William Makling*, who referred internal as well as external relations to natural contractual type. See: *Colombo R.*, Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership, 34 Iowa J. Corp. L. 247, 2008, 5; *Coase R., The Nature of the Firm, Economica*, New Series, Vol. 4, No. 16. 1937, 386-405; *Jensen M., Meckling W.,* The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure, 3 J. Fin. Econ., 1976.

48 *Colombo R.*, Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership, 34 Iowa J. Corp. L. 247, 2008, 2.

49 The Nexus-of-contracts Theory. The theory is based on the work by *Michael Jensen and William Makling*: The Theory of the Firm: Managerial Behavior, and Ownership Structure, Journal of Financial Economics, 1976; *Bainbridge S.,* The Board Of Directors as Nexus-of-Contracts, A Critique of Gulati, Klein & Zolt's "Connected Contracts" model, School of Law, Research paper No. 02-05, Los-Angeles, 2002, 16-25; *Hamilton R.,* The Law of Corporations, 5th ed, 2000, 50-62.

50 Compare: *Eisenberg M.*, The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm, 24 J. Corp. L. 1998-1999, 819-836.

51 *Colombo R.*, Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership, 34 Iowa J. Corp. L. 247, 2008, 5.

52 Compare: *Orts E.,* Shirking and Sharking: A Legal Theory of the Firm, 16. Yale. L. & Pol'y Rev. 265, 1998, 5. ("Firms are more than a matter of contracts because of the importance of the relationships of authority and power among principals and agents organized within a business entity.... The origin of a business "entity" of more than one person thus lies in agency law. Firms do not arise from contracts alone").

53 nexus of contracts.

54 *Eisenberg M.*, The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm, 24 J. Corp. L., 1998-1999, 822-823.

The shareholders are considered as subjects, owning only contractual requirements towards corporation.[55] The result is reflected through the constituent contract.[56] Besides, the above mentioned two theories[57] refers not only to partnership, but all subjects, arranged in organizational way, consequently, capital societies too. In regard to corporation, consolidation of *nexus contracts* concept and traditional approach[58] comes nearer to Aggregate Entity Theory, than others.[59] The latter considers the society as associations of members and calls it aggregate of corporation[60]. Its idea, on the one hand, is in the fundamentals of establishment of society,[61] and on the other hand, in the absence of clear boundary between the established society and its partners. And each of them individually provides the explanation of *nexus of contracts* concept and traditional approaches, i.e., in its turn, opposite situation: unification of these two approaches.[62]

Examination of the mentioned position is bringing of indifferent approaches towards capital societies to specific origins. The problem referred to legally important issue of establishment like expression of element necessary for the formation of society on the basis of manifestation of personal will by the future partners.[63] This element is not the only, but one of the factors, required for establishment of capital society. In particular, not only manifestation of legal will, but performance of legal actions is the necessary element, existence of which is imperatively mandatory for capital-type society.[64] In law doctrine there is an opinion, that the category of legal actions implies certain actions,[65] performed[66] by the partners of the society. And this action is considered as one of the necessary elements of creation of society.[67] On this very stage the legal, as well as economic nature of capital society is reveals: it's the society, created on the basis of unification of capital, but not only capital, but capital society is created in unity with manifestation of coincident will of primary owners of this capital

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55 *Eisenberg M.*, The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm, 24 J. Corp. L., 1998-1999, 825.

56 *Burduli I.,* Fundamentals of Joint Stock Law, Tb., 2010, 398-401.

57 aggregate and entity theory.

58 that the society represents the ownership of its shareholders or members.

59 *Kleinberger D.,* The Closely Held Business Through the Entity-Aggregate Prism, 40. Wake Forest L. Rev., 827, 2005, 3.

60 *French D., Mayson S., & Ryan C.,* Company Law, Oxford University press, 26th ed., 2009-2010, 6.

61 The will, manifested by the partners, is implied.

62 *Phillips M.*, Reappraising the Real Entity Theory of the Corporation, 21 Fla. St. U.L. Rev. 1061, 1994, 1.

63 The following theories exist in corporate law: The Concession, The Nexus-of-Contracts Theory, The Fiction Theory The real entity theory and The aggregate theory, some of them will be discussed in more details below.

64 In spite of the fact that there is no reservation on authorized capital stock in the Law on Entrepreneurs. It. of course, doesn't mean abolition of authorized capital stock of a society. P. 5 of the Article 3 of the Law on Entrepreneurs could be regarded as that establishing the notion of doctrine of capital of the society; it obliges the future partners to determine share holding in the capital. Besides, attention should be paid to the circumstance that making contribution, reserved in German law is one of the mandatory criteria for establishment of Joint Stock Company. See: *Burduli I.,* Legal Outcome of Failure to Make Contribution: Utopic Opinion of Expelling of Partner from Joint Stock Company, "Law Magazine" #12, Tb., 2010, 21-24.

65 E.g. transfer of object having turnover-ability economic value to the society, rendering of service.

66 *Burduli I.,* Fundamentals of Joint Stock Law, Tb., 2010, 401-402.

67 Compare: *Burduli I.,* Fundamentals of Joint Stock Law, Tb., 2010, 403.

(further shareholders of the society). And transfer of property, required for the formation of capital of the society is performed on the basis of manifestation of one more individual[68] will. As a result, there are personal origins of formation of capital society, which, following the above judgment, will be brought to the manifestation of will be the future partners, expressed in agreement, on the one hand, and transfer of the owned property to the society, on the other hand. And their summary notion equals to the basis of formation (establishment) of capital society.

Briefly, on the basis of systemic analysis of personal origins of capital societies, conclusion could be drawn, that the pre-conditions[69] of creation of these societies represent two equal-level elements of establishment of society.[70] Their presence[71] is equally important for creation and maintenance of substantial idea of capital society. In this aspect, p. 5 of the Article 3 of the Law on Entrepreneurs shall be explained in regard to capital societies as individual procedural aspect of performance of transfer of capital and distribution and not the constituent element of the first – coincident will required for the formation of such society.[72] Nevertheless, if there is no mandatory nature for the formation of capital society, will the legal status be changed?! Of course it's changed but this change doesn't lead to functional identity of capital society with partnership societies. The reason is simple: The idea of capital society, in addition to unification of persons, is just unification of capital. Otherwise we would obtain the society with ideal goal.[73]

Non-establishment of mandatory nature of existence of capital for Georgian reality doesn't mean neglecting of substantial idea of capital societies and sufficiency of only manifestation of coincident will be the partners. As a result, despite non-existence of such ruling, unification of capital remains one of the important elements of formation of capital society. It's the adequate outcome of transfer, as a result of legislative changes of 2008,[74] to the model of liberalization and self-regulation.[75]

The difference, outlined as a result of analysis of personal origins of partnership and capital societies, is just one section of the "path" leading to conceptually correct way out in regard to dogmatic delimitation of content-related, as well as functional difference between them. And is represents one of the arguments of lack of justification of expression in one legislative document of dualistic approach of Georgian legislators towards partnership-type and capital societies.

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68 Whether it is natural or legal person.

69 Such as manifestation of coincident will and unification- transfer of capital to the society.

70 Compare: *Burduli I.,* Fundamentals of Joint Stock Law, Tb., 2010, 401-403.

71 On the next stage of establishment, as well as functioning.

72 Compare: *Burduli I.,* Fundamentals of Joint Stock Law, Tb., 2010, 403.

73 Only having the unification of property, e.g. fund, or based on membership of persons – union. Tchanturia, Introduction to General Section of Civil Law, Tb., 200, 251-280, but it should be mentioned that Georgian legislation doesn't provide for fund and union as organizational form. Compare : with the Article 39 of the Civil Code of Georgia.

74 Amendments and Additions dated March 14, 2008 to the Law of Georgia "On Entrepreneurs" (# 5913).

75 self-regulation.

III. Theoretical- Legal Analysis of "Personality" of Capital Society

1. Theories on Capital Societies[76]

1.1. Concession/ Fiction Theory[77]

The idea of theories on corporations is directed towards the development of abstract definition on nature and sense of capital society.[78] The definitions, like the theories, subjecting them, are multiple and abstract. Only some of them are important.

Concession theory regards capital society not as separated subject by itself, but as entity, obtaining the status of individual subject on the basis of legal actions of authorized state agency.[79] Association of persons, which is not registered, will not be granted the status of individual subject of law.[80] In addition

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76 The below discussed theories were selected based on the criteria, which consider the personality of capital society and individual origins of its formation in the most clear manner.

77 The Concession/Fiction Theory.

78 On origination and implementation of theories on corporation see: *Harris R.,* The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business, 63 Wash. & Lee L. Rev., 2006, 1421-1478. Also, see his critical analysis *Mitchell L.,* The Relevance of Corporate Theory To Corporate and Economic Development: Comment on The Transplantation of the Legal Discourse on Corporate Personality Theories, 63 Wash. & Lee L. Rev., 2006, 1489-1502.

79 In the system of Anglo- American law, American and English systems differ in this aspect: in the US legislation, the result of organizational and/ or property unification is the status of legal person after registration in the authorized state agency with the so-called Secretary of State and completion of organizational meeting conducted after registration, see: *Schneeman A.,* The Law of Corporations, 5th ed., 2008, 307-308. The mentioned difference follows from the line of demarcation of the phases of formation of corporation, as the establishment of society and formulation of society differ: establishment of society requires partners' decision (contract in the form of statutes) and its registration and the first phase of formation is registration: after establishment, the society needs functioning and ability of performing transactions, which is impossible without managing bodies. Consequently, the most important phase after registration is conducting of organizational meeting (which, as a rule, is performed by the person, authorized for registration), where election- appointment of structural entities of management of the selected organizational- legal form is performed.

Palmiter A., Corporations: examples and explanations, 5th ed, 2006, 41-45. In the law of English companies the status of registration and legal subject is granted by two basic subjects - permission of activities by Royal Deed of the Queen or the relevant document- decision of the Parliament. *French D., Mayson S., & Ryan C.,* Company Law, 26th ed., 2009-2010, 7-9, 157. In Georgia, entrepreneurial society is recognized as the subject having the status of legal person on the basis of p.3 of the Article 2 of the Law "On Entrepreneurs", and the agency, granting the status is legal person of public law – National Register of Public Registry in accordance with p.2 of the Article 4 of the same law, and registration is performed in the register of entrepreneurs and non-entrepreneurial (non-commercial) legal persons. *Liluashvili G.,* The Idea and Goals of Registration of Entrepreneurs, in the book: Theoretical and Practical Issues of Modern Corporate law, Tb., 2009, 1390 172.

80 But there is an exception, where the case of regarding of the association of unregistered persons, through actual implementation of entrepreneurial activities, as entrepreneurial subject. On this stage, the issue refers to granting of the status of entrepreneur, as entrepreneurial subject, to the association of persons, which is characterized by two – objective and subjective pre-conditions. First, it's formal pre-condition of

to concession theory, fiction theory is often mentioned[81], but discussed separately. Their goals are in actual coincidence with each other.[82] The principle, according to which requires performance of legal actions on the part of the state for formation of the association of persons as individual subject of law, is called concession theory.[83] Fiction theory, by its nature, differs from concession theory. If, in the case of existence of concession theory, certain social formation is granted the status of individual person as a result of performance of actions by the state,[84] according to fiction theory, such formations exist in reality, but granting of the status of individual person and thus its recognition as person is a fiction.[85] The mentioned ruling could be read in famous legal case[86], definition of corporation by the judge *Marshall*.[87] By recognition of corporation as artificial, invisible and imperceptible creature, judge Marshall confirmed fiction theory. And in accordance with the latter, corporation is fictitious, artificial legal person or association, existing independently from its members- establishers. Concession theory, in its turn, reviews formation of corporation as artificial creature only on the basis of law.[88] And this analysis is based on concession on the part of the state – formation of corporation, as individual subject, on the basis of legal action. The last issue is the rudiment, which conditions mixing of concession and fiction theories and leads us to the conclusion that if corporation is formed only on the basis of performance of certain actions buy the state, it, at the same time, shall be artificial, invisible, intangible and fictitious.[89]

1.2. Aggregate Theory[90]

Presence of manifestation of the will of future partners is mentioned among the pre-conditions of establishment of capital societies. Since the XIX c., when partnerships were regarded as partners' associations and the fundament of aggregate theory was laid,[91] the trend of application of features, characteristic for partnership, towards business organization emerged gradually. Consequently, capital society is characterized as an aggregate, formed as a result of manifestation of the partners' personal

granting of the status of entrepreneurs, which is related to the fact of registration, i.e. association obtains the status of entrepreneur since the moment of registration, and second, actual pre-condition, when the association of persons obtain such status through implementation of actual entrepreneurial activities. Compare: *Burduli I.,* Fundamentals of Joint Stock Law, Tb., 2010, 448- 450.

81 *Tchanturia L.,* Introduction to General Section of Georgian Civil Law, Tb., 2000, 210-213.

82 *Phillips M.*, Reappraising the Real Entity Theory of the Corporation, 21 Fla. St. U.L. Rev. 1061, 1994, 2.

83 *French D., Mayson S., & Ryan C.,* Company Law, 26th ed., 2009-2010, 157.

84 Otherwise such association- formation can't obtain the status of the subject of law.

85 *Phillips M.*, Reappraising the Real Entity Theory of the Corporation, 21 Fla. St. U.L. Rev. 1061, 1994, 2; See: *Tchanturia L.,* Introduction to General Section of Civil Law of Georgia, Tb., 2000, 212.

86 Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.), 1819.

87 Original: "A Corporation is an Artificial being, Invisible, Intangible, and Existing only in Contemplation of Law." ix. *French D., Mayson S., & Ryan C.,* Company Law, 26th ed., 2009-2010, 157.

88 Which was explained by the judge Marshall too. Also: *Hamilton R.,* The Law of Corporations, 5th ed, 2000, 46-50.

89 *French D., Mayson S., & Ryan C.,* Company Law, 26th ed., 2009-2010, 153; *Phillips M.J.*, Reappraising the Real Entity Theory of the Corporation, 21 Fla. St. U.L. Rev. 1061, 1994, 2.

90 The Aggregate Theory. The mentioned theory was discussed above, so in this chapter only its relation to corporation and other corporation theories will be discussed.

91 *French D., Mayson S., & Ryan C.,* Company Law, 26th ed., 2009-2010, 153.

will.[92] In accordance with aggregate theory on personality of corporation, the society is regarded as the association of its members. Initially, only the society participants were considered in aggregate theory. With the development of the theory the approach changed. Together with shareholders, the directors and managers of the society were also regarded as pre-condition of creations of the corporation aggregate.[93] For completeness, aggregate theory includes the part of fiction theory, which considers society as artificial creature. But, unlike fiction theory, aggregate theory doesn't recognize separation of corporation as individual subject- person of law. E.g. association of persons is only an idea, mental construction, used for classification of relations of various types among people.[94] Formation of an enterprise as an individual subject requires not only existence of such will, but presence of the property in its (enterprise's) ownership, which would be separated from the property of its members. But for aggregate theory corporation is nothing but the association of its members.[95] Unlike fiction theory, where the corporation is recognized as individual and personal subject of law, different and separated from its shareholders, aggregate theory doesn't recognize difference of the property of the society and partners' property, as well difference of personalities of the society and association of partners. The latter approach was formed in regard to partnership-type societies.[96] The above mentioned theory focuses attention only on personal beginning of corporation and actually excludes the role of capital in regard to establishment of capital society too. And it contradicts the justification of unification of property together with the already discussed personal origins of capital societies. As a result, the latter theory is used only for argumentation of personal origin of capital entrepreneurial subject.

Aggregate theory also reveals similarity with *Nexus-of-Contracts Theory*.[97] None of the theories[98] recognize different and separated personality of elements (actions) required for the establishment of corporation and the establishers from the corporation itself. The latter theory regards corporation as the creature of contracts, concluded among the related persons, or those participating in the society.[99]

The difference between the two above discussed theories is clear, but it's vague for the reality of Georgian corporative law. These theories relate to the status of legal person and mostly capital societies, whereas Georgian partnership-type society is also a legal person. The difference between them is substantial (according to these theories), but in legislation they (partnership and capital societies) are provided on one level and in one normative document. Granting of the status of legal person to the societies of both types makes the personal beginnings of their establishment equally dependant on legal actions of the state. It contradicts classical understanding of partnership-type society at the very heart of

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92 *Phillips M.*, Reappraising the Real Entity Theory of the Corporation, 21 Fla. St. U.L. Rev. 1061, 1994, 2.

93 According to some formulations, persons related to the society and its stakeholders also participate in the formulation of aggregate.

94 *Phillips M.*, Reappraising the Real Entity Theory of the Corporation, 21 Fla. St. U.L. Rev. 1061, 1994, 3.

95 For this reason, Aggregate Theory is regarded as one of the types of methodological individualism. See: *French D., Mayson S., & Ryan C.,* Company Law, 26th ed., 2009-2010, 153-154; *Phillips M.*, Reappraising the Real Entity Theory of the Corporation, 21 Fla. St. U.L. Rev. 1061, 1994, 3.

96 *Kleinberger D.,* The Closely Held Business Through the Entity-Aggregate Prism, 40. Wake Forest L.Rev. 827, 2005, 3.

97 *Pinto A., Branson D.,* Understanding Corporate Law, 3rd ed., LexisNexis, 2009, 109.

98 Aggregate and Nexus-of-Contracts theories are implied.

99 *Phillips M.*, Reappraising the Real Entity Theory of the Corporation, 21 Fla. St. U.L. Rev. 1061, 1994, 4.

its formation.[100] The situation is complicated by covering of the both types of societies by one document. Thus the real difference becomes convectional condition by actual unification. And it reflects on the absence of clear demarcation line of functional difference between them.

2. Legal "Personality" in the Attire of the Status of Legal Person

Uniform structure of entrepreneurial capital societies manoeuvres in the conditions of marginal differentiation of law systems. Despite differences existing in various law systems, capital societies, in global sense, have common fundamental legal features.[101] Fine legal features are formed and established for capital entrepreneurial societies: "legal personality",[102] limited liability, centralized management of the society by authorized bodies and the property of investor.[103] But there are certain legal forms of entrepreneurial subjects, which are not characterized at least by one of the features.[104] For more clarity, majority of societies, functioning in market economy, are the subjects, bearing the five basic features. And principal function of corporative law is provision of entrepreneurial societies by the organizational-legal form, which would have all the five features. Following the goal of the article, only the first – legal personality is subject to theoretical analysis.

2.1. "Double Nature" of Capital Society

The most important element for capital society is in its double nature: it is organizational association of persons, i.e. association of persons and the subject,[105] delimited from its members.[106] In addition to the law, economists also characterize corporations, considering it in systemic notions of contractual law. Qualifying element of the notion of an enterprise, e.g. *nexus-for-contracts*, is referred to as "separated inheritance"[107]. The latter includes demarcation line between the property, created as a result of unification and the property owned by the owners of the enterprise.[108] The society, which performs management of property through the appointed manager, is regarded as the owner of the

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100 It's established on the basis of manifested will of persons, isn't it?

101 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: *Kraakman R., Armour J., Hansmann H., Enriques L., Hansmann H., Hertig G., Hopt K., Kanda H., Rock E.,* The Anatomy of Corporate Law, *A Comparative and Functional Approach,* 2nd ed., Oxford University Press, New York, 2009, 1.

102 Legal Personality – the subject's status of legal person, by virtue of which this entity will be perceived as a substance of specific subject of legal relation. Separate Personality is not identical to Legal Personality. The latter denotes the status of legal persons of social or actual association of persons, which is conditional for perception of association as separate and individual subject of law.

103 The difference between the features of legal person and corporation is conditional in the aspect that corporation is a legal person, but corporation has more features, different from the features characteristic for legal person, e.g. the possibility of complete (and not free, e.g. vinculated shares) alienation. Compare: *Burduli I.,* The Fundamentals of Joint Stock Law, Tb., 2010, 166.

104 E.g. partnership-type society.

105 Legal person.

106 *French D., Mayson S., & Ryan C.,* Company Law, 26th ed., 2009-2010, 152.

107 Separate patrimony.

108 Shareholders.

unified property. The authority of management of certain property includes its disposal, sale and, following the circumstances, transfer to creditors, i.e. as this property is regarded as the ownership of the society and not the ownership of the owners of the enterprise, this property is unavailable for the creditors for imposition of responsibility, which is achieved as a result of legal personality of the society through the status of legal person.[109] The basic function of "separated inheritance" is referred to as "protectability" of the entity.[110] Protection of entity means protection of the property, owned by the society, from the claim of personal creditors of the owners of the society.[111] On this stage it's not considered, that the society doesn't have the status of individual personality: it's a separated society, having the status of legal persons, having individual personality. In corporative law, limited liability and own property of capital society as the legal person is the most important element, thus its analysis is appropriate while reviewing corporative origins and personal origins. JSC is characterized by two more elements (total three) of confirmation of legal personality and actins of society, as a party to contract in relations with the third parties. In particular, the persons,[112] authorized to represent[113] the society to the third parties, who can act on behalf of the entity and dispose its property and enter into the legal relations, which will be secured by the same (society's) property,[114] and the second – procedures, by application of which the society and the third parties, acting in contractual relations on its behalf can initiate and plead legal dispute in the case of its violation.[115]

2.2. *„Entity Shielding"* - Protectability of Capital-type Entity under the Shield, as the Basis of its Definition as Separate Subject of Law

Capital society, in the course of functioning, participates in various obligatory- legal relations. The basis of such participation is its consideration as individual subject of law, to be able to conclude transactions, act as defendant and plaintiff, generally, manage its property. In the course of implementation of these activities rights and obligations are obtained and responsibility for the fulfillment of taken obligations is imposed. For determination of responsibility corporate documents (norms) are used in combination with the norms of civil law. But the duty of fulfillment of responsibility and obligations is one issue. The second and the main one is the property subject to execution of liabilities, determination of

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109 It's encountered only in the case of capital society, as the partnership-type societies, provided by Georgian legislation, in spite of their legal personality, don't have the ability of application of similar "self-protecting" means either within legislative, or partners' private autonomy. E.g. following p. 3 of the Article 3 of the Law of Entrepreneurs, all such reservation and agreements are null and void towards the third parties.

110 The so-called corporate law, expressed in limited liability. Just the elements of limited liability and separated liability are one of characteristic features of the legal person of capital-type society, which the partnership-type society doesn't have.

111 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 6.

112 the person, authorized for management – director – is implied.

113 and this effective demonstration of its functioning in the status of legal personality in contractual relations.

114 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 7.

115 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 8.

the owner of the property and multiplicity of creditors.[116] In this very aspect the limited liability of JSC beneficiaries[117] and limited liability of the society of JSC[118] differ, following the difference of their creditors. Both of them, as a rule, are regarded as limitation of partners' responsibility through the organizational- legal form of society – establishment of society with limited liability. Although, the difference between them is substantial. And the difference follows from two different elements of corporate shielding of capital society - of the rule of priority and protection against liquidity.

2.2.1. The Rule of Priority

One of the primary constituent elements of corporate shielding in regard to capital-type societies is the rule of priority.[119] The rule of priority is based on the partition of property, unified in the enterprise.[120] Partition of property follows from "separated inheritance", which delimits the property of

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116 Multiplicity of creditors implies not one and the same person, having the right of claim towards various shareholders or partners, but their diversity together with difference of shareholders.

117 Partner's liability and its volume, as the result of activities of society and its responsibility from share ownership existing in the capital of the society, which originated from legal relations isolated from society. See: *Hansmann H., Kraakman R., Squire R.,* Law and Rise of the Firm, Harvard Law Review, 2006, 2-4.

118 Scope of responsibility for the society's liability, emerged towards the society from the contracts concluded on behalf of the society. *Hansmann H., Kraakman R., Richard S.,* Law and Rise of the Firm, Harvard Law Review, 2006, 2. Besides, in relation to the third parties it doesn't mean whether it happened as a result of violation of fiduciary obligation of the managing person or not. Compare: *Tchanturia L.,* Corporate Management, Tb., 2006, 61- 69.

119 Priority rule. Application of priority rule is based on the principle of partitioning of property - asset partitioning. Two components of partitioning of property are distinguished in legal literature. The first, when the entity is granted the status of separate subject of law by recognizing it as a subject of law, which is separated from the individuals unified in it (this very circumstance shall become the basic provision of determination of rational difference between p.p.1 and 3 of the Article 20 of the Law on Entrepreneurs: on legislative level). The owner of property of such entity is the society itself. Secondly, it is establishment of priority for creditors in the case of claim against the property. The latter is further divided into two groups: the so-called affirmative and defensive partitioning of property. Partitioning of the former is provided in the present chapter under the paragraphs of Priority and Protection against Liquidation. As for defensive partitioning of property, it equals to limited liability, which is characteristic for capital society and is absent in partnership-type societies. Entity shielding follows from affirmative asset partitioning and determined the rule of priority-admissibility of execution from the property of the society. Briefly, entity shielding protects property from personal creditors of beneficiaries of the society, and limited liability the property of the partners of society from the claim of entity creditors, so it is regarded as a means for shielding of owners – (complete) owner shielding, consequently, its consideration doesn't represent the goal of the present article. The former is included within the composition of legal personality of capital-type society, and the latter is one of the separated elements characteristic for corporation, together with law subjectivity. See: *Hansmann H., Kraakman R.,* The Essential Role of Organizational Law, Yale Law Journal, 2000, 1-14; *Armour J., Hansmann H., Kraakman T.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 5-17; *Pinto A., Branson D.,* Understanding Corporate Law, 3rd ed., 2009, 35-39. It should be noted that in further work the same authors use entity shielding and affirmative asset partitioning with one and the same meaning. See: *Hansmann H., Kraakman R., Squire R.,* Law and Rise of the Firm, 2006, 1.

120 *Elgueta G.,* Divergences and Convergences of Common Law and Civil Law Traditions on Asset Partitioning: A Functional Analysis, Pennsylvania Journal of Business Law, 517-554. *Hansmann H., Kraakman R.,* The Essential Role of Organizational Law, Yale Law Journal, 2000, 4-8.

the society and that of the members of society. Difference between them forms differentiated approach between the creditors of the latter subjects. Consequently, the question is asked – from which property the claim of which subject is to be fulfilled?! In accordance with the rule of priority, the creditors of the firm are predominantly authorized in regard to its (society's) property, which is a kind of securing of the firm's liabilities for imposition of execution as compared with personal creditors of the partners- owners of the enterprise.[121] The mentioned rule is uniformly integrated in regard to entrepreneurial entities established in various legal systems, among which there are partnership-type societies, i.e. the mentioned rule of priority applies not only to capital-type societies, but, in general, to partnership-type society.[122] The result of application of the rule of priority is that the fulfillment of the society's contractual obligations is automatically performed from the property of the entity.[123]

2.2.2. The Rule of Protection against Liquidation

The second important element of shielding of entity, established for performance of entrepreneurial activities if the rule of protection against liquidation.[124][125] According to the mentioned rule, individual owners of capital society[126] can't remove their share from the society in the proportion that will lead the society to the process of liquidation.[127] In their turn, personal creditors of the partners owning the society, whose claims towards these persons arose in the legal regime, separated from the activities of the society, can't satisfy the claim from the share of the debtor – partner of the society – in the enterprise, and thus – from the property of the society.[128] The mentioned rule is a kind of guarantee of protection of current activities of capital society from deconstruction, which could be caused by

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121 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 8.

122 The mentioned element is characteristic for societies of both forms (types), which reveals on the stage of their personality, following the circumstance that societies of both types represent separated subjects of law in one case by fiction, and in another case - by granting of the status of legal person. Thus the form of entity shielding is divided into several types: weak entity shielding, strong entity shielding and complete entity shielding, the same as limited liability. *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 9-12; *Hansmann H., Kraakman R.,* The Essential Role of Organizational Law, Yale Law Journal, 2000, 2-3; *Hansmann H., Kraakman R., Squire R.,* Law and Rise of the Firm, 2006,1-7.

123 Unless otherwise agreed by the parties. In regard to dispositional norms in corporate law see: *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 19-22.

124 Liquidation protection.

125 The latter represents the example of "strong entity shielding". See: *Hansmann H., Kraakman R.,* The Essential Role of Organizational Law, Yale Law Journal, 2000, 3.

126 Shareholders.

127 Similar ruling could be found in p. 7 of the Article 53^1 of the Law "On Entrepreneurs", which considers quantitative limitation of buying out of shares by society. In particular, buying out of the shares of dissatisfied shareholders based on general meeting of the society is inadmissible, if the amount of such shares exceeds 25% of capital of the society. And limitation is established for avoiding liquidation of the society and/or the regime of insolvency.

128 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 8., *Hansmann H., Kraakman R.,* The Essential Role of Organizational Law, Yale Law Journal, 2000, 3-4.

either shareholder or personal creditors of shareholders. The second element of entity shielding is not characteristic for partnership-type society, which conditions differentiation of legal regime of responsibility between them. As a result, capital society enjoys strong corporate shielding,[129] and partnership-type society – weak shielding.[130][131]

The two elements of the above mentioned corporate shielding of capital society represent one part of the chain of arguments of its legal personality. The two main conditions determine the personality of society: implementation of management of the enterprise by appointed/ elected directors or managers and unification of certain capital, which is available for satisfaction of claims of the firm creditors. Legal entities differ from natural persons and, of course, their property.[132] And this last feature – partitioning of the unified capital of society and personal property of beneficiaries of the enterprise is the main determining element[133] of the idea of legal personality of organizational formation implementing entrepreneurial activities[134] and the example of demonstration of the difference, existing in the process of their establishment, as well as activities and components of fulfillment of their liabilities (responsibility), i.e. functional difference.

2.3. Delegation of Managerial Activities to the Authorized Body

In spite of its legal personality, an enterprise cannot have "personal" relations to the third parties. For the implementation of entrepreneurial activities and obtaining profit it needs to enter into contractual relations with the third parties. For representation of society to third parties as the party to contract, two important elements are distinguished in corporate law, which are mostly characteristic for capital-type society. The first is in establishing document of society,[135] on the basis of which the following are performed: registration of enterprise as individual subject of law, determination of the persons (bodies) which will be granted authority to represent the enterprise in contractual relations – sell

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129 strong entity shielding. Consequently, both elements of shielding is used, priority rule, as well as the rule of protection against liquidation.

130 Weak entity shielding, which is characterized only by the rule of priority of shielding and is characteristic only for partnership-type society, in Georgian reality – society with joint responsibility.

131 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 8

132 at least partially.

133 *Hansmann H., Kraakman R.,* The Essential Role of Organizational Law, Yale Law Journal, 2000, 4.

134 The specified is not an entrepreneurial subject, as the property of society and the property of its partners are delimited in the case of responsibility, which follows from the circumstance, that in partnership-type societies, according to the rule, execution shall be directed towards the property of partnership, and then, after its expiration – towards personal property of partners. See: *Schneeman A.,* The Law of Corporations, 5th ed., 2008, 58-59; *Hansmann H., Kraakman R., Squire R.,* Law and Rise of the Firm, 2006, 2.

135 in statutes. There are two types of document of society: one – which is considered "internal" document of society and which regulates internal organizational activities of the society, and the second, which determines issue of specific information regarding the society to the third parties and its rules, i.e. "external" document. In Anglo- American law the first is called "article of association" and the second – "memorandum". See: *Barber S.,* Company Law, 3rd ed., Old Bailey Press, London, 2001, 8. On establishment of society and phases of establishment in general, see *Burduli I.,* Property Relations in Joint Stock Company, Tbilisi University (publ.), Tb., 2007, 57-101.

and buy certain property, conclude contracts, secured by the property, owned by the enterprise.[136] In corporate law it is called delegation of managerial activities to the authorized body[137], which grants the person, appointed/ elected by the society the authority of representation of the enterprise in relations with the third parties. Managers of the society and owners of the society[138] differ from each other, as the latter can't conclude contracts on behalf of the society.[139] Unlike capital society, in partnership-type societies the authority of acting on behalf of the society is granted to the partners.[140] Such activity shall be limited within the scope of common entrepreneurial activities. If it exceeds the scope of common activities, unanimous decision of all partners is required. Similar ruling is infeasible in JSC due to change of its owners. As a result, the problem in capital society is solved by delegation of authority to one specific body – directorate, which is elected by the shareholders of the society.[141][142] The last issue is one of the elements of functional difference of partnership-type and capital societies, which, in its turn, represents important link of content-related, as well as intention-related difference of legal form, characteristic for societies of such types.

As for the second important element of implementation of managerial activities, which defined essential part of perception of entrepreneurial subject as separate subject of law, in combination with the first element, is the procedural issue. It is related to the authority of society[143] and natural persons, implementing it,[144] to the level of which[145] protection of interests of enterprise in relation with the third

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136 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 7.

137 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 13-14.

138 *Armour J., Gordon J.,* The Berle-Means Corporation in the 21st Century, Working Paper, 2008, 6-25.

139 First fundamental work on separation of the property of owners of society and the property of society and its disposal and control was developed in 1932 by *Adolph Berle and Gardier Means.* See: *Berle A. & Means G.*, The Modern Corporation and Private Property, 1932.

140 But it doesn't exclude that some shareholder has delegated authority for representation of society. The issue refers to general rule, in the case of which, as a rule, shareholder shall not be appointed a director in order to avoid the conflict of interests. Following the best practices of corporate management and alien body concept, it's desirable to delegate authority to the person, independent from the society. For definition of the conflict of interests, which, based on analogue rule, could be applied to entrepreneurial subject operating in non-banking sector, see: Code of Corporate Management for Commercial Banks, Tb., 2009, 25-26.

141 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 13.

142 Distinction is made between one-stage and two-stage systems of management of entrepreneurial society, which manoeuvres with variance and difference of lay systems of different countries. *Tchanturia L., Corporate Management, Tb.,* 2006, 107-146.

143 *Burduli I.,* Property relations in Joint Stock Company, Tb., 2007, 83-89.

144 On competence of corporation and status of legal person you can see one of the first fundamental works of John Dewey: *Dewey J.,* The Historical Background of Corporate Legal Personality, Yale Law Journal, #6, 1926, 655- 673.

145 Finally, activities of any entrepreneurial subject (with the exception of private entrepreneur), in spite of its separated personality, is brought down to natural persons, as "artificial" creature, which doesn't have two important human elements – respect and dignity, needs specific individual, implementing its authorities, as the subject of law, which, in its turn, doesn't weaken the fact of its, as separate subject's existence – simply it is the means of its active involvement in entrepreneurial activities. See: *Ratner S.*, Corporations and Human Rights: A

parties is brought.[146] Protection of interests of the society is required when its rights are violated or it is violating other's rights. Abstract existence of rights doesn't exist in the nature without specific subject, bearing it. If protection of interests occurs, it's the result of violation of exceeding of rights, if the right exists, the subject, bearing it is present, and if the subject, having these rights and obligations exist, it is characterized by legal substance, functional realization of which is carried out on the basis of delegation of authorities. The result is unambiguously clear: the three elements of capital society – entity shielding, managerial authority and its delegation and implementation of procedural issues form the three fundamental bases of determination of separated personality of corporation. They are considered and recognized as the so-called heuristic formula of perception of entrepreneurial entities as separate subject of law.[147] Consequently, legal person[148], which will have the above mentioned three elements, is also used as synonym of separate personality of capital-type society, unlike partnership, which is not fully characterized by the mentioned three elements, so it could be indicated that its status, as legal person, doesn't exist.[149] But it doesn't affect the issue of existence of partnership as a separate subject. Simply this fact distinguishes it from capital-type society, one of the necessary elements of which is the status of legal persons. As a result, content-related difference of JSC from partnership is possible at the very basic elements of their formation- perception as separate subject of law. It establishes clear line of content-related, and consequently, purpose-related difference between their activities following their establishment.[150] Another issue is the extent of their regulation in Georgian corporate law and their systemic order. Implicit will of legislator to show functional difference of their substance on the basis of actual legislative reservation is not sufficient for drawing demarcation line in real economic activities. The will requires explicit manifestation. It should be expressed by introduction of strict categorical

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Theory of Legal Responsibility, 111 Yale L.J. 443, 2001, 2-39. So the authorized person is often referred to as the society's double. See: *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 13; *Barber S.,* Company Law, 3rd ed., London, 2001, 8-9, 51-57.

146 *Barber S.,* Company Law, 3rd ed., London, 2001, 8-9.

147 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 9.

148 Compare: *Dewey J.,* The Historical Background of Corporate Legal Personality, 1926, 656, where he indicates that the "person" shall be used as the synonym of entity, bearing rights and responsibilities.

149 See: *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, note 24, 9.

150 In Georgian Law, partnership-type and capital-type societies operating prior to establishment doesn't actually differ from each other, unless otherwise stipulated by the regulations, which follows the issue of their responsibility, in particular, from p.2 of the Article 2 of the Law "On Entrepreneurs". The difference between partnership and capital societies could be revealed. If the regulations provides for specific reservation characteristic for the society of specific organizations form, the difference between them will be clarified by application of post-registration legal regime to the pre-registration period, e.g. the reservation of the regulations doesn't change the stages prior to and after registration of joint responsibility company following its essence, but if in the case of capital society the parties don't consider granting of managerial authority to commandant and the transaction concluded by him is follows by the responsibility of fulfillment of obligation, it will be the transaction, concluded by the authorized limited partner, to which p.p. 1 and 2 of the Article 37 of the Law "On Entrepreneurs" apply, although this responsibility shall apply according to p.2 of the Article 2 of the same Law. But if there is no such reservation in the regulations, such contract will not produce obligation towards the establisher of the society, as this transaction will be concluded by unauthorized person, which will not represent the transaction, concluded on behalf of the society.

regulations on legislative level. Its objective base is change of direction of legislative policy of the legislator, which objectively reflects on purpose-related difference of entrepreneurial subjects. The result is the achievement of content-related differentiation on the basis of business activities as a result of adequate selection of organizational- legal form of the entrepreneurial subject, exactly specified in market economic relations. Showing of content-related difference of legislative level is the first element of typological delimitation of the scope of their purposeful activities. It is *ex ante* implementation of action, which has prevention effect in regard to *ex post* action, as the latter, in most cases, is deprived of possibility of avoiding economic result, obtained as a result of implemented legal action.

IV. Economic Essence of Capital Society

1. Economic Definition of Personified Essence of Capital Society

Personified essence of capital society is a homogenous formation.[151] Only theoretical- typological consideration of content- related aspect of its law provides incomplete picture in regard to systemic analysis. Its economic analysis is required for approximation to perfection. Without it, it's impossible to judge social (in broad sense) success- failure of organizational- legal forms. It's the social formation and directed towards structuring, analysis of demands of broad masses, their fulfillment through specific enterprise,[152] and, finally, for supply to public, isn't it?![153] Combination of economic and legal analyses will lead to understanding- confirmation of regulatory imperfection of the law, giving wrong direction to economic relations: the criteria of selection of organizational- legal forms, desired and suitable for economic activities, will become understandable.

Generalized purpose of corporate law is provision of service to public interests.[154] The purpose of corporate law often required more specific formulation. In legal aspect, it is brought to the purpose of shareholder's interests and increase of financial profitability.[155] But the economists' vision is different. There is an opinion, that corporation by its nature is a social association, as well as the area of special coordination of economic activities.[156] At the moment of establishment an enterprise is "small", and it grows.[157] It shall attract consumer and investor by "promising" the relevant service and property to

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151 It, through juridical structure, at any time, is achieved on the basis of the will, expressed by certain circle of people (entity) and separation of certain capital from "personal property". In spite of absence of requirement of mandatory capital, implementation of economic essence of JSC would be impossible even theoretically without such capital. On property of society and economic factors, see: *Hansmann H.,* Ownership of the Firm, in: Corporate Law and Economic analysis, Editor Lucian Arye Bebchuk, Cambridge University Press, New York, 1991, 281-313.

152 *Henriques A.,* Corporate Truth, Earthscan, UK, 2007, 33-42.

153 i.e. manufacturing of products and offering of items (goods) to the market.

154 *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 28. Compare: *Pinto A., Branson D.,* Understanding Corporate Law, 3rd ed., 2009, 18-19.

155 shareholder value. *Armour J., Hansmann H., Kraakman R.,* What is Corporate Law? in: The Anatomy of Corporate Law, 2nd ed., 2009, 28-29.

156 *Schrader D.*, The Corporation as Anomaly, Cambridge University Press, New York, 1993, 1, 8-9.

157 *Coase R.,* The Nature of the Firm, Economica, New Series, Vol. 4, No. 16. 1937, 394-398.

them.[158] Corporation, which doesn't act like this, ceases functioning soon. When a society seems successful, satisfaction of investors' and consumers' demands is used for evaluation of its success.[159] Functioning of capital society in economic area is conditioned by proper selection of its establishment – legal form and provision with proper capital, on the basis of which it will perform marketing on the market.[160] Proper determination of the basis of activities indicates to its successfulness, as economic system functions by itself: in addition to human opportunities, demand regulates supply, supply regulates production and all the above mentioned becomes automated and flexible as a result of integration in economic system.[161] But it doesn't mean that it is not planned by individuals. The first stage of planning is correct selection of direction of activities. Management problem arises.[162] Management is related to the activities of the society. The result of successful implementation of activities is satisfaction of investor's and consumer's demands. Investor's interest is increase of personal property, and consumer's interest is the product. Their combination forms economic essence of the corporation. The essence determined function. And content-related aspect of function is bringing of product to production. And the main product of capital society is the share, freely circulating on capital market.[163] But it is loaded by the function of protection of interests of both the consumer[164] and the shareholder.[165] Personified essence of capital society is eventually created by its establishers – shareholders.[166] Consequently, interest is produced by the largest stakeholders of the society[167] -

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158 Definition of "promise" is carried out in establishing documents (statutes) and shares, emitted for trading of stock exchange. See: *Easterbrook F., Fischel D.,* The Corporate Contract, in: Corporate Law and Economic analysis, New York, 1991, 186.

159 *Easterbrook F., Fischel D.,* The Corporate Contract, in: Corporate Law and Economic analysis, Editor Lucian Arye Bebchuk, Cambridge University Press, New York, 1991, 184.

160 *Hansmann H.,* Ownership of the Firm, in: Corporate Law and Economic analysis, New York, 1991, 287-290.

161 *Coase R.,* The Nature of the Firm, Economica, New Series, Vol. 4, No. 16, 1937, 387.

162 which are related to the property and control, also the so-called agency cost, which is one of the important issues in corporate law. See: *Fama E.,* Agency Problems and the Theory of the Firm, in: The Economic Nature of the Firm, editor Louis Putterman, Cambridge University Press, New York, 1987, 196-208; *Hansmann H.,* Ownership of the Firm, in: Corporate Law an Economic analysis, New York, 1991, 289-293; *Berle A, Means G.*, The Modern Corporation and Private Property, 1932; *Armour J., Gordon J.,* The Berle-Means Corporation in the 21st Century, Working Paper, 2008, 1-35; *Jensen M.*, *Meckling W.*, The Theory of the Firm, Journal of Financial Economics, 1976, Vol. 3, No. 4, 308-339. But corporate management doesn't represent economic side of personified essence of capital society, it belongs to juridical category, so its' not discussed here.

163 *Easterbrook F., Fischel D.,* The Corporate Contract, in: Corporate Law an Economic analysis, New York, 1991, 185.

164 Other open JSCs, brokerage companies are implied, which perform profitable manipulations on capital market through purchase and sale of shares.

165 Maximization of shareholder's property could be expressed in the increase of quantitative indictor of shares.

166 because in the case of their formation for the purpose of obtaining of profit and further none of criteria of perception of JSC in personified aspect exist with the exception of the shares existing at their disposal in this society.

167 Juridical literature shares the opinion, that shareholder, as the person with the "greatest" interest is included in the group of stakeholders. In opposition to it, there are approaches, which consider the stakeholders and shareholders to be in different, but one-level group in regard to corporation. See: *Mallin C.*, Corporate Governance, 2nd ed., 2007, 49-55. Stakeholders are the components of capital society like cells for body. In

shareholders. They are the "inspirers" of personification of corporation, but after they create is – which requires their unanimous decision, they can't disintegrate it on the basis of manifestation of individual will. It's the most important characteristic feature of personified essence of capital society.

As already mentioned above, society is created as a small one and then it grows in economic sense. Growth includes increase of capital, as well as property,[168] finally – economic stability of the enterprise. The enterprise, as an aggregate of certain circle of persons, creates association of persons for long period of time, where the function of each individual is delimited. They act together and create tangible property, which they would never achieve separately.[169] Initial unification isn't followed by massive accumulation of material- economic opportunities. The goal of profit is attraction of financial instruments. And it represents the basic economic function of capital society.[170] Its implementation is expressed in gaining by the society of established position on capital market. Only capital society, increase of capital of which depends on access to market and successful functioning, has such opportunity.

Briefly, personified basis of establishment of capital society, together with unification of capital, is one of the most important elements of formation of its economic essence and functioning in proper direction. Achievement of the goal, set by persons is carried out through the selected legal form – legal structure. Bringing to the light of the difference between capital societies themselves[171] is performed in two directions: the first lies in determination of functional border on the basis of content-related difference on the legislative level, which, in our reality, actually exists, but the presence of actual legislative ruling is faded due to lack of development of market economic relations, and second, development of economic relations make their (capital and partnership-type societies') function-related, as well as functional difference clear. In the first of the latter, increase of capital lies in the function of implementation of financial instruments, which is characteristic only for JSC due to the possibility of manipulation with shares.[172] In the second instance the advantages of legal form is implied, which follow from the area of different public demands of their functioning. In particular, JSC is not established just due to legal structure of limited liability, but for entering the broad and "simple path" of attracting capital. In its turn, it's possible to establish LLC, but in the case of selection of this "path" it's impossible to "go through" it.[173] Consequently, the circle of persons, who wish to perform activities in the limited and pre-determined circle of partners[174] in the section of limited liability and which are not based on *personal possibilities,* shall establish LLC. Shortly, in economic activities, function-related

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accordance with complexity theory, "human body is an emergentified organism, which can't be described by means of cells." The similar ruling acts in corporate law too, *Henriques A.,* Corporate Truth, UK, 2007, 36.

168 in juridical sense.

169 It originates from as early as *Adam Smith.* See: *Smith A.,* The Wealth of Nations, 1776, in: *Easterbrook F., Fischel D.,* The Corporate Contract, in: Corporate Law an Economic analysis, New York, 1991, 188.

170 *Easterbrook F., Fischel D.,* The Corporate Contract, in: Corporate Law an Economic analysis, New York, 1991, 187-194. See: *Kiria A.,* Corporative Law System in Georgia, in the book: Collection of Articles in Corporate Law, edited by *I. Burduli,* Tb., 2011, 10.

171 LLC and JSC in Georgian reality.

172 *Burduli I.,* Fundamentals of Joint Stock Law, vol. I, Tb., 2010, 261-271.

173 The way out is in its reorganization.

174 i.e. for small and medium entrepreneurs.

distinction shall be made on legislative level[175] even by introduction of double- taxation regime only for JSC, which would stress its economic function. In the case of both forms, simplicity of establishment[176] is present in the aspect of absence of minimum capital stock. Freedom of establishment doesn't necessarily condition successfulness of attraction of capital in regard to LLC.[177] In any case, together with legislative regulation- liberalization of disappearance of functional demarcation line[178] is not just insufficient development of economic relations and capital market, but actual absence.[179] Finally, it should be concluded that the two criteria, showing the existing difference between capital societies and giving direction – legislative and economic relation criteria separately and simultaneously go past their purpose and as a result, there are typologically non-delineated forms. And "correction" of the first one will create complex basis for overcoming economic stagnation. Besides, one more conceptual analysis could be used for their dogmatic- theoretical delimitation and distinguishing of essence: comparative research of functional difference of personal and partnership-type societies in the aspect of profitability. On the basis of the above mentioned it will be possible to determine which of the partnership and capital society types will be more profitable for implementation of economic activities and why. Other issue is the lack of delimitation of the types themselves, which goes beyond the goals of the article.

V. Relation of Georgian Personal and Capital societies

1. Delimitation of Partnership and Capital Societies on Functional Bases

Unification of enterprises[180] is considered as structural union of management, cost of implementation of managerial activities and property, having material value.[181] It has economic traditions. The cause is the viewpoint of considering of subject, implementing entrepreneurial activities, as economic institution.[182] Which legal form is admissible for entrepreneurial activities?! This question and its answer could become principal basic provision of starting a business and its successfulness.

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175 One such element already exists. In particular, the Law on Entrepreneurs allows the possibility of increase of capital through additional contributions in regard to LLC, which is actually excluded for JSC and it is not allowed by direct reservation on legislative basis, following its functional purpose. But the issue on relation of open and closed LSC and LLC is interesting. See: *Burduli I.,* Legal Result of Non-performance of Contribution, # 1-2, Tb., 2010, 18-58.

176 Lack of development of economic market and liberal approach of legislator also reflects on statistical data existing in Georgia. In particular, as of March 1, 2011, 84 200 LLCs and only 1917 JSCs were registered. See: official website of National Statistical Service of Georgia (Sakstati) <http://www.geostat.ge> [last updated on 12.07.2011]. Compare: *Pinto A., Branson D.,* Understanding Corporate Law, 3rd ed., 2009, 92, note 27; 161-162.

177 See: *Kiria A.*, Corporate Law System in Georgia, in the book: Collection of Articles in Corporate Law, editor *I. Burduli,* Tb., 2011, 16.

178 Amendments and Additions to the Law of Georgia on Entrepreneurs dated March 14, 2008 (# 5913).

179 Statistical data on small number of JSC-s also indicate to the lack of development of capital market.

180 Predominantly by economists.

181 *Jensen M.*, *Meckling W.*, The Theory of the Firm, Journal of Financial Economics, 1976, V. 3, No. 4, 305-360.

182 *Schrader D.*, The Corporation as Anomaly, New York, 1993, 3.

Implementation of choice is also referred to as entrepreneurial transaction.[183] Between personal and capital societies capital society, corporation is given preference.[184] Their functional difference goes along the border of definition of economic activity. And it stands beyond dogmatically established delimitation of partnership and capital societies.[185] In legal aspect the partnership, on contractual basis, can create management, similar to corporation.[186] But on legislative level the organizational form, offered by the legislator, which is predominantly based on partnership-type origins,[187] is brought from contractual to normative level. In particular, commandite of capital society functionally equals to JSC shareholder on the stage of shareholder's responsibility, and full partner(s), participating in managerial activities – to director.[188] This way functional approximation of capital and partnership societies may occur. But what happens when purely partnership-type society is concerned?![189] Functional difference could be divided into several components.

Definition of functional difference in partnership-type societies in the USA begins on the stage of establishment. In particular, if establishment of corporation required drawing up and preparation of official documents, which increases costs of implementation of entrepreneurial activities, similar requirements doesn't apply to establishment of partnership-type society.[190] Unlike the US, in Georgian reality collection of official data, conclusion of agreement and registration of its part[191] is required.[192] I.e. "liberal" approach towards partnership-type society in starting entrepreneurial activities is clear as early as on the stage of establishment. The latter could be explained only in the aspect of granting of legal status of only personal society, which completely contradicts "American idea of liberalization".[193]

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183 *Yale E.,* Defining "Partnership" for Federal Tax Purposes, Tax notes, May 9, 2011, 589.

184 In Shrader's opinion, corporation represents a kind of anomaly for traditional economic theories, as it's a real collective unity, which is characterized by "visible hand" of coordination of economic activities. See: *Schrader D.*, The Corporation as Anomaly, New York, 1993, 7, 156-174.

185 It, basically, includes the ability of turnover of shares on the market, number of establishing partners, chargeability of members, freedom of disposal of shares and limitation of liability. Among them, attention is not focused on the body, implementing management and its structure, duration of activities and taxation environment. In spite of the fact that the members of partnership can form centralized management similar to corporation, the form of management still represents the most important distinctive element in combination with the cost of managerial activities. See: *Ribstein L.,* Why Corporations? Berkley Bus. L. J. 183, 2004, 3-5. It should also be mentioned, that In partnership-type society in the USA limitation of liability is possible, unlike Georgian corporate law, where p.3 of the Article 3 of the Law "On Entrepreneurs" categorically restricts establishment of such limitation in regard to the third parties. See: *Pinto A., Branson D.,* Understanding Corporate Law, 3rd ed., 2009, 7.

186 Society with joint responsibility is implied.

187 Commandite society is implied.

188 Directorate. *Ribstein L.,* Why Corporations? Berkley Bus. L. J. 183, 2004, 1, 12-17. Similar opportunity is provided by Georgian corporate law, as, e.g. the norms of the Law "On Entrepreneurs" which regulate society with joint responsibility, following its dispositionality, provides opportunity for bringing of contractual relation to the foreground.

