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The following issue is dedicated to the bright memory of the prominent representative of Georgian legal science, Professor Emeritus Guram Nachkebia



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Mariam Grigalashvili*

Exempting *bona fide* Taxpayer from the Sanction on the Examples of Georgia and the United States of America

The present article is dedicated to the research of the legal regulation and practice of using good faith to relieve taxpayer from sanctions. The notion of bona fide tax payer is a novelty for tax law. The norm, in question, does not give possibility to determine preconditions for application of the norm in which revenue authority, dispute settlement authorities and courts were entitled to exempt tax payer from the imposed sanction. Consequently, the issue of its use in practice becomes more relevant and interesting. The legal norm on exemption from sanction of taxpayer gives comprehensive discretion to taxation authorities and court to assess an act of taxpayer in each particular case and thus it invokes the establishment of incorrect practices and the formation of different approaches. In this regard, the discussion in the article is based on the comparative analysis of the legislation and practices of Georgia and the United States of America. The main features of the American regulation, which are given in the article, provide the opportunity to learn about the experience of the most successful tax system.

The article discusses and evaluates current practice of tax authorities and the courts as well. As far as practice and literature about the issue of exempting bona fide taxpayer from the sanction is one of the less researched issue and consequently it is quite controversial one. According to author's opinion it is necessary to specify the norm, to interpret correctly the preconditions of the use of the norm and establish the burden of proof is crucial too, in order to guarantee public and private interests in the dispute process.

Keywords: tax, bona fide taxpayer, good faith, exemption from sanctions, preconditions for the exemption of from a penalty, a mistake/ignorance, discretion, burden of proof.

1. Introduction

Significant amendments have been introduced to the Taxation Code of Georgia (TCG), as the revenue authority, dispute settlement authority and court were entitled to exempt tax payer from the imposed sanction in cases where the offence was a result of a mistake/ignorance of the tax payer.¹ The mentioned norm gives wide discretion to the entitled authorities, which requires studying and interpretation. Application of respective power by the administrative bodies, as well as by the court, entails qualified analysis of the essence and purpose of the taxation institute and establishment of legal standards.²

Along with the relevance, taxes and taxation legislation is one of the most difficult and complex fields of law. According to the assessment of American scholars, taxation system and taxation laws represent the most hardly comprehensible and perceivable legislation.³

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¹ Taxation Code of Georgia, Paragraph 7 of Article 269, (published by the Legislative Herald of Georgia 59, (12/12/2010)

² See Decision №bs-222-219(k-14) of October 7 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.01.2017].

³ *Painter K. McG.*, There's no Place Like Home: Projections on the Fate of the Home Mortgage Interest Deduction and the Tentative Minimum Tax in Light of Consumer Behavior, *St John's Journal of legal Commentary Journal*, Vol. 22, Summer 2007, 295.

For the proper development of the country the legislative administering in taxation system has an important role, as far as it is directly related to the financial-economic sustainability of the country, quality of the corporate activity and to the establishment and setting of trust towards management system.⁴

(TCG) does not define what is considered as a mistake or who carries burden of proof in order to establish whether the tax payer acted not having knowledge of the relevant legislation or by mistake. There is no margin set between ignorance and knowledge, which may result in the person's responsibility. This gives to the entitled authorities a quite wide discretion, without any prior criteria, to assess the action of tax payer in certain cases, either as a mistake or result of ignorance.⁵ Therefore, application of this norm requires explanation to exclude its illegal use, breach of the principle of equality and at the same time reach the main purpose for which the norm exists.

In diverse fields of law exemption from liability is prescribed by legislation, notwithstanding whether a person fulfils obligation imposed thereon.⁶ In case of committing tax offence legislation stipulates grounds for exemption from liability, which are set in light of the specificities and meaning of tax offences.⁷

Considering the abovementioned, study of this issue, research of the developed practice and determination of preconditions for application of the norm represent topical and necessary legal question.