189 Society with joint responsibility.

190 *Pinto A., Branson D.,* Understanding Corporate Law, 3rd ed., 2009, 6.

191 In the form of registration application.

192 As a result, cost of establishment of societies of both types becomes proportional, because legal assistance is required for drawing up the documents, and it doubles the costs of establishment.

193 Liberalization of business lies in action, directed towards maximization of profit; just for this reason, the increase of the cost of its starting contradicts free entrepreneurial activities.

The next method of expression of functionality follows the condition and specificity of entrepreneurial activity. In its turn, each of them could be divided into sub-elements. Determination of condition is possible into two directions. The first, when "unique" mutual trust of partners is concerned in regard to giving form through legal form of the established entity. It is characteristic for partnership-type society. The second concerns an enterprise, formed in the basis of coincident will, as well as unification of capital of partners. According to their quantitative indicator – together with forming criteria – the relevant legal form is selected for starting business activities. As for specificity, it should be considered in legal- economic aspect. The former should ensure regulation of specific entrepreneurial relations on legislative level, for which specific legal form is determined based on the principle "*numerus clauses"*.[194] The latter, i.e. economic aspect determines the scope of economic activities. In particular, partnership, as a rule, is established for provision of professional services like law, medicine, accounting, management consulting and advertising business. Unlike it, corporation is basically established for factories, technological development and other industrial activities and services.[195] The main thesis of their delimitation lies in the essence of activities, and, consequently, functional goals. Where human capabilities prevail in rendering services, preference is given to partnership. In other cases its establishment is less effective and capital society dominates.

The third criterion lies in their purpose. It relates to partners. Obtaining of profit by partnership is equally important for all partners due to the prospect of equal distribution among them, and in the case of capital society the society makes decision for increase of tangible property of the firm, distribution of which becomes different due to difference of shares. Just this way of distribution provides fewer stimuli to partnership, as compared with corporation, to increase the quantity of work power or partners.[196] Besides, out of partnership and capital societies having equal capabilities, partnership-type society can provide service of much higher quality than corporation. The latter depends on the level of control of market relations – if market control is high, functioning of partnership is checked against the quality of service provided to the client; following the essence of partnership, which provides for obtaining profit for partners, the quality of service, together with market control, offers service of much less level than a corporation, aiming towards the increase of profit. And it causes improvement of quality of the service rendered by capital society.[197] Briefly, if the level of market control is sufficiently reliable, corporations function better than partnerships. But if such control is insufficient, partnership becomes much more profitable.[198][199]

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194 E.g. if separate normative documents, regulating partnership-type societies indicate that the persons who will unify for starting lawyer's activities, have to form only Society with joint responsibility, following the essence of specific intellectual service of the activities, it shouldn't be regarded as limitation of entrepreneurial freedom in the aspect of selection of legal form, but it shall be considered as the type of regulation of function-related difference between partnership and capital societies, which is the basis for outlining the difference of economic functioning between them.

195 *Tadelis L.,* A Theory of Partnerships, working paper 244, 2002, 1.

196 The above mentioned was first revealed by Benjamin Ward in 1958. Reference: *Tadelis L.,* A Theory of Partnerships, working paper 244, 2002, 2.

197 Unlike partnership, where, as a rule, professionals are unified following specific essence of activities. But, in the case of improper market control, client could be unable to determine the quality of service, provided by partnership for years. See: *Tadelis L.,* A Theory of Partnerships, working paper 244, 2002, 2.

198 Complete economic analysis of the above mentioned, See: *Tadelis L.,* A Theory of Partnerships, working paper 244, 2002, 4-29.

Finally, there is a result, which is based on several criteria. Liberal legal political will of staring activities on legislative level doesn't reveal on the level of calculation of establishment. Lack of development of capital market and economic relations leaves the method of determination of functional differentiation of entrepreneurial activities, like qualitative and quantitative indicators of business, beyond the borders of definitions. Purpose-related clarification of technological difference is based o legal-economic definition of capital societies. Georgian legal reality doesn't ensure the relevant legal regulation. On the contrary, t determines only conditional border by placing legal forms of societies having two different substances and purposes in one normative document, which forms the basis for de-stimulation for economic relations. Logical connection is reflected on economy, which is expresses on fading of their functional, as well as purpose-related difference. Nevertheless, primary method of demonstration of difference of content and purpose lies in increase of economic demands, which will clarify the imperfection of organizational form offered by the legislator itself and will turn into the factor, stimulating preparation of the package of changes.

VI. Conclusion

The differentiation of entrepreneurial subjects is in the basis of their formation. Partnership formed according to personal feature is opposed by capital society, formed according to unification of capital and persons. In modern corporative law, growing economic environment is the basis of this opposition. And economic demand required "supply" of legal regulation.

Theoretical delimitation of entrepreneurial subjects in practical aspect in expressed on reflection of legislative level. Theoretical-analytical review of legislative regulation of organizational forms represents the method of clarification of their origination- establishment and personified personality. On the basis of this, the absence of delimitation of the fundamentals of formation of partnership and capital societies on the normative level became clear, which produces complex problems in the moment of imposition of responsibility in judicial practice, whereas the similar judicial practice doesn't exist in Georgian reality. Placement of partnership and capital societies in one normative document became the basis for the defect of the form and content of the Law on Entrepreneurs. Nevertheless, it doesn't and can't change historical, sociological and corporate- legal difference between them. It would be artificially created lapsus, created by avoiding dogmatic delimitation of entrepreneurial subjects. Less justifies is the opinion, that the border between these two types of societies is erased and only the terms differ them. Erasing of border means changing of purposefulness, which is excluded: it's impossible for the legislator to reflect systemic difference of practical, functional or purposeful essence by legislative regulation without the relevant economic conditions. Regulation by one normative document, in its turn, is an invalid criterion of delimitation of their content and purpose. Besides, from practical point of view, there is really conditional border between them. But it has explanatory- specifying factors. In particular, if we assume that the criterion of personal feature, society, created as a result of unification of personal

[199] In spite of improper market control in Georgia, the picture is opposite: the number of capita societies is much higher than that of partnership societies, The above mentioned could be explained: their functional-purpose-related confusion occurs due to improper economic relations, in addition to legal regulatory faultiness.

feature and capital goes along their common goal – the goal of obtaining profit, we'll arrive to absence of difference of content and purpose between them. But if we consider their determining factors, continuing by revision of their functioning and finishing by analysis of implementation of either corporate or civil law actions on capital market, practical picture of dogmatic-theoretical delimitation of partnership and capital societies will be outlines: difference in the section of stock exchange by means of functional loading. As a result, several theses of solution of the mentioned issue could be formed:

1. Normatively regulated legal basis of entrepreneurial subjects shall be changed for elimination of the existing conditional border between them. It could be achieved by changing of approach of legislative regulation towards partnership and capital societies. Present-day corporate law includes well-ordered legal regulation of the societies of these two types in separate normative regulations, which makes clear their practical purpose in regard to content-related and functional bases. Consequently, they shall be regulated in separate documents.
2. Legal status of partnership society, as a legal person, doesn't lie in defectiveness of definition provided in Civil Code. It follows the above mentioned justification of existence of "personal" property of partnership-type society. The last element doesn't fade the difference between partnership and capital societies, but stresses the content of partnership society by introducing the criterion of personal responsibility in it.
3. The five-element dogmatic delimitation, established among entrepreneurial subjects shall clarify, through practical manifestation, legal difference between partnership and capital societies which is separate basis for determination of their functional and, correspondingly purpose-related difference.
4. Outlining of functional- content-related difference by means of the relevant legal regulation in different normative documents will facilitate making of choice of the relevant organizational form by persons, starting entrepreneurial activities.
5. Selection of the relevant organizational form is still "conditional" verge for outlining of economic functional difference between partnership and capital societies. Their purpose is determined by practical applicability, the basis of which is not only the lack of development of capital market, by economic development of the country. In addition to validity of legal regulation, invigoration of economic situation will become the primary source of making proper choice of different organizational-legal form following the specificity of various activities. As a result, function-related and as well as content-related and functional differentiation will find complex reflection in legal- economic section, which will provide well-reasoned answer to the frequently asked and equivocal questions - "un-certainty" in regard to indifferent regulation and purpose of partnership and capital societies, which will be based on really existing and not abstractly assumed results of implementation of entrepreneurial activities. It will eliminate the existing dualistic attitude of legislator toward entrepreneurial subjects. Briefly, dogmatic- theoretical delimitation of entrepreneurial subjects in Georgian corporate law through determination of normative border shall be based on improvement of the form and content of the Law on Entrepreneurs in unity with invigoration of economic policy and environment.

NATIA CHITASHVILI[*]

HARDSHIP AND IMPOSSIBILITY OF PERFORMANCE ARISING FROM CHANGED CIRCUMSTANCES

(Comparative Legal Analysis of German and Georgian Law)

I. Introduction

The principle of contract supremacy - *Pacta sunt servanda*[1] - is a founding concept of every legal order[2], a fundamental concept[3] of a contract law that sets imperatively the compulsory nature of compliance with contract conditions to ensure the stability of civil turnover and equilibrium of contract. Legitimate contractual interest of performance of obligation, in terms of legal protection is a special merit of any legal system. "It is one aspect of the notion of individual autonomy... It is a prerequisite of the freedom of contract [wherewith] freedom of contract corresponds with responsibility.[4]

Unlimited application of the principle of the sanctity of contracts may condition the infringement of fairness, expediency and good faith principles[5] in case of the emergence of changed circumstances in contractual relations, which is typical risk for and an accompanying phenomenon of civil turnover. In the course of contractual relationship pre-determined circumstances by the parties may change in a way as to have significant impact on the binding nature of an obligation. [6]

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1 See: *Surhone L.M., Timpledon M.T., Marseken S.F.,* Pacta Sunt Servanda: Brocard, Civil Law, Contract, Clause, Law, Good Faith, Peremptory Norm, Clausula Rebus Sic Stantibus, Betascript Publishers, 2010, passim; *Houtte H.V.,* Changed Circumstances and Pacta Sunt Servanda: *Gaillard* (ed.), Transnational Rules in International Commercial Arbitration (ICC Publ. Nr. 480,4), Paris, 1993, <http://tldb.uni-koeln.de/ TLDB.html>; *Zimmermann R.,* The Law of Obligations, Roman Foundations of the Civilian Tradition, Oxford University Press, 1996, 576-581; *Sharp M.P.,* Pacta Sunt Servanda, Columbia Law Review, Vol. 41, 1941, passim,<http://heinonline.org/HOL/Page?handle=hein.journals/clr41&div=55&g_sent=1&collection=journals>;

2 In Common Law the *Doctrine of Consideration* corresponds to *Pacta sunt servanda,* a basic principle of Continental Law. See: *Hyland R.,* Pacta sunt servanda, A Meditation, Virginia Journal of International Law, Vol. 34, 1994, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/vajint34&id= 417>.

3 *Candelhard R.,* Actual Performance or Compensation for Damages: International Consensus? Anniversary collection "Sergo Jorbenadze – 70", Tb., 1996, 103 (In Georgian).

4 *Hondius E.H., Grigoleit H.Ch.,* Unexpected Circumstances in European Contract Law, Cambridge University Press, New York, 2011, 4.

5 *Baranauskas E., Zapolskis P.,* The Effect of Change in Circumstances on the Performance of Contract, Mykolas Romeris University, 4(118), 2009, 198, <http://www.mruni.eu/lt/mokslo_darbai/jurisprudencija/archyvas/dwn.php?id=226657>.

6 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Commentary on the Civil Code of Georgia, General Part, Tb., 2001, 399 (In Georgian).

Changed circumstances, in general, give rise to[7] two founding, basic concepts of force majeure (in Roman Law – *vis major*) and hardship, with respective legal consequences. Namely, hardship implies that the performance of objectively fulfillable obligation has become extremely onerous which objectively does not rule out the possibility of performance and when the primary legal protection means is adapting a contract to changed circumstances; while force majeure (impossibility of performance) is based on different legal prerequisites that envisages exemption from obligation of performance as an accompanying legal outcome. [8]

The paper will review hardship in connection with an opposite concept of impossibility of performance on the basis of which correspondence of these two legal institutions will be identified at the example of German and Georgian legislation.

Hardship and impossibility of performance are closely related concepts[9]. It is often very difficult to establish their mutual dependence. Especially that the impossibility of performance does not comprise only the cases of absolute, objective impossibility cases. Respectively, it is necessary to determine the difference which forms the scope of responsibility in the presence of impossibility of performance and hardship. It is important which legal preconditions mark boundaries between hardship as a basis for adapting contract to changed circumstances and the impossibility of performance as the basis for exemption from the performance of obligation, where is the line between the freeing from the obligation to perform and adapting a contract to changed circumstances, in which changes of circumstances the parties can retain a contract – by way of adapting thereof to changed circumstances and in which cases it is justified to free a debtor from contractual binding.

The present study is dedicated to the analysis of the very concepts from dogmatic legal and comparative legal standpoint.

II. Analogous Concepts of Hardship and Force Majeure in German and Georgian Law

In Georgian law problems related to changed circumstances are not regulated under the concepts with the name of force majeure and hardship. Although, legislation envisages regulation of essentially similar legal concepts under the name of insurmountable force, faultless impossibility of performance and changed circumstances.

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7 *Lando O.,* Salient Features of the Principles of European Contract Law: A Comparison with the UCC, Pace International Law Review, Vol. 13, Issue 2, 2001, 27, <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1214&context=pilr>; *Horn N.,* Changes in Circumstances and the Revision of Contracts in some European Laws and International Law, in: *Horn N.* (ed.), Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985, 16, <http://www.trans-lex.org/create_pdf.php?docid=113700>.

8 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 483, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

9 UNIDROIT (Institut International pour l'Unification du Droit, UNIDROIT. From the 6th official commentary to Article 6.2.2 of UNIDROIT Principles of International Commercial Contracts, in: Uniform Law Review, 2004 (hereinafter UNIDROIT Principles) it can be identified that often these principles come so close the each other that it is up to a disadvantaged party as to which means for legal protection to use.

Neither the German law contains a concept with the name of force majeure although civil legislation of Germany sets forth the most general principle that relates contractual obligation for the breach of obligation to a debtor's fault, the presence of negligence, as a minimum, provided strict responsibility (guarantee) has not been agreed upon[10] or to be inferred from the other subject matter of the obligation.[11] Respectively, in accordance with the German law, the responsibility for the breach of obligation is excluded provided the impediment is beyond the control of a party and party will not be held responsible even for negligence towards breach of obligation[12]. The mentioned rule of responsibility corresponds to legal consequences of force majeure.

Therefore, although German law does not contain force majeure concept but identical legal consequence is achieved by an institution with a different name. Namely, faultless impossibility of performance establishes legal outcomes of force majeure – excusing from fulfilment of the obligation with the exclusion of the right to demand compensation for damages.

As for the concept of hardship in German law it is implied under the economic impossibility concept.

Considering the above-mentioned the most general term of hardship will be used in the paper to express the extreme onerous performance of obligation while force majeure will be referred to as the impossibility of performance which is very common to German and Georgian legislation.

III. Legal Importance and Historical Genesis of Changed Circumstances

The issue of binding force of a contract during the existence of changed circumstances is the most important from legal abstraction as well as practical standpoint.

Legal importance of the study of the institution of changed circumstances is closely related to the issue of performance of obligations since "these new circumstances have an impact on further destiny of obligations and the scope of the responsibility of parties."[13] In every legal system of contemporary world performance of obligations is one of the most important institutions of the Contract Law. [14]

Performance is a fundamental element of contract law relationship towards which the performance of counter rights and obligations of the parties is directed. The fundamental importance of performance of obligations is also demonstrated by the fact the contract law in the Civil Code of Georgia[15] (hereinafter – CCG) starts with the following words: under the obligation a creditor is authorized to demand from a debtor to perform certain action. Performance is the "subject of obligation relationship"[16]. Close relationship of changed circumstances with the performance of obligation as an institution of central importance raises scientific value of the topic under research and increases the interest of study.

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10 *Horn N., Kötz H., Leser H.G.,* German Private and Commercial Law: An Introduction, 1982, 93, 112.

11 GCC (German Civil Code - Bürgerliches Gesetzbuch, Bundesministerium der Justiz, Juris GmbH, Saarbrücken, 2005) §276 I.

12 *Horn N., Kötz H., Leser H.G.,* German Private and Commercial Law: An Introduction, 1982, 93, 112.

13 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Commentary to the Civil Code of Georgia, Chapter III, Law of Contracts, General Part, Tb., 2001, 399 (In Georgian).

14 *Dzlierishvili Z.,* Performance of Obligation, Tb., 2006, 12.

15 Parliamentary Bulletin of Georgia, Legislative Supplement, July 24, 1997, No 31.

16 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Commentary of the Civil Code of Georgia, Book III, Law of Contracts, General Part, Tb., 2001, 28 (In Georgian).

The importance of changed circumstances was recognized back by the lawyers of canonical law who did not regard the breach of a condition in case of the emergence of unforeseen changed circumstances contrary to law[17]. The doctrine of changed circumstances was explained through Aristotle's theory of equality of rights according to which circumstances could arise following the enactment of the law in the presence of which a legislator, from the standpoint of equality of rights would deem steady compliance with law unreasonable[18]. The doctrine of changed circumstances was reflected also in the works of Thomas Aquinas, scholastics, lawyers of natural law.

Although the principle of the supremacy of contract is a guarantor for maintenance of legal stability it has been demonstrated in practice that often its unlimited use can be counterproductive[19]. Although, *pacta sunt servanda* is considered a fundamental principle of the law of contracts but to force a debtor irrespective of any changed circumstance to perform obligation would be unreasonable and fatal to international trade turnover, while contract as a legal transaction would lose its significance[20].

Subsequent to globalization in the conditions of complicated civil turnover the principle of supremacy of contract came to face great challenge. To resolve legal issue of changed circumstances arisen in contractual relations *clausula rebus sic standibus*[21] doctrine[22] coming from canonical law came to have significant place in legal doctrine as an alteration of the *pacta sunt servanda*[23] and its exception[24]; it recognizes the binding force of a contract only in the case of stable circumstances.[25]

Historically concept of *clausula rebus sic standibus* found its way into eighteenth century codifications of private law, but was subsequently criticized because of its vagueness and lack of certainty. Not surprisingly, therefore, the *clausula* doctrine fell into oblivion in the late 18th and the 19th

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17 *Gratian,* Decretum*,* C.22, q.2, c.14, cited in: *Gordley J.,* Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment, Oxford University Press, New York, 2006, 347.

18 *Aquinas T.,* Summa Theologiae II-II, q, 88a.10; q.89, a.9, cited in: *Gordley J.,* Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment, Oxford University Press, New York, 2006, 347-348.

19 *Liu Ch.,* Changed Contract Circumstances, 2nd edition, 2005, <http://www.cisg.law.pace.edu/cisg/biblio/liu5.html>.

20 *Lindström N.,* Changed Circumstances and Hardship in the International Sale of Goods, Nordic Journal of Commercial Law, Issue 1, No.1, 2006, 2, < http://www.njcl.fi/1_2006/commentary1.pdf>.

21 For more detail see: *Pichonnaz P.,* From Clausula Rebus Sic Stantibus to Hardship: Aspects of the Evolution of the Judge's Role, A Journal of Legal History, Vol. 17, Issue 1, 2011, 125-143, <http://www.sabinet.co.za/abstracts/funda/funda_v17_n1_a6.html>; *Gordley J.,* Impossibility and Changed and Unforeseen Circumstances, American Journal of Comparative Law, 2004, 513-530, <http://www.cisg.law.pace.edu/cisg/ biblio/gordley1.html>.

22 This principle was known back to the glosators of the early medieval times. Grocius and Pufendorf followed it. It was stipulated also in the 1756 Maximiliane Code and in 1794 Local Codes of Prussia. See: *Zweigert K., Kötz H.,* Introduction to Comparative Law in Field of Private Law, Tome II, Tb., 2001, 210 (In Georgian).

23 *Lando O.,* Salient Features of the Principles of European Contract Law: A Comparison with the UCC, Pace International Law Review, Vol. 13, Issue 2, 2001, 27, <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1214&context=pilr>.

24 *Liu Ch.,* Changed Contract Circumstances, 2nd edition, 2005, 30, <http://www.cisg.law.pace.edu/cisg/biblio/liu5.html>.

25 *Baranauskas E., Zapolskis P.,* The Effect of Change in Circumstances on the Performance of Contract, Mykolas Romeris University, 4(118), 2009, 198, <http://www.mruni.eu/lt/mokslo_darbai/jurisprudencija/ archyvas/dwn.php?id=226657>; *Zimmermann R.,* Roman Law, Contemporary Law, European Law, The Civilian Tradition Today, Oxford University Press, 2001, 80.

centuries: the heyday of "classical" contractual doctrine when freedom of contract, economic liberalism and certainty of law reigned supreme.[26]

Nineteenth century liberalism, which accorded absolute priority to party autonomy and thus to the literal contents of a contract, either set aside the *clausula rebus* concept or sharply reduced its influence in most civil law countries. The rule that the will of the parties as freely expressed in their contract is the law of the parties and must not be changed by the courts, became the leading principle of contract law.[27]

In our times, a backswing in legal thinking can be observed under the influence of the ideas of good faith and equity, contract law abandoned the doctrine of absolute obligations and legal systems started to provide for the discharge of one or both parties when a contract becomes impossible to perform.[28]

IV. Regulation of Hardship and Impossibility of Performance in the Civil Code of Germany

„Every legal system envisages changed circumstances when determining the matter of further performance of obligations." [29] In the regulation of the matter through various modifications each legal system often demonstrates conceptually different approaches. German law is characterized by distinguished and interesting regulation in this regard that has had an impact also on the formation of common law institutions.[30]

The interest towards study of German law is conditioned also by the fact that the German doctrine, starting from the 19th century to date, appeared to be so perfect that it became a theoretical source not only for German legislators, but also to other peoples, among them, the Georgians. Abstract manner of legal thought specific to this doctrine fit well with Georgian consciousness.[31]

Further, CCG corresponds to the Law of Pandect system[32] and is mainly focused on the German Civil Code[33] (hereinafter GCC[34]) when regulating specific law institutions.

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26 *Liu Ch.,* Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL, 2003, 296, <http://www.jus.uio.no/sisu/remedies_for_non_performance_perspectives_from_cisg_upicc_and_pecl.chengwei_liu/portrait.letter.pdf>.

27 *Horn N.,* Changes in Circumstances and the Revision of Contracts in some European Laws and International Law, in: *Horn N.,* (ed.), Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985, 17, <http://www.trans-lex.org/create_pdf.php?docid= 113700>.

28 *Liu Ch.,* Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL, 2003, 296, <http://www.jus.uio.no/sisu/remedies_for_non_performance_perspectives_from_cisg_upicc_and_pecl.chengwei_liu/portrait.letter.pdf>.

29 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Commentary to the Civil Code of Georgia, Chapter III, Law of Contract, General Part, Tb., 2001, 399 (In Georgian).

30 *Riesenfeld S.,* The Impact of German Legal Ideas and Institutions on Legal Thought and Institutions in the United States in the Reception of Continental Ideas in the Common Law World (*Reimann M.,* ed., 1993), 1820-1920, 89, 95-96 .

31 *Surguladze Iv.,* Government and Law, Translated from German and introductory notes included by *O. Gamkrelidze,* Tb., 2002, cited in: *Zoidze B.,* From the History of Creation of the Civil Code of Georgia, Journ. "Georgian Law Review", 6/2003-1, 90 (In Georgian).

32 *Chanturia L.,* Introduction in General Part of the Civil Law of Georgia, Tb., 2000, 82 (In Georgian).

33 *Chachava S.,* Comparative analysis of secondary rights of a buyer, Georgian Law Review, Special Edition, 2004, 35 (In Georgian).

1. Hyperinflation in Germany and the Emergence of the Oertmann Theory

Under the influence of the principle of the supremacy of a contract *clausula rebus sic standibus* was not included in civil legislation of Germany[35]. Representatives of general German common law sciences rejected the mentioned principle. They considered it vague and thought that this principle prevents the maintenance of legal stability.[36]

Despite the afore-mentioned German law could not bypass legislative regulation of the changed circumstances which necessity was demonstrated by the WW1[37] which resulted in destructive economic consequences in Germany[38]: Weimar Republic suffered hyperinflation,[39] prices increased sharply compared to the pre-war period which made performance of long-term contracts economically detrimental for debtors.[40] Inflation conditioned extreme imbalance between supply and payment, i.e., services and reimbursement.[41]

In 1919 several owners of the plant sold their shares. The handover of property took place on January 1, 1920 for half of the purchase price. The payment of the remaining amount was to take place in the first months of 1921. At the beginning of 1920 purchasing power of currency fell by 80%. Amount payable by a debtor significantly no longer corresponded to the performance of a creditor. Although, a buyer demanded performance adequate to an agreement according to original conditions prior to the devaluation.[42]

To offset the results of the devaluation of currency the High Court of Germany (*the Reichsgericht – RG)* turned to the doctrine of the impossibility of performance. Namely, it developed the concept of

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34 GCC - German Civil Code - Bürgerliches Gesetzbuch, Bundesministerium der Justiz, Juris GmbH, Saarbrücken, 2005.

35 *Hondius E.H., Grigoleit H.Ch.,* Unexpected Circumstances in European Contract Law, Cambridge University Press, New York, 2011, 62; *Schlechtriem P.,* The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe, Oxford U Comparative L Forum 2, 2002, <http://ouclf.iuscomp.org/articles/schlechtriem2.shtml#fn1sym>.

36 *Zweigert K., Kötz H.,* Introduction to Comparative Law in the Field of Private Law, Tome II, Tb., 2001, 201 (In Georgian).

37 *Backhaus R.,* The Limits of the Duty to Perform in the Principles of European Contract Law, Vol. 8.1, 2004, <http://www.ejcl.org/81/art81-2.txt>.

38 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 491, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

39 *Renner Sh.,* Inflation and the Enforcement of contracts, Edward Elgar Publishing, Cheltenham, 1999, passim; *Holtfrerich C.L.,* The German Inflation 1914-1923, Berlin: *Gruyter W.D.,* 1986, passim; *Ringer F.K.,* The German Inflation of 1923, New York, Oxford University Press, 1969, passim; *Laursen K., Pederson J.,* The German Inflation 1918-1923, Amsterdam, North Holland Pub. Co., 1964, passim.

40 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 79.

41 *Säcker F.J.,* The Transition from German to European Civil law – Effective Competition, Fairness and Reasonableness and Consumer Protection as New Principles of a Modern Social Civil Law in Europe, 3, <http://web. fu-berlin.de/iww/downloads/china/peking_09_03_the_transition.pdf>.

42 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 491, < http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=1154004>.

practical impossibility which is based on the emergence of an impediment and envisages unreasonably high costs for the performance of obligation.[43]

Court started to invoke the rule of the exemption from obligation to implement the rule set for absolute impossibility in relation to relative impossibility, indicated Article 275 I of the GCC regulating impossibility of performance as the ground for exemption from contractual obligation thereby extending the scope of the concept of impossibility of performance also to the case of extreme complication.

Thus, in pre-reform legislation the norm that regulated absolute impossibility of performance applied to a case of extreme hardship regardless of whether there was absolute or practical impossibility.[44]

Although, the judges found it hard to resolve the problem of relative impossibility on the basis of this vague and inexact criterion, by using norms regulating absolute impossibility.[45] For example, to regulate the issue of relative impossibility Larenz deemed it reasonable to use the principle of good faith (Article 242 of the GCC) instead of Article 275 of the GCC.[46]

Considering existing social-political situation German scientists developed a number of theories. For example, *Windscheid* developed the theory of the "Contractual Presumption" *(Lehre von der Voraussetzung)* that was criticized on the grounds that one-sided motifs cannot be treated as conditions until they are envisaged in the contract.[47]

The theory of interference with the basis of the transaction or collapse of the basis of the transaction (*Wegfall der Geschäftsgrundlage)* suggested by *Oertmann* appeared to be the most acceptable among existing doctrines.[48] The precondition for the use of the above-mentioned doctrine is the presence of a substantial change of those contractual circumstances on which the parties originally founded a contract and in the new conditions it is not reasonable to demand from a debtor the performance of obligations in the original way. The conditions determined as fundamental conditions of a contract are facts deemed by the parties as evidences, their perceptions at the stage of the conclusion of a contract that form the basis for the contract purpose of parties.[49]

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43 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 487-488, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1154004>.

44 *Zimmermann R.,* Breach of Contract and Remedies under the New German Law of Obligations, Saggi, Conferenze e Seminari 48, Roma, 2002, 15, <http://www.cisg.law.pace.edu/cisg/biblio/zimmerman.html>.

45 *Enneccerus L., Lehmann H.*, Derecho de Obligaciones*,* 241, 1966, cited in: *Oliveira N.M.P.,* The German Act to Modernize the Law of Obligations as a Model for the Europeanization of Contract Law? The New Rules Regarding Impossibility of Performance from the Perspective of a Portuguese Lawyer, Electronic Journal of Comparative Law, Vol. 11.4, December 2007, 2, < http://www.ejcl.org/114/art114-2.pdf >.

46 *Larenz K., Lehrbuch des Schuldrechts. Allgemeiner Teil,* 14th ed., 1989, *supra note 2, at* 320, cited in: *Oliveira N.M.P.,* The German Act to Modernize the Law of Obligations as a Model for the Europeanization of Contract Law? The New Rules Regarding Impossibility of Performance from the Perspective of a Portuguese Lawyer, Electronic Journal of Comparative Law, Vol. 11.4, December 2007, 2, <http://www.ejcl.org/114/art114-2.pdf>.

47 *Zweigert K., Kötz, H.,* Introduction to Comparative Law in the Field of Private Law, Tome II, Tb., 2001, 211 (In Georgian).

48 Unlike *Windscheid's* theory, in accordance with the *Oertmann* theory, ideas about future development of events must belong not only one of the parties but must be shared by both parties. See: *Zweigert K., Kötz H.,* Introduction to Comparative Law in the Field of Private Law, Tome II, Tb., 2001, 213 (In Georgian).

49 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 488, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

Respectively, in 1922 the court deemed it ungrounded to apply the provisions regulating hardship for the cases of extreme hardship cases.[50] The court, due to the absence of a relevant provision in the GCC for the first time relied on the concept of economic impossibility[51] and in the decision of 1923 on the above-mentioned case guided with the principle of substantial change of contractual circumstances and based it on the doctrine about the grounds of a transaction (*Geschäftsgrundlage*)[52] developed by *Oertmann* in 1921 and the good faith principle stipulated under Paragraph 242 of the GCC.[53] A number of private law institutions were formed and developed over the centuries on the basis of the "good faith provision".[54] The principle of good faith is also considered to be the basis for the German doctrine – *Geschäftsgrundlage*.[55]

Court deemed devaluation of currency as an unforeseeable and fundamental change of contractual circumstances in case the contract price and equivalency of performance is considered or determined as an essential condition by the parties. Adapting a contract to changed circumstances requires substantial and not regular change in contract price which is an attendant occurrence of civic turnover. In the latter case inflation risk is to be borne by a debtor.

Thus, the court created a precedent of adapting a contract to changed circumstances and set forth the termination of contract only in the cases when it is unreasonable and unjustifiable to demand from the parties to maintain contract.[56]

From 1923 the doctrine of interference with the basis of a transaction was used more and more often for determining the matter of binding force of a contract in case of impracticability of performance in Germany. When unforeseen circumstances significantly disturbed the balance of parties' interests and contractual equilibrium judges on the basis of the mentioned doctrine referred to termination of the contract or adaptation it to the changed circumstances.

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50 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 488, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

51 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 491, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

52 Effect of Inflation in *Zimmermann R., Whittaker S. (eds.),* Good Faith in European Contract Law, Cambridge University Press, Cambridge, 2000, 557-558.

53 RG 03.02.1922, RGZ 103, 328; 27.06.1922, RGZ 104, 394-402. See: *Tallon D.* in a book: *Beale H., Kötz H., Hartkamp A., Tallon D.(*eds.), Cases Matrerials and Text on Contract Law, Hart Publishing, Oxford and Portland, Oregon, 2002, 631-633; RG 03.02.1922, RGZ 103, 328, See: *Lipstein K.* in a book: *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 797-798; 15.12.1941, RGZ 168, 121, 126; *Musy A.M.,* The Good Faith Principle in Contract Law and the Pre-contractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures, December 2000, 5, <http://www.icer.it/docs/wp2000/Musy192000.pdf>.

54 *Kereselidze D.,* The Most General Systemic Concepts of the Private Law, Tb., 2009, 84.

55 *Oliveira N.M.P.,* The German Act to Modernize the Law of Obligations as a Model for the Europeanization of Contract Law? The New Rules Regarding Impossibility of Performance from the Perspective of a Portuguese Lawyer, Electronic Journal of Comparative Law, Vol. 11.4, December 2007, 2, <http://www.ejcl.org/114/art114-2.pdf >.

56 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 492, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

Thus, the concept of interference with the basis of contract as a sample of precedent lawmaking was developed by court and thereby paved the ground for a legislative reform that will be reviewed in detail in the following chapters.

2. Reform of the Law of Contracts and the Results of Conceptual Perfection

2.1 Main Directions of the Reform

The contract law reform implemented in 2002 in Germany is considered to be the most fundamental reform of the Code since the date of enactment of the German codification (January 1, 1900)[57].

First, in 1992 the legal reform commission established in 1984 by the Ministry of Justice of Germany published recommendations on the reforming of contract law. The mentioned recommendations were significantly based on the United Nations Convention on Contracts for the International Sale of Goods (April 11, 1980)[58] (hereinafter – the Convention on Sale of Goods) and draft of UNIDROIT Principles of International Commercial Contracts. The reform ended on November 26, 2001 by enactment of the Law on Modernizing of the Law of Contracts[59] which entered into force on January 1, 2002 on the 102th year from the enactment of GCC. [60]

The scope of the reform[61] comprised the regulation of significant legal problems: substantial changes were made in terms of the implementation of EU directives, in the areas of the limitation periods and the protection of customer rights. New regulation was introduced for the matters of the breach of obligation, sales contract and performance of work.[62]

Although the reform was not conditioned only by the provisions of the EU law, it regulated the problems of the hardship and impossibility of performance as well.[63] Since one of the objectives of the

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57 *Zimmermann R.*, Breach of Contract and Remedies Under the New German Law of Obligations, Saggi, Conferenze e Seminari 48, Roma, 2002, 1, <http://www.cisg.law.pace.edu/cisg/biblio/zimmerman.html>.

58 *Schlechtriem P.,* Uniform Sales Law-The UN-Convention on Contracts for the International Sale of Goods, < www.law.pace.edu/cisg/text/treaty>.

59 Gesetz zur Modernisierung des Sculdrechts, Vom 26.11.2001, verkündet in Jahrgang 2001 Nr. 61 vom 29.11.2001, <http://www.rechtliches.de/info_Gesetz_zur_Modernisierung_des_Schuldrechts.html>.

60 About reforms see: *Zimmermann R.*, Breach of Contract and Remedies under the New German Law of Obligations, 2002, 1-5, <http://www.cisg.law.pace.edu/cisg/biblio/zimmerman.html>.

61 In relation to the mentioned issue see: *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 382-392; *Vogenauer S., Weatherill S.* (eds.), *Zimmermann R.,* Contract Law Reform: The German Experience, Hart Publishing, Oxford, 2006, 71-87, cited in: *Vogenauer S., Weatherill S. (eds.),* The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice (Studies of the Oxford Institute of European and Comparative Law), Hart Publishing, Oxford, 2006; *Zimmerman R.,* The New German Law of Obligations: Historical and Comparative Perspectives, Oxford University Press, 2005, 30, <http://fds.oup.com/www. oup. co.uk/pdf/0-19-929137-3.pdf>; *Löwisch M.,* New Law of Obligations in Germany, Ritsumeikan Law Review, No. 20, 2003, <http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr20/ Manfred141.pdf>; *Schulte-Nölke H.,* The New German Law of Obligations: an Introduction, <http://www. murallivre.net/Archives/Law%20of%20Obligations.pdf>.

62 *Löwisch M.,* New Law of Obligations in Germany, Ritsumeikan Law Review, No. 20, 2003, 141, <http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr20/Manfred141.pdf>.

63 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 486, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

lawmaker was to reflect in codification legal institutions developed independently from the Code by the court[64] on the basis of the mentioned reform the concept of ancillary duties[65], the matter of the obligation emanating from pre-contractual relations - *Culpa in Contrahendo*[66], third party rights and obligations[67] were regulated under the GCC. Further, on the basis of a reform the right to demand the compensation for damages was transformed entirely.[68] To ensure integrity among the means of legal protection arising following the breach of obligation the preconditions for the application of the right to demand the compensation for damages, other than a significant exception – fault –was brought into conformity with the preconditions of repudiation from a contract and the secondary right to demand the reduction of price.[69]

Unlike fragmented regulation that existed prior the reform current regulation system is much more precise and flexible, the purpose of the legislator is achieved through the combination of several Articles.

One of biggest achievements of the reform was the doctrine of the "interference with the basis of a transaction" which the legislator placed in Paragraph 313 of the GCC.[70]

2.2 "Interference with the Basis of the Transaction"(Störung der Geschäftsgrundlage) Legal regulation of the Doctrine

2.2.1 Legal Substance of Hardship

Oertmann theory developed within the judicial realm was codified following the reform of the German Law of Contracts and was reflected in a new Paragraph 313[71] supported by the modernization act under the

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64 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 383.

65 *Reimann M.,* The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations, Tulane Law Review,Vol. 83, 2009, 888, <http://heinonline.org/HOL/Page?handle=hein.journals/tulr83&div=33&g_sent= 1&collection=journals>.

66 *Reimann M.,* The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations, Tulane Law Review, Vol. 83, 2009, 889, <http://heinonline.org/HOL/Page?handle=hein.journals/tulr83&div=33&g_sent=1&collection=journals>.

67 *Reimann M.,* The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations, Tulane Law Review, Vol. 83, 2009, 890, <http://heinonline.org/HOL/Page?handle=hein.journals/tulr83&div=33&g_sent= 1&collection=journals>.

68 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 438.

69 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 438.

70 *Reimann M.,* The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations, Tulane Law Review, Vol. 83, 2009, 891, <http://heinonline.org/HOL/Page?handle=hein.journals/tulr83&div=33&g_sent= 1&collection=journals>.

71 *Säcker F.J.,* The Transition from German to European Civil law – Effective Competition, Fairness and Reasonableness and Consumer Protection as New Principles of a Modern Social Civil Law in Europe, 3, <http://web.fu-berlin.de/iww/downloads/china/peking_09_03_the_transition.pdf>.

name of the *"interference with the basis of the transaction"(Störung der Geschäftsgrundlage).*[72] The mentioned doctrine is a German equivalent of the most general concept of hardship.

The concept stipulated under the new normative provision implies the change in objective basis of a contract arising after the conclusion of a contract, extreme hardship of performance of obligation that causes the distortion of the correlation of contractual obligations, equivalency and contractual equilibrium. Alteration must be so fundamental that in case parties would have foreseen it beforehand they would not have concluded a contract or would have conclude it with an absolutely different content.

The GCC envisages the possibility of adapting a contract to changed circumstances in case, considering the principle of good faith, it is unreasonable to demand the party to perform obligation in an original unaltered manner. The matter of binding force of a contract must be determined by taking into account contractual risk and actual circumstances.[73] In this case the principles of binding force of a contract and good faith contradict[74] that must be determined on the basis of a criterion of reasonableness.

"The scope of application of the good faith principle is mainly conditioned by cases in which the demand officially corresponds to current material law but its implementation in a specific case is unfair. It is inadmissible based on current law for the right or the outcome to be unfair. Respectively, the "stipulation of good faith" will stand up to the realization of demand based on such right "that in a given case has only a form of a right and not substance."[75]

Three elements can be envisaged in the concept of the interference with the basis of a contract: (1) **factual**, which envisages that the circumstances that are substantial, are regarded by the parties, or one of the parties as the basis for a contract from then on, it is implied. If the parties (or a party) did not assume these conditions the contract would not have been concluded or would be concluded with an absolutely different content. (2) **hypothetical** element – the conditions implied by a party/parties regarded as the grounds for a contract would definitely become part of a contract in case one of the parties was willing (3) **normative** element – another party would certainly agree to the inclusion of the

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72 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 79.

73 Pursuant to Paragraph 313 of the GCC: (1) if circumstances that form the basis for a contract have changed substantially after the conclusion of a contract and the parties would not have concluded a contract or would conclude it with an absolutely different content in case they have foreseen this change adaptation of a contract to changed circumstances can be demanded if considering the specific case, contractual and legal distribution of risk it is unreasonable to demand from a debtor to perform original, unchanged conditions of a contract. (2) the case when the perceptions that formed the basis for a contract appear to be false are equalized to the change of circumstances. (3) if the adaptation of a contract to changed circumstances is impossible or it is related to significant difficulty for one of the parties a disadvantaged party is authorized to repudiate a contract. In long-term contract law relations termination of contract is used instead of the repudiation of a contract (In Georgian).

74 *Hesselink M.,* The Concept of Good Faith in the book: *Hartkamp A.S., Hesselink M., Hondius E.H., du Perron E., Joustra C., Veldman M.(eds.),* Towards a European Civil Code, 2004, 471-498; *Ebke W.F., Steinhauter B.M.,* The Doctrine of Good Faith in German Contract Law, in: *Beatson J., Friedman D. (eds)*, Good Faith and Fault in Contract Law, Oxford University Press, 1995, 171-180; *Houh E.,* The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel? Utah Law Review, Vol. 2005, U of Cincinnati Public Law Research Paper, No. 04-12, 2005,<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=622982##>.

75 „*...im gegebenen Falle also nur die Form, nicht das Wesen des Rechtes hätte.*" *Dernburg,* Pandekten, Band I, 1: Allgemeiner Theil, 1900, § 138, 320, Cited in: *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tb., 2009, 84.

mentioned conditions in a contract. Normative element is the most important criterion for it creates the basis for a contract for both parties.[76]

From systemic perspective the doctrine of the interference with the basis of a transaction is often perceived under the name of the breach of obligation *(Leistungsstörung)*[77]. Paragraph 313 of the GCC that is an expression of the good faith principle was placed not with Paragraph 242 reflecting good faith principle as was expected but in the contractual obligations part of Book II of the Law of Contracts, therefore its provisions apply equally to every contractual obligation.

Further, Paragraph 313 of the GCC has strictly subsidiary function.[78] Firstly, contractual provisions are interpreted, the norms regulating mistake, impossibility to perform, faulty performance are used and if neither these mechanisms ensure the resolution of the matter then the judge may turn to the interpretation of a contract on the basis of the principle of good faith (Paragraph 157, 242). Therefore, Paragraph 313 of the GCC is used when all means of legal protection have been exhausted.[79]

2.2.2 Hardship and Mistake in the Basis of a Transaction

Following the reform the problems of changed circumstances came to comprise also the "mistake in the basis of a transaction". Paragraph 313 of the GCC distinguishes between objective or subjective basis of a transaction in a conceptual terms not in terms of legal outcomes.[80] Differentiation is made between fundamental change of contractual circumstances arising following the agreement of parties and the initial absence of subjective circumstances that is not distinctly pointed out. If Paragraph 313 I of the GCC provides solutions of fundamental change in objective circumstances Paragraph 313 II implies initial absence of subjective circumstances, general mistake in motivation, cases when a party mistakenly assumes the presence of certain circumstance. A classical example of the above-mentioned is the case in which the parties erroneously attribute a painting to another artist and following the conclusion of a contract and *Leibl* appears to be a real artist that increases the value of the subject of contract significantly.[81]

Unlike Paragraph 119 of the GCC that envisages the mistake of only one party in relation to the content of the expression of will Paragraph 313 II of the GCC implies bilateral mistake of parties and is to be applied when the parties have not thought about contractual circumstances that later acquire legal

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76 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 489, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

77 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 381.

78 *Hondius E.H., Grigoleit H.Ch.,* Unexpected Circumstances in European Contract Law, Cambridge University Press, New York, 2011, 55.

79 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 490-491, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

80 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 319.

81 BGH, 8.6.1988, 2597.

importance. Here is when the matter of determination of factual circumstances arises that must be considered as the grounds for a contract.[82]

Thus, for the application of Paragraph 313 II of the GCC it is sufficient to have the conceptions of parties about significant circumstances while the application of Paragraph 119 necessarily implies the expression of the will (albeit erroneous) of a party in relation to circumstances.[83]

Differentiation of Paragraphs 313 I and II of the GCC should not be performed by differentiating subjective and objective circumstances but the time of emergence of contractual obstacle must be recognized as a criterion for differentiation. Especially that Paragraph 313 II regulates a special case of subjective circumstances while Paragraph 313 I of the GCC regulates the problem of changed circumstances arising following the conclusion of a contract and among others, comprises objective as well as subjective circumstances.[84]

The difference cannot be discerned in place in terms of the legal outcome either since the modification of a contract is justified even in case the phenomenon unknown to the parties existed prior to the conclusion of a contract.[85]

2.2.3 Legal Outcomes of Hardship

GCC[86] by setting forth Paragraph 313 recognized the primacy of adapting contract to changed circumstances, versus its termination. German judicial practice confirms that courts mostly referred to adaptation of contracts to changed circumstances instead of termination of a transaction.

Legal outcomes of hardship are primarily set forth under Paragraphs 313 I and III of the GCC: (1) … adaptation of the contract may be claimed in so far as, having regard to all the circumstances of the specific case, in particular the contractual or statutory allocation of risk, it cannot reasonably be expected that a party should continue to be bound by the contract in its unaltered form. (3) If adaptation of the contract is not possible or cannot reasonably be expected of one party, the disadvantaged party may withdraw from the contract. In the case of recurring obligations, the right to terminate takes the place of the right to withdraw.

Therefore, German law is directed at saving a contract, adjusting it to changed circumstances, which is considered as a means for legal protection to be used as a primary means in case of the hindrance of performance.

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82 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 496, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

83 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 497, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>; for more details about the types of mistakes see: *Hondius E.H., Grigoleit H.Ch.,* Unexpected Circumstances in European Contract Law, Cambridge University Press, New York, 2011, 56.

84 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 496-497, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

85 *Mekki M., Pelese M.K.,* Hardship and Modification (or 'Revision') of the Contract, 2010, 6, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511>.

86 Unlike the English law (In Georgian).

Further, Paragraph 313 of the GCC grants an authorized party the right to apply to court with the demand to adapt a contract without any preliminary negotiations.[87] The doctrine assumes that holding negotiations and revisiting a contract must be a prerequisite for the adaptation of a contract by court.[88] Parties must be obliged to hold negotiation on the basis of good faith principle in order to adapt contract and use the possibility of applying to court only in case they fail to reach agreement.[89] It is dubious that the practice under which court prior to the use of the right to adaptation assigns priority to the negotiations between the parties will change in practice.[90]

Therefore, it is reasonable that the presence of the prerequisites stipulated under Paragraph 313 of the GCC primarily give rise to the obligation to hold negotiations.

It is important that bilateral termination of a contract is used only as a legal protection measure (on the basis of Paragraph 346 and following Paragraphs) of last resort when it is impossible or unreasonable to adapt contract to changed circumstances.[91]

Therefore, a new way of resolving a problem compared to the legal measures that existed prior to the reform is more directed at maintenance of a contract.[92] By way of adapting a contract to changed circumstances through court legislator ensures the restoration of the balance of parties' interests and contractual equilibrium.

2.3 New Regulation of a Concept of Impossibility of Performance

2.3.1 Types of Impossibility of Performance

The problem of impossibility of performance is extremely important in every developed legal system. In the civil law countries the matter of exemption from responsibility under the grounds of impossibility of performance is regulated in a different manner.[93] The doctrine of impossibility was

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87 *Schlechtriem P.,* The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe, Oxford U Comparative L Forum 2, 2002, <http://ouclf.iuscomp.org/articles/schlechtriem2.shtml#fn1sym>.

88 *Schlechtriem P.,* The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe, Oxford U Comparative L Forum 2, 2002, <http://ouclf.iuscomp.org/articles/schlechtriem2.shtml#fn1sym>.

89 *Horn N.,* Changes in Circumstances and the Revision of Contracts in some European Laws and International Law, in: *Horn N.,* (ed.), Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985, 15, 22-23, <http://www.trans-lex.org/create_pdf.php?docid=113700>.

90 *Backhaus R.,* The Limits of the Duty to Perform in the Principles of European Contract Law, Vol. 8.1, 2004, < http://www.ejcl.org/81/art81-2.txt>.

91 *Backhaus R.,* The Limits of the Duty to Perform in the Principles of European Contract Law, Vol. 8.1, 2004, <http://www.ejcl.org/81/art81-2.txt>.

92 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 492, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

93 See, for example, Swiss Code of Obligations, English Translation of the Official Text, Zurich, 1992, Articles 97, 119; Civil Code of Italy (Codice Civile Italiano, 1942) 1256 (1), Articles 1463 -1465; Civil Code of Spain (Código Civil español, 1889) Article 1182. French Civil Code, Translated by *Rouhette G*. with the assistance of *Rouhette-Berton A*., 2006, stipulate only the case of perishing of sold goods under the impossibility of performance (Article 1302) (In Georgian).

mainly developed under German civil law studies. Therefore, positive legislation and legal doctrine pays particular attention to it.

Natural disasters, unforeseen political or economic factors,[94] social changes – inflation, economic crisis, armed conflicts, embargo, banning of export, failure of a source of procurement, etc., can hamper or render the performance of obligation impossible. For example, impossibility of performance may be established by the destruction of a subject matter; [95]death or incapacity of a debtor in personal contracts[96]; unavailability of the subject matter of the performance[97]; failure of a particular source;[98] impossibility of the method of performance.[99] Legislative changes following the conclusion of a contract can cause legal impossibility, (supervening illegality).[100]

The matter of the performance of obligation requires resolution when the parties have not established the so-called force majeure provisions under a preliminary contractual agreement for the cases of changed circumstances.[101] In this case the determination of the will of parties is performed

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94 *Schwenzer I.,* Force Majeure and Hardship in International Sales Contracts, Victoria University of Wellington Law Review, Vol. 39, 2008, 709, <http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf>;

95 Restatement (second) of Contracts §263, 1981; *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 91, with further reference: *Treitel G.H.,* The Law of Contract, 10th edition, London, 1999, 811; *Treitel G.H.*, Frustration and Force Majeure, 2nd ed., London, 2004, Ch.3.

96 For example, labor contract, representation. Restatement (second) of Contracts §263, 1981; *Treitel G.H.*, Frustration and Force Majeure, 2nd edition, London, 2004, 4-016 and following pages.

97 The case of a requisition of sold goods can be stated as an example of non-availability of a subject of a contract. See: *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 91, with further reference: *Treitel G.H.*, Frustration and Force Majeure, 2nd edition, London, 2004, 4-002 and following pages.

98 Restatement (second) of Contracts §263, 1981. For example, if it becomes impossible to import procured goods due to war, natural disasters or the banning of export. See: *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 91, with further reference: *Treitel G.H.,* The Law of Contract, 10th edition, London, 1999, 814; *Treitel G.H.*, Frustration and Force Majeure, 2nd edition, London, 2004, 4-041.

99 Court reviewed the case Nicholl & Knight v. Ashton Edridge &Co. (See: *Treitel G.H.,* The Law of Contract, 10th ed., London, 1999, 818) according to the facts of which the contract envisaged the supply of cotton grains in January from Alexandria through the ship Orlando. The ship was washed ashore of the Baltic Sea and did not make it to Alexandria in January. The court rules on the basis of the interpretation of the contract that the obligation was to have been closely according to the agreed rule (the dispatch of goods was to be made from Alexandria) (In Georgian).

100 Restatement (second) of Contracts §264, 1981; *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, further reference: *McKendrick E.*, Chitty on Contracts, The Law of Contracts, Vol.1, General Principles, Chapter 24, Discharge by Frustration, London, 1999, 24-021.

101 Force majeure provisions are mainly used in English law since Anglo-American contracts are characterized by significantly detailed provisions, unlike contracts of continental states. The mentioned is conditioned by the decision on a case: Paradine v. Jane, English Rep. 897 [K.B. 1647], see in a book: *Beale H., Kötz H., Hartkamp A., Tallon D.(eds.),* Cases, Materials and Text on Contract Law, Hart Publishing, Oxford and Portland, Oregon, 2002, 608; also see: Force Majeure and the Performance Excuse: A review of the English Doctrine of frustration and Article 2-615 of the Uniform Commercial Code, 2010, 4, 9, <http://www.dundee. ac.uk/ cepmlp/gateway/?news=30853>; *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 483, <http://papers.ssrn.com/sol3/

through fixing the gap on the basis of interpretation of a contract.[102] In addition to interpretation of force majeure provisions and a contract it becomes necessary to use other legal mechanisms for resolving the problem of changed circumstances.

The concept of impossibility of performance stipulated in-depth in the pre-reform GCC was based on *Friedrich Mommsen's* doctrine that differentiated initial and subsequent, absolute and relative, objective and subjective, natural and legal, permanent and temporary, full and partial types of impossibility of performance. Each above-mentioned category of impossibility of performance can objectively arise on the basis of various factual circumstances.[103]

Paragraph 306 of the pre-reform GCC applied to initial absolute impossibility and based the voidness of a transaction.[104] While Paragraph 275 of the GCC regulated the case of absolute impossibility emerged following the conclusion of a contract.

On the basis of the reform provisions regulating initial and subjective impossibility were abolished and the provisions regulating the problem of hardship were added to Paragraph 275 of the GCC.[105]

Unlike the regulation prior to the reform new Paragraph 275 I of the GCC combines and equalizes subjective and objective impossibility,[106] in the presence of which considers the exemption of a debtor from the obligation of performance.[107] Subjective impossibility implies the impossibility of performance of objectively feasible performance for only a specific debtor. The performance of obligation in case of objective impossibility is physically impossible not only for a specific party to an agreement but for everyone.[108]

Article 79 of the Convention on Sale of Goods, Article 7.1.7 of UNIDROIT Principles and Article 8:108 of the Principles of European Contract Law[109] (hereinafter - PECL) stipulate the obligation of a

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papers.cfm?abstract_id=1154004>; *Tallon D.,* Clauses Dealing with Supervening Events, in a book: *Beale H., Kötz H., Hartkamp A., Tallon D.(eds.),* Cases, Materials and Text on Contract Law, Hart Publishing, Oxford and Portland, Oregon, 2002, 639; *Werner M.,* Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practices of the ICC Court of Arbitration, 1 J.Int'l Arb., 1984, < http://trans-lex.org/126600 >; *Trakman L.E.,* Declaring Force Majeure: Veracity or Sham? Un. of New South Wales, 2007, <http://works.bepress.com/leon_trakman/4>; *Draetta U*., Hardship and Force Majeure clauses in international contracts, RDAI/IBLJ, No. 3/4, 2002, 347.

102 ergänzende Vertragsbedingung .

103 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 87.

104 *Zimmermann R.,* Breach of Contract and Remedies under the New German Law of Obligations, Saggi, Conferenze e Seminari 48, Roma, 2002, 6, <http://www.cisg.law.pace.edu/cisg/biblio/zimmerman.html>.

105 *Oliveira N.M.P.,* The German Act to Modernize the Law of Obligations as a Model for the Europeanization of Contract Law? The New Rules Regarding Impossibility of Performance from the Perspective of a Portuguese Lawyer, Electronic Journal of Comparative Law, Vol. 11.4, December 2007, 1, <http://www.ejcl.org/114/art114-2.pdf >.

106 *Zimmermann R.,* Remedies for Non-performance. The Revised German Law of Obligations, Viewed against the Background of the Principles of European Contract Law, Edinburgh Law Review, Vol.6, 2002, 281, <http://heinonline.org/HOL/Page?handle=hein.journals/edinlr6&div=28&g_sent=1&collection=journals>.

107 The impossibility of performance by a debtor or any other party excludes the presence of the demand of performance of obligation. See: GCC (German Civil Code - Bürgerliches Gesetzbuch, Bundesministerium der Justiz, Juris GmbH, Saarbrücken, 2005) §275 I.

108 *Goldman A.J., Sigismond W.D.,* Business Law and Practices, 8th ed., South-Western College/West, 2010, 217.

109 ECLP text can be accessed: <www.lexmercatoria.org>; commentary see: *Lando O., Beale H.* (eds.), Principles of European Contract Law, part I and II, Kluwer Law International, Hague/London/Boston, 2000; in relation

debtor to avoid or overcome an impediment irrespective of whether it is related to performance or the personality of a debtor.[110] In the presence of subjective impossibility a debtor can overcome an impediment by way of delegation of performance to a third party for a reasonable price. If it is impossible for a third party to perform for reasonable price the provisions regulating extreme hardship must be invoked.[111] Therefore, subjective impossibility of performance must not be considered under Paragraph 275 I of the GCC.[112]

Thus, the application of Paragraph 275 I of the GCC (exemption from obligation to perform) applies to the types of objective and subjective, initial and subsequent, partial and full impossibility of performance.[113] The types of impossibility of performance stipulated under the mentioned provision give rise to the right of the avoidance of a contract. Respectively, they do not form the basis for adaptation of a contract to changed circumstances. And the cases of hardship when performance remains objectively feasible are regulated under Paragraphs 275 II and 313 of the GCC.[114]

If Paragraph 275 I of the GCC regulates absolute impossibility of performance, sections II and III are dedicated to the regulation of relative impossibility that combines the practical impossibility (par. 275 II)[115] and moral, ethical, personal impossibility (Par. 275 III)[116] types.[117] Relative impossibility does not rule out the possibility of performance, it simply entitles a debtor to refusal of performance.

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to the mentioned issue see also, *Hartkamp A.S.,* Principles of Contract Law, in a book: Hartkamp *A.S., Hesselink M., Hondius E.H., du Perron E., Joustra C., Veldman M.(eds.),* Towards a European Civil Code, 2004, 125-144.

110 *Stoll H.*, Commentary on Article 79, cited in: *Schlechtriem P.* (ed.), Commentary on the UN Convention on the International Sale of Goods (CISG), 2nd ed., 1998, 612: "as a rule, for ensuring performance of obligation under the agreed upon substance a debtor will be required to overcome a constraint even in case this is connected with significantly large expenditures or economic losses." *Flechtner H.,* Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods, Pace International Law Review, Vol. 19, Issue 1, 4-1-2007, 31, 32, 39, 48, <http://digitalcommons.pace.edu/pilr/vol19/iss1/3>.

111 *Oliveira N.M.P.,* The German Act to Modernize the Law of Obligations as a Model for the Europeanization of Contract Law? The New Rules Regarding Impossibility of Performance from the Perspective of a Portuguese Lawyer, Electronic Journal of Comparative Law, Vol. 11.4, December 2007, 10, <http://www.ejcl.org/114/art114-2.pdf >.

112 *Zimmermann R.,* Breach of Contract and Remedies under the New German Law of Obligations, Saggi, Conferenze e Seminari 48, Roma, 2002, 15, <http://www.cisg.law.pace.edu/cisg/biblio/zimmerman.html>.

113 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 82.

114 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 413.

115 A debtor may refuse to perform obligation provided it is related to such expenses that considering the subject of contract and the principle of good faith is significantly inadequate to the contractual interest of a creditor to performance. For the determination as to what effort a debtor may be required to exert his fault in terms of a constraint resulting in the impossibility of performance needs to be considered. See: GCC (German Civil Code - Bürgerliches Gesetzbuch, Bundesministerium der Justiz, Juris GmbH, Saarbrücken, 2005) §275 III (In Georgian).

116 A debtor that is to perform an obligation personally can refuse from performance in case by taking into account the correlation of creditor's interest towards performance and the constraint for performance it is unreasonable to demand a debtor to perform obligation. See: GCC (German Civil Code - Bürgerliches Gesetzbuch, Bundesministerium der Justiz, Juris GmbH, Saarbrücken, 2005) §275 III (In Georgian).

Paragraph 275 II of the GCC stipulates practical impossibility of performance *(faktische or praktische Unmöglichkeit, practical impossibility)* during which the performance of obligation is objectively feasible yet its performance is unreasonable for it is related to inadequately large expenditures relative to the interest of a creditor to perform. When determining binding force of a contract the volume of expenditures for performance and the difficulty of overcoming an impediment cannot be interpreted under absolute meaning but it can be evaluated only considering creditor's interest of performance.[118]

Paragraph 275 II of the GCC is used in strictly defined cases: if there is an obvious disbalance between the expenditures necessary for performance and creditor's interests[119] not a single reasonable creditor will be able to demand performance.[120]

Paragraph 275 II of the GCC stipulates personal impossibility of performance and applies to the service and labour contracts that envisage personal performance of obligations. For example, opera singer can be exempted from responsibility if his/her child is suffering from a life-threatening disease.[121]

2.3.2 Legal Consequences of Impossibility of Performance

Primary legal interest of parties to a contract is the implementation of a contract according to agreed upon conditions.[122] It is important as to what types of mechanisms satisfying the parties' contractual interests a legal system offers to a party in the presence of impossibility of performance.

According to the doctrine of impossibility of performance a debtor is excused from contractual restraint and the obligation to compensate for damages provided the impossibility of performance that is not attributed to a faulty (intentional or negligence) action (action or omission) of a debtor arose following the conclusion of a contract. Given a dual nature of synallagmatic contracts the faultless impossibility of performance of obligation as the basis for exemption of a debtor from obligation of performance causes the exemption of a party from reciprocal contractual obligation (counter exemption).[123]

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117 *Zimmermann R.,* Remedies for Non-performance. The Revised German Law of Obligations, Viewed against the Background of the Principles of European Contract Law, Edinburg Law Review, Vol. 6, 2002, 271-314, <http://heinonline.org/HOL/Page?handle=hein.journals/edinlr6&div=28&g_sent=1&collection=journals>.

118 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 82-83.

119 *Oliveira N.M.P.,* The German Act to Modernize the Law of Obligations as a Model for the Europeanization of Contract Law? The New Rules Regarding Impossibility of Performance from the Perspective of a Portuguese Lawyer, Electronic Journal of Comparative Law, Vol. 11.4, December 2007, 3, <http://www.ejcl.org/114/art114-2.pdf >.

120 *Volker E.,* Das Recht der Leistungsstörungen 37 (5th ed., 2003), cited: *Oliveira N.M.P.,* The German Act to Modernize the Law of Obligations as a Model for the Europeanization of Contract Law? The New Rules Regarding Impossibility of Performance from the Perspective of a Portuguese Lawyer, Electronic Journal of Comparative Law, Vol. 11.4, December 2007, 3, < http://www.ejcl.org/114/art114-2.pdf >.

121 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 495, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

122 *Lindström N.,* Changed Circumstances and Hardship in the International Sale of Goods, Nordic Journal of Commercial Law, Issue 1, 2006, No. 1, 2, <http://www.njcl.fi/1_2006/commentary1.pdf>.

123 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 79.

In case the impossibility of performance applies only to the portion of obligation then exemption of another contracting party from reciprocal obligation depends on how much a creditor may have the interest to receive partial performance. Respectively, reciprocal exemption can apply to the obligation of reciprocal performance in full or pro rata with the impossible performance.

In case of temporary impossibility of performance reciprocal performance may not be demanded throughout the period of impossibility of performance. Permanent impossibility of performance causes final exemption of contracting parties from substitutable obligations.[124]

It is especially difficult to discriminate between absolute and relative, objective and subjective impossibility of performance by the criterion of exemption of a debtor from the performance. For example, the exemption from performance can be effected not only in case of absolute (objective) but relative (subjective) impossibility cases as well. Thus, the differentiation of absolute and relative impossibility in terms of result is unreasonable. [125]

Binding force of a contract in case of practical impossibility of performance is determined considering the fault of parties and according to the distribution of risk of non-performance of obligation.

2.4 Correspondence of Hardship (Economic Impossibility) and Practical Impossibility

The German doctrine differentiates between practical impossibility of performance *(faktische or praktische Unmöglichkeit)* and economic impossibility *(wirtschaftlische Unmöglichkeit)*. The latter does not fall under the scope of Paragraph 275 II of the GCC; it is regulated under Paragraph 313 of the GCC that relates to the conceptually different issues of hardship based on changed circumstances *(Störung der Geschäftsgrundlage)("interference with the basis of the transaction").* The scope of Paragraph 313 of the GCC is considerably broader and comprises special complication of performance when the case of practical impossibility is excluded.[126]

In case of economic impossibility obligation is although extremely burdensome for a debtor to perform but this burden is not significantly inadequate (disproportionate) with a creditor's interest of performance. For example, following the conclusion of a contract if the price of a sold item increases 100 times although this situation will extremely aggravate obligation but a creditor's interest of performance will increase as well according to the price of a sold item.[127] Naturally, in this case a seller will have a well-grounded interest to receive price adequate to the market value of an item.

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[124] *Gareth J., Schlechtriem P.,* Breach of Contract (Deficiencies in a Party's Performance), International Encyclopedia of Comparative Law, Vol. VII (Contracts in General), Chapter 15, Tübingen, 1999, Parag. 163, 103, cited: *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 80.

[125] *Treitel G.H.*, Frustration and Force Majeure, 2nd edition, London, 2004, 3-003, cited: *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 88.

[126] *Oliveira N.M.P.,* The German Act to Modernize the Law of Obligations as a Model for the Europeanization of Contract Law? The New Rules Regarding Impossibility of Performance from the Perspective of a Portuguese Lawyer, Electronic Journal of Comparative Law, vol. 11.4, December 2007, 3, <http://www.ejcl.org/114/art114-2.pdf >.

[127] *Zimmermann R.*, Breach of Contract and Remedies Under the New German Law of Obligations, Saggi, Conferenze e Seminari 48, Roma, 2002, 12-14, <http://www.cisg.law.pace.edu/cisg/biblio/zimmerman.html>.

Therefore, there is no mismatch between a creditor's interest of performance and the hardship of a debtor in the presence of economic impossibility – the harder for a debtor to perform obligation the more important is the receiving of such performance for a creditor. Creditor's interest of performance is adequate to market price of an item and not an initial price of a contract. Exemption of a debtor from responsibility is determined according to whether the preconditions of Paragraph 313 of the GCC have been complied with.[128]

Article 275 II (1) of the GCC sets forth practical, factual impossibility of performance, exempts a debtor from obligation of performance related to unreasonably high expenditures, while efforts necessary for performance considering the essence of the obligation and good faith principle is significantly inadequate to a creditor's contractual interest. This is when the impediment arisen in relation to the performance of obligation and contractual interest of a creditor is correlated.[129] In the given case the fault of a debtor in terms of the emergence of an impediment is to be taken into account.

A classical example of practical impossibility is a widely known case on the sale of a ring,[130] when the subject of a contract fell into a lake and sunk prior to the handover to the purchaser. Since it is objectively possible to dry up a lake absolute impossibility of performance is not established in the given case (par. 275 I). Since the value of a ring is 100 times less than the expenses necessary for draining a lake, efforts necessary for performance and costs are grossly disproportionate to the value of a ring and a creditor's unchanged interest of performance. In this case demand to perform obligation regardless of the possibility of its implementation is unreasonable since the costs related to overcoming a constraint (draining a lake) is 100 times higher than a creditor's interest of performance.

The prevention of extreme cases of waste of resources being the macroeconomic goal of legislator, the criterion of reasonability is examined in a cost-utility-analysis. It is no longer given when the costs of performance largely exceed the utility of performance, when in other words the exchange of performances is – economically speaking – grossly inefficient.[131]

In 1973 oil importing company considering the existing crisis refused to supply oil to a city on the grounds that it was not reasonable for it to perform for an agreed upon contract price. Federal Supreme Court of Germany (BGH) deemed the company in terms of emerged financial losses faulty for it did not purchase certain amount of supplies that following the discovery of crisis in order to accumulate

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128 *Brunner Ch.*, Force Majeure and Hardship under General Contract Principles, Exemption for Non-performance in International Arbitration, Kluwer Law International BV, the Netherlands, 2009, 83.

129 *Grundmann S.,* Germany and the Schuldrechtsmodernisierung, 2002, European Review of Contract Law, Vol. 1, Issue 1, 2005, 129, 135.

130 See: *Zimmermann R.,* Breach of Contract and Remedies under the New German Law of Obligations, Saggi, Conferenze e Seminari 48, Roma, 2002, 12-13, <http://www.cisg.law.pace.edu/cisg/biblio/zimmerman.html>.

131 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 494, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>; *Posner R.A., Rosenfield A.M.,* Impossibility and Related Doctrines in Contract Law: An Economic Analysis, Journal of Legal Studies, Published by: The University of Chicago Press, Vol. 6, No. 1, 83-118, <http://www.jstor.org/stable/pdfplus/724191.pdf?acceptTC=true>; *Kovač M.,* Comparative Contract Law and Economics (New Horizons in Law and Economics Series), Edward Elgar Pub., August 30, 2011, 259-292; *Kessedjian C.*, Competing Approaches to Force Majeure and Hardship, International Review of Law and Economics, Vol. 25, 2005, 415-431, <http://www.cisg.law.pace.edu/cisg/biblio/kessedjian.html>.

reserve, did not take measures necessary to avoid expected changes. Further, contract stipulated fixed contractual prices that imposed on the parties risks of changes of market prices. In the given case both adapting a contract to changed circumstance as well as termination thereof was excluded, on the grounds of the possibility to foresee the change of circumstances and avoidance thereof.[132] Since legal basis for adapting contract to changed circumstances or exemption from contractual restraint is formed by reasonably unforeseeable changed circumstances.[133]

In the above-considered case on oil crisis the obligation of performance of a debtor is not excluded under Paragraph 275 II of the GCC since sharp change of purchase price caused reciprocal increase of a buyer's contractual interest, contractual benefit, since in case purchase of oil from another source a creditor will have to pay a considerable high price while he will receive significant benefit in case of further sale of oil bought for initial agreed upon price. Since, considering existing factual circumstances there is no considerable disproportion of costs and utility, a debtor is obliged to perform obligation regardless of the volume of efforts necessary thereof.[134]

Thus, Paragraph 275 of the GCC does not apply to a case when a reciprocal, symmetric increase of a creditor's performance interest corresponds to a debtor's contractual obligation related to high costs. Paragraph 313 of the GCC prescribes analysis of interrelationship of the interests of parties in terms of ethical, financial or family matters. While Paragraph 275 II (1) of the GCC sets forth a creditor's contractual interest as a criterion for determining the reasonableness of performance of obligation and assesses it in relation to the value of a debtor' performance.

Ultimately, Paragraph 275 II of the GCC is to be used in cases when counter performance is not justified from economic perspective for costs are higher than utility of the contract. While Paragraph 313 of the GCC can be applied in case if bilateral performance is unfair, for performance price is significantly lower and does not correspond to the value of performance.[135] Main principle for Paragraph 275 II of the GCC is a creditor's interest towards performance of contractual obligation, while Paragraph 313 of the GCC is focused at a debtor's interest – to repudiate undesirable performance.

Legal consequences of the above-mentioned Paragraphs can be identical. Namely, if a party may not be demanded to perform obligations under unchanged conditions a party is authorized under the Paragraph 346 of the GCC to trigger the secondary right for avoidance of a contract after the possibility or reasonableness of adaptation of contract is excluded given its priority importance. Negative outcomes of modifying a contract are distributed equally between the parties for the purpose of ensuring contractual equilibrium and the balance of interests.

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132 BGH 08.02.1978.

133 *Mekki M., Pelese M.K.,* Hardship and Modification (or 'Revision') of the Contract, 2010, 16, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511>.

134 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 494-495, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

135 *Rösler H.,* Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law, Kluwer Law International BV/Printed in Netherlands, European Review of Private Law, Vol. 15, No. 4, 2007, 495, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154004>.

IV. Regulation of Hardship and Impossibility of Performance in the Civil Code of Georgia

1. Civil Code of Georgia Following the Reform of the German Law of Contracts

The enactment of the CC of independent Georgia on June 26, 1997 that had provisions in common to the German law was an attempt for the establishment of a legal framework reflecting principles and value system specific to the European law that would dissociate itself from Soviet legal approaches and would be in line with the demands of civil turnover emerged in the conditions of changed social environment. "The Code was to be the bridge to link Georgia with Western cultural world and the one that would help for the developed legal culture enter Georgia as well that took place to a significant degree took place."[136]

When forming new legal institutions the CCG was based on European codifications and especially reflected the results of conceptual perfection implemented on the basis of fundamental reform of German Law of Contracts.

One of "principle innovations is Article 398 of the Civil Code of Georgia that relates to adaptation of contract to changed circumstances. Such provision can be found in Russian Code as well and it has entered post-Soviet space under the influence of harmonization with modern European law. With the introduction of this Article obligatory nature of a contract was somewhat specified. According to this Article contract is seen as a living body that could require change according to circumstances." [137] "Adapting a contract to changed circumstances is especially important in the conditions of unstable civil turnover which is characteristic of post-Soviet countries" [138] and, respectively, has high scientific and practical value for the Georgian law as well.

As was mentioned in the work the doctrine of *interference with the basis of a transaction* in Germany was introduced on a legislative level only in 2002. Nevertheless, when regulating changed circumstances Georgian law demonstrates significant resemblance to post-reform regulation of the GCC. "However paradoxical it may seem again as a result of German-Georgian cooperation the above-mentioned provisions had been stipulated earlier under the 1997 Civil Code of Georgia."[139] The above-mentioned indicates clearly that Georgian lawmaker is quick to respond to the demands of civil turnover while in Germany they approach legislative changes with great caution. This is "also due to the fact that in Germany the work on the mentioned reform was underway for years and the Georgian legislator was able to get familiar with the draft laws that were still under development.... so obligation part of Georgian and German law mostly correspond.[140] Despite of the above-mentioned a number of concepts introduced under the influence of German law go significantly beyond similar institutions stipulated under the German civil law and often provides conflicting regulation from conceptual or systemic standpoint.

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136 *Chanturia L.,* General Part of the Civil Law, Tb., 2011, 19-20.

137 *Zoidze B.,* Reception of European Private Law in Georgia, Academy of Sciences of Georgia Tinatin Tsereteli State and Law Institute, Private Law Institute, Tb., 2005, 288 (In Georgian).

138 *Zoidze B.,* Constitutional Control and the Rules of Values in Georgia, GTZ, Tb., 2007, 22-23, zhttp://www.scribd.com/doc/44006042/ბესარიონ ზოიძე> (In Georgian).

139 *Chanturia L.,* Introduction to the Civil Code of Georgia, General Part, Tb., 1997, 117.

140 *Machaladze S.,* Compensation for Damages in Case of the Breach of Obligation (Analysis of Georgian and German legislations), Georgian Law Review, Special Edition, 2004, 72.

2. Gaps in the Regulation of Hardship

2.1 Legal Prerequisites of Hardship

The analysis of legal regulation of extreme hardship in Georgian law reveals a number of significant gaps, in terms of systemic nature as well as content.

Namely, according to Article 398 I (1) adaptation of a contract to changed circumstances relates to the presence of determined legal preconditions[141]: (1) of circumstances considered as the basis of agreement (2) substantial change (3) emergence of change of circumstances following the conclusion of a contract (4) impossibility to foresee circumstances – not having foreseen, considered; (5) in case the circumstances were foreseen: (a) non-conclusion of contract by parties (i.e., the absence of contractual interest in relation to conclusion of contract) or (b) agreeing on a different content of a contract.

On the basis of legal analysis of the above-mentioned legislative provision additional preconditions necessary for establishing hardship but the ones that are not expressly stipulated under the Article. Namely, if a party does not deem the change of circumstances probable at the stage of conclusion of a contract we have a precondition of not foreseeing which at the same time implies uncontrollable nature of a constraint, its impassable nature. Namely, if a party did not foresee and could not have foreseen the change of circumstances respectively it was deprived of objective means to avoid, overcome such obstacle or eliminate its negative consequences. The presence of the above-mentioned preconditions considers a constraint as beyond control of a debtor and respectively establishes another additional precondition of faultlessness of a debtor in relation to a constraint. The criterion of faultlessness excludes responsibility for hardship.

Determination of the degree of presence of the above-mentioned legal preconditions and of the level of the altering the balance of contractual equilibrium thereof must be made on the basis of analysis of peculiarities of specific cases. The wording of the mentioned Article bears significant resemblance to the definition of Paragraph 313 I of the GCC.[142]

2.2. Reasonableness of Performance as a Criterion Determining Binding Force of a Contract

Article 398 I (1) of the CCG relates the possibility of adapting a contract to the presence of the above-mentioned legal preconditions which is followed by the following wording: *otherwise, considering specific circumstances, a party to a contract may not be required to closely adhere to unchanged*

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[141] For legal preconditions for the application of Article 398 of CCG see: June 6, 2010 ruling of the Supreme Court of Georgia for the case Nas-7-6-2010, 18, <http://www.supremecourt.ge/files/upload-file/pdf/07-2010.pdf>; November 25, 2008 ruling for the case Nas-466-707-08, 139, <http://www.supremecourt.ge/files/upload-file/pdf/11-2008.pdf> .

[142] Article 398 II of the CCG regulates the case when we see not the change of circumstances but a mistake. See: *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.* (ed.), Commentary to the Civil Code of Georgia, Book III, Tb., 2001, 404. Like Paragraph 313 II of the GCC regulation of mistake in the basis of a transaction when the assumptions of the parties as to the basis of a contract appear to be mistaken was brought by the legislator in the legal regime of regulation of changed circumstances.

contract. The mentioned provision is unclear in terms of legal outcome and demonstrates substantially significant gaps. It is interesting towards whom the phrase "otherwise" is directed. It is obvious that the latter does not imply the absence of legal preconditions stipulated under part one of the first sentence. Under this logic and grammatically as well it must be related to the last part of the beginning sentence: *adaptation of a contract to changed circumstances may be demanded.* Respectively, the last sentence is perceived under the following content: in case adaptation of a contract to changed circumstances is not demanded then a party may not be required to closely adhere to the unchanged contract. I.e., a debtor will be relieved from contractual binding and as stipulated under Article 398 III will be granted right to avoid a contract. In relation to this it should be mentioned as a primary comment that the essence of adaptation of a contract to changed circumstances is the very aspect that in this case consistent adherence to the originally agreed upon conditions does not take place and not "otherwise", as legislator indicates.

It is noteworthy also that such constraint for the performance of obligation when a party cannot (i.e., it is unreasonable) be required to closely adhere to unchanged contract on the basis of good faith and fairness principles is viewed in legal doctrine as a necessary precondition for establishing hardship since the reasonableness of performance is considered to be a criterion determining binding force of a contract.[143] In this case "contract becomes not a means for cooperation and free turnover but the weapon for the submission of one party to another"[144] Respectively, "lawmaker deemed it justified to exempt from contractual binding a person who as a result of change of circumstances is disadvantaged significantly and in a disproportionate manner."[145] Such performance would place the participants of civil turnover in an uneven situation contrary to the requirements of civil turnover.

Therefore, in the Article under discussion unreasonableness, inexpediency of performance must be stipulated along with other mandatory preconditions for fully establishing hardship, as of a concept, not as its attendant outcome. Respectively, legislative provision can be specified with the following wording: if the circumstances that formed the basis for the conclusion of a contract have changed obviously after the conclusion of a contract and parties would not have concluded this contract or would have concluded thereof under other content if they had taken these changes into account *then the right of adaptation of a contract to changed circumstances may exist unless, considering specific circumstances a party to a contract cannot be demanded to closely adhere to unchanged contract.*

2.3 Mandatory Nature of Negotiation of Parties for Revising a Contract and Inadmissibility of Refusal to Adapt Contract

In terms of legal outcomes the analysis of Article 398 III of the CCG is important: in the presence of hardship legislator establishes adaptation of a contract to changed circumstances as a primary obligation. Namely, parties are obliged to hold negotiations to revise a contract: parties should first try

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143 See: e.g., GCC (German Civil Code - Bürgerliches Gesetzbuch, Bundesministerium der Justiz, Juris GmbH, Saarbrücken, 2005) §313 I.

144 *Zoidze B.,* Reception of European Private Law in Georgia, Academy of Sciences of Georgia Tinatin Tsereteli State and Law Institute, Private Law Institute, Tb., 2005, 281 (In Georgian).

145 *Chachava S.,* Competition between the basis of demands and demand in private law, PhD paper, Tb., 2010, 68, <http://www.law.tsu.edu.ge/files/disertacia_Sofio_chachava.pdf>, (In Georgian).

to adapt contract to changed circumstances. The principle stipulated in the mentioned legislative provision corresponds to German legal doctrine and the rule in legal practice,[146] which regards negotiations between parties as the precondition for applying to court with the request of adaptation of a contract. "the purpose of this is again to support performance, to remind parties that they should not shun from changed circumstances but must do all they can to adapt contract to those. This will ensure the maintenance of sustainability of civil turnover and contact will be fulfilled."[147] The mechanism that ensures adaptation of a contract to changed circumstances is considered to be implied as component of contractual binding,[148] which purpose is to implement the principle – contract must be performed.

Certain comments can be expressed in relation to the remaining portion of Article 398 III of the CCG according to which if it is impossible to adapt contract to changed circumstances or another party opposes this then the party which interest was infringed upon can repudiate a contract. The mentioned legislative provision disregards the role of a court[149] in the process of adaptation of a contract to changed circumstances since it relates the impossibility to adapt or the absence of the consent of one of the parties at the stage of contract negotiations directly to the right to avoid contract and does not consider the right to apply to court with a request of adaptation as a next stage of talks. While the institution of adapting contract to changed circumstances is a result of case law that emerged in within the judicial system and later was regulated under legislation. „Even in European law changed circumstances are the ones that have mostly been established in judicial practice."[150]

Further, a justified comment must be expressed in relation to the legislative provision that gives a party automatically the right to avoid contract in case of absence of his consent with regard to the adaptation of contract. As was reviewed in detail in previous chapters in case of economic impossibility although obligation is extremely hard for a debtor to perform but this hardship is not significantly disproportionate with a creditor's interest of performance. There is no discrepancy between a creditor's performance interest and a debtor's hardship – the harder it is for a debtor to perform obligation the more important is receiving such performance for a creditor.[151] In such conditions adaptation of contract always responds to the interests of a debtor as of a disadvantaged party for whom performance under original conditions relates to difficult consequences. And although adapting contract to changed circumstances will not result in difficult economic outcomes for a creditor since during adaptation court is guided as much as possible by the principles of good faith (Article 8 III, 361 III of the CCG) and fairness (Article 325 of the CCG) but for a creditor it is better to perform contract under unchanged conditions that increases significantly his contractual interest, contract price and benefit.

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146 See: footnotes 88, 89, 90.

147 *Zoidze B.,* Reception of European Private Law in Georgia, Academy of Sciences of Georgia Tinatin Tsereteli State and Law Institute, Private Law Institute, Tb., 2005, 288-289 (In Georgian).

148 *Mekki M., Pelese M.K.,* Hardship and Modification (or 'Revision') of the Contract, 2010, 17, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542511>.

149 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.* (ed.), Commentary to the Civil Code of Georgia, Book III, Tb., 2001, 407 (In Georgian).

150 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Commentary to the Civil Code of Georgia, Book III, Law of Contract, General Part, Tb., 2001, 400 (In Georgian).

151 See: Chapter of the paper with title – Correlation of Hardship (Economic Impossibility) and Practical Impossibility of Performance (In Georgian).

Based on the above-mentioned a creditor's refusal to adapt contract to changed circumstances must not be taken into account for it is confronted by a debtor's respected interest, the principle of restoration and adherence to contractual equilibrium and the balance of interests. For example, pursuant to Article 6.111 III (b) of the ECLP in the process of adaptation of contract to changed circumstances court equally distributes damage and benefit arisen from changed circumstances across parties. Further, it imposes the liability for damages resulting from termination of contractual talks contrary to the principles of good faith and due diligence by one of the parties or refusal thereof on a party responsible for such harm. The above-mentioned clearly confirms that a party is obliged to support the measures directed at saving a contract and under the provision of Article 398 III (if it is impossible to adapt contract to changed circumstances or another party disagrees) it may not be assigned the right to refuse adaptation of a contract to changed circumstances.

2.4 Legal Preconditions for Avoidance of a Contract in the Conditions of Changed Circumstances

In case it is impossible to adapt a contract to changed circumstances at the stage of talks between the parties Article 398 III of the CCG stipulates expressly the use of the right of a disadvantaged party to avoid a contract, without the obligation to apply to court with request to adapt. The mentioned legislative provision contains a gap. Namely, triggering of the request to avoid a contract must be admissible only after court deems it impossible to adapt contract to changed circumstances and not at the stage when parties fail to agree on the conditions for adapting contract to new circumstances.

It should be mentioned in favour of the brought position that since in the process of adapting contract certain conditions must be formulated in a new way considering changed factual circumstances in the given case Article 325 of the CCG must be used: *1. If the conditions for the performance of obligation must be determined by one of the parties to the contract or a third party then in the presence of doubt it is assumed that such determination must be made on the basis of fairness. 2. If a party does not deem the conditions to be fair or if their determination is delayed decision is made by the court.* Respectively, if at the stage of contract negotiations parties fail to agree upon the terms for revising a contract court must get involved in relations as a third objective party in order to maintain a contract, as a neutral party that on the basis of reasonable judgment objectively will assess the balance of interest of parties, equivalency thereof and will try to balance those.

Applying to court prior to avoidance of a contract ensures the adherence to the fundamental principle of performance of obligation. The mentioned matter is significantly related to the additional period concept in the Law of Contracts. When regulating secondary rights to be used following the breach of obligation Anglo-American and Continental European system demonstrate conceptually different approach: "the basis for the regulation under the English legal system is a concept that in case of breaching a contract parties may "avoid contract" and seek due satisfaction in another way, while the idea of the German law is opposite. Namely, prior to the determination of another legal regime for contractual relations the parties should try at least once to save contract. That is why granting additional period to a debtor is an undisputed leitmotiv of legal regulation of breach of obligation in continental and especially in German law."[152]

[152] *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 380-381, cited: *Pipia A.,* Main Features for Continental

"Similar to the German law the right to demand performance is widely recognized in Roman law as well and for example, in accordance with Article 1184 II of the Civil Code of France and Article 1453 of the Civil Code of Italy a creditor in relation to whom a debtor does not perform obligation is authorized to demand not only the avoidance of a contract and compensation for damages, but also performance of certain obligation in case the above-mentioned is still possible. While the matter is viewed in a different way in the system of general law and if the obligation agreed under the contract is not fulfilled a party is restricted in terms that it can demand compensation for damages, not the performance in case of breach of a contract."[153]

"Legislation of Continental Europe countries traditionally views the matter from the standpoint that in case of failure to perform obligation it is a principal right of a creditor to demand a debtor to perform obligation in real performance in specie (in-kind)"[154] "Anglo-American law is based on a different interpretation of the essence of obligation.. it is established as a general rule that in case a debtor breaches contractual obligation a creditor can demand from a debtor only monetary compensation."[155]

As a result of reform of German Law of Contracts an approach was introduced that at the same time protects the principle of faulty responsibility in relation to the right to demand compensation for damages and, at the same time, recognizes the primacy of demanding performance in specie.[156] The combination of these two distinguishing elements places German law in a diametrically different position from the Anglo-American system at a doctrine level.[157]

As part of the continental law "Georgian Civil Code is an act directed at performance."[158] General part of the Law of Contracts starts with the following legislative provisions: *1. every performance implies the presence of an obligation. 2. obligation must be fulfilled in a due manner, in good faith at agreed upon time and place.*[159] The "entire body of the Code, general as well as private part is based on performance mechanisms. Responsibility is the most extreme measure in it and until the application thereof the parties are given the chance to better the breached obligation. Main point is performance not responsibility."[160]

The mechanisms stipulated in the Code mainly and foremost are directed at ensuring performance of obligation. "Contract is not a good to be undervalued nor the means to enslave someone. Contract is like a beautiful castle where entry is free and it is difficult to exit... the norms of the Code are organized

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European and Anglo-American Legal Regulation of Avoidance a Contract and their Impact on Georgian Law, Georgian Law Review, Special edition, 2008, 80 (In Georgian).

153 *Zweigert K., Kötz H.,* Einführung in die Rechtsvergleichung: auf dem Gebiet des Privatrechts, 3. Aufl., 1996, 469, 477, cited in: *Chachava S.,* Comparative Legal Analysis of Secondary Rights of a Buyer, Georgian Law Review, Special edition, 2004, 36 (In Georgian).

154 *Dzlierishvili Z.,* Performance of obligation, Tb., 2006, 76 (In Georgian).

155 *Dzlierishvili Z.,* Performance of obligation, Tb., 2006, 76 (In Georgian).

156 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 438.

157 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 438.

158 *Zoidze B.,* Reception of European Private Law in Georgia, Academy of Sciences of Georgia Tinatin Tsereteli State and Law Institute, Private Law Institute, Tb., 2005, 285 (In Georgian).

159 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Commentary to the Civil Code of Georgia, Book III, Tb., 2001, 267-359 (In Georgian).

160 *Zarandia T.,* Place and Terms of Performance of Contractual Obligation (candidate's dissertation abstract), Tb., 2002, 3 (In Georgian).

in a way that it does not call on the conflicting parties to terminate a contract, but pushes them towards maintaining and performing thereof."[161]

Namely, the following fact also demonstrates the primacy of performance: the CCG stipulates additional performance as a priority legal protection measure in a catalogue of secondary rights arisen on the basis of breach of obligation. Namely, Article 405 I of the CCG that sets forth the preconditions for avoidance of a contract relates the refusal to a contract to missing the term set for additional period set for performance. Under the same principle, under Article 399 II of the CCG, *if the grounds for the repudiation of a contract is the breach of obligations the above-mentioned shall be admissible only after the timeframe set for the elimination of gaps is missed or after a futile warning.*

Additional period is set as a precondition in relation to the demand to compensate for damages also in Article 394 of the CCG that shows certain contradictory regulation. For the purpose of judgement it is important to bring the wording of the mentioned legislative provision: in case a debtor breaches the term a creditor can set for a debtor term necessary for performance of obligation. If the debtor fails to perform the obligation in this timeframe as well then the creditor shall be authorized to demand compensation for damages instead of the obligation of performance. From the content of the Article, although at a first glance assigning extension period is seen as a right of a creditor but considering Article 394 III of the CCG it is undoubted that Article 394 II of the CCG sets forth the mandatory rule of assigning additional period. *Namely, it is not necessary to assign additional period if it is evident that it will not be productive or in the presence of a special circumstances that considering the interests of both parties justify the immediate application of the demand to compensate for damages (Article 394 III.* The following conclusion can be made on the basis of considering the above-mentioned provision in relation to each other: if Article 394 III of the CCG lists exceptional cases for determining additional period when "it is not necessary" to assign additional period logically Article 394 II of the CCG implies that in all other cases not envisaged under Paragraph 3 it is mandatory to assign additional period. Georgia, too, followed German law in the regulation of this matter.[162]

The above-mentioned once again evidences that if legislation relates the access to the right to repudiate a contract, along with a respected basis the missing of the additional period determined for performance, in the presence of changed circumstances again to ensure the principle of supremacy of the performance of obligation for the transformation of a contractual relation to the legal regime of avoidance of a contract the obligation of parties to apply to court with a request to adapt contract and the declaring the adaptation of a contract impossible by court must be set as a precondition.

Only in the presence of the above-mentioned legal preconditions may the avoidance of a contract be invoked, as the means for the most important legal protection of a disadvantaged party, which is "performed in accordance with the general rule. In case of exercising this right legal outcome is determined and the demand to restore status quo that existed prior to the conclusion of a contract is established by Article 352 of the CCG in relation with Article 398 of the CCG.[163]

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161 *Zoidze B.,* Reception of European Private Law in Georgia, Academy of Sciences of Georgia Tinatin Tsereteli State and Law Institute, Private Law Institute, Tb., 2005, 286-287 (In Georgian).

162 Paragraph 323 of the GCC sets forth as a precondition for avoidance of a contract observance of the requirement on the appointment of additional period and not the presence of substantial losses by a party (In Georgian).

163 *Chachava S.,* Competition of basis for demands and demand in private law, PhD paper, Tb., 2010, 70. <http://www.law.tsu.edu.ge/files/disertacia_Sofio_chachava.pdf>, (In Georgian).

3. Gaps in the Regulation of Impossibility of Performance

3.1 Faultless Impossibility of Performance as the Only Type of Impossibility Envisaged under the Civil Code

Following the fundamental reform implemented in the German law a unified concept of the breach of obligation was introduced.[164] Impediment to performance of obligation (*Leistungsstörungen)* is used in the GCC with a synonymous meaning to the *Breach of Contract*, a category well familiar to the common law system. It combines all types of non-performance in a unified system of the breach of obligations and comprises all known and possible deviations from the contractual obligation regime.[165] Breach of a contract in German law is defined as full or partial failure to perform contractual obligations.[166] Respectively, the presence of the breach of contract is determined on the basis of an objective criterion – there is a breach in case the failure to fulfil contractual obligation as an objective fact is confirmed.

All types of failure to perform unlike the regulation prior to reform was unified under a general concept – breach of obligation *(Pflichtverletzung)* that comprises four types of failure to perform: 1) delay in performance 2) impossibility of performance; 3) defective performance; 4) breach of obligation to take account of the rights, legally protected interests and the other interests of the other party.[167]

Unlike German law Georgian legislation does not contain a unified concept of the breach of contract obligations. The CCG does not stipulate the regulation of a specific category of breach of obligation under a separate Article. For example, the provisions regulating defective performance as one of the types of the breach of obligation are scattered in the provisions that regulate the purchase and sale contract and not included in a general part of obligation law that would be equally applicable to specific types of contracts. Only delay in performance by a debtor is regulated separately and in the chapter dedicated to delayed performance there is only one Article that deals with the impossibility of performance and it contains gaps as well.

Impossibility of performance of an obligation is represented as one of the main and independent types of breach of contract in Continental Law system, although in the CCG, in terms of regulating the impossibility of performance there is a significant gap. Namely, it is considered in a superficial manner in the category of the delayed performance and this independent type of the breach of obligation is not

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164 After the reform the fault was rejected as a precondition necessary for avoidance a contract. Although the reform commission retained unaltered the fault as the basis for demanding the compensation for damages. See: *Zimmermann R.,* Breach of Contract and Remedies under the New German Law of Obligations, Saggi, Conferenze e Seminari 48, Roma, 2002, 7-8, <http://www.cisg.law.pace.edu/cisg/biblio/zimmerman.html>, (In Georgian).

165 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 379.

166 *Markesinis S.B., Unberath H., Johnston A.,* The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 387.

167 Similarly, the ECLP stipulates a uniform concept of breach of obligation. Non-performance denotes any failure to perform an obligation under the contract, whether or not excused, and includes delayed performance, defective performance and failure to co-operate in order to give full effect to the contract. See: ECLP (Principles of European Contract Law – Parts I and II - Revised 1998, Part III – 2003, <www.lexmercatoria.org>) 1.301 Article IV (In Georgian).

regulated in a fundamental manner in the current Code. It is only Article 401of the CGG regulating impossibility of performance that is represented in relation to the delay in performance to express the case as to when delayed performance is excluded. Namely, according to the wording of the above-mentioned normative provision delayed performance will not be considered to have been founded provided the failure to perform an obligation was due to the circumstances beyond a debtor's fault. The above-mentioned Article does not fully reflect the legal essence of impossibility of performance for it is listed only as a circumstance that excludes the breach of term. Under the above-mentioned legislative provision only one of the type of impossibility of performance -- faultless impossibility is regulated that is not the only classical case of this legal construction. Actually, impossibility of performance can be based on a faulty action (omission) of a debtor, as well as a creditor.

Is can be clearly seen from the wording of heading of Article 401 of the CCG that the Code regards all types of failure to perform obligation that are not caused by the fault of a debtor as the faultless impossibility of performance that is improper. For example, when a creditor breaches term the obligation cannot be performed for reasons beyond a debtor's control although this does not expressly establish the impossibility of performance for a debtor remains obliged to perform (for example, by way of depositing). Further, there is impossibility of performance not only when obligation is not fulfilled due to the reasons beyond a debtor's control but it was faulty action of a creditor or a debtor that has contributed to the impossibility of performance.

Therefore, in Article 401 just one – faultless impossibility category of the impossibility of performance is identified. And in case of failure to perform the matters of relative failure of performance access to the secondary rights, responsibility of parties, exemption from counter performance, those established under a faulty action of a creditor or a debtor, temporary and permanent, objective or subjective, absolute or justified under good faith principle are not regulated at a legislative level which causes substantial difficulties at a doctrine level, as well as on the level of the application of law. For example, court invokes Article 401 of the CCG to regulate only such cases of impossibility of performance that are not attributed to a faulty action of a debtor.[168]

Therefore, Article 401 of the CCG sets forth only the concept of impossibility of performance that is beyond control of a debtor and under an imperfect and poor wording.

3.2 The Problem of Regulation of Impossibility of Performance as a Type of Breach of Obligation and the Relation to the Secondary Rights

Article 399 of the CCG sets forth legal regime for repudiation of a contract that is used only in relation to long-term law of contract relations. Pursuant to Paragraph 1 of the above-mentioned Article any party to a contract can, due to the respected grounds decline long-term contract relations without compliance with the term set for the repudiation of a contract. Determination of the presence of respected grounds relates to an objective criterion. Namely, under the mentioned Article, basis is respected when a party that is dissolving a contract, considering specific circumstance, including

[168] March 2, 2006 ruling of the Supreme Court of Georgia for the case N as -853-1122-05, 42 (In Georgian), <http://www.supremecourt.ge/files/upload-file/pdf/samoq2006-5-uni.pdf>.

insuperable force and bilateral interests cannot be demanded to continue contractual relations until the expiration of the agreed upon term or the term established for the repudiation of a contract. It is important that the above-mentioned provision declares insurmountable force as a faultless impossibility of performance as a precondition for the repudiation of a contract in the presence of which the authority to immediately dissolve a contract is established.

Article 314 I of the GCC sets forth a similar provision; it deems it admissible to repudiate long-term contractual relationship under respected grounds, subject to agreement of parties or under law, without adherence to special terms established for the repudiation of a contract. Although, unlike Article 399 I of the CCG, Article 314 I of the GCC does not contain a reference to the impossibility of performance as the grounds for immediate repudiation of a contract. While Article 323(II) of the GCC stipulates certain cases of impossibility of performance (implies impossibility of performance) when a legal mechanism for additional period is not used. This is the very reason for not indicating the impossibility of performance in Article 314 I of the GCC. Moreover, under Article 314 II of the GCC the breach of obligation is treated as an independent grounds for the repudiation of a contract. This is when the concept of additional period enters fully into effect until the relations are transformed to a legal regime of avoidance of a contract.

If under Article 399 of the CCG insurmountable force as a faultless impossibility of performance is treated as legal grounds for immediate repudiation of a contract, Article 399 II of the CCG declares the breach of obligation as an independent precondition for the repudiation of a contract. Namely, if the basis is also the breach of contractual obligations the repudiation of a contract is admissible only after missing the term set for the elimination of gaps or after futile warning. Respectively, Article 405 II of the CCG is used. Under this logic CCG does not consider the faultless impossibility of performance as to be the breach of obligation since it regulates separately the matter of avoidance of a contract in case of faultless impossibility, while the case of repudiation of a contract in case of the breach of a contract is regulated under an independent – Article 399 II of the CCG. Therefore, impossibility of performance as one of the independent types of breach of obligation must be subjected to the regulation of Article 399 II of the CCG.

Although assigning additional period in the provisions of impossibility of performance, in terms of result is deprived of legal sense but the cases when the authority to immediately avoid contract is established are determined under Article 405 II of the CCG. Article 405 II (a) of the CCG refers to those very conditions when assigning additional period is excluded for it is evident that it will not have any result. Given the definition of the provision this should mean expected violation and legal categories of impossibility of performance when appointing additional period becomes a mere formality. That is why reference to insurmountable force in Article 399 I of the CCG is unjustified from a legal standpoint.

Although in case of faultless impossibility of performance Article 399 I of the CCG provides for the ending of contractual relationship under the legal structure of repudiation of a contract although it is unclear faultless impossibility of performance, which is not represented in the Code as the breach of obligation, and the relation of refusal to contract, since in Continental Law, unlike Anglo-American law, the right to avoid contract arises only on the basis of breach of obligation.

Since the Code stipulates legal regime of ending contractual relationship in case of impossibility of performance only in the presence of long-term relations in all other contract law relations that do not envisage the recurrent performance the matter of avoidance of a contract in case of impossibility of

performance remains beyond regulation. Further, the institution of repudiation of a contract, with its legal essence significantly differs from legal category of avoidance of a contract essential feature of which is the very restoration-restitution of status quo, which in case of repudiation – in the case of long-term contract law relations is actually unimaginable.

The CCG does not envisage legal construction of avoidance of a contract under the grounds of impossibility of performance that proves once again that impossibility of performance as an objective fact of non-performance of obligation is not represented in the Code as a type of breach of obligation (despite the fact that it is provided in the chapter on the breach of obligation). Considering the above-mentioned it is impossible to also have access of a creditor to the right to compensation for damages for according to Article 394 I of the CCG a debtor will be imposed responsibility for compensation only in case of faulty *breach*.

Since the Code envisages the possibility of ending contractual relationship only under the legal mechanism of the repudiation of a contract, and that - in case of faultless impossibility of performance and only in long-term contractual relationships the matter of legal fate, rights and duties of parties, as well as their responsibility remains beyond regulation. And not only in long-term, but in short-term relations as well.

It should be said as *De lege ferenda* that the access of a creditor to the rights of waiver a contract and claim for indemnification of damage incurred will be stipulated by a regulator as a type of the breach of the obligation of failure of performance. For legal clarity it is necessary also to regulate in detail the types of impossibility of performance and establish the boundaries of responsibility of a debtor considering the fault of a debtor in relation to the impossibility of performance.

V. Conclusion

On June 26, 1997 the CC of independent Georgia was enacted the law common to German Law that was the attempt to establish legislative framework reflecting the system of principles and values characteristic of the Europan law space that would separate itself from the Post-Soviet views and would be in accordance with the demands of civil turnover emerged in the conditions of changed social environment.

When forming new legal institutions the CCG was based on European codifications and especially reflected the results of conceptual perfection implemented on the basis of the fundamental reform of the German Law of Contracts. Still, the concepts of hardship and impossibility of performance introduced under the influence of the German law go significantly beyond the later regulation of the GCC reform, similar institutions stipulated under the German civil legislation and from conceptual or system terms, envisages contradictory and non-uniform regulation.

The analysis of extreme hardship and impossibility of performance in Georgian law shows a number of significant gaps in terms of a system as well as content. The results of the study can be formulated through the summarizing points:

- Article 398 I of the GCC regulating changed circumstances does not contain an expressly presented wording of all prerequisites necessary for hardship. The prerequisites for the application of the above-mentioned Article are identified on the basis of the analysis of the provision and judicial

practice. To ensure proper application of the provision it is necessary to precisely and accurately determine all legal features of hardship.

- In the CCG unreasonableness of performance is represented as an accompanying legal consequence of hardship. It is necessary to specify the wording of Article 398 of the CCG - unreasonableness, irrationality of performance when under the good faith principle it is unjustified to demand from a party precise fulfilment of unchanged contract terms along with other mandatory prerequisites should be stipulated as one of necessary requirement for fully establishing hardship. The above-mentioned is conditioned by that the reasonableness of performance is the primary criterion determining binding force of contract.
- Legislative provision regulating changed circumstances ignores the role of court in the process of adapting contract to new circumstances since it relates the impossibility of adaptation of contract or the absence of consent of one of the parties on adaptation at the stage of contractual negotiations directly to the right to avoid a contract and does not stipulate the submission of the demand to court requesting adaptation as the following stage of contractual negotiations.
- It is inadmissible for the CCG to be granting to a party the right to refuse to the adaptation of a contract to changed circumstances. Legal doctrine and European legislation generally recognize the obligation of a party to support the measures directed at maintaining a contract. Respectively, creditor's refusal to adapt a contract to changed circumstances is not to be taken into account for it is confronted by a debtor's respected interest, the principles of restoration and respect of contractual fairness and equilibrium, balance of contractual interests.
- In case of impossibility to adapt contract to changed circumstances at the stage of negotiations between the parties the CCG expressly envisages the application of the right of a disadvantaged party to avoid the contract, without the obligation to apply to court with demand to adapt. The mentioned legislative provision is imperfect. Namely, the triggering of the demand to avoid contract must be admissible only after court deems it impossible to adapt contract to changed circumstances and not at the stage when parties fail to agree on the terms of adapting a contract to new circumstances. In the presence of changed circumstances to ensure the realization of the principle of pacta sunt servanda, for transforming contractual relation into a legal regime of avoidance of a contract the following shall be set as a precondition: obligation of parties to apply to court with demand to adapt contract and declaration of adaptation of contract by court impossible.
- Unlike German law Georgian legal space does not comprise a uniform concept of breach of obligation. The CCG does not envisage regulation of specific category of the breach of obligation through a separate Article. For example, provisions regulating defective performance as one of the types of breach of obligation are scattered among the norms regulating sales contract and are not included in a general part that would have been equally applicable to specific types of contracts. Only the breach of term by a debtor is regulated separately while the impossibility of performance is stipulated in a single Article in a relevant chapter and that provision is imperfect as well.
- In the CCG of Georgia, in terms of regulation of impossibility of performance there is a significant gap. Namely, this issue is covered superficially in the category of delayed performance and this separate type of breach of obligation is not regulated in the current code in a comprehensive manner. The only Article 401 of the CCG regulating impossibility of performance is represented in relation to

the delayed performance to express the case when the term will not be treated to have been breached. The mentioned legislative provision regulates only one of the types of impossibility of performance – faultless impossibility that is not the only classical case of this legal construction. It is unjustified that the Code considers all types of non-performance that are not due to a debtors fault as faultless impossibility of performance. While the matters of access to secondary right, responsibility of parties, exemption from counter obligations, matters of temporary and permanent, objective or subjective, absolute or relative impossibility of performance based on a faulty action of a creditor or a debtor in case of impossibility of performance are not determined at a legislation level, which causes substantial difficulties at a doctrine as well as application of law levels.