2. Notion of *bona fide* Tax Payer

The notion of bona fide tax payer was introduced in the Tax law by the legislator.⁸ In the Georgian legislation the protection of the bona fide principle was initially found in the Civil Code of Georgia.⁹ TCG does not define the criteria which are needed to evaluate level of conscientiousness of a tax payer, such standard definition is not established neither in decisions of court and tax dispute resolution bodies, what creates problem with regard to the qualified and in bona fide application of this right. The mentioned does not comply with the purpose and aim of enactment of principles of fairness, legality of management and justice, as well as with public order.¹⁰ Taxation Code does not define concepts like "conscientious" or "unconscientious", however the matter of conscientious has special significance in the process of decision-making in taxation disputes and application of certain taxation legislative norm.¹¹ In one of the decisions the cassation court considered that such circumstance is a consequence of the essence of legislative norm and it must be overcome by progressive, dynamic and logical explanation thereof.¹²

Various functions of bona fide concept caused the fact, that courts used it for setting the fair outcome and avoiding evident unfair result.¹³ Conscientiousness in an abstract and comprehensive notion, the standard of which shall be specified and established based on the evaluative criteria and according to the practice of legal settlement,¹⁴ to make possible its application in practice. The court must determine requirements of the "bona fide principle" with regard to factual circumstances. However, it shall be noted that the judge is not entitled to

⁴ See Decision №bs-222-219(k-14) of October 7 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.01.2017].

⁵ *Gvaramadze T.*, Dissertation Legal grounds for tax liability (Comparative legal analysis), 2012, 169.

⁶ *Rogava Z.*, Taxes, taxation System and Tax Law, Bakmi, Publishing House of Bondo Matsaberidze, Tbilisi, 2002, 325.

⁷ *Gvaramadze T.*, Dissertation Legal Grounds for Tax liability (Comparative legal analysis), Tbilisi, 2012, 164.

⁸ See Decision №bs-222-219(k-14) of October 7 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, 32 <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.01.2017].

⁹ Civil Code of Georgia, Article 8, published by the Legislative Herald of Georgia, [26.06.1997].

¹⁰ See Decision №bs-222-219 (k-14) of October 7 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>> [25.06.2017].

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ioseliani A.*, Principle of bona fide in the Contract Law (Comparative Legal Analysis), Journ. "Review of Georgian Law" Special Edition, 2007, 12.

¹⁴ See Decision №bs-222-219(k-14) of October 7 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.01.2017].

act in light of his/her subjective observations. While applying the bona fide principle, she/he shall act relying on objective criteria, to the extent possible.¹⁵

The bona fide principle is mostly related to the moral standards. Conscientiousness means – sincerity, sanctity, impartiality, objectiveness, fairness, devotion, etc.¹⁶ Bona fide principle or the principle of protection of conscientious legal relations have general legal nature, as far as the notion of “conscientiousness” as the main principle of civil legal relation, is mainly applied in legal acts regulating civil legal relations.¹⁷

On the one hand bona fide principle is of objective nature. If the party acts unreasonably or unfairly, then it is not convenient to prove during the court proceeding that she/he acted reasonably and fairly. On the other hand, the principle of bona fide mainly arises with subjective criterion, according to which, mental attitude of person is decisive.¹⁸ The cassation court explains that the conscientiousness of tax payer entails subjective attitude towards the committed action. The person believes that his/her action is legal and not wrongful. At the same time, person acts in circumstance of excusable mistake, i.e. she/he did not and could not know that he/she was committing something prohibited. In case of excusable mistake person thinks, that there is no norm which prohibits the concerned action. Therefore, he/she does not have the awareness of committing an offence. In case where the mistake is not excusable (for instance, person acted self-confidently or negligently) person shall not be exempted from tax liability.¹⁹ With regard to the subjective aspect of the conscientiousness, there is a quite interesting decision №9750/2/15 of 26 March 2016 made by the Council of Tax Appeals under the Ministry of Finance, which exempted tax payer from the sanction as the commitment of the offence by this person derived from his/her mistake, tax payer acted with believe, that his/her action was not unlawful.²⁰ In current case the Council deliberated on the conscientiousness in light of the subjective criterion and linked the mistake of tax payer to his/her attitude, that he/she was not committing an offence.

However, in the decision of the Council of Tax Appeals there are not objective circumstances which might have excluded the negligence from the side of tax payer. Determination of tax payer acting in bona fide only by consideration of subjective criterion is not sufficient, yet very important circumstance. Hence, whenever expelling the tax payer from sanction, it is necessary to evaluate subjective and objective criteria of conscientiousness. Moreover, the reasonable cause to exclude from sanction may exist when tax payer was refrained from fulfilling his/her tax obligation and the period for which he/she could not do so - is also reasonable.²¹

3. Preconditions for the Exemption of bona fide Tax Payer from a Sanction on the Example of Georgia and United States of America

According to the paragraph 7 of Article 269 of the TCG, tax payer may be exempted from the sanction prescribed by the code in cases when he/she is acting in bona fide and his/her action is caused by a mistake/ignorance of tax payer.²² The revenue service of the United States, as well as the Court, when deciding on the exemption from penalties takes into consideration those circumstances that give indication to whether tax payer had a reasonable

¹⁵ See *Ioseliani A.*, Principle of bona fide in the Contract Law (Comparative Legal Analysis), Review of Georgian Law, Special Edition, 2007, 34.