- The CCG does not consider faultless impossibility of performance to be the breach of obligation for the matter of repudiation of a contract in case of faultless impossibility of performance is regulated under a separate clause while the case of repudiation of a contract in case of breach of obligation is regulated under a separate – Article 399 II of the CCG. Therefore, the impossibility of performance, as one of the independent types of breach of obligation should be regulated under the very Article 399 II.
- The Code stipulates legal regime of ending contractual relationship in case of impossibility of performance only in the presence of long-term relationship, in all other contractual relations that do not envisage recurrent performance in case of impossibility of performance the matter of avoidance of a contract is left beyond regulation. Further, the institution of repudiation of a contract, with its legal essence, differs significantly from legal mechanism of avoidance of a contract essential feature of which is restoration-restitution of status quo, which is practically impossible in long-term contractual relations.
- The CCG does not envisage legal regime of avoidance a contract under the grounds of impossibility of performance that proves once again that impossibility of performance as an objective fact of non-performance of an obligation is not represented in the code as a type of the breach of obligation. Thus, the matter of access of a creditor to secondary rights and the matter of responsibility of parties is uncertain and is left beyond regulation.
- The codification of impossibility of performance as a type of breach of obligation in CCG will provide for the availability of secondary rights for an authorized person. For legal clarity detailed regulation of the types of impossibility is necessary. Also the scope of debtor's responsibility should be determined by taking into account his/her fault in terms of the emergence of impossibility of performance.

ANA RAMISHVILI*

PRIVATE LAW MECHANISMS FOR THE PROTECTION OF CONSUMERS' RIGHTS IN CREDIT AGREEMENTS FOR CONSUMERS

1. Introduction

Improved standard of living is a natural outcome of the economic development of a country. Experience of developed countries showed that significance of consumer credit has been increasing with the establishment of a middle class of population. Consumer credit allows people to satisfy their personal and everyday necessities to a higher extent compared to that affordable through income of middle class people. One can say that consumer credit has become an integral part of everyday life in the countries of modern market economy. Consumer credit turned out one of the successful financial services in Georgian reality as well and the number of its consumers has been growing increasingly.

Despite the high popularity of consumer credit, credit agreement made by consumers with the view of satisfying their personal and everyday necessities, is considered as one of the most complicated agreements entailing potential risk. This fact makes protection of consumers' rights and interests provided for by legislation especially important and creates the necessity of appropriate legal regulation for consumer credit agreements taking account of their peculiarities. The goal of modern legal regulation in the sphere of consumer crediting is to promote development of healthy competition and ensuring protection of consumers' rights at a higher level.

2. Credit Agreement for Consumer

2.1 Notion

The notion of the Credit Agreement for Consumers[1] or Agreement of Consumer Loan[2] is included in the national legislations of developed countries. In these concepts, consumer credit is defined as a credit or loan agreement signed between creditor and consumer. However, a new directive adopted in EU regarding the consumer credit has refused to a certain extent to use the term "consumer credit" and has provided more precise definition[3] of credit agreements for consumers – 'credit agreement' means an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred

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1 Code de la consummation 311-1 (4); Consumer Credit Act 1974 c.39, sect. 8 (1); Truth in Lending Act (hereafter – TILA) codified to 15 U.S.C. §1602 n. (h) hereafter – 15 U.S.C.

2 German Civil Code, §491 (1), hereafter – GCC.

3 Compare. Council Directive (87/102/EEC) for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit OJ L 42 12.2.1987, 48-53 Art. 1, para. 2 (c) hereafter - Directive (87/102/EEC).

payment, loan or other similar financial accommodation, except for those agreements, which provide services on a continuing basis or supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of installments."[4]

There is no legislative definition of 'credit agreement for consumer' in Georgian legal sphere. Civil Code of Georgia (hereafter CCG) leaves impression of ambiguous document with respect to the abovementioned issue. On the one hand, general section of law of CCG includes article[5] titled 'Consumer Credit;' on the other hand it does not recognize the approach of legal regulation in terms of credit types by determining general concept of bank credit agreement[6], which is used for any types of credit agreement. In Article 37, part I of CCG a specific case of denying obligations by a borrower is stipulated, while in part II, the goal of a lawmaker is to specify this specific case. Definition of credit agreement for consumer is provided in Georgian legal literature – "credit agreement for consumers means an agreement signed between entrepreneur or a professional creditor and consumer."[7]

Credit agreement for consumer is regarded as a linked credit agreement in relation to a basic agreement, through which credit agreement for consumers is made to provide financial assistance to participating consumer. 'Linked credit agreement' means a credit agreement where (i) the credit in question serves exclusively to finance an agreement for the supply of specific goods or the provision of a specific service[8], and (ii) those two agreements form, from an objective point of view, a commercial unit.[9] In Georgian law, purchase agreement only is considered a basic agreement.[10] A commercial unit shall bedeemed to exist where the supplier or service provider himself finances the credit for the consumer or, if it is financed by a third party, where the creditor uses the services of the supplier or service provider in connection with the conclusion or preparation of the credit agreement[11], or where the specific goods or the provision of a specific service are explicitly specified in the credit agreement.[12]

2.2. Parties

Parties of credit agreement for consumers is a determinative indicator of a consumer credit. Therefore discussion of the parties of this agreement is vital.

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4 Directive 2008/48/EC Of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC OJ L 133 22.5.2008, 66-92 Art. 3, (c) hereafter – Directive 2008/48/EC.

5 CCG, article 370

6 CCG, article 867.

7 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Comments on Civil Code of Georgia, Obligation Law, private part, volume III, Tb., 2001, 300.

8 Compare. CCG, article 370, part 2, first sentence.

9 Directive 2008/48/EC Art.3, (n) (i) (ii).

10 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Comments on Civil Code of Georgia, Obligation Law, private part, volume III, Tb., 2001, 301.

11 See: CCG, article 370, part 2, 2nd sentence.

12 Directive 2008/48/EC Art.3, (n) (ii).

a. The Notion of Creditor

Civil Code of Georgia for the indication of the party to credit agreement, who is obliged to issue a credit, uses the term 'credit-giver'[13]. While in the acts regulating bank credit agreements, the term 'credit-issuer'[14] is used. With the view of ensuring unity of terms, it is expedient to establish one term – 'creditor'. However, account shall be taken to the circumstance that CCG also uses the term "creditor" to indicate the party to binding relations, which is granted the right to claim fulfillment by another party. Nevertheless, in credit relations use of 'creditor' for the indication of the party, who shall issue a credit, will not cause either any vagueness or mix of concepts in the relationship between the parties under private law. Quite contrary, use of 'creditor' in relation to credit relationship is normal as it better reflects the specifics of the agreement. Therefore, application of the term 'creditor' in credit relations may be considered as a particular case of a common term "creditor".

'Creditor' may be a natural or legal person "who grants or promises to grant credit in the course of his trade, business or profession."[15] However, this Directive does not affect the right of Member States to limit "the provision of credit for consumers to legal persons only or to certain legal persons".[16] GCC instead of 'creditor' uses the term 'entrepreneur' *(Unternehmer)* which means "natural person or legal entity or group of legally able persons, which acts by concluding agreement for the implementation of its business or independent professional activity."[17] In Georgian reality, any bank or institution, which holds a license of taking deposits or granting loans is regarded as creditor.[18]

b. The Notion of Consumer

Legal term 'consumer', which meets the legal requirements of the Protection of Consumers' Rights has been introduced in XX century[19] in science of law and later has been transferred to economy, where the consumer is perceived as an addressee, and the end beneficiary of the activities carried out by afferent of goods or services.[20]

New directive related to credit agreement for consumers unlike the old directive, which took account only of the trade and profession[21], has specified the sphere and determined that "consumer

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13 See CCG, article 370, part 2.

14 CCG, article 867.

15 Directive 2008/48/EC Art. 3 (b).

16 Directive 2008/48/EC recital (15).

17 GCC, §14 (1).

18 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Comments on Civil Code of Georgia, Obligation Law, Private part, volume IV, p. II, Tb., 2001, 194.

19 *Hondius E.,* The Notion of Consumer: European Union versus Member States, Sydney Law Review, Vol. 28, 2006, 89.

20 *Burgoine T.,* Characteristic of Consumer Law, 297; *Dauses M. A., Sturm M.,* Prawne podstawy ochrony konsumenta na wewnętrznym rynku Unii Europejskiej, KPP 1997, z. 1, 34 ff. ციტირებულია: Elwira Macierzyńska-Franaszczyk, Consumer concepts in the European Union, <http://www.laweuropa.com/English/index.php?d=tuketici&mod=Ab_Tuketicinin_2_Introduction>.

21 Directive 87/102/EEC Art. 1, para. 2, (a).

means a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession".[22]

Legal definition of consumer contains two indicators. First indicator is based on subjective criterion indicating that the consumer is a natural person, while second indicator is based on functional criterion and deals with the purpose of the activity of the natural person. Purpose means the goal, which the consumer as a natural person only may have. These indicators regarding the consumer credit have interrelated and interdependent significance. "The notion of consumer is conditioned by personal features of the consumer and on the other hand the purpose of credit use".[23]

The notion of consumer in Georgian legislation is provided for in the law of Georgia on "Protection of Consumers' Rights" – "Consumer means a user, purchaser, and customer of a good (work, service) for personal consumption, or an individual having such an intention". This notion requires correction regarding the both indicators. With respect to the first indicator, the idea about substitution of 'citizen' with 'natural person' is to be considered.[24] As regards the second indicator, purposes of natural person shall be specified and defined that consumer's purposes shall be outside his trade, business or profession. Besides, with the view of improving legislative technique, it is expedient to introduce such a wording of a norm, which will exclude use of the following terms – "user, purchaser, having an intention". These words reflect the stages of the activity of a natural person only, accordingly, they have no special importance when defining the notion of consumer.

2.3. Subject

Credit agreement for consumers is a service type agreement, through with a creditor renders financial assistance to consumer to satisfy own requirements. Therefore, the subject of the credit agreement for consumers is provision of financial service. Financial service means any service of banking business, including credit, insurance, private pension, investment or type of payment.[25] In case of credit agreement for consumers, financial service is expressed by granting amount of money covered by credit agreement by a creditor. In other words, creditor grants a possibility to consumer for temporary use of money.

2.4. Principles of Crediting for Consumers

The importance of Principles of Crediting for Consumers is based on the fact that they determine basic provisions of legal regulation of credit relationships for consumers.[26] Organic law on "National

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22 Directive 2008/48/EC Art. 3 (a).

23 *Bülow P., Artz M.,* Heidelberger Kommentar zum Verbraucherkreditrecht, 6., neu bearbeitete Auflage, C.F. Müller, 2006, 42.

24 *Kardava E.,* comparative law Review of EU Standards for Protection of Consumers' Rights on the example of agreement signed in the street, Journal "Review of Georgian Law"– special edition, 2007, 158 (In Georgian).

25 Directive 2002/65/EC OF of 23 September 2002 Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9.10. 2002, Art. 2 (b).

26 *Sarnakov I.V.,* Consumer Crediting in Russia: Theory, practice, legislation, ed. "Jurisprudencia", M., 2010, 80 (In Russian).

Bank of Georgia" provides definition of term 'credit'[27], according to which credit is: "any liability related to issuing financial means on the basis of repayment, liquidity, security and maturity."[28] Article 5, paragraph 1 of the law of Georgia on "micro financial organizations" stipulates notion of microcredit - „Microcredit is an amount issued to a borrower or a group of borrowers according to terms and conditions of maturity, repayability, price and purposefulness." From the above mentioned statements those principles can be outlined, based on which consumer crediting has been carried out: repayability, maturity, price, security and purposefulness.

Repayability means obligatory return of funds granted by creditor. The principle is practically expressed by coverage of credit via transfer of appropriate amount on the indicated account of the credit organization, which ensures renewal of credit resources of the bank being a compulsory condition for continuation of statutory activity.[29]

Maturity principle means that money shall be returned within a particular term stipulated by agreement, rather than any time favorable for the consumer. Credit maturity itself is a compulsory condition for ensuring credit repayability. If this principle is not met, according to article 873 of GCC, the creditor is entitled to break credit relationship. The issue of attributing any specific Credit Agreement to the Credit Agreement for Consumers is based on this principle. Namely, it has been determined in EU Directive that the mentioned directive with the exception of some statements[30] shall not be applied to credit agreements of certain type, according to which credit is to be covered in one (overdraft)[31] or three (deferred debtor cards)[32])[33] months.[34] In conditions of market economy, adherence to this principle is in the interests of not only the particular creditor, but sustainability of country's financial system as well.

Price principle deals with the profit to be gained by the creditor in return for temporary use of his capital. "Amount of profit on credit is determined by certain interest of the amount for being used throughout the year.."[35] To calculate annual percentage rate, *total cost of the credit to the consumer* shall be determined, including all expenses, commission, interest and any other payments to be covered by consumer in relation to credit agreement, which the creditor is aware of, except notary costs. Costs of auxiliary service related to credit agreement, particularly insurance premium is included in the price if signing of service agreement is required for taking a loan.[36]

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27 Organic law of Georgia on "National bank of Georgia", article 1, paragraph "m" (In Georgian).

28 Compare with "law of Georgia on activity of commercial banks", article 1, paragraph "h" (In Georgian).

29 *Sarnakov I.V.,* Consumer Crediting in Russia: Theory, practice, legislation, ed. "Jurisprudencia", M., 2010, 85 (In Russian).

30 Directive 2008/48/EC, recital (11).

31 Directive 2008/48/EC, Art. 2, para. 2, (e).

32 deferred debit card.

33 Directive 2008/48/EC, recital (13).

34 Directive 2008/48/EC, Art. 2, para. 2, (f).

35 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Comments on Civil Code of Georgia, Obligation Law, Private part, volume IV, p. II, Tb., 2001, 197.

36 Directive 2008/48/EC Art. 3, (g).

Security principle aims to ensure return of money issued by the creditor in case of nonperformance or malperformance of terms under credit agreement by the consumer. According to article 870 of GCC, bank credit can be secured either by property or person. According to article 871 part 2 of GCC, "if the creditor is a consumer, and credit is not secured by mortgage , the right of abrogation arises after six month following the loan taking date". Based on the abovementioned norm one may conclude that under Georgian law use of mortgage is acceptable in order to ensure fulfillment of consumer obligations under credit agreement for the consumers. Goal of consumer credit is to improve standard of living rather than vice versa. Therefore, the approach to consumer credit is different, according to which credit agreements should not be secured either by a mortgage or by another comparable security commonly used on immovable property or secured by a right related to immovable property.[37] However, this approach has been modified by limitation of maximal amount to be transferred under the credit agreement for consumers.[38]

Purposefulness principle acquires special importance in relation to consumer credit. Credit agreement for consumers in banking business is distinguished from other credit agreements by legal state of the debtor and credit purposes. ,, credit is awarded for private purpose, if it serves meeting personal needs of a borrower.[39] There are two approaches to the definition of private purposes regarding the credit agreement for consumers. The first is based on American consumer culture implying under private purposes the personal, family and everyday life purposes.[40] While second approach, which has been formed by unification of EU law, implies purposes, which are outside consumer's trade, business or profession. In particular, according to consumer's definition specified in the new Directive on Consumer Credit, consumer is acting for purposes, which are outside consumer's trade, business or profession.[41] At first sight, an impression can be created that second approach provides wider definition of purposes, because negative definition as a rule is always longer; however, Directive on Consumer Credit has specified purposes for concluding the credit agreement for consumers by setting exceptions. Namely, "This Directive shall not apply to credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building"[42]. However, those credit agreements should not be excluded from the scope of this Directive only because their purpose is the renovation or increase of value of an existing building.[43] Therefore, credit purpose objectively and in accordance with the subject of the agreement shall be determined at the moment of concluding the agreement based on entire coincidence of the will of creditor and debtor,[44] as "the purpose of credit turns a debtor into a consumer"."[45]

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37 Directive 2008/48/EC Art. 2, para. 2, (a).

38 15 U.S.C. §1603 (3).

39 *Bülow P., Artz M.,* Heidelberger Kommentar zum Verbraucherkreditrecht, 6., neu bearbeitete Auflage, C.F. Müller, 2006, 50.

40 TILA (Regulation Z) §226.2 (a) (12).

41 Directive 2008/48/EC Art. 3 (a).

42 Directive 2008/48/EC Art. 2, para. 2, (b).

43 Directive 2008/48/EC, recital (14).

44 *Bülow P., Artz M.,* Heidelberger Kommentar zum Verbraucherkreditrecht, 6., neu bearbeitete Auflage, C.F. Müller, 2006, 50.

45 Ibid, 49.

3. Main Mechanism of Protection of Consumers' Rights

Mechanisms under private law for the protection of consumers' rights conditionally can be divided into two groups. First group deals with those obligations of the creditor, fulfillment of which is important for the protection of consumers' rights. Second group covers consumers' rights and their realization ensures protection of consumers' rights at a higher degree.

3.1. Obligation Regarding Information Disclosure

Imposing an obligation to creditors on information disclosure is an important mechanism of the protection of consumers' rights. The main duty of openness of information is that consumers can read and get aware of obligatory open information and therefore they are authorized to make better (more rational and informed) choice after they receive information about advantages and threats of a specific deal."[46]

An obligation of creditors on information disclosure aiming at raising consumers' awareness while concluding credit agreement for consumers implies provision of information to potential clients in ads and pre-contractual information to particular clients. An obligation of creditors on pre-contractual information disclosure mainly covers the information on the conditions and procedure for terminating the credit agreement and prepayment of the amount of credit.[47] Information open to the consumers is divided into two main categories. The first category itself contains two subcategories: price of consumer credit (total amount and installment to be paid by consumer, annual percentage rate, borrowing rate with all the financial data on any charges) and conditions of potential credit agreement for consumers (total amount of loan, duration). Second category deals with the disclosure of the information on the obligations for concluding subsidiary agreement for services related to credit agreement.[48] Consumers should be protected against unfair or misleading

practices, in particular with respect to the disclosure of information by the creditor, and „Such information should be given in a clear, concise and prominent way by means of a representative example".[49]

3.2. Duty to Assist

Duty to assist means relevant explanation and advice with respect to the conditions of the credit agreement for consumers to be provided to consumer. This duty aims at raising financial awareness of consumers. Financial awareness is an integral part of consumers' authorities taking central position in modern complex financial market. Financial awareness is a precondition for making right decision.

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46 *Garcia Porras C. I., Boom van W. H.,* Information Disclosure in the EU Consumer Credit Directive: Opportunities and limitations, Working Paper, Rotterdam Institute of Private Law, 2009, 4.

47 Explanatory Memorandum to Modified Proposal for a Directive on Credit Agreements for Consumers Amending Council Directive 93/13/EC, COM(2005)0483 final, Brussels 7.10.2005, 6.

48 *Garcia Porras C. I., Boom van W. H.,* Information Disclosure in the EU Consumer Credit Directive: Opportunities and limitations, Working Paper, Rotterdam Institute of Private Law, 12.

49 Directive 2008/48/EC, recital (18).

Financially informed consumer has knowledge of managing his/her own finances and is capable to assess the financially favorable services as well as those at risk.[50] "Where appropriate, the relevant pre-contractual information, as well as the essential characteristics of the products proposed, should be explained to the consumer in a personalized manner".[51] This will allow consumers to assess whether the proposed credit agreement is acceptable for his/her needs and financial conditions.

3.3. Duty to Assess Consumer's Creditworthiness

With the view of ensuring the stable development of consumer credit market and secure the creditor from potential risks, „Creditor has a special interest to evaluate ability of a borrower to repay the credit."[52] Duty to assess creditworthiness is based on *Principle of Responsible Lending*. Responsible Lending means that credit product complies with consumers needs and fits their creditworthiness.[53] "A responsible credit agreement can depend just as much on responsible borrowing as it does on responsible lending."[54] *Responsible borrowing* means that consumer shall provide creditor with the relevant, full and reliable information on his/her financial conditions, and on the other hand make informed decision on borrowing. Thus, consumer creditworthiness is assessed prior to conclusion of credit agreement based on the information provided by consumer and that obtained through the database. Creditor is responsible for individual assessment of creditworthiness.[55]

3.4. Right of Withdrawal

In order to approximate the procedures for exercising the right of withdrawal in similar areas, it is necessary to make provision for a right of withdrawal. It is aimed at protecting the consumer from hasty decisions and is expressed by the right of consumer to change his/her prior decision on concluding credit agreement for consumers without penalty and with no obligation to provide justification.[56] At first glance, the abovementioned creates an impression that right of withdrawal protects the consumer by limiting the binding nature of the agreement and thus contradicts one of the principles of the law on agreements - "the agreement shall be fulfilled". However, "right of withdrawal might be interpreted as just another example of the fact that formal and material notions of 'agreement' are not necessarily to coincide as indicated by more famous means, such as substantial error, cheating and defraud. In this

50 EBF Report on Financial literacy, Financial literacy - Empowering Consumers to Make the Right Choices, European Banking Federation (a.i.s.b.l.) D0305C-2009, 2.
51 Directive 2008/48/EC recital (27).
52 Civil Consulting, Broad Economic Analysis of the Impact of the Proposed Directive on Consumer Credit, Study, 2006-2007, 52.
53 European Commission, Internal Market and Services DG, Public Consultation on Responsible Lending and Borrowing in the EU, Brussels, 15 June 2009, 3.
54 *Kempson E.*, Over-indebtedness in Britain: A Report to the Department of Trade and Industry, Personal Finance Research Centre, September 2002, para. 4.2.
55 Directive 2008/48/EC recital (26).
56 Directive 2008/48/EC recital (34).

respect, right of withdrawal actually does not contradict the principle of *pacta sunt servanda,* as *pactum*, on which the binding nature of the agreement is based, does not rely on freely defined consent by consumer."[57]

GCC provides for the conclusion of agreements in the street.[58] With the view of exercising the right of withdrawal, Georgian consumers are given a week, while in case of credit agreement for consumers EU consumers have 14 calendar days.[59]

"These 'cooling-off periods' allow a party to a contract (usually a consumer) to terminate the contract within a certain period after its conclusion. The period shall be long enough so that a consumer can actually use the right of refusal. In other regard, *cooling-off shall not put additional load for a trader in regards to the end of an agreement concluded in indetermination. Interest of both sides shall be balanced in such a way that a trader* does not have excessive load and a consumer is give a possibility to take and later realize a decision about declining an agreement.[60] Unlike the agreement concluded in the street, for making the best choice from the present possibilities in case of credit agreement for consumers, the consumer shall be financially educated.

Information on the right of withdrawal is provided to the consumers at the pre-contractual stage[61]. ßonsequently the 14-day period starts either from the day of the conclusion of the credit agreement, or (b) from the day on which the consumer receives the contractual terms and conditions and information in accordance with Article 10, if that day is later than the date referred to in point (a) of this subparagraph.[62] Meaning that, *cooling-off* period starts only when the contract is concluded and the creditor has fulfilled his duty to information disclosure, as "when signing an agreement, the consumer usually shall be informed about his/her rights of withdrawal and the rules of their exercising"."[63] If the consumer is not provided with the information on right of withdrawal, *cooling-off* period will not start.[64] In case of linked credit there is an interdependent link between the basic agreement and the credit agreement for consumers signed for the purposes of financing. Therefore, where the consumer has exercised a right of withdrawal concerning a contract for the supply of goods or services, he shall no longer be bound by a linked credit agreement.[65] Besides, where the linked credit agreement is not fulfilled, or fulfilled only in part, the

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57 *Canaris W.,* 'Wandlungen des Schuldvertragsrechts, Tendenzen zu seiner 'Materialisierung', *Archiv für die civilistische Praxis* 200 (2000), 344. Cf. also Büßer (2001), 133-134; *Möllers Th.M.J.,* 'Europäische Richtlinien zum Bürgerlichen Recht', *Juristenzeitung* 2002, 130; *Valk W.L.,* 'Wanneer is een bedenktijd gerechtvaardigd?', in: *Hijma Jac., Valk W.L., Wettelijke bedenktijd*, preadviezen Nederlandse Vereniging voor Burgerlijk Recht, Kluwer: Deventer, 2004, no. 39. cited: *Loos M.*, Right of Withdrawal, in: Modernising and Harmonising Consumer Contract Law, *Howells G., Schulze R.* (eds.), Sellier. European Law Publishers, Munich, 2009, 241.

58 CCG, article 336 (In Georgian).

59 Directive 2008/48/EC Art. 14, para. 1.

60 *Loos M.,* Right of Withdrawal, in: Modernising and Harmonising Consumer Contract law, *Howells G., Schulze R.,* (eds.), Sellier. European Law Publishers, Munich, 2009, 244.

61 Directive 2008/48/EC Art. 5, para. 1, (o).

62 Directive 2008/48/EC Art. 14, para.1, (a) (b).

63 *Loos M.,* Right of Withdrawal, in: Modernising and Harmonising Consumer Contract law, *Howells G., Schulze R.* (eds.), Sellier. European Law Publishers, Munich, 2009, 255.

64 Ibid, 251.

65 Directive 2008/48/EC Art. 15, para. 1.

consumer shall have the right to pursue remedies against the creditor if the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction.[66]

3.5. Right of Early Repayment

Right of Early Repayment is an important mechanism for the realization of Consumers' Rights. The consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement.[67] Right of Early Repayment is provided for by CCG too, which links this right to the absence of real reason of the creditor.[68] According to the article 626, part 2 line 2 of the CCG, "Early Repayment of interest loans is allowed only upon prior agreement of the parties or on the consent of the creditor". With the view of bringing the credit agreement for consumers in compliance with EU regulations, it is expedient to specify the Right of Early Repayment as unconditional right with respect to credit agreement for consumers, which is independent either from the cogent reason, or the consent of the creditor..

Granting a consumer credit is a commercial activity of the creditor, thus early repayment is unprofitable for him. Therefore, In the event of early repayment of credit the creditor shall be entitled to fair and objectively justified compensation for possible costs directly linked to early repayment of credit.[69] The calculation of the compensation due to the creditor should be transparent and comprehensible to consumers already at the pre-contractual stage. In addition, the calculation method should be easy for creditors to apply.[70]

3.6. Agreement in Written Form

According to the law of Georgia on the activity of commercial banks, "relations between the client and the bank with respect to bank services shall be regulated by the agreement".[71] CCG stipulates that "the agreement is deemed concluded, if the parties agree on substantial conditions in the appropriate form".[72] Appropriate form of credit agreement under the Georgian law is a written form.[73] The requirement for the credit agreement for consumers to be in written form is a reflection of the reasonable protection of consumers' rights.[74]

Credit agreement for consumers, as a rule is concluded based on standard contract conditions offered by one party (creditor) to another (consumer) as the contract forms. In this regard, consumer's

66 Directive 2008/48/EC Art. 15, para. 2.
67 Directive 2008/48/EC Art. 16, para. 1.
68 CCG, article 364 (In Georgian).
69 Directive 2008/48/EC Art. 16, para. 2.
70 Directive 2008/48/EC recital (39).
71 Law of Georgia on the activity of commercial banks, article 19 paragraph 3, (In Georgian).
72 CCG, article 327, part I (In Georgian).
73 *Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J.,* Comments on Civil Code of Georgia, Obligation Law, Private part, volume III, Tb., 2001, 301.
74 *Zweigert K., Kötzt H.,* Introduction to Private Law in the Field of Comparative Law, v. II, editor *Ninidze T.,* Georgian Translation: *Sumbatashvili E.,* Tb., 2001, 64.

rights are acquired special importance in Credit agreement for consumers, and the pre-contractual information shall specify the consumer's right to be supplied, on request and free of charge, with a copy of the draft credit agreement.[75] This right serves to the raising the consumer awareness of the conditions and rights/obligations under the credit agreement.

Requirement concerning the written form of credit agreement for consumers shall be met through two mediums, namely credit agreements shall be drawn up on paper or on another durable medium.[76] 'Durable medium' means any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored."[77] 'Durable medium' definition consists of the two elements: (1) 'durability' – time variable, need for recurring access and reproduction of the information; and (2) unchanged – potential unilateral change by the sender would not ensure unchanged accessibility of the information for the future.[78] 'Durable medium' is aimed at encouraging the practice of concluding credit agreements in electronic form.

4. Summary

Present article outlines the basic mechanisms of private law being the most important with the view of the protection of consumers' rights when concluding credit agreement for consumers. Properly protected rights of consumers are a guarantee of consumer confidence. Protected consumer means a consumer, which has faith in market and, the trusting consumer is a potential client. Accordingly, in the event of advocating consumers' rights, the optimal conditions of credit agreement are secured for both parties – creditor and consumer. Mutually beneficial conditions of credit agreement for consumers result in balanced interests of the both parties, which is the precondition of stable development of a consumer credit market.

Legal guarantee of the protection of consumers' rights is a properly improved crediting, meaning adequate regulation of the mechanisms of private law regarding the both, credit agreement and protection of consumers' rights discussed in this article including the solution of the following issues:

1. Define the notion of the 'credit agreement for consumers' and its place in view of the interests of legal clearness. Along with the elaboration of the legislative notion of 'credit agreement for consumers', the term 'economic unity' is to be extended. When specifying the term 'economic unity', account shall be taken to the fact that not only the purchase agreement constitutes the basic agreement. 'Economic unity' means legal relations, in which the consumer is financed by seller, service provider or the third person himself, who uses the service of the seller, or service provider while preparing or concluding the credit agreement; during which the financing of the consumer or/and specific goods or specific service conditions are detailed in credit agreement.

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75 Directive 2008/48/EC, Art. 5, para. 1, (r).

76 Directive 2008/48/EC, Art. 10, para. 1.

77 Directive 2008/48/EC, Art. 3, (m).

78 Research Group on the Existing EC Private Law (Acquis Group), Principles of the Existing EC Private Law (Acquis Principles) Contract I Pre-contractual Obligations, Conclusion of Contract, Unfair Terms, Sellier European Law Publishers, 2007, 51.

2. Protection of consumers' rights makes no sense unless clear and distinct definition of the notion of 'consumer' is provided. In order to bring the definition of 'consumer' in Georgian law on "Protection of consumers' rights" into compliance with modern requirements, the goals of natural person's activity are to be specified, and it is to be determined that a natural person is acting for purposes which are outside his trade, business or profession. Besides, it is required to elaborate the definition of 'consumer', which will exclude the use of the following wording: "user, purchaser, customer, or an individual having such an intention". In parallel with the definition of the notion of 'consumer', it is expedient to establish a single term 'creditor' to indicate consumer contrahent in the credit agreement.

3. with the view of developing healthy competition in the field of consumer crediting and ensuring protection of consumers' rights, it is expedient to elaborate special requirements for financial service advertizing. Obviously, the law cannot provide for all the types of financial service, however, the changes to be made in advertizing based on the EC experience shall include those principles and requirements, which are more or less common for all types of financial service.

4. Arrangement of the application of the means of security guarantees for the fulfillment of obligations arisen from the credit agreement. Based on the goal of credit agreement for consumers, it is expedient to limit the use of mortgage to secure fulfillment of consumer obligations.

5. The mechanism of exercising the right of withdrawal is to be specified in legislation. To ensure the realization of the right of withdrawal in credit agreement and in particular in credit agreement for consumers, it is expedient to determine 14-day period. It is also expedient to stipulate the arrangement of exercising of this right – as a general right – in the law of Georgia on "Protection of consumers' rights". This sort of arrangement will ensure the chance of exercising this right regarding not only the agreement concluded in the street, but also regarding the all agreements, party to which is a consumer.

6. Determine the conditions to exercise the Right of Early Repayment in credit agreement. Namely, with respect to credit agreement for consumers, the Right of Early Repayment shall be specified as unconditional right, to be independent from either the cogent reason, or the consent of the creditor.

Appropriate legal regulation of credit agreement for consumers in the light of the protection of consumers' rights, is one step made towards the harmonization of Georgian legislation with EU legislation, which will greatly contribute to the development of Georgia integration process.

SERGI JORBENADZE*

MISTAKES IN TRANSACTIONS, PARALLELS WITH OTHER LEGAL INSTITUTIONS

I. Introduction

Every person makes different types of transactions throughout the lifetime. In many cases such actions do not envisage the fact of participation in the legal relationships at all. All transactions cannot be perfect and mistakes may be made in them.

Making a mistake in many cases may cause the issue of the put transaction. But every error is not the reason of the legal dispute cause.

Civil Code of Georgia (hereinafter referred as – CCG) is not familiar with the definition of a mistake.[1] The law envisages the mentioned issue only from the standpoint of definition, when it is pointing to the legal consequences of the incorrectly made transactions. Accordingly, it is significantly important to define the fact of a mistake as a legal institution and it should be established in Georgian legislation in this very way.

Mistakes may take place not only in transactions, but also in other legal relationships, for example when making an administrative agreement.[2] Deriving from this, it is important to make parallels between these two (deriving from the example, in other case the article presents other type of comparison-legal analyses) legal institutions.

Mistakes appear in a permanent manner in people's lives. Each time the mistake is made, the opposite result comes out. Not preferable result may make a person get involved in certain actions. Therefore, when developing the issue in this direction, it is very important to discuss it in two aspects, at first: a mistake from a legal side and a mistake from a moral side.

II. Mistake, as a Legal Institution

Legal institution of a mistake is an important issue in the Civil Law.[3] No one is guaranteed not to make any mistake when making transactions. In spite of the fact of the mistake, each action is not the precondition of legal consequence. A mistake has to be distinguished from creative or any other type of failure.[4] A mistake would have really occurred if the outcome has been caused against the intension.

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1 See: CCG, where the first case of a mistake is envisaged by Article 72 and where there is no direct certain definition towards the mistake itself. I use the word – "certain definition" in order to consider the comparison of settlement norms of the mentioned issue to other norms. For example, in connection with Article 50 of CCG, where there is defined the concept of a transaction.

2 Regulation of legal relationships in connection with the administrative agreements/contracts is the prerogative of the General Administrative Code, but its legal consequences are solved based on the norms of CCG.

3 See: Articles 72-80 of CCG.

4 *Chanturia L.*, General Part of Civil Law, Tb., 2011, 370.

Therefore, it is important to discuss what kinds of actions may cause the prevention (or creation) of the transaction actually appearing the result of making a mistake.

1. Mistake Considered from a Moral Side

When considering a mistake from a moral side, it is important to define from the beginning that the abolishment of moral rules does not cause[5] any legal results and, consequently, there is created no authority to protect his or her abolished rights at the court.[6] When exceeding some moral limits an apologize in many cases, from one of the sides, may be considered as a way to regulate legal relationships, but this is not sufficient in resolving a dispute in legal relationships. Morality belongs to an unwritten regulation area and is a matter of subjective perception.[7]

Each physical person (natural person) has different attitude towards the issue to under which circumstances can be violated moral norms. For example, if the action of singing loudly in the street for somebody is not approved and justified from a moral point of view, such action may be pleasant for other person. The mentioned appears one of the distinguishing marks of morality from the law. Discussion of a matter from a moral point of view is also possible when a person has made a mistake.[8] For example, a person addresses to another person who is 50 years older than he is in a so called "singular form in second person - you". At declaring his or her intent, a person did not mean or wish to commit any immoral behavior, but despite this, the interested side shall not have a legal possibility to appeal person's action in the court.[9]

2. An Error Considered from a Legal Side

When there exists the fact of a mistake to be discussed by legal norms, it should be noted that each legal relationship must be qualified as a result of certain discussion and judgment. CCG provides the possibility to become familiarized of the norms for settling different types of errors.[10]

After what has been mentioned above, it is possible to decide what kind of legal norms are used for the regulation of legal relationships, in particular with respect to the issue.[11] The court must lead to a relevant conclusion as the result of judging the mentioned.[12]

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5 This does not include damage compensation that is regulated by legal norms separately and is subject to a separate discussion.

6 See: <http://www.zellux.net/m.php?sid=63>.

7 *Horster D.,* Recht und Moral, Analogie, Komplementaritaeten und Differenzen; in: Zeitschrift fuer philosopische Forschung, 51. Jg. 1997, 367-389, Siehe 1-5, <http://sammelpunkt.philo.at:8080/300/1/Recht_und_Moral.pdf>.

8 This does not include a mistake/error made in the transaction.

9 The right to appeal is acknowledged by the Constitution of Georgia (See: Article 42 of the Constitution of Georgia) and any person enjoys the right to use it. But, the above mentioned fact cannot be considered as a definition of the dispute subject in the factual circumstances of the pointed appeal.

10 See: *Chanturia L.,* General Part of Civil Law, Tb., 2011, 267 – the author is talking about the fact and circumstances that the types of errors are resolved in detail by CCG.

11 What kind of error/mistake has been made and the level of its legal consequences and results.

First of all, it is important to discuss the legislative ground of the fact of a mistake itself. But before the fact of a mistake, it is necessary to talk about the legal ground of its occurrence. First of all, when discussing a legal ground, it is important to talk about the wishes and the desires of the involving, participating parties. Person's wish, intent to make a transaction in jurisprudence is called the expression, demonstrative of intent.[13]

2.1 Transactions

Transaction is the most general concept of the private law and is used in other scopes of civil law.[14] Transaction is the result of the declaration of a person's intent, but it is necessary for the intent to be expressed in such a way that it did not cause legal consequences.[15] In addition, there should exist material and formal preconditions that include the age, health conditions, legal capacity of the participant of the legal relation, or also other types of necessary conditions which may arise legal consequences.[16]

Creation of legal obligations deriving from the contract has been known since the Roman law.[17] A contract out of the three ways[18] of creating obligations appeared one of the widely spread legal institutions. The contract was such a civil institution in Roman Law that its mis-performance would cause certain obligations.[19]

There were several types of contracts in Roman Law, the main one was a sale-purchase contract (emptio-venditio).[20] The purchase contract itself appeared as a type of bilateral and multilateral transactions. Such division (unilateral, bilateral and multilateral) is originated from the Roman Civil Law[21] and since then the estimation of the intent of the parties has been significantly important during justice definition.

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12 See, for example: Supreme Court of Georgia ruling, March 26, 2007 N.bs-928-887(k-06), descriptive part: decision of the Zestaponi District Court, September 11, 2005 and ruling of Kutaisi Court of Appeal, September 11, 2006. The judge qualifies the action committed by a person as a fact of error and regulates the legal relationships by CCG norms (regulating norms of error transactions).

13 See: *Kropholler V. J.*, BGB, Studienkommentar, 8. Auflage, Verlag C.H. Beck, München, 2005, 39.

14 Compare: *Chanturia L.*, Introduction to General Terms of Civil Law, Tb., 2000, 313.

15 *Zoidze B., Akhvlediani Z., Chantutia L.*, CCG comment, Book I, General terms of the Civil Code, Tb., 1999, 167,

16 Compare: *Chanturia L.*, Introduction to General Part of Civil Law, Tb., 2000, 312-313.

17 *Metreveli V.*, Roman Law, Basics, Tb., 1995, 60.

18 Ibid. The author represents Roman lawyers' attitudes regarding the creation of the obligations and notes that the most part of them pointed out two sources of the creation of the obligations: the obligations caused from contract (co tractus) and from offences, infringements (delictum). Different attitude is stated by a Roman jurist – Gaius, who divided the creation of the obligation into three groups: the obligations derived from contracts, offences and from the other causes. Hereby, the author states, that Gaius has a different attitude being expressed at different places as the existence of four ground: obligations derived from contract, from as if (quasi) contracts, from doing harm, and from as if (quasi) doing harm. At the same time, division of obligations into four parts is suggested in the digests by Justinian's digests (Codex Iustinianus, The Digesta). It's noticeable that each of the above mentioned suggestions considers the contract as a main aspect for the creation of obligations that directly points to the role of contract in Roman Law.

19 Ibid, 61.

20 Ibid, 66.

21 Ibid, 62-63.

2.2 Declaration of Intent

Freedom of declaration of intent has been granted by constitution in Georgian jurisprudence. Accordingly, each person has the possibility to express his or her own intent and achieve desirable aims by the declared intent. Expressed intent might have some faults. The fault intent becomes noticeable if the transaction towards what the intent is directed shall become valid, shall enter into force. In most cases, the declared intent is the ground to make a transaction and when talking about the faults and defects, it is important to discuss the concept of a transaction in Civil Law.

Declaration of intent is the action realized by a human in his or her daily life. It might be expressed in abstinent, sober conditions, also under some influence.[22] Each of them does not cause legal consequences, as in many cases, for example the intent expressed in sleep or in hypnosis does not have the intent receiver[23]. Deriving from this, first of all it is important to define, in detail, what kind of expressed intent can be regarded as having legal consequences and what kind of deficiency of intent can be the cause of the of the transaction, but then the consequence of becoming null and void. It is important to discuss the deficiency of intent and its legal consequences.

2.3 Fault of Intent

In Civil Law the case when "the actually declared intent does not match the real inner intent of the expressing person and the transaction has been made as a result of the actually declared intents, is called the fault of intent."[24] For example, a person wishes to purchase a large area in Adjara, on the territory of Georgia. In spite of the transaction, he signed the contract with the person who did not actually own the property. As the result of the contract, the property would not be handed over to the private property of the intent declarer. As far as the transaction has been resulted based on the consent of the person, here occurred the fact of deceive as he/she convinced the intent declarer that the property appeared in his/her possession.[25] Such transaction is characterized as void.

Fault of intent may be the declaration of both recognized and not-recognized intent.[26] Fault of intent is regulated by the general part of Civil Code and it is based on the mistake.[27] Fault of intent in most cases is the transaction made by mistake. But there are given other cases regarding the deficiency of intent in Civil Law – deceive and duress. In both cases when making a mistake and when being deceived, a person makes transactions against his/her intent[28] but it differs from making a mistake, as he/she falls under the influence of others.

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22 Compare: *Chanturia L.*, Introduction to General Terms of Civil Law, Tb., 2000, 331.

23 Compare ibid. A declared intent in sleep cannot be considered as a unilateral type of transaction.

24 Ibid, 365.

25 Compare ibid. See: Article 81, CCG.

26 *Brox H., Wolker W.D.,* Allgemeiner Teil des BGB, 30. Auflage, Carls Heymanns, München, 2006, 201, reference in: *Kikoshvili S.,*Master thesis on the fault of intent in Georgian Law, "Review of Georgian Law", 10. <http://www.geplac.ge/newfiles/glr/2008/kikoshvili(geo)pdf>.

27 See: *Chanturia L.,* Introduction to the General Terms of the Civil Code of Georgia*,* Tb., 2000, 378.

28 Ibid.

There is one more case of deficiency of intent – a transaction made by force. A person's intent appears the only common thing between the deficiency of intent and the transaction made by a mistake, but the addressee, or the person making the transaction against his/her wish, shares everything and is mistaken neither in its content nor in its legal nature. Apparently, this is the action against the intent, when a person is actually aware of the circumstances and he/she is only forced to realize an action against his/her intent.

When making a transaction under deception or by mistake, the transaction participant is convinced of the rightfulness and validity of his/her intent. He/she reckons that he/she is just mistaken in it, but when transactions are made by duress this is the case of apparent interference in the declaration of intent.[29]

2.3.1 Duress

Duress is the realization of an action when a person has no desire of the occurrence of the result. Duress takes place when a person falls under the influence of the others in such a way that he or she does not share this fact and the only outcome for him/her is regarded as to follow the directives.

2.3.2 Deceit

Deceit is the realization of an action when a person acts according to other's instructions and falls under the influence even not realizing the final outcomes. On the contrary, a person wishes the consequences to happen as the result of the deceit and feels grateful to the deceiver. For example, when signing labour contracts, when an employer puts a contract with the employee, the deceit will occur if a person, in the process of an interview, hides that he/she does not know how to perform his/her duties at all. On the one hand, the employer might be grateful to have fount found a relevant person, but on the other hand this is a deceit[30] because if the employer had been aware of the abilities and skills of the employee, then he/she would not have signed the contract.[31]

2.3.3 Estimation of the Fact of Mistake

Mistake is the realization of an action when the desire is irrelevant to the consequences. It may take place at any stage of civil legal relations, for example, when preparing the above mentioned contract or at the moment of signing it. It is important to distinguish the fact of a mistake from the different standpoints of the contract parties and the lack of knowledge that in many cases is the result when making transactions.

Lack of knowledge does not exempt a person from legal responsibility, or from the fulfillment of relevant obligations. For example, in violation of traffic rules. It is possible that a driver makes a

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[29] *Zoidze B., Akhvlediani Z., Chantutia L., Jorbenadze S.,* CCG comment, Book I, General terms of the Civil Code, Tb., 1999, 246.

[30] Compare: *Wolllenschläger M.*, Arbeitsrecht, Carl Heymanns Verlag, München u.a., 1999, 56-57.

[31] Ibid. It is possible to make parallels with the made mistake in the identity of contracting party, but this time it is not the case, as the transaction occurred as the result of the fault description from the employee's side.

mistake in given, specific situation and he/she was going to take a different direction, but this fact does not free him/her from performing the coming responsibility. This is the fact of a mistake.

At the same time, the transaction made by a person cannot be considered void if he/she has got a different attitude, but acts against the wish all the same. The same principle may be used in such case when discussing the lack of knowledge. For example, a person is crossing a road where the traffic lights show him/her a red light. The person is crossing as he/ she thinks that there should not be any traffic lights at that place. The given fact cannot be regarded as a mistake as the person was obliged to know (or he/she knew in this very situation) about the coming legal outcomes and responsibility. Deriving from the mentioned, it is intresting to discuss the lack of knowledge and different attitudes in connection with the transactions made by a mistake.

2.3.3.1 Lack of Knowledge

Lack of knowledge, as a ground to make a transaction, does not exempt parties from responsibilities. Parallels can be made between the mistakes made in the motive, when a specific transaction cannot be void, or moreover, null due to the non-existence of legal consequences.

Transactions made as the result of the lack of knowledge can be discussed in terms of Article 56, CCG (voidance of a transaction due to sham and fraudulent transactions, Article 56, CCG), or the transactions made by deceit. During the transactions made by deceit, a person is mistaken in his/her imagination, but is aware of the legal consequences towards what the transaction should be directed to. But when making a transaction by the lack of knowledge, the person is wrong in almost any imagination and assumptions.

Article 56 of Civil Code of Georgia discusses that type of transaction when the agreement of the transaction lacks the validity.[32] Accordingly, here we face not the lack of knowledge, but the realized action of the parties. Such transaction is null from the moment it is made, as it is frequently directed to conceal the other types of transactions.[33]

For more clarity, let's discuss the decision of Supreme Court of Georgia. According to the decision a transaction has been fount null compliance to Article 56, II of CCG.[34] The court deemed that the transaction of exchange was concealed by the purchase agreement.[35] According to the explanation of the court, the reason of the qualification of the mentioned case the way as it is, is the fact that the parties wished to conceal another (exchange) transaction.

If the parties wish to conceal other transaction, then it is not the case of the lack of knowledge, but if the parties are making a specific type of transaction and are wrong in its content, then it can be the case of the transaction made by deceit or the transaction made by the lack of knowledge.

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[32] Compare, for example: *Zoidze B., Akhvlediani Z., Chantutia L.*, *Jorbenadze S.,* CCG comment, Book I, General terms of the Civil Code, Tb., 1999, 186.

[33] CCG, Article 56, II; see also for example: *Chantutia L.*, Introduction to the general terms of the Civil Code, Tb., 2000, 365.

[34] Decision N3k-1142-02, Supreme Court of Georgia, December 11, 2002: decisions of the Supreme Court of Georgia on civil, entrepreneur and bankrupt cases, Tb., 2003, 411.

[35] Ibid, 414.

2.3.3.2 Different Attitudes when Making an Agreement

Different attitudes[36] when making an agreement as a legal regulatory field has not been separated in civil legislation. In spite of this, Article 155 of German Civil Code (hereinafter referred as - GCC) makes an interesting citation "If the parties to a contract which they consider to have been entered into have, in fact, not agreed on a point on which an agreement was required to be reached, whatever is agreed is applicable if it is to be assumed that the contract would have been entered into even without a provision concerning this point".[37] Deriving from the content, it is interesting to make parallels with different attitudes and a mistake when making an agreement. In both cases the consequences are unfavorable for the parties and in both cases it is irrelevant to the intent declared by, at least, one of the parties. Accordingly, the main distinguishing mark of theirs may be the legal character itself, in particular in estimating whether the agreement entered into force or not.[38] In contrast with the transaction made by a mistake, the agreement does not enter into force even when there exists a disagreement because of different views and consequently, it is impossible to make it void.[39]

It is interesting to discuss the court decision regarding the mistake in the explanation and different views when making a transaction.[40] The complainant insisted on the agreement to be found null considering the fact that he/she had made a mistake when making a transaction. Instead of 300 m^2, he/she wrote 441 m^2 and accordingly, he purchased 141 m^2 more area from the other party of the transaction. The court explained in its decision that the consequences were not relevant to the desires and intent of the transaction party. Discussion was led to two ways: a mistake in the explanation (*Erklärungsirrtum*) and concealed disagreement (*Versteckter Einingungsmangel*). It is true that the party was mistaken in the process of explanation and when recording figures but is this case a very significant fact is that the agreement did not enter into force. Therefore, the court made a decision and according to it the complaint was not approved. It is true, that there was a mistake in the explanation that is also possible to be made when writing or recording specific figures and numbers incorrectly (against intent), but the agreement had not entered into force and consequently the rescission would not take place. The parties had different views and obtained different results that is the first ground of the disagreement.[41] During a disagreement neither of the parties should be aware of the fact of fault transaction,[42] otherwise it cannot be regarded as not agreed.[43]

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36 In German language – der Dissens.

37 See: German Civil Code – in German language: Bürgerliches Gesetzbuch (afterwards – BGB) § 155, „Haben sich die Parteien bei einem Vertrag, den sie als geschlossen ansehen, über einen Punkt, über den eine Vereinbarung getroffen werden sollte, in Wirklichkeit nicht geeinigt, so gilt das Vereinbarte, sofern anzunehmen ist, dass der Vertrag ohne eine Bestimmung über diesen Punkt geschlossen sein würde".

38 See, for example: *Kramer E.A., Rebmann K., Säcker F.J., Rixecker R*., Münchener Kommentar, Bürgerliches Gesetzbuch, Allgemeiner Teil, 4. Auflage, Verlag C.H. Beck, München, 2001, 1546.

39 *Kropholler V. J.,* BGB, Studienkommentar, 8. Auflage, Verlag C.H. Beck, Mün., 2005, 78.

40 Rechtsprechung des Bundesgerichtshofs in Zivilsachen, Jahrgang1967, 1. Halbband, N 1-154, 1967, Köln, Berlin, Bonn, 142, Court decision – Urt. V. 15. März 1967 – V ZR 60/64 – OLG Stuttgart.

41 Compare ibid, 166.

42 *Prütting H., Wegen G., Weinrich G.*, BGB, Kommentar, 4. Auflage, Köln, Stuttgart, Old., 2009, 198.

43 *Herberger M., Martinek M., Rüßmann H., Weth S*., Juris Praxiskommentar, BGB, Band 1, Allgemeiner Teil, 2. Auflage, Verlag Juris Saarbrücken, Saarb., 2004, 890.

Considering Article 155, GCC, it is important to discuss the Article 150, II of the same code:[44] "An acceptance with […] alterations are deemed to be a rejection combined with a new offer".[45] Accordingly, deriving from this standpoint, it is clear why the Court did not consider the put agreement made by mistakes in the explanation.

In addition, during comparison, it is important to apply to Article 333, II, GCC, where there is explained that the offer containing other terms made in the reply shall be regarded as a new offer and at the same time a new proposal, a new offer. During the mentioned, the agreement is not valid and, consequently, the fact of a mistake is excluded.