¹⁶ *Ibid*, 34.

¹⁷ See Decision №bs-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

¹⁸ *Ioseliani A.*, Principle of bona fide in the Contract Law (Comparative Legal Analysis), Review of Georgian Law – Special Edition, 2007, 20.

¹⁹ See Decision №bs-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

²⁰ Decision №9750/2/15 of 26 March 2015 of the Council of Tax Appeals under the Ministry of Finance <http://www.taxdisputes.gov.ge/Default.aspx?sec_id=4043&lang=1>, [25.06.2017].

²¹ Internal Revenue Manual - 29.1.1 Introduction and Penalty Relief, <https://www.irs.gov/irm/part20/irm_20-001-001r.html#d0e991>, [25.01.2017].

²² TCG, Article 269, Paragraph 7, (published by the Legislative Herald of Georgia 59. 12/12/2010) As of January 25, 2017.

cause and whether he acted in bona fide while committing an offence.²³ The reasonable cause must be based on all existing facts and conditions in each particular case. Consequently, what may be considered excusable for one tax payer, may be considered as a breach for the other.²⁴

In the USA there is an internal manual for revenue service (herein after referred as Manual) which is used when imposing penalties and it entails explanation of those conditions which must be in place in case of the exemption from penalties.²⁵ According to the Manual, the core purpose of the imposition of a sanction is reached even when tax payer in bona fide tries to fulfill obligations stipulated under the taxation code.²⁶ In such case all circumstances shall be established, it shall be determined what happened and when, what was the period of breach of the obligation and which facts were the obstacle for tax payer in fulfilling his/her obligations. How these facts and conditions had an impact on noncompliance with the obligation and what was the effort from the side of tax payer aiming to fulfill that obligation. Whether or not he/she tried to fulfill the tax obligation after the change of circumstances.²⁷

There are main circumstances outlined in the Manual, which may have an impact on the exemption from sanction of the tax payer, namely:

- a) Required attentiveness typical for the entrepreneur and making mistake regardless precaution.
- b) Death, serious disease or inevitable absence.
- c) Ambiguity and controversy of the applicable norm.
- d) Wrongful advice from taxation consulting companies, taxation authorities.
- e) Mistake.²⁸

According to the general rule, the most important condition in case of the exemption of tax payer from sanction is the extent for which the tax payer tries to fulfill the obligations prescribed under tax legislation. Those conditions which indicate to the reasonable cause and conscientiousness, shall be determined taking into consideration experience, knowledge and education of tax payer.²⁹

3.1 Required Attentiveness Typical for the Entrepreneur and Making Mistake Regardless Precaution

According to the Manual to check the required attentiveness and precaution typical for the entrepreneur, the following conditions must be determined:

- f) Compliance of facts, explanations and evidence.
- g) What is the tax payment history of tax payer? The last three years have to be checked, how the tax payer pays taxes. Whether he/she is fined for the same offence, which excluded the attentiveness typical for the entrepreneur.
- h) The duration of time shall be taken into consideration. The reason when that conditions took place which became obstacle for fulfillment of tax obligation. Therefore, following shall be established: (1) when was the due time for the fulfillment of obligation. (2) The period in which tax payer could not fulfill the obligation. (3) When he actually fulfilled the obligation.

²³ 26 CFR 1. 6664-4- Reasonable Cause and Good Faith Exception to Section 6662 Penalties, Cornell University Law School <<https://www.law.cornell.edu/cfr/text/26/1.6664-4>>, [26.06.2017].

²⁴ Ibid.

²⁵ Internal Revenue Manual - 29.1.1 Introduction and Penalty Relief, <https://www.irs.gov/irm/part20/irm_20-001-001r.html#d0e991>, [25.06.2017].

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ 26 CFR 1. 6664-4- Reasonable Cause and Good Faith Exception to Section 6662 Penalties, Cornell University Law School <<https://www.law.cornell.edu/cfr/text/26/1.6664-4>>, [26.06.2017].