An agreement is considered valid though acceptance only when its participating parties wish the considered results to occur.[46] The mentioned will not take place if a modified acceptance is proposed by the party. A modified acceptance means that the acceptance party rejected the proposed offer and proposed a new offer.[47] A relevant acceptance is necessary for the proposal of a new offer to cause legal consequences. Deriving from this it will be impossible for the not made transaction to become void that excludes a mistake (or any other case of rescission or annulment).

2.4 A Mistake in the Transaction as a Type of Fault Intent

A mistake in Georgian Civil Law is called the case when a relevant action of the person's wish does not lead to preferable consequences. A mistaken made in the transaction is explained as a person's action against his/her intent,[48] but it should be noted that jurisprudence does not establish **a delusion** as a legal institution.[49] Formation of modern attitudes towards the issue of a mistake is connected to the name – Savigny, who explains the following: "Declaration of intent by a mistake is not valid, as a real intent stands behind the expresses intent".[50] According to Savigny's opinion there should be distinguished a mistake taking place during intent formation[51] and a mistake taking place when a person expresses is incorrectly[52] during his/her intent description and explanation.[53] This way makes it possible to distinguish from each other two types of legal consequences made as a result of a mistake – the existence or non-existence of the question of its rescission.

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44 § 150 BGB – „Verspätete und abändernde Annahme".

45 § 150 II BGB, „Eine Annahme unter Erwiterungen, Einschränkungen oder sonstigen Änderungen gilt als Ablehung verbunden mit einem neuen Antrag".

46 *Chantutia L.*, *Zoidze B.,* CCG comment, Book III, Tb., 2001, 142.

47 Ibid, 143.

48 Compare, for example: *Zoidze B., Akhvlediani Z., Chantutia L.*, *Jorbenadze S.,* CCG comment, Book I, General terms of the Civil Code, Tb., 1999, 223.

49 For example, in Russian Law, a transaction made by mistake - <ошибка> is also mentioned as a delusion – <заблюждение>, See, for example: <http://fineref.ru/16/239/index1.11.html>. Dissertation on «проблемы недейсствительных сделок в гражданском праве».

50 See: *Chanturia L.*, Introduction to General Terms of Civil Law, Tb., 2000, 369.

51 „in der Phase der Willensbildung"/ask for it to be cleared".

52 *Zweigert K., Kötz H.,* Einführung in die Rechtsvergleichung, 3. Auflage, Verlag Mohr Siebeck, Tüb., 1996, 409, The author brings Savugny's opinions.

53 „die Willen in eine Erklärung umgesetzt hat, die jenen Willen irrtümmlich nicht richtig zum Ausdruck bringt".

If to bring Savigny's example, already made mistake cannot be regarded as the ground for the transaction to be regarded as void, as it is a mistake made in the invisible type of motive.[54]

The issue of existence of each type of such mistakes and accordingly their qualification as a specific type is possible if a general agreement shall be made between parties and consequently an agreement shall entre into force.[55]

German Law describes in detail the institute of a mistake as **visible and invisible** types of mistakes. An invisible error may be regarded as a mistake made in motive, when a person does not realize the final consequences of his or her actions.[56] It is interesting to make parallels with Georgian legislation. When speaking about mistakes, Georgian Civil Code does not define an invisible mistake as a type of mistake, but indirectly it envisages the mentioned in Article 78.[57] When making parallels it is interesting to talk about the visible mistake taking place only if it were[58] the defining motive[59] for the transaction to be made. The defining motive itself appears the very ground for the transaction to be made and when it exists "a person making a mistake would not make such an agreement".[60]

Deriving from the mentioned above, it is significantly important to distinguish and isolate the existence and non-existence, invisible (invisible for the person where the mistake is meant to be in the motive) and visible mistakes from each other.

2.5 A Mistake at Other Void Transaction

As is has been mentioned above, apart from mistake, a deceit and/or duress may be regarded as the ground for the transaction to become rescinded. In spite of such division of the void transaction, minimum two of them are as followed: for example, a mistake made by a person being under the duress of other person, or a mistake that is an intentional, purposeful action of the other person directed towards the other participating person in the transaction. Consequently, it is interesting for the mistake to be discussed in two aspects: - when making deceit, fault and duress transactions.

2.5.1 A Mistake in the Transaction Made by a Deceit

A transaction made by a deceit resembles an unlawful transaction with its nature, but the distinguishing mark between them is the intent and the will the parties had. In particular, when making an unlawful transaction, parties aim at reaching preferable outcomes by avoiding certain norms. But when a transaction is made by deceit, this is the case when we deal with intent from one party (deceiver) to mislead the other party to make a transaction. When making a transaction by deceit, even if one of the parties is wrong, the legal norm shall be due to deceit.

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54 Ibid, „der unbeachtliche Motiviirtum".

55 Ibid, 407.

56 Compare, for example: *Brox H., Walker W. D*., Allgemeiner Teil des BGB, Verlag Vahlen, Köln, 2009, 202; *Zweigert K., Kötz H.,* Einführung in die Rechtsvergleichung, 3. Auflage, Verlag Mohr Siebeck, Tüb., 1996, 409 and the following.

57 Compare: CCG, Article 78, Petty mistake/ Mistake in motive.

58 *Zweigert K., Kötz H.,* Einführung in die Rechtsvergleichung, 3. Auflage, Verlag Mohr Siebeck, Tüb., 1996, 413.

59 „Bestimmendes Motiv".

60 Ibid, „der Irrende ohne den Irrtum den Vertrag überhaupt nicht[…]abgeschlossen hätte".

It is impossible to speak about the existence of a substantial mistake during transaction coming in conflict with the norms established in the country. For example, political union "Kartli" puts an agreement with a foreign citizen promising that he/she will get a place in the election list of the mentioned party only if he/she gives them in cash an amount of one million GEL. This transaction is unlawful and cannot be considered valid in case the transaction is reached,[61] because the constitution of Georgia envisages some rights and freedoms of the citizens in such a way that it can be used only by Georgians,[62] i.e. foreign citizens do not enjoy the same rights.[63] A transaction should be compliance to certain legal norms not to raise the question of the validity as far as the mentioned norms are compliance with the Constitution of Georgia[64] that shall be the legal ground when making a transaction. The mentioned case may be also become null for making it by deceit as far as one of the parties trusted the other one in such a way that he/she did not get familiar with legal consequences of the content of the transaction. Another standpoint can be found in this discussion relying on the principle by what any person is not approved of his lack of knowledge regarding the laws, but this is the case when the reaching of the transaction is based on the trust between the parties.[65] A transaction may be considered to be made by deceit if it is clear that it would not have been reached without deceit. This fact may become the question that should be discussed not from the civil law, but from the point of the criminal law responsibility.[66] This is a real case of forgery (deceit) from the side of the transaction initiator.[67] Deriving from the given example, we can conclude the following that a foreign citizen would not pay one million GEL if he/she knew that he/she would not become a member of parliament. Therefore, the transaction can be considered to be made by deceit,[68] as far as the party wished to obtain benefit from this transaction.[69]

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61 It is unlawful for three reasons: 1. Article 49, II, of the Constitution of Georgia is violated, according to the mentioned article a citizen of Georgia, who has attained the age of 25, having the right to vote, may be elected as a member of the Parliament; 2. Article 81 of CCG, if one of the parties make a transaction by deceit; 3. This is the precondition envisaged by Article 180 of Criminal Code of Georgia, a person who makes a transaction by deceit is charged forgery.

62 *Kvachadze M.*, Constitutional Law, Tb., 2005, 133.

63 Compare: Article 49, II of Constitution of Georgia; Article 70, II, Article 86, I, Article 88, IV; Chapter two of the Constitution of Georgia can be used for the comparison with the institution of the citizenship of Georgia (Georgian Citizenship. Basic Rights and Freedoms of Individual; see comments to the relevant articles of the Chapter Two of the Constitution of Georgia – *Izoria L., Korkelia K., Kublashvili K., Khubua G.,* Comments to the Constitution of Georgia, 21.

64 *Kvachadze M.*, Constitutional Law, Tb., 2005, 130.

65 Compare: *Mjavanadze Z.,* Criminal Code of Georgia, Private Part, Comments, Tb., 2000, 178. The author defines in detail the fact of such consequences and points out that when violating other person's property, in most cases the injured person cannot understand clearly the guilty person's actions and in most cases the actions of the guilty is approved by him or her until he or she faces relevant consequences.

66 *Zoidze B., Akhvlediani Z., Chantutia L.*, *Jorbenadze S.,* CCG comment, Book I, General terms of the Civil Code, Tb., 1999, 239-240.

67 *Mjavanadze Z.,* Criminal Code of Georgia, Private Part, Comments, Tb., 2000, 179. (a person is charged such crime because (according to the given example) a political union "Kartli" and its representative (a director or other authorized person) is not a public servant; at the same time there has not been any fact of threat. Accordingly, no norms regarding bribery and extortion cannot be considered in order to solve the problem).

68 Compare: Articles 81-82, CCG.

69 *Zoidze B.,* CCG comment, Book I, 242.

Given example has been discussed the way when a participating party made a mistake and instead of one million GEL, he/she transferred the transaction initiator only one thousand GEL. Deriving from the general principles of the transaction to be made by deceit, this is a clear mistake as million GEL is thousand times more than a thousand GEL. The issue of rescission of the transaction shall be raised not for having transferred an amount by mistake, but for the transaction that has been made by deceit. Deriving from this we can conclude that when making a transaction by deceit, even if the declaration of intent has been clearly the result of a mistake, the legal consequences will be the deceit of the party participating to deceive the other party to make the transaction.

The question might be: what are the legal relations of the transaction made by deceit regulated by the norms of private law and not by the norms of the civil law? The logic of the question derives from the given example, from where it is clearly obvious that this is a forgery, a person does not fulfill taken obligations and does not intend to fulfill them. For example, a defendant was sentenced to imprisonment for certain period of time[70] under Supreme Court Ruling (No.1276-Ap), June 15, 2007.[71] The court decision shared all those factual findings that had been defined as the results of the preliminary and court investigations (city and appeal instances). The defendant was charged forgery, deceit and wanted to take the finances belonging to another person and for this purpose, he spread the information in Tbilisi that a tourist bureau took "Georgian Voices" ("Kartuli Khmebi") and a group of dancers to the USA and he would be also able to find jobs for the interested persons in exchange for some money. Accordingly, a number of interested applicants visited the bureau, from who the defendant, between 1997-2001, took money and doing this he intended to take them to different countries (Morocco, Portugal, the USA). As a result, the court found that the defendant violated the norm envisaged by criminal legislation,[72] i.e. took other persons' property by deceit. The court in the motivation part indicated that the sentence of the Chamber of Appeal should be cancelled on one part, in particular: the defendant was sentenced a relevant punishment for the damage caused for the injured by deceit, that has been annulled by the Chamber of Criminal Cases of Tbilisi Court of Appeal for the following reasons: a lease agreement has been formed between the convicted and the victim[73] and based on it the convicted was obliged to pay a relevant rent, but he/she did not fulfill the mentioned obligations. The court indicates on one of the points of the lease agreement, according to what: "public cases are solved compliance to active legislation, through a court",[74] and the regulator of such legal relations is the Chamber of Civil Cases not the Criminal Cases, as far as the process of making an agreement is a civil-legal relationship and the mis-performance and violation of the taken obligations does not raise the question of criminal responsibility.[75] According to the court, the convicted did not obtain other person's object or the property right by deceit or did not get it by abuse of power.

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70 Under Supreme Court Ruling, June 15, 2007, a defendant was alleviated the sentence made by the Chamber of Criminal Cases of Tbilisi Court of Appeal, October 4, 2006 in several parts (see also: Resolution Part, 48).

71 See: Supreme Court decisions on Criminal Code cases, economic crime, No.9, Tb., 2007, 39.

72 Compare: Article 180, CCG.

73 Agreement participant as a tenant – he had a status of a victim in city and Court of Appeal instances and during the discussion of the mentioned case at the court.

74 Ibid, Motivation part, 47.

75 Ibid, 47.

It's clear from the given court decision that each type of deceit the transaction is based on does not cause the criminal law responsibility. It must be directed towards obtaining other person's object or property right or mis-use the trust. For example, **U** is a director of a legal company, and was applied by **K** to be employed, who said to have a big experience as a cleaner. In fact **K** lied and he/she did it for the purpose of obtaining **U**'s trust and get employed there. This is the case of a civil legal relations (labour law), but the agreement was made as a result of a deceit, by the trust from one side who made the transaction because believed the other party. Further development of the transaction does not lead to the criminal responsibility for the deceiver as he/she has not committed a crime and this is not the case of strong consequences. If **U** (employer) applies to the court, he will not be found a victim based on the norm of deceit, as this is the case of a private legal relationship and it is possible to find the transaction rescinded due to deceit. Under such circumstances the specific case shall be qualified as a passive action being expressed in the concealment of some data for the employer.[76]

Transaction made by deceit may cause criminal law responsibility if one of the parties will be damaged and the case will be the appropriation of the property. In this case deceit is used as a means of committing a crime,[77] and by this the property will be appropriated.[78] Forgery (appropriation of property by deceit) in the criminal law responsibility can be one of the means to appropriate the property, but in private law relationships the handover of the property is the only means.[79] The party has the possibility to take complaint to the court and commence the case on a relevant lawsuit. Under such circumstances a state prosecutor will not be able to interfere in the case and in case of the approval of the complaint, the person shall be posed civil law responsibility, which can be expressed in the fulfillment of different obligations.

Taking into consideration the court practice, we will make sure that in most cases transactions made by deceit are regulated by Article 54[80] of Civil Code of Georgia.[81] To confirm the given words, it would be preferable to discuss the Supreme Court Decision, July 16, 2004,[82] where the Cassation Court does not agree with the opinion of the Court of Appeal[83] and finds the transaction null and recognizes

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76 *Chantutia L.*, Introduction to General terms of the Civil Code, Tb., 2000, 377.

77 *Lekveishvili M.*, General Terms of Criminal Code, Part I, Tb., 2008, 367.

78 Compare ibid, 366.

79 Based on Civil Law there exist no other means by what the property shall be appropriated, and realization of such actions by duress and force methods is possible through both forgery and stealing (Criminal Code of Georgia (later CCG) (Article 177, CCG), robbery (Article 178, III, CCG), assault (Article 179, CCG), extortion (Article 181, CCG), or at any other crimes committed towards other person's possession (CCG, Section VIII, Economic Crime, Chapter XXV, Articles 177-189[1])

80 See: Article 54, CCG – Unlawful and Immoral Transactions.

81 It does not mean the violation of the capacity to have rights (passive capacity) and legal capacity (capacity to act) envisaged under Chapter IX of Civil Procedural Code of Georgia. Compliance to Article 83, III of the same Code, parties enjoy a procedural right that indicates to the impossibility of the ground for the complaint or change of the subject after preparing for the preliminary discussion of the case. Accordingly, when it is the case that specific situation is regulated by other norm, here is meant the fact that the court grants prioritized right to Article 54, of CCG, out of the norms presented based on the main demand. A good example of this is the discussed court decision (Supreme Court Decision N.as-325-619-04, July 16, 2004).

82 Supreme Court Decision N.as-325-619-04, July 16, 2004: Supreme Court Decisions on civil, entrepreneur and bankruptcy cases, Tb., 2004.

83 February 5, 2004, Ruling of the Chamber of civil, entrepreneur and bankruptcy cases of District Court of Tbilisi.

the warrant cancelled.[84] The essence of the case is the following: A purchase agreement has been made between a claimant (in first instance, regional court) and a defendant (since first instance). The defendant at the moment of the agreement signing was represented by a spouse of his/hers. According to the explanation of the claimant, he/she did not know the defendant and the fact that they established close relations is the result of his/her brother-in-law, who was proving to him/her that after selling the house he/she would help him/her together with the defendants and buy for him/her a 2-room flat belonging to the claimant (that was impossible according to the brother-in-law of the claimant in the moment of making a transaction, as he/she owned a small business and would satisfy him/her from the profit share gained in his/her business). The defendant party and the claimant's brother-in-law did not keep their promise and did not buy a flat and as the result of this the claimant applied to the court and based his/her claim on Articles 58, 114 and 81 of CCG. As far as the complaint was not satisfied at the court of first instance,[85] the claimant decided to file a lawsuit, a complaint in the court of appeals. Compliance to the ruling of the mentioned instance, the complaint was not satisfied. The discussion chain, logic of the court was as followed: a) this is not the case of Article 81, CCG, due to the fact that a deceit was not the only means deriving from the case findings, and without it the transaction would not have taken place; at the same time the appellants could not identify the purchase agreement did not enter into force for the only wish that later on they would get a 2-room flat; b) The defendant did not make a transaction with him/herself as represented the third party based on the warrant and, consequently, this was not the case envisaged by Articles 54 and 114, as the property appeared in the co-ownership of the spouses.

The opinion of the cassation instance is shared as they conclude that a purchase agreement has been signed between the defendant and his/her spouse and sold the house to him/her. Therefore, Article 1158, I, CC, was violated[86]. As the result of this agreement the parties enjoyed the right of co-ownership on the property of the represented person and considering this, such kind of transaction should be identified as the transaction made with him/her[87]. Consequently, if the norm of Article 114 was violated, this is the unlawful transaction as it "abolished the rule set by law".

Supreme Court of Georgia did not discuss the Article 81 of CCG at all that is regarded as an indirect approval of the mentioned above. The court concluded indirectly that the claimant was not able to present necessary proofs and facts that the transaction was made for some agreed purpose.[88] Though, there can be another approach to the case: it is worth discussing if there was the case of making a mistake? The fact that a person was forced to make a transaction[89] under some conditions means a

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84 Supreme Court Decision N.as-325-619-04, July 16, 2004: Supreme Court Decisions on civil, entrepreneur and bankruptcy cases, Tb., 2004, 2081.

85 Vake-Saburtalo District Court Decision, July 24, 2003.

86 **Community Property of Spouses**: Property acquired by the spouses during the marriage shall constitute property owned by them in common (community property), unless otherwise stipulated in a marital agreement concluded between the spouses".

87 Supreme Court Decision N.as-325-619-04, July 16, 2004: Supreme Court Decisions on civil, entrepreneur and bankruptcy cases, Tb., 2004, 2081.

88 The mentioned is concluded by the Court of Appeal and with its decision the Supreme Court of Georgia shares all.

89 The word "was forced to make an agreement" means duress, but in this case this is a specific situation where a person does not stay ungrateful to the other party until the mis-performance of the obligations, on the

deceit. At the same time, the fact that the claimant filed a lawsuit in the court only after the defendant did not fulfill taken obligations, can be regarded as an indirect proof. Deriving from this, court conclusion can be regarded deficient and incomplete, as it should have taken into consideration additional factual circumstances.

2.5.2 Disregard of the Fact of Mistake by Deceit, Unlawful and Immoral when Making a Transaction

If there is the case envisaged under Article 54, CCG, and there has been made a mistake in the transaction, the matter shall be regulated not by the transaction made by a mistake, but by the rescission of the unlawful and immoral transactions. For example, one of the tourists is selling the songs by the best known singer of his/her country as an author and behaving so this he/she has not reached any agreement with the singer. The seller of some pieces of music wishes to sell the selling production to one of the well-known companies, which is carrying out "PR" campaign in the whole territory of Georgia. The tourist is mistaken in the addressee and gives the mentioned production to another firm instead of the relevant named company, who is implementing not a "PR" campaign, but a charity event. Does the seller enjoy the right to claim the voidance of the decision made by a mistake?

By copyright law, a piece of music is a protected object, i.e. the copyright laws are spread on it. In this case a person's copyright and adjacent (non-property values of the author)[90] rights are violated. The seller does not enjoy the voidance rights, as he/she made a transaction by violating the law.[91] The given example may also result in the question of criminal law responsibility. Criminal law responsibility results when a person appropriated other person's copyright and consequently used (made is spread, appropriation and so on) it without acquiring such right from the author.[92] This example is important in the context of discussing the issue of making a mistake, which in this case will not take place any more.

There would be other circumstances if the seller sold other person's music work, but had the right to act so[93]. For example, a seller is selling those pieces of work that have been composed by one of the eminent singers, but a special license agreement has been signed with the mentioned singer, by what the seller has been granted the property rights of the music work.[94]

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contrary, he/she has nothing against that a 2-room flat shall move to his/her private property. All this is the fact of deceit and a word "was forced to make" is discussed in this very regard.

90 Compare ibid, Article 17.

91 This is the case of the violation of several legal norms at the same time, in particular: Article 23, Constitution of Georgia – Intellectual property shall be inviolable; at the same time, Article 18, CCG considers – personal non-property rights; personal non-property rights are protected by Article 17 of the law on copyright and adjacent rights protects author's music work; deriving from the mentioned above, several legal norms are simultaneously violated.

92 *Mjavanadze Z.*, Criminal Law, General Terms, Comments, Tb., 2000, 194.

93 Based on Articles 35-42 of the Georgian Law on Copyright and Adjacent Rights, the copyrights have been granted.

94 Compare: *Jorbenadze S.,* Copyrights in life, Tb., 2008, 110. (An example given in connection with the granting of the property rights: former member of the band "Beatles", Paul McCartney, gifted his wife and child a Christmas song "a mother and a child").

Lawfulness of the transaction is defined by which norms of laws has it been made. It is necessary that is should not conflict with the legal values being defined by the constitution in the country. Deriving from this, we can conclude that each legal transaction, despite the interests and wishes (the wish is the precondition for the intent to be expressed and its declaration is the fact of reaching the agreement on the terms) of the parties shall not be regarded as implemented in the legal frames and norms if it does not come in conflict with the defined rule by law. Such characteristics of the transaction prohibiting unlawful transactions, derives from Roman Law. For example, legal relationship participants could not make any transaction for the other person's liquidation purposes, if he/she had been judged by Lynch Rule.[95] Such decisions belonged to the authority of the Judges only, but they had to make relevant decision compliance to the specific case.

As it was mentioned above, if a mistake is made by a person, a transaction cannot be void based on the transaction made by a mistake compliance to relevant norm. Let's make parallels with the GCC, where paragraphs 134 and 138 talks about the issues regarding the voidance of the transactions. In particular, if other legal consequences do not derive from the law, a transaction is void if it violates the act prohibited by law.[96] The existence of the given criteria is necessary for such transactions to be void.[97]

In contrast to the Georgian Civil Law, GCC regulates legal nature of immoral transaction in other norm than the unlawful transaction. Like paragraph 134, such transaction is void.[98] Transaction is immoral is the one made against the moral norms, and for it to be considered such one, it should conflict with the moral.[99] For example, a transaction, which is made with a person for committing some kind of crime or for violating specific legal norm.[100] Based on the same example, let's discuss a case when a person makes a transaction over the property being in other person's possession. The transaction shall be void as Paragraph 903 of GCC grants the owner of the property to manage it according to his/her wish.[101] Therefore, as the subject does not belong to either of the parties, the transaction cannot be made compliance to legal norms.[102] Let's follow the example: a person, who wished to purchase the property being in other person's possession, and did not know about the defect, deficiency of the subject, made a mistake in the characters of the subject. What shall the legal consequences be of this case? Taking into

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95 *Тираспольский Г.И.,* Беседы с палачом, М., 2003, 69. The author indicated several types of punishments (sentenced to the criminal). One of such types of punishment was an exotic punishment that itself included several ones (see also 66 - *Экзотические казни)*. An exotic punishment belongs to the punishment of special character (see also 62 - *Особые казни*). To make parallels with current situation, exotic type of punishment would have been used only in the some of the cases of grave crimes (minor, serious and grave crimes. Compare – Criminal Code of Georgia, Part III). If to talk in the context of parallels, the criminal was sentences more than 10 years of imprisonment for such kind of grave crimes.

96 See: BGB, § 134 – „Ein Rechtsgeschäft, das gegen ein gesetzlicher Verbot verstößt, ist nichtig, wenn sich aus dem Gesetz ein anderes ergibt".

97 *Kropholler V. J*., BGB, Studienkommentar, 8. Auflage, Verlag C.H. Beck, Mün., 2005, 63.

98 See: BGB § 138 I „Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig".

99 See: *Meyer-Maly T.*, Münchener Kommentar, Bürgerliches Gesetzbuch, Allgemeiner Teil, 4. Auflage, Verlag C.H. Beck, Mün., 2001, 1352-1354.

100 See: *Kropholler V. J.,* BGB, Studienkommentar, 8. Auflage, Verlag C.H. Beck, Mün., 2005, 66.

101 See: BGB § 903 „Der Eigentümer einer Sache kann [...] mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen".

102 Compare: *Meyer-Maly T.*, Münchener Kommentar, Bürgerliches Gesetzbuch, Allgemeiner Teil, 4. Auflage, Verlag C.H. Beck, München, 2001, 1296-1298.

consideration the fact that the transaction participant had already realized the legal consequences and the defect of the subject, the transaction shall be void based on Paragraph 134.

Unlawfulness of the transaction can be qualified as a result of some consequences. In German jurisprudence such transactions are called "evasive transactions".[103] In case of existence of such transaction, the content of the transaction does not conflict with the legal norms, it is the final consequence based on it.[104] For example, a labour agreement being directed towards hiring an employee and managing his/her duties and obligations, and as it is found out, these activities are unlawful. The unlawfulness of the employee was not concluded from the agreement as each detail of his/hers was defined in detail. Even in this case, if a mistake is made in the personality of the contracting party and is signed with somebody else, the transaction shall be annulled (Article 134, GCC).

Institution of immoral transactions in German law originates from Roman Law.[105] It is true, that immoral transactions in German law dates back to antique ages, but it has undergone some modification and appears nowadays as more defined.[106] An immoral transaction may violate as the interests of a certain person, as the ones of the state.[107] For example, a transaction has been made against state interests aiming directly at immoral consequences.[108] It should be noted, that in most cases an immoral transaction may include unlawful content that shall be regulated by relevant norms of the legal relationships. For example, when a person without any rights makes an agreement regarding narcotics purchase.[109]

Violation of moral norm should "occur by a transaction, by the fact of its reality and its content" for it to be found void.[110] Transaction party is not guaranteed not to make a mistake. The question is - what kind of legal consequences shall be for a person becoming a party in such transaction and when is a mistake made in the content of the transaction? The case should be regulated by Article 138 likewise the case of unlawful transaction.

Let's make parallels between Articles 134 and 138, GCC and relevant norms of CCG (Article 54). Comparing the mentioned norms, it is clear that in Georgia, the legal cases directed towards moral and unlawfulness in Georgia are united in one article, that in GCC are given in two separate paragraphs. But the mentioned two paragraphs are connected with each other and this is the voidance of the transaction as a legal consequence of the transaction.[111] The separation of legal consequences makes different the transaction made by a mistake from immoral and unlawful transactions.

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103 „Umgehungsgeschäft".

104 Compare. *Meyer-Maly T.*, Münchener Kommentar, Bürgerliches Gesetzbuch, Allgemeiner Teil, 4. Auflage, Verlag C.H. Beck, München, 2001, 1296.

105 *Looschelders D.,* BGB, Anwaltskommentar, Band 1, AT mit EGBGB, Deutscheranwaltsverein, 2005, 719.

106 See comment: Compare Staudinger/Sack, R. 1; Flume BGB AT B. 2, § 18, 1.

107 Ibid.

108 Compare ibid.

109 Legal consequences (the issue of responsibility of a person) shall be compliance to Chapter XXXIII of the Criminal Law of Georgia (Narcotics crime, Articles 160 174).

110 *Zoidze B., Akhvlediani Z., Chantutia L.*, *Jorbenadze S.,* CCG comment, Book I, General terms of the Civil Code, Tb., 1999, 181.

111 *Meyer-Maly T.*, Münchener Kommentar, Bürgerliches Gesetzbuch, Allgemeiner Teil, 4. Auflage, Verlag C.H. Beck, Mün., 2001, 1351.

Article 54, CCG, regulates immoral and unlawful transactions.[112] This is the case when "A transaction, that violates rules and prohibitions determined by law, or that contravenes the public order or principles of morality, is void".[113] The same is envisaged in German legislation, where the voidance of the transaction is based on the intent declared by persons and the actions performed by them.

An intent declared by a mistake shall not cause legal consequences for the transaction made by a mistake if it was made by duress. The mentioned is regarding each of the mentioned mistakes. "When deceiving, it is not essential for the rescission what kind of mistake is caused as a result of the declaration of the intent to influence the other by deceit".[114] The mentioned is proved by an expressed opinion in Georgian legal literature that a deceit may only be declared only as a purposeful intent.[115]

Lado Chanturia's opinion should be noted, that is based on the competitions of the rights of the transactions made by a mistake or a deceit.[116] A deceit is defined as the ground of a mistake, but if both of them occur, it is interesting which of them shall make the transaction void: a transaction made by a mistake or made by a deceit. Deriving from voidance and prescription (statute of limitation) rights, the latter should be a more preferable choice for a person.[117] Author's opinion may be shared and it should be noted here, that for a person, it is an easier way to demand voidance of the transaction made by a mistake, as one of the parties of the transaction acted intentionally and has realized the legal consequences of his/hers.[118]

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[112] According to one interesting attitude, the legal consequences are divided into three categories: 1) an action violating "the established rules and prohibitions by law" (unlawful, the same as a declaration of an intent against prohibition); 2) an action "conflicting with the public order" (declaration of intent against public order); 3) an action violating "immoral norms" (declaration of intent against moral). See, *Kereselidze D.,* General system notions of the private law, Tb., 2009, 271-272.

[113] Ibid, 275. The mentioned case belongs to the category of the declaration of the unlawful intent.

[114] Ibid, 340.

[115] *Chantutia L.,* Introduction to General terms of Civil Code of Georgia, Tb., 2000.

[116] Ibid, 378-379.

[117] Ibid, 378.

[118] The load of the existence demand is other matter during the court stage, which is imposed on the party later during the court duration, but the mentioned plays important role for the purpose that the fact of a mistake estimation appears a very complication issue, rather than to define the transaction made by a deceit, when a person often realizes what kind of transaction he/she makes, that is excluded in transactions made by a deceit. A person deceiving the other person is sure in his/her intention. For example, 1. The case of a mistake: a person should receive a car "Mercedes" as the result of the transaction, but "AUDI" will be sent to his address by mistake; 2. in case of a deceit: a person should receive a car "Mercedes", the mentioned was the ground of the transaction, but the serial number of "Mercedes" does not match the series as preciously described, but the other party is convincing him/her and makes him/her believe that the intent declared by him corresponds to the content of the transaction. The competitions of rights has been given as an example by me, but that fact that a person had an intent to sell some other car, a much cheaper one, itself excludes the fact of a mistake, but it is not a big difficulty from the receiver party to prove that he/she had declared other intent before making a transaction, that was shared in the whole by an acceptance party and made a different agreement intentionally. Another idea can be developed, that the assertion of a mistake in the given example has much more simple character. Deriving from this, let's discuss the case by other example. The types of complications for the identification of a mistake have been mentioned clearly: a person wished to purchase a car "BMW X6", but when explaining his/her intent, he/she explained that de wished to purchase "BMW X5", that was satisfied by the acceptance party. In such case, the fact can be explained in two contexts: a mistake in the explanation, or a mistake in the motive. The assertion that the existing content is disproportionate to the declared intent does not cause any legal consequences. Therefore,

Article 123, GCC, regulates the legal nature of the transaction made by a deceit. A deceit[119] is the very specific case when it can be the result of the carelessness.[120] For example, a person had understanding about the expected natural changes, but he/she made the invitation to make an offer and only after the made transaction it became clear that the participants of the lease agreement transaction would not be able to use the subject of the transaction according to their wish.

It is also important to make parallels between the norms regulating the transactions made by a deceit and unlawful and immoral transactions. A mistake in the transaction is regulated by other types of legal relationship regulating norms. In such case the mistake does not have the possibility to make influence on a final result of the transaction.

2.5.3. Competition of Immoral and Unlawful Transaction Regulating Norms in Connection with the Relevant Norms for the Transactions Made by a Deceit

In the Chapter – Transaction made by a deceit, Article 83, II of Civil Code of Georgia, defined the non existence of relevant legal consequence. In particular, when both parties of the legal relations made a transaction by deceit. Davit Kereselidze develops a very interesting opinion, and reckons that such - "formulation of the norm conflicts with the essence of the regulation of the transactions made by a deceit".[121]

Author's opinion should be shared in the context of the fact that an agreement remains valid, but there is the ground for its voidance.[122] Accordingly, these two legal institutions conflict with each other and eventually the parties are deprived the rights that they used to possess when making a void transaction.[123]

Parallels should be also made between transactions made by a deceit and unlawful and immoral transactions. Likewise the first case, if there is a mistake in the unlawful and immoral transaction,[124] it shall be impossible to demand the voidance of the transaction compliance to the CCG norms, that itself is regarding the transaction made by a mistake. One of the rulings of the Supreme Court of Georgia presents the mentioned issue in a very interesting way. The demand of the cassator has not been satisfied and the gift contract has been found void.[125] The subject of such discussion at the court appeared the fact of the transaction made against the civil order.[126] The gift contract was made by one of the participating parties of the transaction such a way that the gifted subject did not appear in his/her

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if there is a mistake in the explanation then it should be approved by the person that itself appears a very simple activity to be performed. Deriving from this, it is interesting to share Lado Chanturia's opinion, that it is quite preferable for a person to claim the fulfillment of certain obligations from other party of the transaction compliance to Articles 81-84, CCG.

119 „Täuschung".

120 Compare: *Kropholler V. J.,* BGB, Studienkommentar, 8. Auflage, Verlag C.H. Beck, München, 2005, 49.

121 *Kereselidze D.,* General system notions of the private law, Tb., 2009, 347.

122 Compare: CCG, Article 81, where a transaction is void if it is made by a deceit.

123 Compare: *Chanturia L.,* Introduction to General Terms of Civil Code of Georgia, Tb., 2000, 377-379 – where the author points to the voidance of the transaction if it is made by a deceit and where the author states that the demand for the voidance of the transaction may be claimed by one of the parties of its).

124 Compare: Article 54, CCG.

125 Supreme Court Ruling N.as553-786-08, November 18, 2008, Tbilisi; Decisions of the Supreme Court of Georgia on civil, entrepreneur and bankrupt cases, No.3, Tb., 2009, 118-127.

126 Ibid, 127.

possession, i.e. other person's property has been gifted that conflicts with the legal norms.[127] According to the statement of the contracting party, he had gifted out the property by a purchase agreement to the person named as a defendant in the mentioned case, who did not register the purchased immovable property at the state registry within 30 days.[128] Consequently, the cassator considered that he/she appeared the owner of the property and made a gift contract with the third party (the presented third party was the contracting party's mother).

Let's lead the decisions chronologically step by step and discuss the case, where the cassator may have made a mistake when making a transaction and he/she formed the gift contract with other, not preferable person instead of a preferable contracting party, who actually did not wish to make a transaction.[129]

It is evident from the case material that the gifted property has been given to the purchaser based on the gift contract, i.e. it was not the property of the person making a gift. Consequently, it does not matter who he/she would pass the property over, the property that the other person enjoyed the right to sell it. Made transaction is unlawful, as the owner is rightful to manage the property, use it, as he/she has legal rights to do so.

2.5.4 Transaction Made by Duress

First of all, it should be noted, that **in case of duress neither of the parties declare their intents compliance to their desire**. This is very why it is not mentioned among other rescinded and/or void transactions. The fact of duress is the action against intent[130] and this is the case when a person, different from when making a transaction by a deceit, acts against his intent intentionally. The word "action", might seem soft in such case, as the transaction party is obliged to realize certain actions. Therefore, a realized action has not preferable character and from the very beginning contradicts with his/her wish and intent to achieve a relevant legal consequence.

2.5.4.1 A Mistake in Duress

Like transactions made by a mistake, the relevance of the declaration of a person's intent in the transaction made by duress does not match the consequences. The mentioned case is the same when making a transaction by a mistake, when preferable consequences cannot be reached by the declared intent.

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127 Compare: Article 183-185, CCG.

128 Ibid, 125. where in the court motivation letter he/she points to Article 8 of the existing law "on land registration" during the disputing relations, according to what if a purchaser does not register the purchased property within 30 days, he/she shall not be deprived the property rights over the mentioned property, he/she will only have to pay additional amount except the fee.

129 Despite the fact that it is hard to imagine how it was possible from one of the parties of the transaction to make a mistake in the addressee choice, when it is clear from the case documents that this person appeared a mother of the cassator's; though the example has been given in order to make it clear which article our of Articles 54 and 72 of CCG shall be used for the problem solution purpose.

130 Compare: *Kramer E. A., Rebmann K., Säcker F. J., Rixecker R.,* Münchener Kommentar, Bürgerliches Gesetzbuch, Allgemeiner Teil, 4. Auflage, Verlag C.H. Beck, Mün., 2001, 1186.

The case is also interesting, when a mistake is made in the transactions made by duress. For example, an employer forces the employee to make him/her sign a labour agreement. The labour agreement according to the intent of the employer is going to be a 2-year one. The fact of a mistake occurred at the moment of signing the agreement and instead of 2 years, there was written 2 months. As a result, there were two bases for the voidance of the transaction: voidance of the transaction made by duress and voidance of the transaction made by a mistake. In this specific situation, the case is the voidance of the transaction made by duress. It is true that the mistake is also the fact, but it is the result of the transaction made by duress and consequently it does not have its distinguishing mark.[131] What concerns the definition and estimation of the fact of a mistake in the transactions made by duress, this should be envisaged in the explanations of some specific cases.[132]

2.5.4.2 The Meaning of the Fact of Duress during Mistakes

Taking into consideration the fact that transactions made by duress with its content exceeds the content of the transactions made by a deceit (negligence of the declaration of a person's intent), and when making such transaction, even if it is the case of some kind of specific mistake, the case shall be regulated by the transactions made by duress.

2.5.4.3 Analysis of the Obtained Result

The most distinguishing mark of the transactions made by a deceit or duress from the transactions made by a mistake is the prescription (statute of limitations). Legislation considers different periods of limitations for each of the above mentioned cases. For example, compliance to CCG, a transaction made by deceit is voidable within one year,[133] and a transaction made by a mistake is voidable within one month.[134] The question of a Person's civil law obligation is resulted for its violation and the court is granted the function to qualify the case relevantly compliance to legislation.[135]

III. Competition of the Norms Regulating Transactions Made by a Mistake with Other Legal Norms

Each transaction made by a mistake requires solution on specific facts that plays an important role when defining a legal consequence. Final result of the voidable transaction is its recognition or not

[131] Distinguishing mark means the fact of a mistake when a person's intent and a results conflict with each other, but the person does it intentionally and intends to make a transaction, that is not the case during transactions made but duress. See example – David Kereselidze, General system notions of the private law, Tbilisi, 2009, 317, a mistake as a not-recognized defect, deficiency of the intent.

[132] *Kropholler V. J.*, BGB, Studienkommentar, 8. Auflage, Verlag C.H. Beck, Mün., 2005, 51; A direction on a court decision – BGHZ 78, 216, 221.

[133] See: CCG, Articles 84 and 89.

[134] See: CCG, Articles 79.

[135] See: Supreme Court of Georgia, November 9, 2010 Ruling (N.as-435-407-2010); see alsi, direction in the descriptive part, November 30, 2003 Decision of Tbilisi Gldani-Nadzaladevi District Court and October 27, 2009 Decision of Tbilisi Court of Appeal.

recognition as void, but the rescission of the transaction as an institution, without recognizing a transaction rescinded, is not discussed during the existence of a mistake. Therefore, it is important to point out the importance of the rescission of the transaction when making substantial mistakes. Legal consequence definition is realized by a court, but a norm may not be explained relevantly in the court decision that characterizes the transactions made by a mistake when a judge regulates certain action as the fact of a mistake.[136]

1. Voidable Transactions

A word voidable differs with its meaning from the word - indisputable void (absolutely null). Differences lie in its legal consequence and accordingly, it is different when the legal consequences of the transaction are discussed. In particular, a voidable transaction has a distinguishing mark that keeps the transaction valid until the time when the parties decide to make it rescinded.[137] A voidable transaction is valid at the moment of its making meaning that there exist the circumstances that may make the transaction rescinded in future.[138]

GCC deprives the party from having the right to rescind if he/she knew, or should know, about the ground for the voidance of the transaction.[139] For example, when a person makes a mistake in the explanation (*Erklärungsirrtum*), but the way that he/she realizes about is and does not try to recognize the actually existing information, as a result, he/she will not have a right to demand the transaction to be void.[140]

"Funny transactions are valid at the moment of making".[141] An interested person enjoys the right to rescind, who, apart from putting an appeal at the court, is able to make it void with the other party without the interference of other agencies.[142] Three of the most distinguished types of void transaction are: transactions made by mistake, duress and deceit,[143] based on what the first ground for an interested party[144] to rescind is the defect of intent.[145]

The result of the voidable transactions is the annulled transaction, which differs from the voidance by the fact that a court decision is not required for its annulment.[146] Consequently, it is important to differ the voidance as a result of rescind and annulment the reason for what is the indisputable void

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136 See: Supreme Court of Georgia, March 26, 2007, ruling N.bs-928-887(k-06), see also a directions in the explanation part: March 11, 2005 decision of Zestaponi District Court and September 11, 2006 ruling of Kutaisi Court of Appeal.

137 *Kobakhidze A.*, Civil Law, I, General Part, Tb., 2001, 302.

138 *Kereselidze D.,* General system notions of the private law, Tb., 2009, 270.

139 *Prütting H., Wegen G., Weinrich G.,* BGB, Kommentar, 4. Auflage, Köln, Stu., Old., 2009, 110.

140 Compare, *Erman W*., Bürgerliches Gesetzbuch, Handkommentar, 12. Auflage, Band 1, Schmidt (Otto), Köln, 2008, 101.

141 *Chanturia L.*, Introduction to General Terms of Civil Law, Tb., 2000, 388.

142 Ibid, 389.

143 Ibid.

144 Ibid, 389-390; it is interesting to define the fact who is "an interested party". Compliance to Article 59, III, CCG, any interested party is any person having the right to rescind.

145 Ibid, 389.

146 *Kobakhidze A.*, Civil Law, I, General Part, Tb., 2001, 303.

(absolutely null) transaction.[147] A rescinded transaction shall be regarded annulled from the moment of its execution and not from the moment of its rescission.[148]

2. Voidance/Nullification of a Transaction

Voidance of the transaction may be understood as a legal (final) consequence of a voidable transaction. Voidance of the transaction occurs only when it is rescinded based on a real legal right of rescind.[149] Paragraph 142 of GCC explains legal consequences based on the rescission of the transaction. It can be said that voidance is the result of the voidable transaction.[150] Accordingly, in case of the recognition of a transaction as void, the transaction shall be regarded to be like this from the moment of its making.[151] Void transaction does not give any privileges to any of the parties to claim any additional demand (after recognizing a transaction like this).

Voidance should be separated from rescission. It is the result in certain cases envisaged by law without any additional actions, or automatically. "A law does not consider the possibility to correct void transactions".[152] Therefore, its changing (correction) can take place neither by the transaction parties nor by the court.[153]

Considering the fact that rescission of the transactions, compliance to given examples, in most cases means the rescission of the purchase agreements (is meant legal practice, or other given examples), it is interesting to explain the legal essence, importance and direction of the administrative agreement[154] in connection with the legal consequences of the civil law agreement in the context of voidance.

2.1 Voidance/Nullification of a Civil Law Agreement

Ground of the voidance of the agreement is regulated by relevant norms of the void (rescinded) transactions. Regulation of legal consequences of the different agreements existing in German Private Law is regulated by relevant norms of void transactions. This is proved by GCC comments[155] and German legal practice.[156] Deriving from this, it is interesting to discuss the ground for the voidance in other legal relationships an example of what can be given a voidance of a marriage.

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147 Ibid.

148 *Chanturia L.*, Introduction to General Terms of Civil Law, Tb., 2000, 389.

149 *Feuerborn A., Looschedlders D.,* Herausgabe von Heidel Thomas, Hüßtege Reiner, HeinzßPeter Mansel, Noack Ulrich, BGB, Anwaltskommentar, Deutscheranwaltverein, Band 1, Allgemeiner Teil mit EGBGB, D. A. Verlag, B., 2005, 826; „Die Nichtigkeitsfolge ergreift das wirksam angefochtene Rechtsgeschäft".

150 Compare: *Herberger M., Martinek M., Rüßmann H., Weth S.,* Juris Praxiskommentar, BGB, Band 1, Allgemeiner Teil, 2. Auflage, Verlag Juris Saarbrücken, Saar., 2004, 811.

151 *Walter E.,* Bürgerliches Gesetzbuch, Handkommentar, 12. Auflage, Band 1, Schmidt (Otto), Köln, 2008, 479.

152 *Chanturia L.*, Introduction to General Terms of Civil Law, Tb., 2000, 383.

153 Ibid.

154 See: Article 70 of General Administrative Code of Georgia, before the changes have been made in the code, it was regulated as an administrative transaction but legal changes have not caused substantial changes in its content.

155 See: *Prütting H., Wegen G., Weinrich G.,* BGB, Kommentar, 4. Auflage, Köln, Stu., Old, 2009, 103 and etc.

156 See: BGH, Beschluss vom 5.6.2008 – V ZB 150/07 and etc.

2.2 Voidance/Nullification of an Administrative Contract [157]

Voidance of the administrative contract is very interesting in discussing legal relationships in the context of the transactions envisaged by civil code, as it is regulated by relevant norms of general terms of the CCG.

2.2.1 Definition of an Administrative Contract

Article 2, Paragraph 'g', GACG explains that the notion administrative contract means a contract concluded between an administrative agency and a natural or artificial person or another administrative agency. Therefore, its legal nature is identified: common interest – public purposes[158] of its participants is necessary for the administrative contract to be issued, that itself excludes certain, non public interested of the transaction parties. In other cases the administrative contract shall not be issued.

2.2.2 Difference of an Administrative Contract from the Civil Law Transaction

Administrative contract has several distinguishing marks from the civil law transaction. First of all such mark is the purpose of the transaction.[159] As mentioned above, it is important for the purpose of its making to have a public character and should be defined in objective context;[160] at the same time, one of the parties of it should be an administrative agency;

It's true that an administrative contract is distinguished from other type of agreements by the subject of the agreement, but CCG has the greatest role in the definition of its legal consequence.

2.2.3 The Role of Civil Code of Georgia

CCG defines the voidance and nullification of the administrative contract by relevant norms established for transactions.[161] Apart from civil code legal regulations, General Administrative Code of Georgia considers those requirements that shall be the ground for the voidance of the administrative contract in case of the violation of the requirements.[162] For example, orally issued administrative transaction[163] that shall become the ground for voidance without the interference of civil law norms.

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[157] See: Article 70 of General Administrative Code of Georgia, where it is indicated that relevant norms of CCG are used to regulate the definition of the voidance of the administrative contract, that itself regulates voidable and annulled transactions.

[158] *Tskepladze N., Turava P.,* General Administrative Law Manual, Tb., 2010, 94.

[159] *Kopaleishvili M.* and a group of authors, General Administrative Law Manual, 2005, Tb., 196.

[160] *Tskepladze N., Turava P.,* General Administrative Law Manual, Tb., 2010, 94.

[161] Ibid, 105.

[162] Ibid.

[163] See: Article 69 of GACG, where it is explained that unless otherwise prescribed by law, an administrative contract shall be concluded only in writing, which in contrast with civil law norms, excludes the fact of orally made administrative contracts.

Decisions regarding the voidance of the administrative code by civil law norms were not previously determined by General Administrative Code of Georgia.[164] Consequently, the explanation of Article 70 of GACG determines the similarity of the administrative contract with the consequences of the civil law agreements.

2.2.4 Similarity of Legal Consequences

Regulation of legal consequences by civil law norms is admissible only when each norm envisaged by GACG has been ensured by the parties. What concerns the legal consequence, it may cause the voidance/nullification of the administrative contract (for example, in case of circumstances envisaged by Article 54) and rescission of the administrative contract (for example, in case of the circumstances envisages by Article 81).

Let's discuss Supreme Court of Georgia Ruling as an example,[165] according to what a person has been refused to recognize an administrative contract void for the reason that the prescription, statute of limitation determined by Civil Code has been expired.[166]

Let's discuss one more case, where the dispute between the parties was admitted by Kutaisi District Court.[167] According to the opinions of the Chamber of Appeal, Supreme Court of Georgia did not consider in its decision[168] and issues a new decision. An important aspect in the court decision is the fact that Chamber of Cassation points to Article 129 of CCG[169] and estimates the limitation period to be expired.[170]

The above mentioned legal practice is important in the process of determining legal consequences of the administrative contract. It's true that Article 70 of GACG regulates the ground for the voidance of the administrative transaction, but it does not mean that an administrative transaction shall become void for the party. Deriving from this, compliance to Article 70 of GACG, the person having the right to rescind, in case of such rescind ground, can make a transaction void. The word – "transaction" envisages the administrative contract in it. It's true that the parties of the administrative contract are obliged to fulfill certain type of obligations and appear in certain frames (for example, public purpose), but in spite of this, in the case of not existence of the declaration of intent, as well as the civil law transaction, an administrative contract shall not enter into force.

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164 Compare, for example: *Kopaleishvili M.,* General Administrative Law Manual, 221-222; it's true that changes have been made in Chapter V of the code, but given bibliography is important in the context of the discussion of the legal regulation methods of the administrative transactions compliance to relevant norms being active before June 24, 2005.

165 Supreme Court of Georgia, Ruling Nbs-19-18-k-04, June 9, 2004; see Supreme Court decisions on the cases regarding administrative and other categories, Tb., 2005.

166 Ibid, 2713-2714.

167 December 18, 2002 Ruling of Kutaisi District Court of Administrative Law and Chamber of Appeal of Tax Issues; Supreme Court of Georgia decisions on the cases regarding administrative and other categories, Tb., 2003, 2766.

168 Supreme Court of Georgia Decision N.g-d-101-k-03.

169 See: Article 129 of CCG - Limitation Period on Claims Arising out of a Contract.

170 See: Supreme Court of Georgia decisions on the cases regarding administrative and other categories, Tb., 2003, 2768, where the court estimates the period with respect to contractual claims regarding immovable things – six months (Article 129, I, CCG).

2.3 Voidance of Marriage[171]

When speaking about the voidance of the marriage, it is primarily important to distinguish it from a divorce.[172] In case of the existence of the latter, it is meant that there used to be marriage between spouses and all those legal consequences before it remain valid even after the divorce.[173]

The legal norms during the voidance of marriage may not be applied that are determined during the voidance of the civil law transaction,[174] as the marriage does not belong to either of the types of material transactions.[175] In present legislation, voidance of the marriage has an independent ground that does not derive from the legal consequences of the nullification.[176]

If to bring an example from history, we will notice that the voidance of the marriage are regulated by different norms even in Soviet legislation, than they were explained in the regulation of the solution of void transactions.[177] For example, Article 173 of SSR Criminal Code of Georgia, estimated criminal law responsibility for the blood mixes between the parties of the marriage[178] that once again proves the voidance of the marriage, the distinguishing specification from transaction voidance.

For the marriage to be regarded as void, in contrast with the regulating norms of void transactions, it is necessary that the required conditions of the marriage were violated,[179] that for example does not appear as a separated determined article for the voidance of the purchase agreement and accordingly, the subject of its voidance is envisaged by relevant transaction regulating norms.

2.4 A Mistake Made in the Court Decision[180]

Any person may make a mistake. It does not matter he/she is a schoolchild or a person with an academic degree; a parent, or a child; elderly or young… No one is assured not to make a mistake and as it occurs permanently in a person's life. Deriving from this, like any mortal, even a judge is not guaranteed not to make a mistake.

First of all, it should be noted that it is the case when a judge makes a mistake in the decision issued by him/her and not in the transaction where he/she is represented as one of the parties; and in such situation this is the case of legal consequence for the transaction made by a mistake.

It is important what kind of actions is the court able to realize when the case discussing person – a judge makes a mistake when issuing a decision.[181]

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171 See: Articles 1140-1150, Chapter Three, Book Five, Title One, CCG.
172 *Jorbenadze S.*, Soviet Family Law, Tb., 1957, 192.
173 *Shengelia R., Shengelia E.,* Family Law, Tb., 2011, 107-110.
174 *Новицкий И.Б.,* Сделки, М., 1954, 96-112, reference in: *Shengelia R., Shengelia E.,* Family Law, Tb., 2011, 107-110.
175 Ibid.
176 See: Articles 1140-1150, CCG.
177 See: *Jorbenadze S.*, Soviet Family Law, Tb., 1957, 192.
178 Ibid.
179 *Shengelia R., Akhvlediani Z., Chantutia L.*, CCG comment, Book V, Tb., 2000, 83.
180 Articles 260, I, of Civil Procedural Code of Georgia - correction of inaccurate and obvious arithmetic errors.
181 Here, it's not considered the case with a subjective approach, as one of the parties is always dissatisfied with the court decision and the fact that he/she sees the case from his/her subjective point, it cannot be the

Article 260, I, Civil Procedural Code of Georgia (later referred as CPCG) explains legal regulations of inaccurate and obvious arithmetic mistakes in decisions. At the same time, if the court finds it reasonable it can discuss the case at the court hearing as a type of a correction. The mentioned article is discussed in two aspects: in the context of comparison of the substantial mistake and a minor mistake.

2.4.1 A Mistake Made in the Court Decision, as a Ground to Correct the Mistake without Holding a Court Hearing; a Parallel with a Petty Mistake

As mentioned above, a transaction and a legal institution radically differ from each other. Though, it is interesting to put parallels between them.

As far as made mistake envisages putting changes in the court decision, it is interesting to see some connections between it and a petty mistake, Article 260, I, of CPCG. In case of a petty mistake does not result in the rescission of the transaction, the parties only correct the content of the transaction. Consequently, in case of the fact of a mistake in the court decision, the court is authorized to correct the mistake.

It is important for the correction not to change the case substantially and its legal discussion. Correction is only admissible in case of specific (obvious) irrelevance expressed, for example, in figures, or letters written differently and so on.

On January 25th, 2010, Supreme Court of Georgia issued a ruling on the correction of the mistakes in court decisions and in the context of inaccurate and obvious arithmetic mistakes.[182] Motivation part of the ruling[183] points out to the Article 260 of CPCG and the court confirms the mistake made in the ruling[184] and defines that there must be made a correction in the ruling and instead of a word "ko" there must be written a work "ka".[185]

The court discussed the case without an oral hearing proving that the mistake did not have a substantial character.[186] Parallels can be made such a way and this is how it resembles a petty mistake. In case of the existence of the latter, there shall be the ground only for the demand on the correction.

2.4.2 A Mistake Made in the Court Decision, as a Ground to Correct the Mistake by Holding a Court Hearing; a Parallel with a Substantial Mistake

When making a substantial mistake, transaction shall become void and its legal consequence is its recognition as void. Only a court can recognize a void transaction rescinded, and this is rather a difficult

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reason for the made mistake in the issued decision by a judge. Accordingly, there, in the above mentioned part, is not the legal evaluation criteria analysis made by a judge, but of the one made in the issued decision, for example, a mistake made in the printing/typing.

182 Supreme Court of Georgia, Ruling N.a-1183-s-40-09, July 23, 2009

183 See: Supreme Court decisions on civil cases, recognition and execution of the decisions made by the court of a foreign country, Tb., 2000, 15-16.

184 Chamber of the Supreme Court of Georgia on civil, entrepreneur and bankrupt cases, Ruling №-as-1183-s-40-09, July 23, 2009, ibid 16.

185 Ibid.

186 In the mentioned opinion, the discussion was not lead in the context of the substantial mistake made in the transaction, this was the case when the analysis and the legal consequences of the court decision has been implemented.

procedure in contrast to petty mistakes and requires dates (these dates are defined by legislation, amongst them complaint dates from estimating the fact of an error in the transaction). That is very why I found reasonable what is given in Article 260, I, 2nd paragraph of CPCG: "if a court finds it reasonable, correction of changes can be solved at the court hearing".

This norm proves the complication of the content solving the case. Complication is that a court shall hold a hearing where there shall be made a decision regarding putting changes in the decision/ruling[187]. For example, let's discuss the Supreme Court decision[188] regarding the issue of a correction of an inaccuracy[189] in the court decision.[190] In particular, there occurred a mistake by the court giving back the 70% of the state customs. This is the case of the amount three times more than defined by the complaint.[191] Such fact would be the ground to rescind when, for example, making a mistake in transactions, but this does not mean that the mistake made in the transaction should be discussed and regarded as the mistake made in the court decision.

In contrast to substantial mistake, when it is admissible to discuss the voidance of the transaction, this is not the ground for the nullification of the court decision during the mistake made in the court decision.

2.4.3 Difference between a Court Decision and a Transaction

In spite of the fact of a mistake, it is necessary to distinguish these two institutions from each other. A transaction is the realization of civil law authority based on intent of the persons, but court decision agreement is inadmissible. Content of the contract of the transaction is established by the parties. The principle of the freedom of contract allows contract parties to make a preferable agreement,[192] but it is not the case for court decisions. At the same time, a person based on CCG is able to estimate (except of certain cases) the form of a contract (for example, oral loan contract, or written purchase contract), contract dates, periods of time (if there is not considered something else by law) and content of contract.[193] Each of the above listed issues are not solved by the agreement of the parties when making a court decision, they are solved compliance to the rules defined by Georgian legislation.[194]

Mistake made in the court decision has one more distinguishing mark in contrast to the mistake made in the transaction: it cannot become void or null. In other words, it is inadmissible to make substantial changes in the content and idea of the court decision.[195] Accordingly, it is impossible to discuss the mistake made in the court decision compliance to the norms regulating the transaction made by a mistake.

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187 See: *Khrustali V., Liluashvili T.*, Georgian Civil Procedural Code Comment, 2nd edition, Tb., 2007, 454-455.
188 Supreme Court of Georgia, Ruling N.as-799-1014-08, February 25, 2009.
189 See: Supreme Court of Georgia, Decisions on civil cases, civil process, N12, Tb., 2009, 202-204.
190 Supreme Court of Georgia, Ruling, January 12, 2009
191 Ibid, resolution part, 203-204.
192 *Shengelia I.,* Freedom of Contract, as a civil law principle, essence and importance, journal justice and law, N4(23)'09, Tb., 2009, 46.
193 Ibid, 47.
194 For example, see: Article 247, I, of Civil Procedural Code of Georgia: "a decision shall be defined by the judge in a written form".
195 See: *Khrustali V., Liluashvili T.*, Georgian Civil Procedural Code Comment, 2nd edition, Tb., 2007, 454.

3. Intermediate Results

Legal consequences of the transaction based on each example are regulated in a different way. In particular, a transaction may carry legal rights, or be void. As it is obvious from the examples given above, the fact of a mistake is defined by a court, but the court decision does not have decisive significance in case of a void transaction. Each case is subject to separate discussion. There should be legal ground for voidance for the transaction to be found void.[196] The primary principle of private law – legal relationships based on the equality of the people grants possibility to its parties to realize actions fitting in certain legal frames. They have opportunity to choose the transaction object, make an agreement towards the price in the market and so on.[197] In spite of this, there are such frequent cases when transactions despite declared intent is not relevant to the will/desire, that makes the party void. Accordingly, it is important to define what kind of facts shall be the cause for such reasons. As in Georgian, as in German Civil Codes, an important place is held by the classification of the transactions made by a mistake, which makes it possible to differentiate relevant cases during voidable transactions and explain them based on the specific type of a mistake. The following is determined when talking about the legal consequences of the transactions made by a mistake: a) a transaction may be rescinded if a mistake is of a substantial character and its final result is qualified as the void transaction; b) changes may be made in the transaction (content may be corrected and changed), if this is the case of a petty mistake; c) legal consequences shall not occur if a mistake has been made in the motive.

IV. Conclusion

A mistake should be of substantial character in order to have the transaction legal consequences. Existence and non existence of a mistake is determined based on specific cases and the combination of opinions relying on subjective and objective factors. In Georgian legislation, in contrast with GCC, there are specified those types of mistakes when there should not occur legal consequences.

Both in Georgian and German Civil Codes, legal consequence of a mistake is transaction to become void. Accordingly, the mentioned holds an important role to distinguish the case of a rescission from the voidance. As a conclusion of the discussion given in this thesis, the following can be stated, that a void transaction takes place only when a transaction has been already made and its terms are necessary for both parties. In other words, in order the transaction to be rescinded, it is important for the contract to be made compliance to the declared intent and not based on the influence of any other person.

Mistakes may occur in any kind of transactions, it can be a purchase, rent, lease or other contract. Realization of the contract terms plays an important role for all its parties, but when a contract is made by a mistake, it is significantly important to observe and check the case of its existence.

It is important for the existence of any type of a mistake that the intent declared by a person should have defects, but a person should act according to his/her intent and express an **initiative** when making a transaction. In other cases there shall not be made transaction by a mistake. Deriving from this the definition for a mistake can be defined, that sounds as followed: **deficiency of an intent declared towards making a transaction.**

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[196] *Herberger M., Martinek M., Rüßmann H., Weth S.,* Juris Praxiskommentar, BGB, Band 1, Allgemeiner Teil, 2. Auflage, Verlag Juris Saarbrücken, Saar., 2004, 811; Das Rechtsgeschäft kann angefochten werden, wenn ein Anfechtungsgrund vorliegt.

[197] Compare: *Grunewald B.,* Bürgerliches Recht, 7. Auflage, Beck Juristischer Verlag, München, 2006, 1-5.

GIA GOGIBERIDZE[*]

PROTECTION OF PUBLIC INTERESTS AND REGULATION OF THE LOBBYING PROCESS UNDER THE LEGISLATION OF GEORGIA DURING DECISION MAKING

1. Introduction

State government, its organization and functioning is closely connected with acceptance and protection of public interests. Implementation of governance and decision making is conducted by the state government in accordance with public interests. On the other hand, the state government provides development of the public interests in the process of its functioning. It can be said that definition and protection of the public interests is the base of the state government activities. In addition, realization of the public interests is provided by governmental bodies that play very important role in the functioning of the state and in the process of decision making. The mentioned bodies act in conditions of strictly defined regulation and are means to achieve public goal.

On its side, development of public interest is a multilateral and complex process, requiring consideration of important circumstances and interconnection and consolidation of wide spectrum of opinions in order to achieve its goal. In the widespread opinion, development of public interest is achieved through the state's lawmaking process, when establishment and normative design of the obligatory norms is made in the name of the state. However the mentioned process is contradictious enough and requires overcoming of many barriers and reaching trade-off decisions to make final decision. In addition, form of making decisions[1] it and adequacy of the results to public interest requirements are to be taken into consideration. Not to say anything about authoritarian regimes, where decisions are made in accordance with the sole will of governor, even in democratic regimes a certain imbalance is seen, when decision is made by simple majority, and the norms become obligatory for the other, big part, considered as minority, or when making decisions become prerogative of "Power Elite". Despite these peculiarities, state functioning means determination of those basic questions that have to protect harmonious communal life and public order. Together with this it is important to provide protection of public interests in the process making of such decisions by the state.

The purpose of this article is to review problems, connected with decision making and development of public interest, as well as review of mechanisms, existing within the legislation of Georgia that provide protection of public interests, exclusion of hidden techniques of impact and private interests of decision maker governmental officials.

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[1] Decision is understood as any decision made on regulation of state governance and social relation.

2. Public Interest and Decision Making Process

Definition of public interest is connected with activities of the state and its bodies. On its side activities of the mentioned bodies are characterized by certain appropriateness and definition of competences. In accordance with widespread contemporary opinion, functioning of the state bodies follows the principles of strict division of power, mutual control and balance. This provides that the state bodies make decisions only within their competence and defined legitimate limits. The counterbalance to it is existence of mechanisms of deterrence and constitutional control. Existence of these very mechanisms is the guarantee of conducting by the state bodies their activities in accordance with public interests.

Determination of the decision making system is essential for the formation of public interest and those factors are taken into account, which are accompanying the decision making. Currently, the democratic and constitutional principles of implementation of power by the people are connected with recognition and protection of public interests. Since the formation of states human mind has always sought to provide such a government formed which would guarantee their way of life, property and personal safety and support protection of public order. Humanity's historical mind has kept many forms of governance (from despotism to democratic governance) and even more opinions on the possible implementation of the rule. Most of the thinkers considered the most effective means of governing as the one implemented directly by people (different options of this), thought that the only people who were eligible and could establish a desirable management. The implementation of this idea caused a number of serious historical changes, and eventually led humankind to recognition of the principle of implementation and management of authority only by the people, that were characterized by a democratic form of government. "Almost all the sense of "democracy" is based on the principle of public administration. This means that people are actually a key source of government – they participate in decision-making and provide advantages and disadvantages of their community."[2]

The doctrine of governance by the people in its essence is connected with natural human freedom and historic and liberal principles of its disposal only based on a general agreement. "Social contract argument itself incorporates several key point of Liberals on the state and the political power specifically. First of all, it means that political power is, in some sense, coming "from below". The state is set up by individuals for individuals; it exists to serve their interests and needs. Governance comes from consent of the governed."[3] Significant basis for this view was stressed by John Locke in his work "Two treatises of government", according to which "As far as humans are by nature free, equal and independent, no one can take them from this kind of situation, and obey to the political power to its without their consent. The only way in which they refuse this natural liberty and put on with civil society restraints – is association with the other people with the community in order to live conveniently, in prosperity and peace, with peace of mind to enjoy their property and they were more secure than those who are not the society members. When a certain number of people agree to the terms of

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2 *Heywood E.,* Politics, Georgian edition, translators *Chumburidze G., Chelidze Z*., Tb., 2007, 106 (In Georgian).

3 *Heywood E*., Political Ideologies (introductory course), 3rd edition, Georgian editors *Beraia K., Saradze Z.,* Tb., 2005, 45 (In Georgian).

a society or state, they form a single united political organism in which the majority has the right to act and decide instead of others."[4]

Together with the institutions of direct democracy (elections, referendum, etc.) as well as the most important feature of the model of democratic governance, existing of representative institutions is the condition where people pass the decision-making capability to the authorized officials (delegated entities). "As direct democracy does not meet the requirements of the modern state, representation is the necessary condition." says Philip Lovo in his book "The great democracies".[5]

The representation system has been reflected in the legislative branch of government. Most of the legislative bodies that are established as a parliamentary institution, as a rule, are staffed by the people's representatives – deputies. Set by the elected representatives of the people making up a representative collection, which provides the will of people formation and behavior required. Thus, such bodies become a legislative body.

The people's elected representatives as well provide power to other bodies and the formation of delegating power to them, especially those adopted by the enforcement section. It is difficult to find the government in a democratic state as an institution, which did not participate in the formation of some form of a legislative body elected by the people. As Philip Lovo said in his book "The great democracies", "representative bodies, in the terminology suggested by the German lawyer Yelinek are the secondary bodies, the bodies of the primary state bodies. The primary bodies are the people in the legal sense, ie, real people, voting by the Constitution, ie unity of adult citizens."[6] András Sajó's idea is to be mentioned, according to which "all the powers, which have the constitutional institutions, the people gave them. On the other hand, the people's sovereignty does not mean that those who exercise this sovereignty, rule sovereign over the destiny and action of every human."[7]

Exercise of power by the people means having authority of a public interest determination. In addition, the power of the delegation will also take place in tandem with the public interest in determining the transfer function. It can be said that the creation of the legislature serves to clarify the will of the majority of the people. But only representation and clarification of the will, will not be enough resources for the formation of the will, which is why there is a legislative function of the representative body for the grant of the need to ensure that the will of the majority as the total - required behavior. In particular, the common will of the people forming the basis of the Act is required to be done – the adoption of the law that regulates a diverse range of public relations. Nature of the various political forces and the country's various regions of the collection (unity) is a reflection of the country and the main trends, the design of the trends and the views is the adoption of the law. Consequently, interconnectedness between the representation and functioning of the legislative body is natural, they

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4 *Locke J.,* Two Treatises of government, Source: Locke J., Works: in 3 vol., vol. 3., M., 1988, 317.

5 *Lovo P*., A modern large democracies, 1990. Translated from French by: *Balavadze M., Tskitishvili N*., Scientific Editor - *Keshelava V.,* Special Editor – *Khubua G*., Georgian Academy of Sciences Institute of Political Sciences, Tb., 2005, 77 (In Georgian).

6 *Lovo P*., A modern large democracies, 1990. Translated from French by: *Balavadze M., Tskitishvili N*., Scientific Editor - *Keshelava V.,* Special Editor – *Khubua G*., Georgian Academy of Sciences Institute of Political Sciences, Tb., 2005, 80-81 (In Georgian).

7 *Sajo A.,* Limiting government. An Introduction to Constitutionalism, translation from English, scientific editor – *Ninidze T.,* Tb., 2003, 68 (In Georgian).

source from each other and provide the design on the basis of expression of common interests, in the form of law, the normative (mandatory rule to be implemented). As a Russian scientist. B. Chicherin says "however the benefits of a state from people's representation, is not restricted only by expressing their opinion freely. To do so other devices would be enough. More important is that, here it goes directly to the case that public opinion is determined by expressing the will of the people, citizens of the state in the general case."[8]

The legislature's decision-making, as a rule, is made according to the will of the majority. Will of the majority is much determined by society's general attitude towards problems and issue of the discussion. The mood of the decision will be based on the principle of common prosperity, which is the essence of the majority of the public relations and harmonious co-existence with each other for the resolution of important decisions. The principle of the common welfare of the public purpose of which is connected to the community, not a single individual, but for the purpose of the formation of a unity of individuals. The purpose of defining the rules and arranging public and private interests as well, given that each of these private goal can not contradict or conflict with the coming goal. But of course, the public interest should be considered during the formation of individual interests and opinions.

In the process of forming of public interests an opinion aggregation requires the existence of certain conditions. As a famous scientist Bernard Manen indicates "freedom of public opinion is the characteristic of a democratic system, because through the people's voice it goes to those who govern... freedom of public opinion provides the opportunity to present these ideas and these ideas can be brought to them, who govern. Of course the decision is theirs, but set up of a system of the people will is one of the factors that may be necessary to take into account"[9].

In addition, this scientist defines two conditions to provide the freedom of public opinion. In his opinion, "the freedom of political expression requires the two terms. In order to have the ability to establish and run their own opinion on political issues, the governed need to have access to political information; it will require government decisions publicity. The second condition for the freedom of public opinion – is the free expression of political opinion at any time and not just voting in elections."[10] In addition, Bernard Manen indicates advantage of the expression of the collective nature, in his opinion, "the expression of the collective character defines its political weight. Authorities without any risk to ignore the individual freedom of expression, but it cannot also simply ignore the mass of the streets, or petitions signed by thousands, no matter how peaceful they were."[11]

Keeping of the above conditions, as a rule, is possible in democratic governance which ensured people's participation in the decision-making process. In addition, as Lane, points out in his article "democracy and constitutionalism", "democracy is a combination of institutions of "social decision" achieving, under which mechanisms are meant to enable the individual views of the decisions of the aggregation group."[12]

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8 *Chicherin B.N.,* On the representation of people, see Theory of State and Law. reader, author-composer *Mukhaev R.T., M.,* 2000, 195 (In Russian).

9 *Manen B.,* Principles of Representative Government, Trans. from English: *Roschun E. N.,* scientific. ed. *Kharkhordin O. V*., St. Petersburg, 2008, 213 (In Russian).

10 Ibid*,* 209-210.

11 Ibid, 211.

12 *Lane I. E.,* Democracy and Constitutionalism, Magazine "Polis (Political studies)", №6, 1998, 33 (In Russian).

Democratic governance, as a rule, supports decision making in the collective form, according the will of the majority. Various forms of democracy (direct, indirect, etc.) regardless of the principle remain the same for all forms of governance. I. E. Lane says, "a minimum order of democratic institutions involves in itself the realization of two fundamental principles: a) the "one person – one vote", b) make decisions by simple majority."[13] In Sajó view "the constitutional democracies (and voters) are equal, they have equal voting rights based on equality and they are agreed to act in accordance with the rules and accept the final result. The reason for the preference is given to the majority principle is that the majority rule for decision-making process to ensure unilateral outcome."[14]

As noted, representative bodies and representatives (the voters), play an important role in democratic government decision-making processes which provide connection of solutions with the will of people. According to the Russian scientist B. Chicherin "the representative offices themselves in important quality provide elements for good governance. This is another important service they provide to the state."[15]

In addition, it should be noted that the capacity of the elected representative bodies depends a lot on compliance with the decisions made with the public interests. As Alex Tocqueville said in his book "Democracy in America" – "The Americans thought that in each state the highest authority shall be established by the people, but as soon as the authorities has been established, the Americans did not consider them be restricted, they would gladly agree with the idea that government can do everything."[16] The assumption is revised in view of what the Liberals formed that the "Liberals believe that all government against an individual's potential is tyranny. On the one hand, such a conclusion is based on the fact that the government is equipped with sovereign power and therefore an individual's freedom is under constant threat... That's why liberals fear the idea of free government and support the principle of limited government. The government may restrict or "make obedient" by constitutional limitations or democracy."[17] The same opinion is stressed by András Sajó in his book "Limiting government. An Introduction to Constitutionalism" according to which "all the powers, which have the constitutional institutions, the people gave them. On the other hand, the people's sovereignty does not mean that those who exercise this sovereignty, the sovereign rule over the destiny and action of every human."[18]

Despite the effectiveness of democratic governance, the mode of decision-making process is the subject of the specific characteristics of balancing the interests and accommodation of various needs of the members of the society. As Shumpeter indicates in his book "Capitalism, Socialism and Democracy", "the democratic method – is an institutional capacity to stage a political decision-making

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13 Ibid.

14 *Sajo A.,* Limiting government. An Introduction to Constitutionalism, translation from English, scientific editor – *Ninidze T.,* Tb., 2003, 72 (In Georgian).

15 *Chicheri, B.N.,* On the representation of people, see Theory of State and Law. Reader, author-composer *Mukhaev R.T., M.,* 2000, 196 (In Russian).

16 *Tocqueville A.,* Democracy in America. Translated from French. Translation *Oleynik V.T.,* foreword. *Laski G. J.,* M., 1992, 483 (In Russian).

17 *Heywood E*., Political Ideologies (introductory course), 3rd edition, Georgian editors *Beraia K., Saradze Z.,* Tb., 2005, 46 (In Georgian).

18 *Sajo A.,* Limiting government. An Introduction to Constitutionalism, translation from English, scientific editor – *Ninidze T.,* Tb., 2003, 68 (In Georgian).

in which individuals acquire the power of decision-making through the competitive struggle for votes."[19] Respectively, activities of representatives and decision-making process is significantly related to people's opinion. P. Sherel's point of view of citizens' opinions – a target of the candidates for the post. . . . Impact on the citizens' views is the group's goal who compete with each other for the post of public service. Such groups, of course, need to develop any kind of sense, in order to obtain for themselves or even snatch the support of the majority of them."[20]

Existence of the collective form of decision-making in democratic regime, in the content means the necessity of compromise and balancing of the interests of the relevant members of the society. In this regard it is noteworthy P. Shmitter's assumption according to which "modern democracy can not be considered as a "mode", but as a combination of` private regimes", each of which is institutionalized with some part of the society and social group and its submission for a specific solution for the conflict. Within the similar regimes competition and association of the political parties, associations, movements ... And their struggle for the posts and the impact on the policy is going on."[21]

French scientist P. Sherel indicates the specific features of the in terms of decision-making within democracy, according to which the democratic order is entered into the practice just because they were regarded as the most economical of all to solve the conflicts, which structurally confront the different groups in the society. Physical destruction or winning over the enemy often costs expensive and the winner group's existence is threatened. The successful outcome of the democratic strategy is to strengthen the parts of human society through the achievement of a minimum of consent."[22]

Constitution in the democratic governance is that important document that provides the appropriate conditions to identify the public interest for the development and strengthening of institutional capacity in this process. The Constitution establishes the basic principles and promotes the development and operation of state government decision-making system. As G. Almond says "Constitutions contain decision making norms combination – fundamental principles that determine by what means decision can be made, institutions and agencies based, a specific authorities assigned, determine the competence of territorial and functional scope of such institutions and agencies."[23]

In addition, I. E. Lane's view is that "The constitutional state has two major mechanisms for increasing the stability of solutions: the first of these is the so-called immunity system, ie Law, which is not subject to revision, the second – inertia into decision-making process. Immunity and inertia reduces the spell circle probability of voting, reduces the negative consequences of strategic voting and vote the principle of "I to you, you to me". When considering the problem of the constitutional state is not in the

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19 *Schumpeter Y.A.,* Capitalism, Socialism and Democracy: Trans. from English. (Foreword and general editing *Avtonomova V, S.*), Moscow, 1995, 412. M., 1995, 412 (In Russian).

20 *Sherel P.I.,* Building democracy: freedom of creation and expression. Mag. "Polis (Political Studies)", №6, 1993, 95 (In Russian).

21 *Schmitter F.,* Reflections on civil society and consolidating democracy. Mag. "Polis (Political Studies)", № 5, 1996, 20 (In Russian).

22 *Sherel P.I.,* Building Democracy: Freedom of Creation and Expression. Mag. "Polis (Political Studies)", №6, 1993, 94 (In Russian).

23 *Almond G., Powell, J., Strom K., Dalton R. ,* Comparative Political Science today: World Survey (short translation from English. *Bogdanovskiy, A. S., Galkina L. A.;* Editor. *Iliyna M . V., Melville A.Y.*), Moscow, 2002, 188 (In Russian).

acceptability or unacceptability of immunity and inertia institutions, but at what the extent they can be used."[24]

G. Almond indicates the two key principles of the contemporary bodies from a variety of decision-making rules from the point of decision making in. In his opinion, "in the majority of contemporary legislative bodies, as well as in many courts, equal voting is used, in other words the votes of the members of each lawmaker or judicial body are the same (although in certain cases the votes of equality, the officials of the voice, for example, the British House of Commons speaker, can be assigned as a casting vote). In other words: one person – one vote. In addition, in the government institutions (ministries) such practice is rare. Decision-making process, there is of hierarchical nature. Considered that all act on their superiors' orders. In the hierarchical system only the vote of a person is considered, who is in the head of the hierarchy (for example, the Minister)."[25]

In addition, protection of the public interests in the decision-making process means consideration of closely associated many factors, along with the legal formality it includes the psychological, political and sociological aspects. In accordance with E. Heywood, "There are a few theories of political decision-making, in accordance with which the following factors may be singled out in this process: rational, considering the circumstances, the role of bureaucratic mechanisms, the importance of ideologycal factors."[26]

Despite the complex structures of decision-making as Thomas M. Magshtadt says, "the policy goals and means are inseparable from each other. Often, when we argue about what kind of a political course, almost always we base on the assumption that effect must agree to the public welfare or public interest should be included in the overall benefits and profits of political unity as a whole. As a rule, the democratic political debates are held in connection with mechanisms and not targets."[27]

As it was mentioned, formation of public interests during the decision making process is complex issue and many specific peculiarities are to be considered. In conditions of representative democracy it is conducted by delegated representatives, however, during the process of decision making and formation of public interests, it is important to understand opinion of people and harmonious balancing of their private interests that is achieved based on the structuring of interests and trade-offs. As the Russian scientist I. A. Tikhomirov in his book "The public law" on the interpretation of "public interest" refers that "the precise meaning of this word is mutual interest, averaged own personal, group interests. This is a public interest, without which it is impossible to satisfy the private interests on the one hand, on the other hand to ensure the integrity, strength, and normal development of the organization, state, nation and society as a whole."[28]. The research also highlights the essential characteristic of public interest, in particular, his opinion of the "public interest is recognized by law and secured interest in a social relationship, which is a precondition for the satisfaction and guarantee its existence and development."[29]

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24 *Lane I. E.,* Democracy and Constitutionalism, Magazine "Polis (Political studies)", №6, 1998, 45 (In Russian).

25 Ibid, 189-190.

26 *Heywood E.,* Politics, Georgian edition, translators *Chumburidze G., Chelidze Z.,* Tb., 2007, 518 (In Georgian).

27 *Magshtadt T.M.,* Understand the policies, ideas, institutions and problems, the Georgian edition, Tb., 2010, 422 (In Georgian).

28 *Tikhomirov I. A.,* Public Law, p.s BEC, M., 1995, 55 (In Russian).

29 Ibid, 55.

Taking into account the public interest formation is complex and specific, it is problematic, to protect the public interest during the decision-making process, drawing limit between public and private interest and its definition, as a permanent and unchangeable substance, because in many cases the public interest appears as the averaged private interest of the majority. "Borders between the state and public life, public and private interests are very small and mobile, and it is not so easy to define. On the one hand, it is difficult to limit life of every party that has "public" meaning; on the other hand the development of dynamic, change of life in material terms, will cause us to talk about the "public" as a constant evolutionary category.[30] Such dynamics in many cases is connected with the country's political situation and decision-making process. However, the constant change even if there are some issues which are of vital importance for the realization of public interests and the needs of decision-making process.

3. Mechanisms of Public Interests Protection under the Legislation of Georgia

There is no precise legal definition of the "public interest" in the legislation of Georgia, there are some adequate terms in separate cases, "state interest" or "social interest" are used. It should be noted that the Constitution uses adequate term "social need" is used and to benefit it, considers limiting and even exempting the most important virtues that characterize private interests, such as property.[31]

In addition, there are many norms in the legislation, directed to protect the public interest and is aimed at the realization. State agencies arranging, performance, balance and mutual control mechanisms, as well as decision-making constitutional norms provide a firm basis for it. The state has also an important means for the public interest to regulate the decision-making process, ensuring community involvement in this process of, effective government and public relations, and legal mechanisms to protect the public interest in the decision-making process for cases of possible violations.

In parallel with the constitutionally corroborated decision-making system, it is important to define the rights and responsibilities of those and competences of those directly involved in the decision-making process and on whom much depends the process of protecting of the public interests. In this part the issues of protection of the public interests in the process of decision-making shall be discussed form the above mentioned point of view.

States are trying to regulate the decision-making process in such a way that minimizes consideration of the decision-makers personal, financial or other private interests. The special anti-corruption legislation is adopted for this. The common practice is to adopt codes of ethics, which define the norms of conduct of a single branch of government officials and their established restrictions and prohibitions. As Susan Rose – Ackerman notes in her book "Corruption and Government, Causes, Consequences, and Reform", the majority of developed countries' bans on public servants to participate in the decision-making processes that affect their financial interests. In many cases, public servants and high ranking political officials are obliged to submit the list of their financial assets, to the public agency at least and the high-level officials are required to maintain their assets in "*blind trust*". Gifts and fees are regulated as well."[32]

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30 *Kryazhkov A. V.,* Public interest: concept, types and protection, Magazine "State and Law", 1999, # 10, 93 (In Russian).

31 See: the Constitution of Georgia Article 21.

32 *Rose - Ackerman*, Corruption and Government, Causes, Consequences and Reform, translation from Georgian, Tb., 2002, 109.

The legislation of Georgia, in terms of protection of the public interests by decision-makers during decision-making process, mainly the norms of a preventive nature, designed to exclude private interests of decision-making officials during decision-making process. They therefore have an anti-corruption load. Such rules are usually directed at the officials for to restrict or prohibit certain actions or regulation the issue of incompatibility of office. But naturally, the legislation also contains provisions on the determination of liability (criminal or administrative), a specific person for action against the public interest. For example, the Criminal Code, Chapter XXXIX contains responsibility for the official crime. According to norms of the same chapter, characteristics of the official crime are abusing the power against the public interest.

One of the most important issue to ensure that the interests of public in the decision-making process is incompatibility of job requirements set for officials, when a public office is incompatible with the exercise of any other service, especially to perform any function in the private sector. It should be noted that norms of the incompatibility for the current position for certain high-ranking officials of can be found in the provisions of the Constitution. In particular, the Constitution defines incompatibility issues of the President, Member of Parliament, and members of the government, judges and other officials.[33] Along with the Constitution, the incompatibility issues with the officials are defined in the special legislative acts regulating their activity. For example, office incompatibility issues of a member of Parliament, are determined in the Law of Georgia "On the status of Member of the Parliament" rules of procedures of the Parliament, members of the government official and their deputies are regulated by the incompatibility by the Law of Georgia "On the Georgian Government structure, accreditation and activity rule[34], the judge's office incompatibility issue – by the Organic Law of Georgia "On the common courts",[35] etc.

In addition, norms for incompatibility for persons employed in public service positions are given in the Law of Georgia "On public service" and in the Law of Georgia "On the conflict of interests and corruption". The latter is a very important document, it applies to almost all high decision-maker officials, sets for them restriction of office incompatibility, gift-making and disclosure of economic interests and publication obligation with regular submission of financial and property declaration, as well as defines notion of corruption and corrupt offense in the public service and its prevention-related norms.

It should be noted that definition of the "conflict of interests" was determined by the Law of Georgia "On the conflict of interests and corruption"[36] in accordance with which "conflict of interest in public service is conflict of a public servant's property or other personal interests with public service interests." Based on this it is notable that definition of conflicts of interest by legislators is focused on the possible conflict of the official's property interest, as well as other personal interests with the interests of the State service. In particular, state officials to use the authority granted by the government for purpose of gaining property good, or benefit. It attracts the attention the use of the term the interests of public office. Naturally, given the broad meaning of the term should be construed, as it involves not

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33 For example, see: the Constitution of Georgia Articles 53, 72, 81^2, 86.

34 The Law of Georgia "On the Structure, Accreditation and Activity Rule of the Government of Georgia" Legislation Herald of Georgia № 3, 13.02.2004, 7.

35 The Organic Law of Georgia "On the common courts" Legislation Herald of Georgia №41, 08.12.2009, 300.

36 The Law of Georgia "On the conflict of interests and corruption" Herald of the Parliament of Georgia №44, 11.11.1997, 86.

only the conflict of particular interests with those of the state, but with the order of the state government organization and its functioning. The State service and its operating principles can not be separated from the general of the public order, moreover they ensure the formation of this order and the public interest by their activities.

In accordance with the legislation, of Georgia, out of the issues of professional incompatibility, set for the officials, those prohibitions are to be mentioned that are connected with the impossibility of officials to conduct entrepreneurial activities or restriction to participate therewith.

Under the Article 13 of the the Law of Georgia "On the conflict of interests and corruption", "public official has no right to occupy any position in any enterprise" (paragraph 4), however, the "official or his family members have no right to occupy any position or to perform any work in those enterprises registered in Georgia, whose business activities are in control of the officer or his department within the authority""(paragraph 3). Moreover, according to this law the "public official, his family member is not entitled to own shares or capital shares in the enterprise, control of the activities of which is within the authority of this officer or his department." The Constitution of Georgia bans an establishment of the enterprise to the member of the Government.[37] It should be noted that under the Law of Georgia "On the conflict of interests and corruption", obligation of keeping of incompatibility requirement also applies to family members of the official too. Family members are considered to be an agent's spouse, minor children and step children, as well as permanently resident" (Article 4 a), subparagraph).

Under the Law of Georgia "On the status of Member of Parliament of Georgia"[38] restrictions for entrepreneurial activities for members of Parliament are even more specified. Under the Article 8 of the mentioned law, "members of Parliament, have no right to carry out multiple activities of administration in order to gain material values and the financial means[39]; exercise of entrepreneurial activity in a subject's permanent leadership, supervising, controlling, auditing and advisory body members' rights; however this law contains a reference that the "business incompatibility with membership requirements do not violate the right of property recognized by the Constitution. It is possible to own stocks, shares and other assets" (Article 8, paragraph 2). The Article 9 of rules of procedure of the Parliament (which has the force of law with a legal act), contains the same rules with respect to the members of the Parliament.

It should be noted that the Article 337 of the Criminal Code of Georgia imposes criminal liability for illegal participation in entrepreneurial activities. According to which criminal convictions shall be caused by the "officer or equivalent person by himself or someone else through the enterprise, organization or institution shall establish a business purpose or for its management despite the restrictions of the law, if this is related with the illegal concessions or advantages of the establishment or other form of protection."[40]

Important provision is contained in the Article 7 of the Law of Georgia "On the conflict of interests and corruption" according to which the "public official has no right to use of public service

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37 see the Constitution of Georgia Article 812 paragraph 4.

38 The Law of Georgia "On the status of Member of Parliament of Georgia" Herald of the Parliament of Georgia, №13-14, 8.04.1998, 201.

39 Under the Law of Georgia "On the entrepreneurs", "multiple activities for the purpose of profit" is one of the most important characteristics of the definition of entrepreneurial activity – (see the Law of Georgia "On the entrepreneurs" Article 1, paragraph 2).

40 The Criminal Code of Georgia, Legislation Herald of Georgia, №41(48), 1999, 209.

authority or related opportunity against the interests of either to make decision on those issues that does not belong to his public service authority."

Along with this restriction the legislation contains provisions on the obligation of the obligation of private interests during the agent's decision-making process. In particular, under the Article 11 of the Law of Georgia "On the conflict of interests and corruption", "official whose duty is the decision-making within a collegial body, towards which he has the property or other personal interests, he must notify other users of the agency or his immediate supervisor, however, refuse to participate in making a decision. And under paragraph 2 of the same Article, "official, whose duty is to make unilateral decision to which there are the property or other personal interests, he must declare refusal to accept and in writing notify his immediate supervisor (head office), which will make an appropriate decision or imposes such a duty on other official." However, in accordance with the reservation in the law, this obligation does not apply to number of officials, in particular, the President, Member of Parliament members of the supreme representative bodies and heads of executive bodies of Abkhazia and Adjara Autonomous Republics.

The Law of Georgia "On lobbying activities"[41] contains the specific provisions on disclosure of interests, under the Article 3 of which "public servants are obliged to declare the personal interests in the areas of entrepreneurial activity in writing, subsequently of election, appointment or approval to the position, if such interests have emerged. Member of Parliament, other public servants, who have written about personal interest in the area of entrepreneurial activity, has the right to refrain from taking part in the consideration of the relevant act."

Legislator also sets restrictions on officials to get any additional material benefit in connection with their work activities. In particular, under the Article 9 of the Law of Georgia "On the conflict of interests and corruption", "agent of public service who because of the public service is obliged to render services or to make a decision free of charge, has no right to accept or demand for this any compensation in property or for other good". Also under the paragraph 3 of the same Article, "shall not be entitled to receive any compensation for information created or obtained by the public agency or for the work, report, or other material for publication prepared on the basis of such information."

One of the important limitations, which is connected with the activities of officials is limitation of the specific property transactions. Under the Article 10 of the Law of Georgia "On the conflict of interests and corruption", "public official has no right of property deal with the public agency, where he occupies the position. An official is not entitled to to make a property deal with his close relatives or his representative, as a public servant." The Law of Georgia "On public service"[42] contains key principles of public servants in terms of arrangements of restriction on deals: "civil servant must not: acquisition of the agency property assigned for deal concluding; property arrangement with an agency where they work, other than exceptions allowed by the law; as a civil servant, enter into a transaction with the subject party or other institution of its business activities; as a civil servant, enter into financial arrangement with his, her or her husband grandmother, grandfather, parent, brother, sister, child or grandchild." Under the Article 66. Deal made wit violation of the aforesaid requirements shall be declared void.

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41 The Law of Georgia "On lobbyist activities" Herald of the Parliament of Georgia, #2, 26.10.1998.

42 The Law of Georgia "On public service", Herald of the Parliament of Georgia, №45, 21.11.1997, 55.

The legislation of Georgia also contains significant restrictions on the acceptance of gifts by officials. Under Law of Georgia "On the conflict of interests and corruption", the "gift" is the property or service given to a public servant, his family members for free or on preferential terms, total or partial exemption from the obligations, which is the exception of the general rule" (Article 5, paragraph one). Under the same law "total cost public of the gift to public official in the reporting year shall not exceed 15% of the annual amount of the salary, and 5% - for once received gifts - if these gifts are not received from one source" (Article 5, paragraph 2), however, the "total cost of the gift for each family member of a public official's family, should not exceed 1 000 GEL for each member for the accounting year of, and for once received gifts - 500 GEL, if these gifts are not received from one source" (Article 5, paragraph 3). Under this law, official shall pass the prohibited gift within the three working days to the legal entity of public law - the Financial Agency (Article 52).

Law of Georgia "On the conflict of interests and corruption in the public service" and the Law of Georgia "On public service" provide for submission of a periodic public declaration by officials and public servants on their property and income in order to achieve transparency of their activities and disclosure of their economic interests. Under the Law of Georgia "On the conflict of interests and corruption in the public service" public servant is obliged to complete and submit the property declaration within two months after judicial appointment and resignation an official duty and yearly while being at the position (Article 14). Failure to submit the declaration within the time prescribed by law causes the administrative responsibility as a fine, and failure to submit the declaration after the administrative penalty or entering of intentionally incorrect or incomplete data causes the criminal responsibility under the Article 355 of the Criminal Code of Georgia.

It should be noted that the law sets limitations, not only for the period of stay in public service, but also sets the limitations regarding taking certain positions and execution of certain works for a certain period after resignation. For example, under the Article 65 of the Law of Georgia "On public service" "dismissed state employee can not enter to work at the facility or to conduct business in an enterprise which he has been systematically supervising during the last 3 years, within 3 years after dismissal. During this period he also has no right to receive income from such institution or enterprise."

Incompatibility of relevant person with the job demands is basis for job termination. It should be noted that request for termination case of incompatibility of a Member of Parliament is given in the Constitution of Georgia.[43] In addition, the Law of Georgia "On the conflict of interests and corruption in public service" provides for the of the norm, according to which the "public official, a family member is obligated to stop incompatible activities, to resign from incompatible position within 10 days after his appointment, unless it is otherwise provided by the Constitution or Law" and failure to comply with such request would result in his dismissal from office.

4. Regulation of Lobbying Process under the Legislation of Georgia

Possibility of hidden impact on the decision making process during decision making is a significant threat for protection of public interests. Impact on the decision making is in general considered as the process of lobbying. Relation to the process of lobbying is not univocal. If in some cases it is

[43] See: the paragraphs 53 and 54 of the Constitution of Georgia.

considered as a negative event, in other cases it is considered as an attendant event of democracy and support information-analytical source for the process of decision making. In addition, in contemporary circumstances, the states actively use lawmaking or other administrative measures, in order to provide publicity of the process of lobbying and development of its advantages.

In contemporary circumstances the lobbying, according to the widespread opinion, is considered as a specific form of political impact on the state governing bodies by separate persons or interested groups, in order to present, protect and ensure their interests on the legislative level. Today, lobbying is legally accepted activity in many countries and is regulated by special legal acts. The mentioned legal acts determine definition of the lobbyist activities, requirements for lobbyist status creation, lobbying activities and regular reports, as well as rights and obligations of lobbyists.

The two main models of lobbyist activities are distinguished in the contemporary world: in accordance with the first – i. e. Anglo-Saxon model (USA, Canada, Australia, etc.), there is a special law on regulation of lobbyist activities that provides registration and regular reporting of lobbying persons acts in the mentioned countries. In accordance with another, European or continental model (Italy, Germany, France, etc.), there is no special law on regulation of lobbyist activities, but there is a possibility for the interested persons to impact on decision makers through registration in the lawmaking bodies and participation in the committees an commissions of the lawmaking bodies.

Special act regulating lobbying activities – the Law "On the lobbying activities" was adopted in Georgia as far back as 1998. This law was one of the first unified and systematized acts on regulation of lobbyism in the legal system of Post-Soviet and continental European states. Its adoption was connected with adoption of acts regulating activities of governmental bodies and anti-corruption acts. Adoption of the mentioned law was forestalled by the legal acts, such as Laws of Georgia "On the public service", "On the conflict of interests and corruption in the public service", rules of procedures of the Parliament of Georgia, etc.

It should be mentioned that along with special act, regulating lobbying activity, there are some norms, connected with lobbying process and its regulation in other legal acts of Georgia. The norms connected with specific peculiarities of lobbying activity in the legislation of Georgia, can be for convenience divided into several groups, for example, one part of norms is connected with the regulation of the lobbying process itself. These norms determine the creation of the status o lobbyist, registration as lobbyist, rights and obligations of lobbyist as well as methods and techniques, legally allowed in the lobbying activity as a legal action. All these are regulated by the Law of Georgia "On the lobbying activity" as it was mentioned.

The second part of norms concerns application of citizens (group of citizens), interested persons (groups of persons) to the state bodies, and issues of presenting and protection of their interests in the state bodies. The mentioned norms also define the order of application of citizens to the state bodies, peculiarities of their participation in the process of review of an issue and decision making. For example, the Article 203 of the rules of procedure of the Parliament of Georgia[44] provides for the possibility of a group of persons to submit a written **appeal - petition** addressed to the Speaker of Parliament, which concerns the issues, resulting from the public and common problems. Decision on the petition shall be notified within one week to its authors. Also the Article 150 of the rules of procedure of the Parliament of Georgia provides for a possibility for a subject without right to the legislative initiative - of citizens,

[44] Rules of procedure of the Parliament of Georgia, Legislation Herald of Georgia, №8, 25.03.2004, 38.

political and social associations registered in Georgia and other legal entities to submit duly signed and justified proposal to the Parliament concerning a new law making or changes in the law and / or amendments. After discussing by the legislative committee, the proposal may be recognized as adopted or rejected based on the motivated decision. Also, the General Administrative Code of Georgia[45] provides for the opportunity to participate for natural and legal persons interested in the administrative proceeding of administrative-legal acts. In accordance with the part 3 of the Article 1061 of the mentioned Code "administrative proceeding, for legal and administrative - legal act can be started be a natural person or legal entity, the administrative authority based on the application." In addition, in accordance with the part one of the Article 1064 of the mentioned law "everyone has the right to present his opinion to the collegial administrative body regarding the project of statutory and administrative - legal acts." It is to be mentioned that under the Law of Georgia "On the statutory acts"[46] the bill submitted for consideration, if any, should be attached with the conclusion of duly registered lobbyist (Article 17 paragraph 2).

The third part of the norms concerns protection of public interests and issues of transparency of the activities of public officials during governance determination of hidden methods lobbying and relevant anti-corruption efforts in and providing for its prevention. In this regard, Laws of Georgia "On the conflict of interests and corruption in the public service", "On the public service", "On the Member of Parliament status" are to be mentioned. As mentioned earlier, these laws provide for the issues of limitations, restrictions set for public servants and their families, rank-incompatibility, disclosure and publication of economic interests, as well as appropriate mechanisms of accountability.

The fourth part of the norms concerns regulating the activities for the individual associations (legal persons) and certain rights guaranteed on the basis of the legislative acts, specific legal status, business forms, submission and security of interests, as well as participation in decision-making characteristics. In this regard, the Law of Georgia "On Chamber of Commerce and Industry"[47], is to be mentioned, under which the Chamber of Commerce and Industry of Georgia is organized as a corporate legal entity. Under Article 4, paragraph 2 c) subparagraph of this law the function of the Chamber of Commerce, belongs to the "business-related issues, including abroad, entrepreneurs and individual interests submitting and protection", and under the Article 5 of the paragraph 1 of the same law, is entitled "to take part in the draft development and review on economical and other issues, to undertake independent examination of the normative acts in the field of economics, and to submit proposals to the appropriate state agencies." The Law of Georgia "On Trade Unions"[48], is also to be mentioned, under Article 10 of which "Trade Unions, Trade Union associations are eligible to participate in the relevant bodies in the previous discussion of the legislative and normative acts on labor and social - economic issues in, to develop alternative proposals", and by the paragraph 3 of the same Article "Trade Union present proposals to state authorities on the basic criteria of the living standards and on determination of compensation. The Law of Georgia "On creative workers and creative unions" is o be mentioned as well, under the Article 15, paragraph 2, of which "creative community has the right within its com-

[45] General Code of Administration of Georgia, Legislation Herald of Georgia, №32(39), 1999, 166.
[46] The Law of Georgia "On narmative acts", Legislation Herald of Georgia, №33, 09.11.2009, 200.
[47] The Law of Georgia "On the Chamber of commerce", Legislation Herald of Georgia #33, 10.11.2001, 132.
[48] The Law of Georgia "On Trade Unions", Herald of the Parliament of Georgia, №15-16, 26.04.1997, 6.

petence to take part in the review of international treaties, the legislative and other normative acts of Georgia in the field of literature and art, submit proposals to the legislative and executive bodies of the literary and artistic development, as well as social - legal protection of creative workers". In addition, the Law of Georgia "On State support of children and youth unions"[49], is to be mentioned, under the Article 5 of which, the children and youth unions have the right to "following the children's and young people's interests, submit proposals for the laws and other normative acts amendments to the parties, having the legislative initiative, to participate in development, review and implementation of state programs in the field the state youth policy."

The Law of Georgia "On the lobbying activities" defines the notion of lobbying activities, according to which the lobbying activities mean "an impact that is not prohibited by the legislation of Georgia of a person registered as lobbyist on a representative or executive body in order to implement legislative changes" (Article 2 a) subparagraph), and the legislative changes include the adoption of the act or change or reject of the project of an act (Article 2 d), subparagraph).

It should be noted that the mentioned law took into consideration the experience of continental Europe and the lobbyist registration is critical to its lobbying activities for the origin of authority. After the registration of an individual lobbyist the legal status originates and certain additional rights are assigned. The law regulates in detail the lobbyist registration rules and requirements, defines the circle of subjects, who do not have the right to lobbyist registration, list of data to be submitted to the agency for registration and public official to who the data shall be submitted. Parliament office, the Head of the Chancellery, the Head of district or city governing body play the role of the registrar, depending on the point of governance impacted. The law provides the possibility of appealing the decision in case if Registration as lobbyist is rejected, as well as the legal status of lobbyist termination (and loss of seizure) cases.

Under the Law, base for the lobbyist's lobbying activities is the task, which shall be prescribed by the Civil Code of Georgia. The task can only provide adoption of one act or to change or deny a single - project of the act. It should be noted that the principal for the task can be a legal entity registered in Georgia (other than treasury production and treasury institutions) or capable group of citizens of at least fifty persons (Article 7).

Under the Law of Georgia "On lobbying activities", implementation of lobbying is allowed on the government's legislative and executive authority, as well on local self-government bodies and their executive units.

Law gives in diffuse the lobbyist rights and legal guarantees of activities, in particular, according to the law, lobbyists have the right to enter and move around within the building of a relevant representative or executive body, to take part in the discussion of projects of normative acts, attend all stages of open discussion of normative acts, held by structures of representation bodies, be assigned the right of the regulated speech, to obtain the necessary information from the appropriate structure based on the written request, to meet a member of a governing body, etc. By law, a lobbyist is authorized to carry out lobbying activities on its own, as well as through duly established various lobbyist associations.

The law defines accounting rules for lobbyists, according to which the lobbyist, no later than the first ten days of each of the following months after the date of registration, also no later then 10

[49] The Law of Georgia "On State support of children and youth unions", Legislation Herald of Georgia, №25(32), 1999, 124.

days after the termination of legal status must submit a report to the official who has a registered a person as a lobbyist. In addition, the lobbyist's activities are provided for the public, any citizen has the right to inspect the documents and reports submitted by the lobbyist to the state bodies and to make their copies

5. Conclusion

Protection of public interrest during decision making is of basic importance, as adequacy of decisions made is highly dependent on it, in terms of public requirements and public law and order. Accordingly, concern of states during decision making is determination of the interesrt acceptable for the majority of society and along with other factors, exclusion of private interesrts of decision maker officials. As it was mentioned, Georgian legislation contains many important provisions in this respect and is directed towards possible conflict prevention.

Official incompatibility, limitation of participation in entrepreneurial activities, disclosure if interests and limitation of certain activities requirements, existing in the legislation, significantly decreases possibility of consideration of personal, property or other private interests of decision makers in the process of decision making. In addition, it should be mentioned that legislation puts less accents on keeping such prohibitions or limitations in terms of supervision or administration. Violation of any such prohibition or limitation causes respective responsibility (disciplinary, administrative or criminal), however there are not many norms on keeping of these obligations in terms of systemic and complex supervision (naturally, it does not mean cases, where violation of any such prohibition or limitation is connected with criminal responsibility).

Norms connected with legal regulation of lobbying activities existing in the legislation of Georgia that make important prerequisite of publicity and legal framing of this activity should be mentioned as well. In addition, to stimulate this process, it is necessary to expand rights assigned to a person, registered as a lobbyist, especially in terms of informational and analytical possibilities. For regulation of lobbying activities, consideration of the experience existing in separate countries (United States of America, Canada, etc.), in accordance with which, implementing of lobbying activities with violation of the established order causes certain responsibility (mainly financial sanctions) is important as well. The mentioned is especially important for cases, where impact and lobbying on the decision makers is made by corresponding persons with violation of requirements of registration and other legally established procedures, that gives the process hidden form, connected with “fix votes” and corruption.

TAMAR ZAALISHVILI[•]

LEGAL GUARANTEES FOR THE SEPARATION OF COMPETENCIES BETWEEN THE LOCAL SELF-GOVERNMENT AND REGIONAL DECONCENTRATED GOVERNMENT

1. Introduction

After ratification of the "European Charter of Local Self-Government" on October 26, 2004 by the Parliament of Georgia, a process of formation of self-government in accordance with the European standards started in Georgia. Through activation of the organic law of Georgia "On Local Self-Government" on December 16, 2005, a new decentralized[1] governmemt system was established in Georgia, constituting a major condition for legal State and democracy principles. Since the day of announcement of final results of local self-government elections of October 5, 2006 a one-level local government system integrating 69 self-government units – 64 municipalities and 5 self-governing cities-has been intzoduced.

Prior to government system decentralization, regional deconcentration[2] was conducted and in addition to regional bodies of government institutions, a State Representative's – Governor's institution was established to represent the President and the Governmen of Georgia in its administrative-territorial units.[3] The Ministry of Regional Development and Infrastructure has been established and regional development policy set as its sphere of government.

Separation of powers between the central, regional and local institutions poses a special challenge to the new democratic countries, including Georgia, since conducting of consistent decentralization and deconcentration process depends on effective distribution of powers between different levels of government.

The aim of the present paper is to: analyze constitutional guarantees of local self-government and regional deconcentrated government as well as issues of legal regulation of powers of state institutions in the sphere of local self-government and regional deconcentrated government, and establish legal per-

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1 Decentralization implies division of a state into administrative-territorial units enjoying administrative autonomy with respect to the state. However, it is noteworthy that sometimes the term "decentralization" is used in a broader sense and implies delivery of authority and resources from the central level to the regional and local levels or regional or local units subordinate to central government. In this case, forms of decentralization are deconcentration, delegation and devolution. In this respect, See: Democratic Decentralization Programming Handbook, USAID, Office of Democracy and Governance, Washington, 2009,9.

2 Deconcenration implies distribution of state competencies between the central authorities and those organizationally and structurally subordinate to them (regional, local, etc.). See: *Demetrashvili A., Kobakhidze I.,* Constitutional Law, Tb., 2008, 374.

3 Since the establishment of the President's institution in 1993, there's been a State Representative's institution; a State Representative was a representative of the state leader in a corresponding region. From establishment of a President's institution up to 2007, there existed a State Representative's institution; a State Representative of the President of Georgia was the representative of the President of Georgia in various administrative-territorial units.

spectives for separation of powers between the local self-government and reginoal deconcentrated government, including the ones in such an essential sphere as strategic planning of regional development.

2. Constitutional Fundamentals of Local Self-Government and Regional Deconcentrated Government

2.1 Constitutional Guarantees of Local Self-Government

By adoption of the Constitutional Law of Georgia On Amendments and Additions to the Constitution of Georgia of 15 October, 2010, a new Chapter VII[1] - "Local Self-Government" was added to the Constiution of Georgia and came into effect from 1 January, 2011. By Chapter VII[1] of the Constitution, along with other local self-government issues, the basics of definition of the power of local authorities were regulated. Besides, in accordance with the above Constitutional Law, based on the amendment to Article 89, the representative body of local auhority was granted the power to submit a constitutional suit to the Constitutional Court.

In accordance with Chapter VII[1], Article 101[2], Paragraph 1, "Local authority powers are dissociated from those of the state bodies." Additional constitutional guarantees were provided by Paragraph 2 of Article 101[2], stating that "a self-government unit implements its powers according to the Georgian legislation, independently and under its own responsibility." By this agreement provided by the Constitution, any direct interference of state authority became inacceptable. Also, Chapter VII[1] of the Constitution defined the two types of power of a self-governing unit – own and delegated powers and established guarantees of exclusiveness of own powers.

In the process of implementation of constitutional amendments, Articles 2 and 4 of the Constitution of Georgia stipulating the general fundamentals of local self-government, were partially reconsidered. Namely, according to its updated edition, "The citizens of Georgia registered in a self-governing unit shall regulate the matters of local importance through local self-government, without the prejudice to the state sovereignity, in accordance with the legislation of Georgia." The content of the above norm shall correspond to the principle of universality of powers of local authorities implemented in the theory of Constitutional Law.[4] The principle is reinforced by Paragraph 3 of Article 102[2] of the Constitution, which states: "Self-governing unit is empowered to solve by its own initiative any issue, which, in accordance with the Georgian legislation, is not within the power of any other authority and is not prohibited by law." ("voluntary" own powers). Thus, the Constitution of Georgia is in accordance with the European Charter of Local Self-Government, Paragraph 2 of Article 4 of which stating that "Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority".

The Constitution does not define any spheres of power of local authority (economic, social, educational, communal, etc.)[5], which can be conditioned by the reluctance of the constitutional legis-

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4 *Nierhaus M*., Art. 28, in: Sachs M . (Hrsg.), Grundgesetz: Kommentar, 3. Aufl. 2003, Rn. 40 ff.

5 This recommendation was provided by the summary of Vienna Commission. See: CDL(2010)017 Draft Constitutional Law on changes and amendments to the Constitution of Georgia – Chapter VII1 Local Self-

lator (due to potential need for making frequent amendments in the list of these powers). However, it should be noted that in case of definition by the Constitution of the main spheres of local self-governing authorities, strong guarantees of independence of self-governing units would be created. Creation of these guarantees is especially essential in such a sphere as strategic planning.

2.2 Constitutional Guarantees of Regional Deconcentrated Government

From 1993, in accordance with the Decree of the President of Georgia (Head of State), the institution of a State Representative of the President of Georgia (Head of State) has been functioning in the regions of Georgia and has been implementing formal and informal coordination of regional representation of local and central authorities.

The institution of a State Trustee – Governor was legally enacted by the Parliament in a rather late period, by adopting a Law on the Activity of Authorities Regarding the State Supervision on 8 July, 2007. In addition to the above law, a Law of Georgia on Making Amendments and Additions to the Law of Georgia on the Structure, Power and the Rule of Activity of the Government of Georgia, defining the boundaries of power of a State Trustee – Governor, was adopted.

Constitutional enactment of a State Trustee – Governor was implemented by means of a Constitutional Law of Georgia on Making Amendments and Additions to the Constitution of Georgia, adopted on 11 March 2008. According to this Constitutional Law, Article 81^3 was added to the Constitution that determined that representation of the President and the Government of Georgia in administrative-territorial units shall be provided by a State Trustee – Governor. The above Article also stipulated the power of a State Trustee – Governor, to implement state supervision on the activity of local authorities according to the law, as well as other powers defined by law.

In accordance with the Law of Georgia on Making Amendments and Additions to the Constitution of Georgia, by a Constitutional Law of 15 October 2011, amendments were made to Article 81^3 of the Constitution (which will come into effect from the moment of oath of the President elected through the elections to be held in October 2013) and it was determined that the powers of the State Trustee – Governor (providing representation of the Government of Georgia in the administrative-territorial regions of Georgia) shall be defined by law.

Therefore, the acting Article 81^3 of the Constitution defines the only power of the State Trustee – Governor, to implement state supervision, while the new edition of the above Article (where the power of state supervision is no longer stipulated) does not stipulate any power of the State Trustee – Governor. This poses a risk of limitation of realization of the principle of separation of authorities and of the independence of local authority, since State Trustees – Governors are practically implementing active, strongly deconcentrated governance in the regions.

Government; also see: *Kobakhidze I.,* Analytical Review of critical remarks about the Constitutional Law, <www.osgf.ge/files/In-house%20Prijects/Human%20Good%20Governance/Const_Final_(Geo)_-Irakli_Kobakhidze.doc>.

3. The Powers of Local Self-Government According to the European Charter of Local Self-Government

On 26 October, 2004, the Parliament of Georgia ratified the European Charter of Local Self-Government. By this act, the State undertook the responsibility to develop a decentralized governance system according to the norms provided by the Charter. The Charter defines universal European standards and principles for local self-government. Therefore, the significance of the mentioned document is immeasurable for the member countries of the Charter, "regardless the fact that this group belongs to the category of "non self-fulfilling" norms whose usage is almost impossible without a defining national normative act."[6]

The major goal of the signer states is regulation by means of national legislature in order to implement the standards and principles defined by the Charter. Thereto, it is noteworthy that according to Paragraph 1 of Article 4 of the Charter, the States of the European Council – signers of the Charter undertake the responsibility to have the main powers of local authorities defined by the Constitution or a law. This only means that the Charter directly obliges the member States of the European Council to actually use the main legal norms ensuring political, administrative and financial independence of local authorities.[7]

According to the Charter, the main powers of local authorities should be the powers essential for implementation of local self-government. These are the powers that should be defined by the Constitution or law. Thus, the principle of definition by the Constitution and law of the main powers and responsibility of local authorities was recognized by the Charter.[8] It should also be noted that, according to Paragraph 2 of Article 4 of the Charter, the boundaries of the powers of local authorities are limited in a negative way. Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority (voluntary powers). Practically, implementation of these powers is associated to the need for implementation of activities involving powers that have not been legally defined by any of the authorities. In this case, local authorities are entitled to exercise power to solve specific issues, unless the law directly prohibits the right to solve the issue.

Powers of local authorities can be classified according to their features (form of limitation, content, obligation, etc.). During the legal regulation of powers of local authorities, first of all, classification of powers by the type of relation to the subject (own, common and delegated) is applied. The European Charter of Local Self-Government mainly classifies powers according to their relation to the subject. The Charter identifies two main categories of a self-government unit: 1. own powers and 2. delegated powers. According to Paragraph 4 of Article 4 of the Charter, "Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions."

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6 *Chighladze N.,* Guarantees of Local Authorities, Review of the Georgian Law, vol. X, # 4, Tb., 2007, 438, citation 6: *Korkelia K., Kurdadze I.,* International Human Rights Law according to the European Convention on Human Rights, Tb., 2004, 29.

7 *Ezugbaia Z., Melkadze O.,* Some Comments to the Implementation of the European Charter of Local Self-Government in the National Legislation, Review of the Georgian Law, vol. V, # 1, Tb., 2992, 98.

8 On Principles Associated with the Definition of Powers of Local Authorities in the European Charter of Local Self-Government, The Problems of Legal Regulation and the Ways of Their Solution, Tb., 2009, 11-15.

Paragraph 3 of Article 4 of the European Charter of Local Self-Government establishes an essential principle of exercising of powers by local authorities – the principle of subsidiarity. According to this principle, it is unacceptable for a comparatively high level authority to exercise the powers that are exercisable by comparatively low level authorities. Also, during allocation of responsibility, efficiency and economy requirements should also be taken into consideration. In case the higher level authority could exercise a power in a more efficient and economical manner than the lower authority, this power can be defined as the power of a higher authority. Thorough protection, implementation and respect of the European Charter of Local Self-Government is deemed by the European Council[9] as a legal basis of opportunity development on local and regional level, which first of all implies implementation of the subsidiarity principle.

Paragraph 6 of Article 4 of the European Charter of Local Self-Government reinforces the responsibility of central authorities to conduct preliminary consultations with local authorities (to the best of their abilities) in case of planning and making decisions directly associated with local authorities. This principle of conducting consultations with local authorities, reinforced by the Charter, has not been ratified by the Parliament of Georgia.

4. Legal Regulation of Powers of State Institutions in the Sphere of Local Self-Government and Regional Deconcentrated Government

4.1 Legal Regulation of Powers of Local Authorities

The Organic Law of Georgia on Local Self-Government defines two types of powers of self-governing units: 1) own powers and 2) delegated powers.[10] Besides, the Organic Law defines the full list of issues whose solution falls within the power of a self-governing unit (according to the so-called principle of positive regulation of powers[11]). These issues are:

In the sphere of local service of general purpose:[12] a) review, approval of the budget of the self-governing unit, introduction of amendments and additions to it, hearing of the reports on the budget execution and its assessment; b) introduction of local taxes and fees, definition of their rates within the limits envisaged by the law; c) identification of funds for implementation of investment directions and own and joint target programs and facilitation of investments in accordance with the Georgian legislationl d) approval of agreement on unification of budget funds with those of other self-governing units in order to implement joint projects; e) local purchases; f) issuance of permissions on constructions, supervision over the construction underway on the territory of the self-governing unit; g)

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9 Recommendations of the European Council on the Issues of Local Authorities, Tb., 2009, 317.

10 Law # 1254 (Article 9) adopted by the Georgian Parliament on 20 February 1998 "On the Capital City of Georgia – Tbilisi" also establishes the joint competencies of the state and Tbilisi.

11 *Lazarev V.V., (Editor-in-charge),* Constitutional Law, Publishing House "Jurist", M., 1999, 517 (In Russian).

12 In the Organic Law of Georgia on Local Self-Government, own powers are not regulated by spheres, classification presented in the paper belongs to the author and is developed according to the functional qualification of operations connected with expenses and non-financial assets and methodological instructions connected to this classification. See: Order # 672 of the minister of Finance of Georgia of 25 August 2010 on Approval of Budget Classification."

creation, reorganization and liquidation of legal bodies in order to implement the power of a self-governing unit; h) determining vehicle parking lots, land use planning, division of self-government unit territories by zones (planting, recreational, industrial, commercial and other special zones), demarcation and alteration of their borders; i) regulation of outdoor trade, markets and malls; j) regulation of placement of outdoor advertisements in accordance with the Georgian legislation; k) regulation of the issues in regard to organizing meetings, rallies, demonstrations according to the rule set by the Georgian legislation; l) naming and numbering streets and squares; m) municipal fire safety and rescue operations within the self-governing unit; n) planning of the motor-roads of local importance and traffic on the territory of a self-governing unit; spatial - territorial arrangement of the self-governing unit in compliance with the Georgian legislation; o) setting rules for the general plan of land use, the plan for regulation of planting, approval of rules regulating usage of settlement territories and planting; p) approval of the program of organization of amenities of the territory and development of engineer infrastructure; q) creation of a municipal archive and setting tariffs for archive services according to the rule set by the Georgian legislation.

In the sphere of economic activities: a) management and disposal and usage of the property under the ownership of the self-governing unit, in accordance with the Georgian legislation; b) approval of employment facilitation municipal programs; c) issuance of permissions on constructions, supervision over the construction underway on the territory of the self-governing unit in accordance with the law; d) management and disposal of the land resources under the ownership of the self-governing unit according to the Georgian legislation; e) management of forest and water resources of local importance; e) maintenance, construction and development of the roads of local importance unit according to the Georgian legislation; f) regulation of road traffic and road transportation within the power granted by the Georgian legislation, issuance of licenses according to the law and organization of passenger transportation services.

In the sphere of environment: a) cleaning of the streets, lightening of settlements, planning of drainage and sewage system, organization of junkyards, organization and implementation of collection of solid waste and utilization works planning or conducting municipal purchases for their implementation; organization of amenities and planting trees on the territory of a self-governing unit, approval of appropriate programs, implementation of activities within the program or conducting municipal purchases for their implementation; maintenance of cemeteries.

In the sphere of health and social protection: mobilizing the resources in the spheres of health and social protection on the territory of a self-governing unit, working out, implementing and informing the population about the appropriate events/actions, such as the creation of safety environment for people's health, the establishment of the wholesome manner of life and the identification risk factors concerning the health, according to the Georgian legislation.

In the sphere of culture: organizing the activities of libraries, museums, theatres, exhibitions, sports and health centers of local importance.

In the sphere of education: establishment of pre-school and out-of-school educational institutions as non-profit (non-commercial) legal bodies and approval of their statutes.

Presentation of own powers of a self-governing unit according to the spheres of powers vividly demonstrates the lack thereof. Own powers of a self-governing unit mainly belong to the sphere of

administration. Besides, according to the organic law, these powers are formulated as issues so that some of these powers contain issues belonging to both separate sector and general issues. Therefore, it is impossible to consider them in the general sphere local services. Hence, the ratio of certain powers increases even more in the administration sphere, while own powers of a self-governing unit will become even less in other sector spheres. The limited own powers of a self-governing unit are obvious when comparing them to local authority competencies established by law in East European states.[13] A self-governing unit has no defined powers in the spheres of housing and communal services and social protection which can be deemed as neglect of the subsidiarity principle established by the European Charter of Self-Government.

Legal regulation of own powers of local self-governing units within separate sectors by appropriate sectoral legislation is an important problem; namely, sectoral legislation reflects them in a way that does not provide the exclusiveness of own powers and thus fall within the sphere of governance of state authorities.[14] Therefore, the issue of legal regulation of separation of powers between the local authorities and central authorities, including those within the regional deconcentrated governance sphere is a vital issue.

The need for above legal regulation also emerges on the basis of review of delegated authorities of a self-governing unit. Presently, only two laws[15] - the Law of Georgia on Social Health and the Law of Georgia on Military Duty and on Military Service – expressly emphasize the delegated powers of a self-governing unit. Also, self-governing units actually implement a whole range of delegated sector powers, despite their legal regulation as of delegated powers. A dual problem emerges in this case: on the one hand, one of the main principles of implementation of local self-governance (the principle of separation of state and local authorities) is violated and, on the other hand, implementation of delegation (during delegation, appropriate material and financial resources should be delivered to the self-governing unit)[16] stipulated by the Organic Law of Georgia is undermined. In our view, one of the legal solutions of this problem, in case of delegation by law and in addition to sectoral legislation, is definition of a list of delegated powers of a self-governing unit (other than powers delegated on a contract basis).

4.2. Regulation of Powers in the Sphere of Regional Deconcentrated Governance

A State Trustee – Governor's institution is effective on a regional level. In accordance with the Constitution of Georgia[17], as mentioned above, a State Trustee – Governor represents the President and the Government of Georgia in the administrative regions of Georgia. The Constitution defines the

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13 *Zardiashvili D.,* Powers of a Self-Governing Unit, issues of Legal Regulation and Ways of their Solution, Tb., 2009, 4-60.

14 Ibid, 72.

15 There is no indication on Law # 4107" on State Budget of Georgia for 2011" adopted by the Parliament of Georgia on 17 December 2011. The delegated powers mentioned in the law (as it was defined by the Laws on State Budget for 2007, 2008, 2009 and 2010), other than the powers defined by the two laws, should not be deemed as a power delegated based on the law, since they are not (expressly) reflected in appropriate sector laws.

16 See: Article 17, Paragraph 1 of the Law No2304 on Local Self-Government, adopted by the Parliament of Georgia on 16 December 2005.

17 See: Article 81^3 of the Constitution.

only power of a State Trustee – Governor, to implement state supervision of the activity of local self-governing bodies. According to the Constitution, other powers of a State Trustee – Governor, are established by law. Legal regulation of the powers of the State Trustee – Governor, was implemented by the Law of Georgia on the Structure, Powers and Order of Activity of the Government of Georgia and the Law of Georgia on State Supervision over Activities of Local Self-Government Bodies.[18]

Apart from the powers determined by the Constitution and the Law on State Supervision, State Trustee – Governor exercises the following powers:[19] conducts regional socio-economic development in the administrative units as assigned by the Government and, when necessary, coordinates the activities of the territorial bodies of the Ministries of Georgia. A State Trustee – Governor is empowered to participate in Government meetings only with the right of deliberative vote and issue an individual legal act within his/her powers.

Within the powers defined by law, the powers of the State Trustee – Governor, are specified by the regulation approved by the Order of the President.[20] Apart from the powers, the Order also defines the goals and functions of the State Trustee – Governor, that can be deemed as his/her additional powers. Some of the mentioned functions (e.g., protection of public order, facilitation of activities aimed at achieving stabilization of environmental situation) is also a function of a territorial body of an appropriate Ministry. As for the State Trustee – Governor, according to the legislation, he/she is empowered to coordinate functioning of the territorial bodies of the Ministries by the Government assignment only, which limits to an essential degree his/her ability to implement functions within his/her competency. Such a situation in the deconcentrated governance can be evaluated as a "deconcentration against deco-ncentration" (in order to diminish). Besides, it is noteworthy that territorial borders of powers of territorial bodies of Ministries (not all Ministries have territorial bodies) and other organizations conducting public activity are not homogeneous and often do not coincide with the territorial borders of powers of regional bodies of either a State Representative – Governor, or regional bodies of any other governmental institution. Therefore, "it becomes impossible to coordinate management bodies on a regional level."[21]

Territorial bodies of the Ministries and other organizations implementing public activity have mainly predefined by appropriate legal acts the functions of collection, supervision and control of information (as it is predefined for a State Teustee – Governor). Therefore, this stage of deconcentrated regional governance in Georgia can be called a stage of quasideconcentrated regional governance.

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18 According to Paragraph 1 of Article 3, State Trustee – Governors, normally implement state supervision by the form and conditions of this law.

19 See: Article 27^1, Paragraph 2 of the Law # 2304 on State Supervision over Activities of Local Self-Government Bodies.

20 See: Article 6 of the Regulation of a State Trustee – Governor approved by Order # 406 of the President of Georgia dated 27 June 2007.

21 Regional Development in Georgia, Diagnostic Report, Task Force for Regional Development in Georgia, Tbilisi, 2009, 30.

5. Legal Guarantees of Separation of Powers in the Sphere of Regional Development Strategic Planning Between Local Self-Government and Regional Deconcentrated Governance

In accordance with the Organic Law of Georgia on Local Self-Government, a self-governing unit only is empowered to make a decision on the following issues: preparation, review and approval of the budget of the self-governing unit, introduction of amendments and additions to it, hearing of the reports on the budget execution and its assessment, development and approval of municipal programs and plans of the self-governing unit. In addition, a self-governing unit is empowered to develop a general development plan for administrative units of local authorities provided by the Budgetary Code of Georgia – a document of priorities of a local self-governing unit. The project of a budget of a self-governing unit should contain information on mid-term priorities provided by the document of priorities of a local self-governing unit, as well as the aims and results of the priorities. Thus, development of priorities by local authorities is presently linked with the budgetary process and presents a basis for making up a budget.

Definition of priorities is sometimes hindered by contradictions of the Law of Georgia on Local Self-Government with sectoral legislation and legal acts regulating non-sector, general own powers. Eradication of these contradictions will contribute to exercising of the own power by a local self-governing unit to develop and implement the strategy of a local self-governing unit and its action program. This power of a self-governing unit also implies the development and approval of priorities. However, for effective implementation of these powers by local authorities as well as by appropriate subjects on a central and a regional level, creation of a "frame" legislative base is necessary.

Within the law and in the regional development process, the competencies of central and autonomous republics, temporary administrative-territorial units, the city of Tbilisi and other local authorities should be developed and dissociated and tools of ensuring state policy of sustainable regional development should be established. Besides, the law should identify the need for definition of regional development priorities on a regional and local levels based on a united order and methodology (similarly to development of priority documents provided by the Budgetary Code of Georgia). In addition, compatibility of definite powers in the budgetary sphere of appropriate subjects should be provided.

It should be noted that the Government of Georgia has adopted a State Strategy on Regional Development of Georgia for 2010-2017[22] and an Action Plan[23] of the Strategy for 2011, thus preparing the legal background for separation of powers between the local authorities and regional deconcentrated government in the sphere of strategic planning of regional development. For the purpose of providing effective management for sustainable regional development, the strategy considers implementation of a number of objectives, including: legal provision of regional development, definition of competencies of state bodies participating in the process of regional development reform of Georgia, facilitation of

[22] See: Resolution # 172 of the Government of Georgia of 25 June 2010 on Approval of State Strategy on Regional Development of Georgia for 2010-2017 and on creation of Governmental Commission on Regional Development of Georgia.

[23] The Action Plan came into effect by Decree #1448 of 16 November 2010 on Approval of the Government of Georgia on Approval of an Action Plan of 2011 for State Strategy of 2010-2017 for Regional Development of Georgia.

independence of local self-government and distinct separation of powers between the central and local authorities. According to the strategy, every legal act regulating public powers should be revised and made compatible with the European Charter of Local Self-Government and with the Organic Law of Georgia on Local Self-Government. During the revision of legal acts, a principal decision should be made – a specific public competency should be transferred to local authorities as their own competency, or delegated to a self-governing unit, or place implementation of the competency to the power of state authority (including the State Trustee – Governor).

State Trustee – Governor, as has been mentioned above, within the assignment of the Government, implements regional programs of socio-economic development within the administrative-territorial units and coordinates the activity of territorial bodies of various Ministries of Georgia, as assigned by the Government. According to the regulation of the State Trustee – Governor, approved by the President, the competencies of the State Trustee – Governor in strategic development are as follows: development and implementation of socio-economic development programs of the appropriate administrative-territorial units; participation in attracting investments and regional development activities; in cases defined by law, providing relevant consultancy for a local self-governing unit with regard to the planned fees or priorities to be reflected in the document regarding the main data of the state. Based on the above, the State Trustee – Governor does not have a regular competency in the sphere of strategic planning.

For implementation of effective regional deconcentrated governance and establishing distinct competencies or a State Trustee – Governor, which, in its turn, will ensure separation of powers at various governance levels, a State Trustee – Governor should be assigned the regular competency of preparation of regional development strategy and coordination of its implementation (consequently, identification of regional development priorities). For legal enforcement of the above regular competency for a State Trustee – Governor, corresponding amendments and additions should be made to the Law of Georgia on the Structure, Power and the Rule of Activity of the Government of Georgia and Order of the President of Georgia # 406 of 27 June 2007 on Approval of Regulation of State Trustee – Governor. Besides, an exhaustive list of competencies of a State Trustee – Governor (as well as those of the Ministries and territorial bodies of other organizations implementing public activity) in the sphere of regional governance, otherwise the regional strategy may become the basis for legitimacy of interference into own competencies. Apart from this, there should be institutions functioning on the regional level (regional development councils) with consultations on any issue directly concerning them being held with local bodies within the activities of such institutions. Thus, the principle of the conducting consultations defined by Paragraph 6 of Article 4 of the European Charter of Local Self-Government will be ensured on the deconcentrated regional governance level. This will contribute to the creation of conditions for ratification of this Paragraph.

6. Summary

Analysis of legal regulation of powers of state institutions in the sphere of local self-governance and deconcentrated regional governance has revealed problems with respect to separation of these powers. To solve these problems, the following issued should be regulated:

a) It is expedient to define the major powers of a self-governing unit by the Constitution of Georgia;

b) The main powers of the State Trustee – Governor, including the regular power in the sphere of regional strategic planning, should be defined by the Constitution of Georgia, which will ensure constitutional guarantees for separation of powers and independence of local authority;

c) According to the Organic Law of Georgia on Local Self-Government, own powers of self-governing unit and those delegated to it based on the law, should be defined according to the spheres;

d) Powers of a self-governing unit, first of all including those in the sphere of housing, communal services and social protection, should be expanded;

e) Regulation of own sector-based powers of a self-governing unit should take place in the appropriate sectoral legislation.

f) In case of delegation based on the law, a list of delegated powers of a self-government unit (other than powers delegated based on agreement), along with sectoral legislation, should be defined by the Organic Law of Georgia on Local Self-Government.

g) An exhaustive list of regional development competencies of a State Representative – Governor should be defined by law.

NINO KILASONIA[•]

THE FORMS OF PUBLIC PARTICIPATION IN ADMINISTRATIVE RULEMAKING

(Comparative Legal Analysis)

1. Introduction

Nowadays it is a compelling requierement to draw together citizens and decision-makers, as well as to increase openness and transparency of governmental activities throughout Europe. Therefore, public participation in administrative rulemaking acquires special importance. Citizens can participate in political process not only through elections or on the basis of administrative adjudication (concerning issuance of individual acts), but get actively involved in the process of rulemaking by administrative or quasi-governmental agencies.[1]

The present paper is dedicated to focusing on the role of public participation in administrative rulemaking and analysis of the forms of participation, which affect legitimation of administrative rulemaking. This issue isn't studied in Georgian legal literature; so it will be interesting to provide analysis of various forms of public participation according to American legislation.[2] The paper will provide study of the forms of public participation in administrative rulemaking, which could be applied both in the USA and Georgia. Besides, the article will examine other forms of participation typical for American law. Advantages and drawbacks of formal and informal public participation shall be considered and the ways of solving of problems, provided by American law, shall be displayed. The first part of the paper concerns the doctrine of delegation and administrative rulemaking, the second part – importance and forms of public participation in administrative rulemaking, the third – revelation of pros and cons of the forms of public participation, and the result of study will be presented in the conclusion.

2. Doctrine of Delegation and Administrative Rulemaking

All countries, following traditional principle of separation of power, come across dilemma, related to delegation of legislative power.[3] In accordance with the opinion, expressed in American legal literature, theoretically, the legislator cannot delegate legislative power, but practically legislator

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1 *Ziamou T.,* Public Participation in Administrative Rulemaking: The Legal Tradition and Perspective in the American and European (English, German, Greek) Legal Systems, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2000, 43, <http://www.zaoerv.de/60_2000/60_2000_1_a_41_102.pdf>.

2 General Administrative Code of Georgia supports American model of public participation in administrative rulemaking. Therefore American legislation was chosen for comparative research. It is obvious that consideration-sharing of American practice and experience will be interesting for analysis of the forms of public participation.

3 *Punder H.,* Democratic Legitimating of Delegated Legislation-A Comparative View on the American, British and German Law, Cambridge Journals, "International Comparative Law Quarterly", Vol. 58(2), 2009, 353-378.

permanently does it through statutes, which give broad power of rulemaking to administrative agencies.[4] It's obvious that legal norm cannot regulate public relations in the sphere of governance due to their diversity and dymanic nature. Consequently, complete legal regulation of governmental relations and the goal of activities is secured by law-making activities of the state governmental authorities.[5] As far as the legislative power isn't able to ensure normative regulation of all issues of public life of the country, rulemaking requires division of work between legislative and executive authorities.[6] The need of delegation of legislative power by the Parliament to the government is conditioned by necessity of saving working time of the Parliament.[7] Putting in order of all technical details in the law is practically impossible... E.g. if the Parliament were commissioned with price regulation, price regulation would become impossible at all.[8] Consequently, development of the whole detailed legislation is not convenient for any Parliament.[9] Therefore, the Parliament transfers legislative power to executive authorities, which apply special knowledge and competence[10] for development of administrative rules. Governmental-legal sense of delegated lawmaking is in involvement of special abilities and specialized professional knowledge of executive authorities in fulfillment of regulation tasks with accordance of the requirement of the law.[11] So, delegated lawmaking is the power, specially granted for this purpose,[12] which is directed towards the achievement of economy and efficiency, as well as improvement of public activities.[13]

Delegated power finds manifestation in creation of bylaw administrative rules,[14] i.e. executive decision,[15] which is nothing other than lawmaking[16] by governmental agencies and prescription of law.[17] In the United States, as well as in Georgia, it is considered prerequisite requirement of the principle of separation of power[18] and the specific form of bureaucratic decision-making.[19] In the United States,

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4 *Asimov M.R.,* Administrative Law, The BarBri Group, Chicago, 2002, 2-3.

5 *Kaplunov A.I.,* Administrative Law (Common Part): Handbook-SPB, group of authors, edited by *Salnikova V.P.,* topic 13, Saint Petersburg, 2000, 134 (In Russian).

6 *Turava P., Tskepladze N.,* Handbook in General Administrative Law, Tb., 2010, 83 (In Georgian).

7 *Bailey S.H.,* Cases, Materials and Commentary on Administrative Law, 4th ed., Sweet and Maxwell, London, 2005, 206.

8 *Shaio A.,* Self-limitation of Government, Introduction to Constitutionalism, Tb., 2003, 203 (In Georgian).

9 *Seerden Rene J.G.H.,* Administrative Law of the European Union, its Member States and the United States - A Comparative Analysis, 2nd ed., Intersentia, Antwerpen-Oxford, 2007, 233.

10 *Rikhter I., Shupert G.F.,* Judicial Practice in Administrative Law, Moscow, 2000, 141 (In Russian).

11 *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P.,* Handbook in Administrative Procedural Law, Tb., 2008, 271 (In Georgian).

12 *McHarg A.,* What is Delegated legislation? Journal "Public Law", issue AUTUM, 2006, 557.

13 *Langhauser D.P.,* Executive Regulations and Agency Interpretations: Binding Law or More Guidance? Development in Federal Judicial Review, "Journal of College and University Law", Vol. 29, 2002, 6.

14 In more details, administrative acts, as bylaw administrative rulemaking. See: *Kozlov J. M., Ovsyanko D.M., Popov L.L.,* Administrative Law, M., 2002, 256 (In Russian).

15 French politologist *Max Gennel* pointed out administrative acts from other sources of public law and called them executive decisions, for details, see: *Tikhomirov J. A.,* Administrative Law and Process: Complete Course, M., 2001, 107 (In Russian).

16 *Furlong S.R., Kerwin M.C.,* Interest Group Participation in Rule Making: A Decade of Change, Economics of Administrative Law, edited by *Rose-Ackerman S.,* An Elgar Reference Collection, Chentelham, UK, Northhampton, MA, USA, 2007, 318.

17 Administrative rulemaking is defined as development of resolution by executive authorities for more precise formulation of law. In details, see: *Aedama A., Loman E., Parrest N., Pilwing I., Vene E.* Handbook in Administrative Proceedings, Tartu, 2005, 560 (In Russian).

18 *Wade, W., Forsyth, C.,* Administrative Law, Chapter 22, 9th ed., Oxford University Press, New York, 2004, 857.

rulemaking is the only most important function, performed by governmental agencies."[20] By using rulemaking, they follow from rough and non-existing rules, established by statutes, towards justified and well-defined rules,[21] legally binding requirements, which shall be used by society, agencies and court.[22] The same definition of administrative rulemaking is provided by General Administrative Code of Georgia (hereinafter – GACG). According to GACG, normative administrative-legal act is the legal act, issued by the authorized administrative organ on the basis of legislative act, which contains the general rule of behavior of its permanent or temporary and multiple application.[23] Thus, for American and Georgian legislators the rulemaking, as one of the main inventions,[24] is the administrative equivalent of legislative process,[25] which is expressed in making of legal rules[26] and completion of legislative activities.[27]

On the one hand, rulemaking is invaluable, if we consider that executive authorities have the competence of making decision in regard to this or that sphere of public life; on the other hand, granting of unlimited power to executives, who are not directly elected by people is a problematic issue,[28] so the problem of legitimating of delegated power comes to agenda, which can be solved in various ways.[29] American and Georgian legislators support people-oriented approach of solving of this issue. They apply formal and informal procedures of public participation for legitimating administrative rulemaking, which will be considered in detail below.

3. People, as Administrative- Legal Rulemakers

At present, when delegation of legislative power to executive authorities is so widely spread, its legitimating is especially important. As Paul Graig mentions, absolute trust towards rulemaking doesn't exist, as dicussions about rationality of government always causes question. Governmental acts often

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19 *Black, J.,* Rules and Regulations, Oxford University Press, New York, 1997, 213.

20 *Warren K.F.,* Administrative Law in the Political System, 4th ed., Westview Press, Colorado, 2004, 213.

21 *Davis K.C.,* Discretionary Justice: A Preliminary Inquiry, Louisiana State University Press, Baton Rouge, 1969, 219.

22 *Koch C.H.Jr., Jordan W.S. III., Murphy R.W.,* Administrative Law, Cases and Materials, 5th ed., Mathew Bender and Company, San-Francisco, 2006, 183.

23 CACG, June 25, 1999, sub-paragraph "e" of the Article 2 (In Georgian).

24 *Cooper J.P.,* Public Law and Public Administration, 4th ed., Wadsworth Publishing, 2006, 180.

25 *Hall D.E.,* Administrative Law Bureaucracy in a Democracy, 2nd ed., Prentice Hall, Upper Saddle River, New Jersey, 2003, 110.

26 For more details, see: *Brovko N.V., Smolensky M.B., Sokolova J. A.,* Administrative Law, M., 2003, 127 (In Russian).

27 As professor Kerwin states, rulemaking is the most important invention, which could be used by Federal agencies for promotion, definition and perfection of working product of Congress. For details, see: *Croley S.,* Making Rules: An Introduction, How Government Agencies Write Law and Make Policy by *Cornelius M. Kerwin*, "Michigan Law Review", Vol. 93, 1995, 1512.

28 *Balla S.J.,* Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking, "I/S: A Journal of Law and Policy for the Information Society", Vol.1, 2004/2005, 60.

29 E.g. in some countries the method of legitimating of rulemaking is implementation of Parliamentary control over the activities of executive authorities. For details, see: *Punder H.,* Democratic Legitimating of Delegated Legislation-A Comparative View on the American, British and German Law, Cambridge Journals, "International Comparative Law Quarterly", Vol. 58(2), 2009, 353-378.

represent the result of political confrontation and consequently, necessarily require democratic legitimation.[30] The way, through which rulemaking could be realized without contradiction of its result and the principle of democratic governance, is involvement in rulemaking of the persons who are interested in solving of the issue,[31] however it is possible that instead of people the elected representatives of the people could be the sources of legitimation of administrative rulemaking[32] that In this case, they shall have significant legal mechanism of control over the executive authorities,[33] but due to excessive workload the representatives elected by people are deprived of opportunity of supervising the appointed officials.[34] Consequently, direct public participation in rulemaking becomes necessary, as replacement of verbal process, which, in its turn, ensures constitutional legitimation of legislation[35] and gives opportunity to citizens to implement democratic self-governance.[36] So, modern states shall broaden the limits of public participation in rulemaking,[37] as citizen-oriented procedures ensure consideration of viewpoints and opinions of persons involved in rulemaking.[38] People want fair administrative solutions.[39] Consequently, governors shall equalize all stakeholders in rulemaking process and develop techniques, which will better reveal people's interest.[40] Such techniques in Georgia and America are informal- notice and comment rulemaking as well as formal rulemaking (considers formal procedures like public discussions and presentation of evidences).

3.1. Notice and Comment Rulemaking

According to American Administrative Law, Notice and Comment rulemaking is an important institution, during which the agency is obliged to ensure participation of stakeholders in rulemaking by granting them the power of submittion of written documents.[41] So, informal rulemaking, also

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30 See: reference No. 28, 353-378.

31 *Balla S.J.,* Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking, "I/S: A Journal of Law and Policy for the Information Society", Vol.1, 2004/2005, 60.

32 *Punder H.,* Democratic Legitimating of Delegated Legislation-A comparative View on the American, British and German Law, Cambridge Journals, "International Comparative Law Quarterly", Vol. 58(2), 2009, 353-378.

33 *Richardson H.S.,* Democratic Autonomy, Public Reasoning About the Ends of Policy, Oxford University Press, New York, 2002, 4.

34 *Coglianese C.,* The Internet and Citizen Participation in Rulemaking, "A Journal of Law and Policy for the International Society", Vol. 1, 2004/2005, 36.

35 *Furlong S.R., Kerwin M.C.,* Interest Group Participation in Rule Making: A Decade of Change, Economics of Administrative Law, edited by *Rose-Ackerman S.,* An Elgar Reference Collection, Chentelham, UK, Northhampton, MA, USA, 2007, 318.

36 *Noveck B.S.,* The Electronic Revolution in Rulemaking, "Emory Law Journal", Vol. 53, 2004, Spring, 460.

37 *Rose-Ackerman S.,* Regulation and Public Law in Comparative Perspective, Vol.14, <http://www.law.utoronto.ca/documents/conferences2/Trebilcock09_Rose-Ackerman.pdf>.

38 *Aman A.C. Jr.,* Politics, Policy and Outsourcing in the United States: The Role of Administrative Law, Administrative Law in a Changing State, Essays in Honour of Mark Aronson, edited by *Pearson L., Harlow C., Taggart M.,* Hart Publishing, Oxford and Portland, Oregon, 2008, 220.

39 *Shapiro M.,* Who Guards the Guardians? Judicial Control of Administration, the University Georgia Press, Athens and London, 1988, 34.

40 *Warren K.F.,* Administrative Law in the Political System, 4th ed., Westview Press, Colorado, 2004, 234.

41 *Longley D., Rhoda J.,* Administrative Justice: Central Issues in UK and European Administrative Law, Cavendish Publishing Limited, London, 1999, 237-238.

known as notice and comment rulemaking considers publication of the draft of an act by the agency in the Federal Register and granting opportunity to the stakeholders to represent their views regarding rulemaking.[42] Georgian legislator, like American legislator, chooses notice and comment rulemaking The difference is that according to GACG only collegial administrative authority is obliged to use notice and comment rulemaking.[43] So we'll consider rulemaking of collegial administrative authority in the present article, as notice and comment rulemaking referred to as the corner-stone of American democracy[44] is used just in the case of rulemaking by collegial administrative authority.

According to the Administrative Procedure Act of the United States[45] (hereinafter – Administrative Procedure Act), administrative rulemaking begins by publication of notice of administrative rulemaking, which is followed by the relevant response from people.[46] Administrative Procedure Act[47] stipulates that the notice of rulemaking shall be published in Federal Register and contain information on the time and location of rulemaking, procedures of rulemaking and the agency, which is the initiator of rulemaking. The notice shall also contain the information on the content of the proposed draft or description of the topics, included in the proposed draft. Morover, the stakeholders shall have comprehensive information on the legislative norm, on the basis of which the agency issues regulation.[48] Similar rule of starting of administrative rulemaking is used in Georgia by collegial administrative authority in the case of issuance of normative administrative-legal act. In particular, according to GACG, publication of the draft of normative administrative-legal act is required[49] in printed media of collegial administrative authority, and if the administrative authority doesn't have printed media, which is spread all over the territory of jurisdiction of the administrative

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42 *Kolber M.,* Rulemaking without Rules: An Empirical Study of Direct Final Rulemaking, "Albany Law Review", 72, 2009, 85.

43 Since coming of GACG into force (January 1, 2000) till adoption of new Law on "Normative Acts", GACG pointed out, as a separate section, the administrative proceedings related to the issue of normative administrative-legal act, which provided for the need of publication of notice and presentation of viewpoints in the case of issue of all kinds of normative administrative acts. New Law "On Normative Acts" came into force on October 22, 2009, where p. 3 of the Article 1 established that administrative proceedings provided by GACG would only be applied towards normative acts, issued by collegial administrative authority, whereas Organic Law of Georgia "On Normative Acts" would regulate the issues of adoption (issuance) of normative acts, issued by other administrative authorities and officials.

44 *Croley S.,* Making Rules: An Introduction, How Government Agencies Write Law and Make Policy by *Kerwin C.M.*, "Michigan Law Review", Vol. 93, 1995, 1525.

45 Administrative Procedure Act (APA), §553.

46 Ibid, 1519.

47 Administrative Procedure Act (APA), §553(b).

48 It has special significance, which is proven by the case of Global Van Lines, Inc. v. ICC, 714 F.2d 1290 (5th Cir.1983), in regard to which county court made decision on abolition of regulations issued by Interstate Trade Commission. The basis of abolition of regulations was limitation of the opportunity of presentation of petition related to draft regulations by the stakeholders. The Commission stated in the court, that it had changed limitations on transport services by the relevant normative act, power of issuing of which followed from the Regulations of Interstate Trade Act. But the draft hadn't provided reference to legal basis. Finally, County Court abolished the decision, made by the Commission and ruled that absence of reference to the basis had deprived stakeholders of the opportunity of presentation of viewpoints. *Aman A.C. Jr., Mayton W.T.,* Administrative Law, Hornbook Series, West Publishing, St. Paul, Minn., 1998, 51-52.

49 E.g. p.1 of the Article 106^2 of GACG specified that the rules provided by the Articles 55 and 56 of the same Code shall be used for publication of draft normative administrative-legal act.

authority and is issued at least once a week, it shall be announced publicly[50], which implies placement of the act in the publicly available place.[51] Besides, it's admissible to place draft normative administrative-legal act on the website of collegial administrative authority instead of publication in official printed media.[52] Besides, publication of the draft of normative administrative-legal act, GACG in addition obliges collegial-administrative authority to publish a notice on initiation of administrative proceedings related to issuing of normative administrative act.[53] Publication of notice on administrative proceedings is required to inform the persons who are interested in the result of rulemaking. Consequently, the administrative authority specifies in the notice the name of the collegial administrative authority, where proceedings are carried out, the deadline of adoption of normative administrative-legal act, address of the collegial administrative authority, where presentation of viewpoints is possible and the deadline of submittion of viewpoints.[54] Moreover if the draft of normative administrative-legal act has big volume and the collegial administrative authority doesn't have its own website, collegial administrative authority is authorized to publish only notice on administrative proceedings related to adoption of normative administrative-legal act. In this case the name and brief summary of normative administrative-legal act shall be mentioned in the notice.[55] The above provided discussions prove that American and Georgian legislators pay special attention to the informal form of public participation in administrative rulemaking. Through special acts, regulating administrative procedures,[56] they directly formulate the procedures of publication of notice and presentation of viewpoints, but how effective these procedures are and at what extent they ensure involvement of stakeholders in administrative rulemaking,[57] will be discussed below.

3.2. Formal Rulemaking

As early as in the 20th century there existed an opinion that public discussions, advisory committees and other forms of consulting played important role in the process of rulemaking.[58] As a rule, persons are more likely to fulfill the norm, which represent the consensus in the negotiations, to

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50 As provided by p.p. 1 and 2 of the Article 56 of GACG.

51 See: Article 57 of GACG.

52 Such procedure of publication of normative administrative-legal act is a novelty in Georgian legislation and apparently, is a forward step, if we consider that participation of stakeholders in administrative rulemaking by means of electronic governance is not a strange thing for anybody at present. Although the mentioned issue, due to its volume and complexity, is the object of separate discussion and we won't touch it in the present article.

53 See: p. 2 of the Article 106^2 of GACG.

54 See: p. 3 of the Article 106^2 of GACG.

55 See: p. 4 of the Article 106^2 of GACG.

56 The world is equally divided into the states, which have Common Procedural Code and the states, which leave solution of procedural issues, especially in the field of policy making, to the norms, established by "parent" status. See: *Galligan D.J.,* Langan R. II, Nicandrou C.S., Administrative Justice in the New European Democracies, cases Studies of Administrative Law and Process in Bulgaria, Estonia, Hungary, Poland and Ukraine, COLPI, University of Oxford, 1998, 343.

57 *Harrington C.B., Carter L.H.,* Administrative Law and Politics: Cases and Comments, 4th ed., A division of Sage Washington D.C., 2009, 242.

58 *Balla S.J.,* Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking, "I/S: A Journal of Law and Policy for the Information Society", Vol. 1, 2004/2005, 66-67.

which they were parties.[59] Therefore, various formal procedures are used for ensuring of public participation in administrative rulemaking in the world. According to the view of the part of scientists, conducting of negotiations between governmental authorities and stakeholders and partnership-based[60] relation is the best procedure, which is directed towards improvement of public participation in administrative rulemaking. In the process of negotiated rulemaking the parties jointly study their common interests, as well as differing opinions and cooperate in the aspect of collection and analysis of technical information, form viewpoints and have discussions in regard to these viewpoints based on different priorities.[61]

Despite the above-mentioned advantages of the negotiated rulemaking, different opinion is spread among the scientists, who consider that public discussion is one of the models, which is the closest to the governance and decision-making process implemented by the people. In accordance to their view any other model has only advisory character[62] It's remarkable that American and Georgian administrative law knows different forms of formal rulemaking. Procedure, like negotiations between the representatives of the agency and the stakeholders is used in administrative rulemaking in the United States of America. It is the supplement to the rulemaking, determined by the Administrative Procedure Act,[63] which ensures conduct of negotiations prior to the publication of notice of rulemaking.[64] In the case of typical negotiated regulation the stakeholders negotiate with administrative agency the content of the proposed rule, which is further published by the agency for traditional procedure of notice and comment[65] The above mentioned model of negotiated rulemaking was introduced in America for the purpose of improvement of the form and content of administrative rulemaking.[66] The supporters of using of negotiations in administrative rulemaking consider that often involvement of stakeholders in early stage of rulemaking would be more effective, than further participation in the process of confrontation.[67] Therefore they chose negotiation mechanism of public participation. It should be mentioned that the model of such negotiations isn't known to Georgian administrative law, but the procedure of public participation based on verbal hearing in administrative rulemaking, which obviously has formal nature, is known to Georgian legislators. For illustration of the above stated we

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59 *Freeman J.,* Collaborative Governance in the Administrative State, "UCLA Law Review", Vol. 45, 1997, 23-24.

60 Partnership-based governance is one of the ways of improvement of quality, enforcement and legitimacy of the initiatives of the agency like administrative rulemaking. For details see: *Zabawa B.J.,* Making the Health Insurance Flexibility and Accountability (HIFA) Waiver Work Through Collaborative Governance, "Annals of Health Law", Vol.12, 2003, 378.

61 *Susskind L., McMahon G.,* the Theory and Practice of Negotiated Rulemaking, "Yale Journal on Regulation", Vol. 3, 1985, 137.

62 *Abels G.,* Organizer, Observer and Participation, different pTA models? "Science, Technology and Innovation Studies", Vol. 5, 2009, 25.

63 Administrative Procedure Act (APA), §553

64 *Lubbers J.S.,* Approaches to Regulatory Reform in the United States: A Response to the Remarks of Professors Levin and Freeman, "Washington University Law Quarterly", Vol. 83, 2005, 1898.

65 *Rossi J.,* Bargaining in the Shadow of Administrative Procedure: the Public Interest in Rulemaking Settlement, "Duke Law Journal", Vol. 41, 2001, 1021.

66 *Esposito D.H., Ulbrich K.W.,* Negotiated Rulemaking in Environmental Law, "Rhode Island Bar Journal", Vol. 46, 1998, April, 5.

67 *Fine J.D., Owen D.,* Technocracy and Democracy: Conflicts Between Models and Participation in Environmental Law and Planning, "Hastings Law Journal", Vol. 56, No 5, 2005, 918-919.

can cite the provision formulated in GACG on application of formal procedures in administrative rulemaking. In particular, in p.1[1] of the Article 103 of GACG it is said that unless otherwise provided by the Law, the rules, established for public administrative proceedings are used by collegial administrative authority in the case of adoption of normative administrative-legal act. Referring to public administrative proceedings, which provide for verbal hearing,[68] makes obvious that GACG gives opportunity to the stakeholders to directly participate in administrative proceedings related to issuing of normative administrative-legal act. So, in the case of issuing of normative administrative-legal act by collegial administrative authority, the mentioned authority shall involve stakeholders in administrative rulemaking, unless otherwise provided by the Law.[69] The above mentioned makes it obvious that in Georgia, as well as in the United States, formal procedures are used for public participation in administrative rulemaking, with the difference that negotiated rulemaking applied in the United States of America, is used prior to the traditional procedure of publication of notice and comment, but not always.[70] And Georgian legislation, as we have mentioned above, does not know negotiated rulemaking. Only verbal hearing is provided by GACG, which is usually used in issuing of normative administrative-legal act by collegial administrative authority unless otherwise provided by the Law. The above stated makes it clear that unlike American law,[71] Georgian Administrative Law recognizes application of formal procedures of public participation in rulemaking directly by GACG.[72]

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[68] Article 120 of GACG rules: "verbal hearing shall be held during administrative proceedings, where the provisions of the Articles 110 and 112 of this Code shall be applied" (In Georgian).

[69] In p. 1[1] of the Article 103 is stated that public administrative proceedings shall be used in the case of issuing of normative act in order to ensure public participation. The normative act is directed towards indefinite circle of people; many members of society can potentially be under the influence of this normative act and thus, society has full right to be informed about the progress of issuing of normative act and participate in it. At the same time, law can establish other procedure of issuing of normative act as well. See: *Adeishvili Z., Winter G., Kitoshvili D.,* Comment to the Common Administrative Code of Georgia, Tb., 2002, 371 (In Georgian).

[70] Negotiated Rulemaking Act lists several requirements, which should be observed for conducting negotiations and only based on these factors; the agency chooses how expedient the use of negotiation as an auxiliary means of rulemaking is. *Aman A.C. Jr., Mayton W.T.,* Administrative Law, Hornbook Series, West Publishing, St. Paul, Minn., 1998, 51.

[71] Administrative Procedures Act of the United States of America ensures adoption of normative acts through formal and informal proceedings. The difference between these two types of proceedings is that the procedure of official proceedings requires verbal public hearing of the case whereas in the case of informal proceedings holding of verbal hearing is the discretional right of the competent authority. Formal proceedings are only applied in the cases provided by the legislation; in all other cases informal proceedings are used. See: *Adeishvili Z., Winter G., Kitoshvili D.,* Comment to the Common Administrative Code of Georgia, Tb., 2002, 369 (In Georgian).

[72] In some states (e.g. Great Britain, Germany, Greece) public participation in administrative rulemaking is regulated not by general code or special act (like the United States or Georgia) but by the concrete legislative act, to enforcement of which the administrative rulemaking serves. It means that the instruction on the concrete form of public participation (publication of notice and presentation of viewpoints, holding of negotiations and examination of evidences) is to be applied in administrative rulemaking. Different rule applies in the United States, where informal rulemaking is usually used, and formal rulemaking is applied by the agencies only in the case when obliged by statutes. *Heinzerling L., Tushnet M.V.,* the Regulatory and Administrative State, Materials, Cases, Comments, Oxford University Press, New York, 2006, 425.

4. Formal or Informal Procedures?

After the above comparison, it would be interesting to determine which procedure (formal or informal) is more effective for ensuring of public participation in administrative rulemaking. In accordance with the opinions, expressed in American legal literature, the possibility of demonstration of knowledge by persons in the course of publication of notice and presentation of viewpoints and admission to material is not fully considered.[73] Ensuring of performance of consideration in fair manner by the agency is an important issue. The procedure of notice and comment provides opportunity for the parties to present their viewpoints, but does not ensure the guarantee of taking into account of these viewpoints by the agency.[74] E.g. Administrative Procedures Act[75] doesn't define what is implied in the term "taking of viewpoints into account". The persons, directly affected by the result of activities of the agency, specify that for most agencies, "taking into account" means putting of the date of submittion and a stamp on the viewpoint and its further placement in the room of the relevant materials. It's quite clear that the agency isn't constrained absolutely by the viewpoint in the course of formation of final rule. It can apply its own expertise in the course of rulemaking even in the case of obtaining of opposite result with consideration of viewpoints.[76] Georgian legislator, like American legislator, doesn't establish the necessity of taking of viewpoints into account by collegial administrative authority. According to GACG all persons have the right to present his/ her viewpoint in regard to normative administrative-legal act. The presented viewpoints shall be considered by collegial administrative authority. Providing answer to the viewpoints isn't mandatory.[77] In the opinion of some administrativists, such approach decreases the sense of notice and comment rulemaking. Consequently, the opinion on application of formal procedures like court hearings in the course of administrative rulemaking dominates among the scientists of administrative law.[78] They consider that public discussion and solving will be far more effective. In the case of introduction of public hearing people will try to present evidences in the course of public hearing directly and nullify viewpoints provided by other persons. Furthermore, part of researchers doesn't consider it sufficient to introduce only formal procedures in administrative rulemaking and state that agencies shall apply exhaustive procedures of preliminary elaboration and analysis of the issue prior to publication of notice of administrative rulemaking.[79] How much the above mentioned formal and preliminary procedures ensure improvement of notice and comment rulemaking and, therefore, increase the role of public involvement in administrative rulemaking? Scientists, who support application of formal procedures, state, that public discussion and hearings provide the agency with opportunity to obtain important practical information, which would be impossible to obtain

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73 *Galligan D.J.,* Due Process and Fair Procedures, a Study of Administrative Procedures, Clarendon Press, University of Oxford, New York, 1996, 497-498.

74 Ibid, 498.

75 Administrative Procedure Act (APA), §553(c).

76 *Fox W.F.Jr.,* Understanding Administrative Law, 4th ed., Mathew Bender and Company, Lexis Publishing, Danvers, 2000, 169.

77 P.p. 1 and 2 of the Article 106^4 of GACG.

78 *Galligan D.J.,* Due Process and Fair Procedures, a Study of Administrative Procedures, Clarendon Press, University of Oxford, New York, 1996, 498.

79 *Stern S.,* Cognitive Consistency: Theory Maintenance and Administrative Rulemaking, "University of Pittsburg Law Review", Vol. 63, 2002, 598.

otherwise and which finally improve the policy of the agency.[80] Moreover, the number of claims submitted to the court against the adopted regulation could be decreased as a result of negotiation, as majority of the persons, who are affected by the result of rulemaking, actually participate in development of the rule.[81] Negotiation process also reduces the costs of enforcement of the decision.[82] Consequently, negotiation, which requires additional time and prolongs rulemaking, is mostly considered as fair procedure for obtaining of the benefit, which is the result of the mentioned process.[83] But the opponents of introduction of negotiations and other formal procedures in administrative rulemaking, state that the governmental decision-making can not be based on consensus, as solving of the best interests of the society, people. Policy-making is the function and obligation of the government.[84] So, neglegence of the mentioned statement is against "people's interests".[85] Furthermore in the opinion of critics, public discussion and solving of issues require the level of consensus among citizens, which usually doesn't exist in the modern mixed society.[86] However according to their opinion, formal, "court-like" procedures are not applicable in rulemaking… they are created for quite different procedures and may cause virtual paralysis of administrative process.[87]

Taking into consideration the differences of the above mentioned viewpoints it could be said that neither notice and comment rulemaking, nor any other formal procedure is the panacea[88] and cannot be applied in all cases. The main challenge for citizens, officials and practitioners is to determine which form of public participation in regard to specific rulemaking shall be most effective and favorable.

5. Conclusion

As a result of research it is obvious that public participation in administrative rulemaking is considered as necessary pre-requisite of legitimating of administrative rulemaking by Georgian legislator. It quite fairly establishes formal and informal procedures for ensuring of public partici-

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80 *Harter P.J.,* A Plumber Responds to The Philosophers: A Comment on Professor Menkel-Meadow's Essay on Deliberative Democracy, "Nevada Law Journal", Vol. 5, 2004-2005, 384.

81 *Coglianese C.,* Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter, "New York University Environmental Law Journal", Vol. 9, 2001, 417.

82 *Mee S.,* Negotiated Rulemaking and Combined Sewer Overflows (CSOS): Consensus Saves Ossification? "Boston College Environmental Affairs Law Review", Vol. 25, 1997, 230-231.

83 *Selmi D.P.,* the Promise and Limits of Negotiated Rulemaking: Evaluating Negotiation of a Regional Air Quality Rule, "Environmental Law", Vol. 35, 2005, 460.

84 *Harter P.J.,* A Plumber Responds to The Philosophers: A Comment on Professor Menkel-Meadow's Essay on Deliberative Democracy, "Nevada Law Journal", Vol. 5, 2004-2005, 384.

85 *Goldfien J.,* Negotiated Rulemaking and the Public Interest, "Journal of American Arbitration", Vol. 5, 2006, 88-92.

86 *Hunold C.,* Corporatism, Pluralism, and Democracy: Toward a Deliberative Theory of Bureaucratic Accountability, "An International Journal of Policy and Administration", Vol. 14, No. 2, 2001, 153.

87 United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973) After the case, courts demand from the agencies to apply formal rulemaking in the following cases: 1. concrete status clearly require formal rulemaking; 2. verbal consideration and examination of evidences is mandatory following the status; For details, see: *Warren K.F.,* Administrative Law in the Political System, 4th ed., Westview Press, Colorado, 2004, 220.

88 *McKinney M.,* Negotiated Rulemaking: Involving Citizens in Public Decisions, "Montana Law Review", 1999, 537-538.

pation in administrative rulemaking. Establishment of verbal hearing together with notice and comment rulemaking represents a kind of hybrid of public involvement in administrative rulemaking. But it would be desirable to regulate on a legislative level the procedure of consideration of received comments from interested persons and to specify the reason of rejection of comments in written justification of normative administrative-legal act.[89] Furthermore, it will be expedient to define various formal procedures of public participation (like negotiations, verbal hearing and study of evidences), not only by the Code, but also by the legislative act itself, for the execution of which the relevant normative administrative-legal act is to be issued. The establishment of such formal procedures as supplements stipulated in the legislative act which is to be enforced, will much more ensure real public participation in administrative rulemaking

[89] According to GACG, provision of written answer to the presented viewpoints is not necessary, as in controversial cases a lot of viewpoint could be presented and provision of answers to each citizen could hamper the process of issuing of administrative act. Nevertheless, the authority shall perform internal consideration of viewpoints and record it. See: *Adeishvili Z., Winter G., Kitoshvili D.,* Comments to Common Administrative Code of Georgia, Tb., 2002, 378 (in Georgian).

BESARION ZOIDZE[*]

ON THE SCOPES OF OPERATION OF POSITIVE LAW, I. E. ORGANIZED/RESPONSIBLE PERSON AND TOLERANT STATE

(Essay)

I

Expanding the frames of law enforcement is as threatening as oppressing/reducing its boundaries. Briefly speaking it's not desired to exist without law and to "prosecute/accuse" everything. When the lack of law prevails, relations are unsteady. Improper civil life creates unorganized/solvent person. Unorganized person losses freedom. Person's will is not the object of legal protection. The will with the straight insight is not a will, its natural display of obstinacy. The fundamental base of obstinacy is the lack of law. **Free will is there where the law reigns.** The success of will is depending on personal/individual capabilities when the will is abstinent. The person owns the will and its protection mechanism. In such situation the state becomes functionally inactive, stands behind civil life as the power of authority followed by anarchy. There is no trust in justice when there is a lack of law. A person displays him/herself with natural freedom, that is the constraint of freedom for him/her. **Freedom exists there where peace and solidarity domains between people and not the rival.** Lack of justice/law will definitely cause these problems. Other social norms can never carry out the functions accomplished by the law. They can not exist there where only legislative will can reign.

Few words about excess law. This is reality/real life when the law is dominant everywhere and in everything. The end state is steady civil life, defined and controlled with the law/justice. It can derive from steady life so that living essence can completely change. A person turns out to be in the center of life controlled by law and automatically follows these living standards. Life is so much changed that the law becomes the object of will and sets obligations for people to follow the will. This is the "free will" of people. In such circumstances a person is like a vehicle and becomes one of the bolts of the community via technocratic law. A person/individual, like any mechanism of a clock, is engaged in public life, and even one variance can seize the relationship. If such form of being organized is high the limits/boundaries between public laws and technical laws abolishes and an individual becomes like Charley Chaplin. Serious successes are followed after such high rate of being organized as everything is detailed and people carry out everything in high accuracy. A question can be raised – is a person the object of such order/being organized? I doubt it, a person is the element of the order/steadiness. The Steadiness/order is the kindness itself. For that reason an individual is not the object of free will anymore. For such person steadiness/order is not the natural requirement but obliged value. Acts, performs because it's required by the law.

For that reason I always assert that excess law/justice seizes the freedom of person. Such law is the deny of individual life and is completely fitted to public life interests. Public interest can be overwhel-

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ming for individual interest. People live with their lives but predicted and defined by public life and not vice versa. Such behavior impacts on person's nature and makes him/her the prisoner of civil life, changes the nature/characteristics and the expression of the face. It's tough to judge the freedom. In such situation the law creates the lives of people and makes them live with it with adequately adjusted mentality, perception. Such law can not reign for a long time and people will definitely run away from it. Being in different environment, individuals will try to get rid of these laws and revert to normal life. **Dominance/dictatorship of excess law, order is the display of unsteadiness/disorder.** What is needed-/required to gain freedom and live with laws/legal environment. Firstly, it's desired to determine the area of accurate/proper law. **The law/justice should not intervene in areas where a person behaves not like the subject of the law, but as a person with traditional mentality/morale,** when the behavior doesn't have negative impact/influence on the public. The requirement of the law is not needed there.

Additionally State normative involvement is not necessary where the norms/standards exist. It's better to have a desire to fulfill own liabilities and obligations than be forces by the state. Briefly, **the justice/law should be the capability to live and not the goal.** Such dictation is allowed and necessary as well. In the environment where the law prevails a person will have ability to feel him/herself a human being and the owner of the law/justice. In such conditions a person is the human being and is familiar with the law.

The law/justice can not be enforced with total, absolute supremacy. It is fetishism and self-denial. The Law/justice as all physical or mental characteristics demands competitive environment. The law/justice as positive value, requires negative environment. When the law enforcement refines/improves the living environment there should remain other mechanisms of enforcing order. The law will coexist with it in harmony. This is the correct determination of social norms that can exclude law monopolism and establish peaceful balance among existing norms. There are many cases when the morale is pursuit in relations thus creating the threat of order and steadiness and making people avoid each other. **In any environment where the law prevails there are still some areas where an individual is obstinate but such areas are required for free will and law/justice.** The state should stand behind as it is caused by necessity.

Briefly saying, overwhelmed threat of steadiness/order is followed by first of all unnatural, strange/avoiding relationships between people and the second, the control of behavior better governed without normative acts/involvement. **Enforcing evaded behavior is the violation of individual freedom and is the act directed against the nature.** It is never followed by positive impact. Any law enforcement should facilitate development of the positive/natural behavior that helps to reveal oneself as a person with free will followed by promoting the behavior. **Mental and natural features of the law/justice should be revealed in behavior.** Such behavior and the method of establishing law doesn't create conflict towards normative environment, vice versa it will be easier for people to be convinced that only in such reality it is possible to coexist in peace and freedom. The law/justice will turn out to be the inevitable necessity and be respected by people. If artificial, avoiding behavior will be legalized an individual and the law will be evaded and unnatural features of the law will be revealed. That would not be the law/justice.

If we will recall the Gustav Reedbuck formula – excess law becomes unfairness within the frames of the law. The compulsory and unnatural elements are redundant. Such law aims to create well-or-

ganized person working/living as the mechanism of the clock. In all cases this is to bring up a person with less impulsive, unconscious behavior. We are facing the total limitations of natural environment and become a stranger within own existence.

Thus the law/justice is required at the level that will be absolutely reachable for practical thinking of a person.

II

What is needed for a person to be happy? According to the legal fundamentals a person is happy within the environment where the law reigns – one cannot doubt it, however as we already talked about **the order is not the value but the mental order.** Excess order/steadiness is restraining/tiding a person as baby is swaddled in the cradle. Mental order is the capability and not the aim/goal. Such capability is required for happiness and people get used to it easily. Unfortunately people get used to unintelectual, excess order and steadiness and consider it as kindness and evil as well. Such person is fake and the smiley face and decent manner of speaking is completely unnatural. As the merchant or waitress step out the threshold of the store/restaurant they will take off the legal obligation mask and try to return their own real face. It means that law enforcement is not so "delightful". We cannot demand from people to live the same way in all environments but the most rational law will be the one composed of psychological will/desire.

Lawmaker/legislator must face the law the way as an ordinary person does that can be reached if the will of lawmaker and an individual coincides. This is the matter of legal ethics. **Legal ethics is the result of mental sense of justice; if not so the pertinent legal ethics cannot be developed and be evaded.** Thus mental order is the fundamental of accurate legal ethics. The law should be the ethical value to establish adequate natural behavior. As a result the law/justice is one of the important factors for a person to be happy.

The questions can be raised – how to determine the essence of law – is it the value existing outside our mentality or just a kindness within us? The law has to answer the question – yes or no. If I could I would existentially refer to the issue. I believe that the law has to be understood as a kindness that can "deny oneself" in some cases. The self-denial should not be considered as resulted in suicide. The denial is followed by the law but negative and not general. This is the existential law pertinent to particular cases. In any cases the denial must be mentally justified and not threatening the law and order/steadiness. Mental denial can concur pedantry. The lawmaker established the following words "allowed" and "not allowed" for general behavior, excluding deviations. However as the general actions are derived from specific actions and cannot result in all cases as specific cases are changeable and cannot be completely concluded in general provisions, this should be considered in the law. I do not exclude individual behaviors in specific cases, the essential factor is to remain within the mentally accepted legal frames. Accordingly it turns out that we must face the law as living organism representing the imitation of behavior. In old Georgian Law historical data the following is frequently stated "It's required by Law". The law is not only the normative will of lawmaker, it can be different and can be justified in specific cases. The court is the monopolist in defining the legal will of the law. No one can be involved in this process but lawmaker and the court. I'm asserting that existential deviations establish different approach to specific case if there is a general will, that reveals the legal will and effectiveness of the law.

III

According to Plato state must be set up as the organism of a person and be similar to human being. The more the similarity is the more humane is the state. What similar features should the state have, can we consider the tolerance of Christianity? We will be right to define that **the state should be tolerant as an individual has to be**. The state must consider biblical imperatives and accordingly trust in God. If not so the state cannot be similar to human and always be in contrast. How can we understand the state tolerance is similar to individual's tolerance or not? Here we have to separate with boundaries. The public interest is the measuring mechanism of state tolerance. A victim can pardon the offender, though the state is authorized to consider the public interest. **The tolerance of a person is not obedient to the law but state has limitations to this regards.** Accordingly the level of tolerance depends on how well the state understands it. In democratic states the order is the kindness and state tolerance is adequate to maintain the value of kindness. When the state is immoderate it losses the sense of tolerance. Accordingly the state tolerance should always be mental, necessary and fair. Any action taken by the state, not derived from necessity, will be unreasonable and ineffective. The state will be avoiding an individual. Modern European law requires pertinent necessary and reasonable actions from the state to be taken towards the goal.

IV

Tolerance and revenge expel each other. The tolerance results in peace as it is the propagation of kindness. The revenge is followed by the "war" as it is avoiding the kindness. Both are the weapons against the evil/enemy. One destroys the evil but the other can become the reason for new evil. Tolerance and revenge can establish such features in humans. Their functions are different for the state. The state, as already mentioned, cannot be purely tolerant. As it becomes like a church that is similar to the state with its parish.

State tolerance is the measuring capability for sanctions. What does it mean? First and foremost, the state should accurately define the sanctions against the behavior of people. It's possible that sanction is not required at all and the state can establish limits for free action of people. The kindness derived from positive action cannot be easily understood. People sometimes act positively and sometimes derive from the way. **The state must establish such environment that enables a person to act according to the sanction policy and should not tide them up**. The state will definitely succeed if has deep understanding of person's philosophy. What can be the feedback if the above mentioned will not be considered? Every individual will become criminal, violator and be responsible to account for being a person and not a bad person. Such people will permanently sense the fear and threat forcing them towards negative actions and be behind the civil life. A person will always be a "prisoner" of the state despite the living conditions/rules. State tolerance will be revealed if a person is not punished for being a human. Thus, **the state must consider that a person is a sinner and there are some sins revealed during positive actions as well.**

There is another category of people who are far from positive actions and even are resisting them. The state tolerance can be revealed in a different way. Those actions can be divided into two groups.

The first incorporates illegal actions when resistance depends on presumption of law knowledge. The presumption is against middle class people. The fundamental of presumption can not be the same for all illegal actions. There can be actions when the "punishment" is not depending on presumption and a person needs special knowledge to notice the difference. We are not facing presumption when we have officially required knowledge. For instance a driver cannot justify that didn't know about driving rules. When the presumption depends on safety interest and requires more knowledge, special education from a person the state should consider the following when establishing sanctions against an individual: "I had to know" does it always mean "I have to know what I learn" "I cannot know what I cannot learn". The state has to be restrained when the knowledge of action is not derived only from its nature.

As for second group of actions, the presumption of its knowledge is revealed from the action itself and additional knowledge is not required. The evil nature of the action is known for everyone and everyone has right to know. Why is it so? Because the action itself is so evaded and resisting the normal being that it's easy to notice. Even an underage knows that assassination is a sin and unacceptable. A child knows that it's prohibited to steal someone's property. How can the state react on the case? Unsheathe the shield and cut the heads of criminals. The state must consider that **a person has to be punished for the sins not producing another one**. The state should be tolerant towards a person and not full of revenge.

V

Any sanction must be stipulated with urgent cases. Sanction is the culmination of any goal to be reached. If the state can get the same result with less sever actions they should be carried out. The Civil Codes define it as follows: The goal of the law is to improve, carry out the violated liabilities and do not refer straight to sanctions. Sanction is used only after enforcing all other methods but in vain. All sanctions cannot be considered in this approach. Everything depends on severity of the action determining what sanctions can be established. Still, what can be reached with sanctions. The same that is relevant to all sanctions – private and general prevention. The state warns the criminals/violators that they will be punished for such illegal actions in the future emphasizing the fact that punishment can not be avoided. Punishing the particular person the state sends the warning message to everyone that they will be prosecuted the way the violator was and have to avoid such actions. **Doing so the state reminds others that only mental steadiness can create peaceful environment for living. Thus the law/justice is peace.** It refers not to all laws but to those that are kindness and the valued as well. Such law can cause the sanction enforcement. The promotion of sanctions are known from the old times and was accomplished in different ways in various times. For instance, the murderer was executed on the field cutting the head or was hang or hang on the road to threaten others. It was long ago, but sanction eliminating further threats will always be dominant. It's obvious that any criminal can ask: you are punishing me as I caused a damage or because to teach others on my example? Any state can answer: for both reasons.

As we see, the main goal of sanction is the punishment of a person. Yes, it's correct and cannot run away from punishment no matter how nicely it will be stated. The punishment can be doubtful as it compensates the unfairness. When it's impossible to compensate, as results can not be rehabilitation, the sanction should be punishment. There are a lot of such cases and it is less authentic that sanction is adjusted to humanitarian goals. Who will believe that a person is imprisoned for the reason to improve the

life of a person. Who will trust in the fact that sanctions are established based on the time needed for discipline. These are the promotion bases as well. **Any sanction is established based on the severity of violation.** Proportionality, adequacy is not more then meant in old times. Accordingly the punishment should be the main fundamental of establishing sanction. The state should be tolerant and not diseased with revenge. **The confession of sins with the sense of guilt is the most important for the criminal.**

Punishing/hurting the feelings of the criminal the goal is achieved that is called private and public prevention. The criminal, who will be tortured with physical and spiritual "food/torture" will confess and loss the desire of violation/criminal. As for the public, being informed on the punishment, the torture of the criminal will prevent them from criminal actions. The criminal is punished for illegal actions. the punishment is followed by the private and public prevention. Accordingly the answer to the criminal is as follows: "I punish you for your sin and not for making you and those like you, sinless". Such statement/vision of prevention will not make the punishment more sever. Aslo idealization of revenge is not required and the prevention should not be forgotten as well.

VI

There is no need to otherwise state that the criminal is acting with revenge. Punishing the criminal the peace will be reached. Punishment is the morale compensation.

The fact that the authority of punishing the criminal has the state doesn't mean the denial of interests of the criminal. The interests of the criminal is permanently considered during the court process. The interest will be satisfied by the fair sentence declared by the state court. If not so the distrust towards the court will prevail. The court as the guarantee of civil order will become the subject of nihilism, resulted in avoiding people and patriartichy of self-discipline. **Fair verdict is the guarantee of peace. Any decision made by the state threatening the peace, is unacceptable. The peace is established upon restoration of fairness. Fairness is the essential feature for punishment.** In any cases the interests of the criminal must be reviewed with the interest of victim. It's wrong to review the interests of the criminal after illegal actions, the punishment refers to the rights of the victim. **The victim, like the accused person, is authorized to promote fair punishment that is the obligation of the state.**

The state is tolerant when judging with humane ideas establishing the sanctions. Humanity is the philanthropy, the state should love each of its citizen. The state should look at the criminal with humanity and conform the punishment. Long imprisonment can, if in civilized form, impose a person to get used to uncivilized forms of living like Robinson Crusoe did living alone on the island. The sanction will be effective if above mentioned will be considered as well. **The sanction shouldn't destroy the interest of freedom in person. If the freedom losses the value the person becomes more dangerous, than the person who still has a desire to be free.** Accordingly severe or very humane sanctions are not re-commended. The state should be moderate when making decision on sanctions.

The will of the state is derived by the court or other facilities. How should the court act? the same way as the state does when establishing sanctions. Thus the court should have humane attitude meaning that the court should take into consideration the conditions of the criminal and conform humane punishment. **The attorney who is always making decisions on sever punishment is not a good attorney, he/she will definitely make unfair decision**. In such conditions the court will not be able to

act with legal functions and will confront not only the criminal, but the public against the state. **Severity doesn't mean fairness.**

VII

There are sanctions that have economic effect for the state. Mainly these are administrative sanctions. Establishing such sanctions should be reasonable, to overcome the attempt of the state to make the sanctions as the sources of income. If the state will focus the budget on such sanctions they will loss inherent features and will become the weapon against the right of its citizens. The state should be guided by equivalent, moderate principle. However there is a difference between equivalence and moderateness. **Equivalence is the equal for compensating kindness when moderateness is the most pertinent form of the goal considered under the sanction.** Administrative sanctions are of great value in this context. When the sanction defines that second time smoking in the administrative building is prohibited and is punishable with 5 times more sanctions, is it punishment or prevention? probably none. Establishing 5 times or more sanctions are not adequate of unfairness. Its vague how can the smoking on second time cause hyper transformation of a person. The sanction enables the action to be evaluated the way to change the essence of the action, creating the picture as if a person smoked second time in the administrative building that is "criminal". There is no need of increasing sanctions if it is just a prevention. The prevention cannot be caused by the reasonable increase of sanctions. **Any prevention should be within the free will.** The repetitive and additional sanctions can not put the freedom under the threat. Accordingly with such approach the state changes the classification of violations, besides the state is liable to consider the responsibilities of a person. The responsibilities are determined by the property owned by the person. When the sanction/penalty is more then the property owned by the person the freedom of a person is restrained as in many cases he/she is obliged to sell everything and take debt to fulfill the obligations. Such sanctions decreases the attitude towards the state and is facing the authority resisting them rather than protecting their interests.

VIII

What was said about the state, the same refers to an individual. If we recognize that rights are natural kindness then we have to admit their connection with supreme will. **Religion is not only the rites.** It can be less recognized in countries where the church is less involved in public life but always maintains its position. No one will prohibit a person from acting only on religious imperatives. When we speak about honesty, the source of its production is religion as well. Maybe we'll see only mercantile, property interests in honesty. **The person who says that they do not lie only because not to bankrupt, is wrong. The honesty is the value without any property interests.** That's why I state that the honesty defined by the religion is of high value and becomes the integral/vital part of civil nature. The person who is free of religious value is less credible towards achieving the goal. The sense of confession is important for person as he/she knows that be judged by the God for the sins.

The state is not always the best authoritative for discipline. **The criminal must be punished. A person with the sense of confession can accept the punishment.** Accordingly its needed for the state

to involve the church in this process. It doesn't mean that state becomes a church. It's impossible to have church in the country and permanently state that they have different goals. The goal is the same for both – a human being. The difference can be found in the ways to achieve the goal. The state must use the religion to the level if go higher will loss the publicity. As the religion is the highest value the state must cooperate with it. **There have never been a fact when a person leaving the church found shelter under the state, vice versa the church was always a shelter for people ignored by the state.** Even though when people cannot get the adequate protection from the state they find protection in the church. The number of parish increases when the state becomes powerless. A person must find a shelter somewhere. He goes there where feels him/herself better. When the state is strong the parish should be of great number as well. The church should play vital role in this process. Not only poor people should go to the church but the wealthy ones too. The motivation is to serve the kindness and recognize that everyone is equal and the rich should be more open-handed and tolerant. **The huge treasure is general happiness. Everyone should know that will not be happy if will live in the environment that has the deficiency of happiness. Happiness is the happy environment. The happiness is in the house and not in an isolated apartment.**

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CRIME AND PUNISHMENT IN GEORGIAN CUSTOMARY LAW

(Publisher "Meridiani", Tbilisi, 2011)

Resume

The paper studies crime and punishment institute in Georgian customary law on the basis of materials of Georgian customary law of the second half of XIX and XX centuries. Namely, the present work gives general description of this institute.

Chapter One: Essence of Crime, Crime Classification in Georgian Customary Law.

1. According to materials of Georgian customary law crimes can be classified in the following way: Crimes directed against the society and private offences.

2. There was no clear distinction between these two categories of crimes established by customary law, though based on materials of Georgian Customary law we may say that certain crimes in specific cases were mainly considered crimes against the society and others – private offences.The above enables us to divide crimes in the two above mentioned categories.

3. According to the materials of Georgian customary law crimes directed against society (public offences) comprise mainly: public treason, public freedom infrindgement, public default, larceny (committed in one's own village or community, mainly repeated, systematic), immoral act (illegitimate sexual relation, rape, giving birth to a bastard), failure to comply with the community decision, infringement of property of the Church (of Pagan chapels in mountainous regions of Eastern Georgia), infridgement of, unlawful use of common possessions, property of public (village, community), illegitrimate marriage, striding towards gaining certain privilages (social, economical) in the village, community and attempt to get separated from the community (this is identified in certain mountaious regions), failure to observe days off, etc.

4. Private deliquencies (private offences) mainly comprise: homicide, injury, maiming, larceny, insult, damage of the property, nonpayment of debt, domestic disputes, divorce, pecuniary disputes, disputes related to property sharing, etc.

Chapter two: General Description of the Institutie of Vengeance in Georgian Customary Law.

1. Vendetta (blood vengeance) still existed in XX century in certain regions of Georgia (Svaneti, Khevsureti).

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2. Institute of vendetta had religious- belief basis, which is also true for Georgian reality. Namely, it is related to the cult of the deceased.

3. Vendetta is an obligation to the murdered person, who requiers from his relatives blood of the murderer or murderer's relative, otherwise the murdered will bring misery to his own relatives. Because of extremely realistic vilualisation of horrible danger brought by the murdered for "not taking blood" (for not committing blood revenge), vendetta was perceived by the community.

Chapter Three: Entity of the Crime in Georgian Customary Law.

1. In Georgian customary law there is collective, group responsibility, characteristic for those nations, which have preserved institute of vengeance and observe clan-community solidarity. According to materials of Georgian customary law an entity of the crime can be an individual, as well as a clan, a structural unit of a clan, (Samkhubi), a community, a village.

2. According to our observations Georgian customary law significantly exceeds the level of evolution, when an individual is completely absorbes by a group, while imposing the reponsibility. We can identify certain distinct elements of individualization of responsibility. In our opinion, in Georgian customary law (in case we make judgements on the basis of materials of Svaneti or Khevsureti customary law), there is certain stage of transition from collective to personal responsibility in Georgain customary law; In those regions, where vendetta is not preserved (e.g. according to Kartli customary law), we can see absolutely sole, individual responsibility of a perpetrator.

3. Under the influence of "impersonal declaring", based on data of Svaneti and Khevsureti) in case of an offence, committed by a juvenile or a mentally ill person, responsibility is fully born by a group, represented by a perpetrator. Mentally diseased or a juvenile offender would not usually become an object of revenge. Sufferer party Would generally direct the vengeance against the members of his clan (more specifically his Samkhubi), distringuished for their courage. In those regions where blood vengeance and clan solidarity principles have not been registered in the materials of customary law, there was no criminal responsibility for crimes committed by mentally ill or minor persons.

4. Only a human being or a group of persons are entities of crime in Georgian customary law and no cases of responsibility born by anumals, birds, insects ot inanimate objects have been registered.

5. In case of damage inflicted by a domestic animal, its owner is considered a responsible entity. We also see cases of certain reposnsibility born by an owner of a weapon (gun) , in case a crime is committed with another person's weapon.

Chapter Four: Issue of Accusation (Charge) in Georgian Customary Law.

1. Georgian customary law clearlyt distinguishes two forms of accusation: premeditation and action without forethought. This is registered in all regions of Georgia, where existence of customary law in the end of XIX and XX centuries has been identified on the basis of materials available to us (inter alia materials,belonging to the end of XX century).

2. In Georgian customary law there are the following terms to define premeditation: „Gizamaobit", "gangeb", "gangebisait", "mofiqrebit", "simterisit", "nebit", which means: deliberately, with forethough, with hostility, wilfully, intentionally, voluntarily.

3. Crimes committed without premeditation in Georgian customary law is defined with the following terms: "ishobrad", "kezad". Which means: accidentally, mishap, involuntarily, unintentionally, suddenly, mischievously, etc.In present understanding the above terms imply negligence, as well as an accident, a mishap, i.e. they can be related to an offence, committed without intention, against the will of an perpetrator.

4. Elements characteristic for impersonal declaring have been long preserved in Georgian customary law. It is especially true for Khevsureti and Svaneti where, compared to other regions, customary law was enforced at its fullest and most ancient form. The principles of impersonal declaring implied the following: 1). from various data, registered in Svaneti and Khevsureti it is clear, that while imposing responsibility, decisive weight was assigned to criminal outcome, rather than motive and reason of an offence. According to these data, when imposing responsibiilty no attention was given to the fact whether a crime was committed with or without premeditation (accidentally, unintentionally). In this regard principles of impersonal declaring were especially strong in Khevsureti. In relation to homicide this principle could be found here as late as the end of XX century. In Svaneti principle of impersonal declaring can be found in materials of Eg. Gabliani and A. Davitiani. According to these materials local mediator judges (morves) fully understood the difference between wilfull and unintentional offence, importance of reason and motive, but still had to comply with certain rules/traditions and ignored the above factors when passing a sentence. b). A sufferer party could kill not just a murderer, but also his relative instead of him,, which implied probability of responsibility of a person, who had no personal relation to this particular crime. Consequently, elements of the principle of impersonal declaring, characteristic for early stage of evolution of jurisprudence were present in customary law of certain regions of Georgia even in XX century.

5. Principles of impersonal declaring are not the only ones, existing in Georgian customary law. Even in those regions of Georgia, where impersonal declaring played essential role, we are still able to see presence of personal declaring. The above circumstance is proved by the fact, that in cases of an unintentional (accidental) offence reconciliation of parties was relatively easy. In all regions of Georgia, where existence of the institute of vendetta is confirmed on the basis of materials of XX century, reconciliation of parties was relatively simple in case of unwilfull homicide, compared to intentional one.

6. Functioning of the principle of personal declaring in Georgian customary law implies, while determining the responsibiilty, putting main focus on considering personal attitude of an offender towards the offence. It becomes obvious from the fact, that responsibility imposed was much less in case of unintentional (accidental) offence, mentioned in the materials of XX century - in Khevsureti (for injuries and maiming, but not for murdur), in Pshavi, in Svanet (both for cases of murder, as well as injuries and maiming).

7. In materials, recorded by M. Kekelia in 60-70 –ies of XX century we can clearly see that motive and reason of an offence were taken into consideration while imposing the responsibility.

8. Materials from Svaneti of various periods clearly illustrate progress of Svaneti customary law. Namely, according to Eg. Gabliani while imposing the reponsibility no attention was paid, whether the

crime was intentional or unintentional, either to the motive and reason of the crime, which confirms impact of impersonal declaring principle on Svaneti customary law. According to M. Kovalevski and A. Davtiani in case of unintentional offence it was possible to impose full fine or decued one. A. Davtiani mentions, that unintentional murderer would usually be imposed full fine; for reduction of fine a perpetrator had to comply with certain conditions; as for motive and reason of the crime, for some reason they were usually ignored (though judges fully understood that it would be fair to considered them). Materials of M. Kekelia of later period clearly show, that Svaneti MORVES unconditionally took into consideration motive and reason of a crime, they also tend to substantially reduce responsibility in case of unintentional murder. Obviously, at certain stage, factors, which impeded consideration of motive and reason of a crime while imposing responsibility, as well as significant reduction of fine in case of unintentional murder, were not paid as much attention as earlier.The above illustrates that gradually the principle of personal declaring was fully established in Svaneti MORVI judiciary activities, which indicates genesis of Svaneti customary law (though it should be mentioned that concurrent functioning of Svaneti impersonal declaring is also confirmed, which implies possibility of murder of absolutely innocent close relative on the basis of blood vengeance).

9. In materials, recorded in Adjara, Khevi, Khevsureti, Pshavi and some other regions of Georgia we find facts of consideration of motive and reason of the crime while imposing the responsibility, which, according to various data, in certain cases even implies removing any responsibility for murder or other offences.

Chapter Five: Issue of Participation (Complicity) in Georgian Customary Law.

1. According to Khevsureti customary law materials, available to us, responsibility is also imposed on persons other than perpetrators, involved with crime committment: an accomplice, a lender to an offender of a weapon, which was used for committment of an offence; in case a crime was committed on the basis of snitching – an informer, etche above shows existence of an institute of participation of some form in Khevsureti. In a way this is deviation from the principle of impersonal declaring, which implies only imposing the responsibility on a person, directly inflicting damage, causing criminal outcome. Though influence of the principle of impersonal declaring on the institute of participation is still quite strong.

2. In Khevsureti responsibility for a crime committed was only imposed on an actual perpetrator (e.g. in case of murdur, on a person inflicting an lethal injury). An accomplice of a murdur had only to pay for "khelchasamtao" "Instrument", which did not imply full fine, prescribed for murder; an accomplice did not have to comply with the rules, set for a murderer in Khevsureti, i.e. he was not responsible within the confines of the punishment for the offence, he was involved in. The same can be said about an informer and a lender of a weapon, which had to pay "Arbit", regardless of their own personal attitude towards the crime. The above factors illustrate influence of the principle of impersonal declaring on the institute of participation.

3. Peculiarity of the institute of participation in Khevsureti can be explained by the fact, that murder, injury , maiming and other offences are delicts of private nature. For a sufferer party the most important thing was to receive pecuniary compensation for damage incurred. Number of accomplices,

involved in the crime had nothing to do with the amount of fine, composition implied for the specific crime. If direct committer of the crime could not be identified, accomplices bore solidary responsibility for "paying for blood", as a single entity. In case of blood vengeance the act or revenge could only have been exercised in relation to one of the accomplices.

4. The above shows, that in Khevsureti customary law we do not have institute of participation in our modern understanding, We think, that here we deal with early, embryonic stage of the institute of participation, and its peculiar nature is conditioned, on one hand, with supremacy of the principle of impersonal declaring over the personal one, and on the other hand, with the fact, that offences belong to the category of private delicts.

5. From Svaneti customary law materials we can also see responsibility of an accomplice of an offence, of a lender of a weapon to the offender, or a person, starting a fight resulting in the crime (materials available to us do not illustrate responsibility of an inciter).

6. Unlike Khevsureti in Svaneti amount of fine to be paid by the above persons was not fixed in advance and Morves prescribed it for each particular case according to the degree of their participation in criminal activity, which indicates certain level of development of personal factor in Svaneti customary law. This fine is substantially less compared to the amount, which had to be paid by direct committer of an offence in the process of reconciliation. In case of presence of the latter responsibility for given crime, including relevant pecuniary compensation (Tsori), had to be paid by him.

7. Despite the fact, that The institute of participation seems to be more developed in Svaneti, compared to Khevsureti and there are certain differences in regards to participation issues, main peculiarities of this institute in the customary law of both regions are rather similar.

Chapter Six: Issue of Attempted Crime in Georgian Customary Law.

1. Similar to materials of Georgian law, in Georgian customary law we also see so called "restricted *corpus delicti"*. We think that a delict of such resrtricted corpus, and therefore of high threat is illegitimate penetration into other person's place, carried out for the purpose of committing another offence, though such illegitimate penetration is considered a completed offence according to Svaneti and Khevsureti customary laws.

2. Though the principle of impersonal declaring had strong impact on Georgian, namely, Svaneti and Khevsureti customary law, they still clearly illustrate punishability of an attempted crime. In regards to Svaneti, it is especially true for Kvemo (lower) Svaneti; in Zemo (upper) Svaneti punishability of an attempted crime has not been registered on the basis of materials of the end of XIX century (exception is M. Kovalevski's document related to Ushguli). Punishability of an attempted murder is confirmed with materials recorded by M. Kekelia at the end of 60-ies of XX century.

3. Similarly to materials of Georgian law, in Svaneti and Khevsureti punishability of only one particular attempted crime, namely of attempted murder has been confirmed.

4. According to majority of materials, available to us, punishment for an attempted murder is half of a punishment for a completed murder. This is confirmed by majority of Svani and Khevsuri informers used by M. Kekelia, who writes about punishability of an attempted murder, also by B.

Nijaradze in relation to Kvemo (lower) Svaneti. Only B. Gaburi gives different data in relation to Khevsureti – the fine is 5 cows.

5. In Khevsureti an injury, inflicted with the end of a sabre in a vulnerable spot (even a light, insignificant wound), was considered an attempted murder, which is obvious from decisions of mediatory court and implied payment of half of "blood fine".

6. In Svaneti and Khevsureti customary law punishability of an attempted murder shows, that in certain cases, responsibility was imposed considering personal factor, namely, fact of intention to commit murder, rather than based on actual damage inflicted, actual outcome received. All this confirms that in Svaneti and Khevsureti customary law the principle of personal declaring was also present.

Chapter Seven: General Description of the Institute of Punishment in Georgian Customary Law.

1. Similarly to classification of delicts, punishments in Georgian customary law can be categorized as belonging to public and private punishments.

2. According to materials of Georgian customary law objectives of punishment can be: vengeance, public and private prevention, correction of a delinquent, protection of private and public interests.

3. On the basis of generalization of materials we can talk about aggravating and mitigating circumstances in Georgian customary law. Mitigating circumstances were the following: committing an offence without intention, hard domestic conditions of a delinquent, repentance, committing a crime in relation to one's own relative (except for certain offences of private character) etc. Aggravating circumstances were the following: repeated commitment of an offence, committing an offence in a church or on the territory of a chapel (praying house), committing a crime in relation to a minor (it is obvious in connection to illegitimate sexual relation), a crime committed in relation to one's a relative (certain crimes of public nature) etc.

Chapter Eight: Various Types of Punishment in Georgian Customary Law.

1. According to materials of Georgian customary law available to us, we can see types of punishments, which are registered in legal written documents and also some other types, which are not recorded in legal documents. Therefore the above mentioned materials enable us to have an idea about punishments which legal written documents were unfamiliar with.

2. There are certain punishments (elements of punishments), characteristic for the society with strong clan-communal relations. This enables us to review punishments and their reflections, characteristic for early stages of development of the society.

3. **Capital punishment,** was certainly applied for the most grave crimes. Capital punishment was rarely applied on the basis of Georgian customary law norms. We can also see the oldest form of capital punishment -"stoning" (killing through throwing stones), cases of which have taken place as late as the beginning of the XX century. This type of capital punishment was very spread in Georgia. We can see it in Mountainous regions of Eastern Georgia, in Svaneti, Ajara, also in lowland regions. We also see other types of capital punishment, e.g. with sharp, pointed objects (skewer, spear), with a fire gun, etc.

4. The most frequent punishment for private offences in Georgian customary law was **pecuniary punishment.** Pecuniary compensation ("composition") could have been paid in kind or in cash. Namely, in Mountainous regions of Eastern Georgia main means of payment was mostly cattle, in Svaneti it was land, which was conditioned by factor of leading types of economy in these regions. Cattle and land were main equivalents of pecuniary compensation in these regions. In Svaneti, Pshav-Khevsureti, Tusheti compensation for murder was fixed amount - in Pshav-Khevsureti it was called "Tavsiskhli" , in Svaneti – "Tsori". In mountainous regions of Eastern Georgia and Svaneti there was whole system established for pecuniary compensation for injuries, maiming and other offences. In some other regions we can see multifold compensation of stolen property in case of larceny, in mountainous regions of Eastern Georgia from materials of Georgian law we are familiar with so called "Seven" – sevenfold compensation of stolen property. Penalty was a very popular form of pecuniary compensation. It was mostly imposed in case of public offences, though sometimes it was also imposed for private offences, for the benefit of both public and of a private person. A specific form of penalty was plunder. This term implied method to collect fine imposed on a perpetrator. In the process of plunder people (representatives of the people) would take out from a perpetrator's home cattle, wine, without the consent of the latter and the whole community would then party. Other types of pecuniary compensation can be seen in various regions of Georgia and they were applied in different cases.

5. According to ethnographic data of XIX-XX centuries available to us, in Georgia we have cases of application of various types of humiliating punishments on the basis of customary law. Most popular humiliating punishments were the following: public criticizing – condemning, symbolic "stoning", pouring mud over the head of a perpetrator, putting on a donkey, tying to pillory, taking through the village. Some of humiliating punishments were only characteristic for certain regions. Humiliating punishment could have been applied both as a basic, or an additional penalty. It has to be mentioned, that, according to certain data, a person, subjected to humiliating punishment, was isolated from the society without being cast out or boycotted.

6. **Casting out (declaration of boycott, distrust)** was rather popular punishment according to the materials of Georgian customary law. A person could have been cast out both from the territorial unit (community, village), and from the relatives circle. A decision about casting out (boycotting) was taken by a community meeting of a relevant territorial unit, or a relevant group of relatives. Casting out (boycotting, declaring distrust) was applied for the most grave offences, e.g. for public (village, community) treason, illegitimate marriage, illegitimate sexual relation, larceny, etc. In mountainous regions of Eastern Georgia ritual of casting out was usually accompanied by sacrificing cattle in a prayer house, in some especially grave cases- by "samnis chasma". The outcast (boycotted person) would stay in his/her home, though he/she was completely isolated from the society. All members of the society were banned to have any relations with the person. No one would invite, help, talk to the person, community would not let him/her enjoy any kind of public benefic. In the mountainous regions of Eastern Georgia an outcast was also considered to be cast out from prayer house, with all the relevant consequences. After certain time an outcast could have been returned back to the society. The relatives would usually cast a person out for illegitimate marriage (for disgracing family), illegitimate sexual relation, etc. Casting out from relatives' circle would be carried out through "madzaxuroba" (loudly cursing a person), through killing a dog, and in certain, especially grave cases, through (sticking a

pointed stone at the border of an offender's property): All relatives, participating in casting out, would be released from any liabilities of kinship in relation to the outcast, including responsibility on the basis of blood vengeance. In case a person, cast out from the relatives had committed a murder, relatives casting the person out were released from any responsibility – would not be subject to persecution on behalf of a sufferer side, would not have to pay share of composition usually imposed on relatives ("Drami"), would be released from paying "honor" to relatives of the murdered. In case of murder of an outcast relative they would not raise any claims in relation of a murderer and his relatives.

7. According to Georgian customary law, apart from casting out there also was tradition of expelling. This one of the most ancient punishment has been preserved in Georgia till quite late period and we can judge about it on the basis of materials recorded in the second half of XX century. Expelling, as a punishment was registered in customary law of actually every region of Georgia, both mountainous, and lowlands. A person would be expelled from certain territorial unit. The main thing was for a person expelled to leave the confines of the territorial unit, it was up to him/her where to go. A person could be expelled from a village, from a community (union of villages, or a gorge (union of communities). In lowlands we mostly see expelling from the village, in mountainous regions there are also cases of expelling from the community or the whole gorge. It can be explained by the fact, that in the period of survey community unions were stronger in the mountains, compared with the lowlands. Expelling could have been with or without time limitations, with or without pecuniary penalties attached. It was traditional to apply other punishments (condemning, casting out) in conjunction with expelling. In almost every region of Georgia the decision about expelling was taken by the meeting of the community of the relevant territorial unit (in certain regions by custodians of the community, which were authorized by the community). This decision was usually applied in relation to public offences. All persons, taking a decision about expelling would cease any kind of relations with the expelled. Expelling and casting out were actually applied for the same types of offences. The community would make a decision about expelling in the case of an offence with aggravating circumstances, or if it had grave consequences. The community would take a decision in each particular case considering the above factors, or personality of a perpetrator. Expelling is considered one of the most strict punishments, which we come across in the materials of Georgian customary law.

8. According o Georgian customary law, **cursing** of different form and type was quite frequently applied punishment. According to its content it could have been both public and private. As it is obvious, cursing could have been applied by the society (village, community, gorge) in the form of condemning with the participation of cult servants. In this case cursing was a punishment of public nature. The fact, that it was imposed by the meeting of the society of certain territorial unit, indicates public nature of the offence it was imposed for. Here we would also like to mention, that when a group of relatives condemned a person, it would be not for a public offence, but for an offence, encroaching interests of this particular unit of relatives and therefore a punishment applied had to be of private nature, though, generally speaking, it was still to be considered a public punishment. As for other types of cursing – anathematizing, "bedua", "windiT gadacema", "dakochva" they were mainly applied at the initiation of private persons in case of actions, infringing their interests. Frequently, this ceremony was conducted by a sufferer side. In such case, the above punishments were considered to be of private nature.

Guidelines for Authors

1. Circle of Authors

Law Faculty Journal includes articles covering all branches of jurisprudence. The following persons are authorized to submit articles or other material:

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- Law Faculty doctoral candidates;
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- Other authors to prepare publications on different matters on instructions of editorial board.

2. Article Size

Approximate size of article should not exceed 70 000 printed symbols except spaces and referenced resources.

3. Content Requirements

- Articles presented by academic personnel and covering acute problems of law and the suggested ways for their resolution will be attached special importance;
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4. Procedure and Form of Submission

An author should present his/her article in *Microsoft Word* through e-mail and should include the following data:

a) author's full name
b) article name
c) contact details and e-mail address
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Georgian version of article should be in ***AcadNusx–12***, foreign-language articles - ***Times New Roman–12***, footnotes – same font size 10; spacing – 1; indent by one ***Enter*** instead of Tab; styles should be equal and no hyphens are allowed. Right indent – 4 cm; pagination – each page, lower right corner.

Structure of article should be developed not only through numeration of chapters, but also subtitles of issues to be discussed. When dividing an article in chapters, subchapters and sub-subchapters Arabic numerals should be used, e.g. 1.; 1.1.; 1.1.1. etc., introduction and conclusions should be given separately.

Text mainly should be in third person; while express his/her own position, an author should try to avoid telling in first person.

Article should not have the references (sources are given as footnotes).

5. Citation and Footnote Technique

Footnotes should involve the sources of citation (quotation) and factual circumstances.

No abridgements of words, names and titles are allowed in text and in footnotes, except for the universally known ones (e.g. paragraph — §, for example – e.g., reference – ref.

Etc).

If an article includes abbreviation first should be given the full version of it, and then abbreviation in parentheses (e.g. German Civil Code (hereafter "GCC"); accordingly, frequently used names of conventions, laws etc. should be shortened using key words, i.e. first should be given the full version of it, and then key words in parentheses (e.g. EU Convention for Human Rights (hereafter "the Convention").

• When using **legal act,** its full name and source it has been published should be given in footnote, as well as date and page.

• When using **literary sources,** the following data are required to be included in footnote:

1. for **a book** – author's surname, first letter of first name, title of book (no quotation marks), number of part, section, volume (if necessary), place and year of publication, page number (without "p".)

2. for an **article from collection** – article author's surname, first letter of first name, title of the article (no quotation marks), title of collection (no quotation marks), editor, number of part, section, volume (if necessary), place and year of publication, page number (without "p".)

3. for an **article in a journal (newspaper) - —** article author's surname, first letter of first name, title of the article (no quotation marks), type of periodical in brief (magazine, newspaper) title (in quotation marks), number of copy, year (month, date), page number (without "p".);

All bibliographic elements of foreign sources should be in original language, or in language the author have read in (indicating appropriate official translation).

Literature in western European languages shall amount not less than four fifths of the total number of cited scientific sources, except the cases derived from the particularities of the topic.

Unified system should be maintained regarding footnotes: author and the work title should be emphasized (e.g. author – italic, other information – ordinary fonts, italic should be used also for all surnames used, e.g. editor), besides each units (except for surname and first name initial) should be separated by comma and at the end of footnote should be a point.

Materials obtained through Internet should have relevant webpage and date of updating; In case of an article, author's surname, article title, webpage and date are required. E-address should be in <....> last updated in brackets [....].

4. for **decisions of international court and foreign countries:**

Court of Justice

e.g. Case 16/62, Van Gend en Loos, [1963] ECR 95.

European Court of Human Rights

e.g Kostovski v. The Netherlands, [1990] ECHR (Ser. A.), 221.

International Court of Justice

e.g. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, [1995] ICJ Reports, 6.

Names of cases and decisions on them should be used in Georgian (Italic). Full versions can be given in original language in text, or as a footnote with the following order: party vs. party, year, publisher, page, court.

e.g. for Great Britain courts: case *Argyll v. Argyll*, [1967] 1Ch 302,324, .332));

for US courts: case *Brown v. Board of Education,* 347 US 483 (1954)).

5. for decisions of **national courts** official national style should be maintained. In case of absence of equal national approach, the author should follow the following basic rule:

When using Georgian court decisions, the events should be emphasized - 1. Decision is published; 2. Available in official electronic source; 3. Accessible only in court archive – and unified approaches should be developed.

6. Documents of International Organizations

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7. Conventions and International Agreements

Conventions and International Agreements should be cited, e.g. 1985 Vienna Convention for the Protection of the Ozone Layer, International Legal Materials, 1985, 1520. Reference should be given when a quote is in quotation marks and footnote is in accordance with above mentioned rules. When citing source of periphrasis or separate opinion, the word "see" or "compare" should be used. "Compare" is used when author wants to cite different opinion.

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The following quotation marks are to be used: „." in Georgian text, and "." in foreign text.

Punctuation marks at the end of quotation, such as point, semicolon, colon or dash should be used only after quotation marks. Question mark and exclamation mark or dots - before quotation mark, if it belongs to the word or words included in quotation marks, and after quotation mark, if it belongs to entire sentence along with the word or words included in quotation marks.

When there are simultaneously several punctuation marks, quotation mark and footnote mark with word, the following order should be adhered to: 1. quotation mark, 2. punctuation mark, 3. footnote mark; and at the end of quotation (i.e. sentence): 1. quotation mark, 2. punctuation mark,

3. footnote mark. Two quotation marks should not be written together. In case of parentheses, the different forms of it can be used;

Dash and hyphen should be identified. Hyphen is short line with no intervals before or after it, while dash is longer line and intervals are required before and after it;

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a) "idem" – when indicating an author or work that has just been mentioned in above footnote. After "idem" (if necessary) the different data should be indicated (volume, year, page);

b) when indicating an author or work that has been mentioned in previous footnote, and not in the above one, the full name of source can be indicated with page, or number of that footnote, in which the source has been last mentioned with relevant page number (e.g. see footnote 15, 20).

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