- i) Circumstances which are not under tax payer control. It should be determined whether tax payer could foresee the circumstances which created obstacles for the fulfillment of obligations. The efforts from the side of tax payer to fulfill the obligations have to be continuous even after the requirements of legislation are already infringed.³⁰

Similar approach had the Supreme Court of Georgia when it indicated in its decision, that the Appellate Court did not take measures to obtain additional pieces of evidence, information, and considered claimant as acting in bona fide, not having even checked his/her tax payment history.³¹ With regard to the tax payment history of tax payer it is interesting to consider decision 9750/2/15 of the Council of Tax Appeals of the Ministry of Finance dated of 26 March 2015, where the Council exempted the tax payer from sanction and took into consideration the fact that the offence was the first occasion.³² Consequently, the payment history of tax payer represents an important circumstance for exemption from sanction of the tax payer acting in bona fide.

3.2 Death, Serious Disease or Inevitable Absence

In the US death or serious disease (of tax payer and/or member of family) may be the reason for exemption from sanction of tax payer, where such reason caused the commitment of the offence, however existence of several conditions have to be determined in that case.

- j) Relation between tax payer and the person who died;
- k) Date of death;
- l) Duration and complexity of the disease;
- m) How the disease intervened fulfillment of obligation;
- n) Whether other business obligations were fulfilled or not;
- o) Whether the infringement of the obligation lasted for reasonable period of time;³³

For instance, in the case *Fitch v. Commissioner* tax payer was charging-off purely operational expenses of the company. The revenue service considered it as unacceptable because the tax payer did not have proper evidence, documentation proving the charging-off of expenses. Husband, who worked as a certified public accountant was diseased with brain aneurism. The court did not take into consideration his health condition as a ground for exemption from the sanction.³⁴

3.3 Ambiguity and Controversy of the Applicable Norm

Taxpayer may conscientiously have a wrong understanding of essence of a law, if the norm gives possibility of differentiated interpretation because of its explicitly ambiguous and equivocal content.³⁵

The taxation legislation shall not be ambiguous and equivocal in order to allow realization of constitutional obligations of citizens. They must be formulated with proper accuracy. Ambiguous and equivocal norms are inconsistent with the principles of legal State and are basis for the arbitrary actions from state bodies and author-

³⁰ Internal Revenue Manual - 29.1.1 Introduction and Penalty Relief, <https://www.irs.gov/irm/part20/irm_20-001-001r.html#d0e991>, [25.06.2017].

³¹ See Decision №bs-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

³² Decision №9750/2/15 of 26 March 2015 of the Council of Tax Appeals under the Ministry of Finance <http://www.taxdisputes.gov.ge/Default.aspx?sec_id=4043&lang=1>, [25.06.2017].

³³ Internal Revenue Manual - 29.1.1 Introduction and Penalty Relief, <https://www.irs.gov/irm/part20/irm_20-001-001r.html#d0e991>, [25.06.2017].

³⁴ Taxpayer Advocate Service-2013 Annual report to Congress, Accuracy-related Penalty Under IRC 662(b)(1) and (2), 343, see citation: T.C. Memo, 2012, 358.

³⁵ See Decision №bs-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

ized officials, which infringes the constitutional principle of equality before the law.³⁶

Deriving from the constitutional principle of equality of citizens before the law and administrative bodies, the legal norm has to be expressly determined, clear and unequivocal. In the law enforcement process equality of citizens may only be provided with the condition of uniform understanding and interpretation of the norm. Non-specific content of the legal norm leaves room for differentiated understanding-explanation in the legal settlement process, as well as for the arbitrariness, which finally leads to the infringement of principles of equality and rule of law.³⁷

As mentioned above, taxation legislation is one of the most challenging and complex field of law. It represents a legislation which is hardly understandable and perceivable.³⁸

Taxpayer has to show proper attentiveness and caution for determination of fulfillment of his/her tax responsibilities.³⁹ As a general rule not knowing the law does not exclude from liability.⁴⁰ The cassation court of Georgia considers inadmissible to establish in practice an understanding and interpretation of the mistake of taxpayer in a not legal way, i.e. in a way of life, and explains that in current case the purpose of the law is to exempt from tax liability a person ordinarily making a mistake, but the one who acts in the context of legal mistake, as in this occasion a person wrongfully assesses the legal content of the action committed and the legal outcome deriving therefrom.⁴¹

As outlined in the Manual, the revenue service may exempt taxpayer from a sanction because of the ambiguous norm existing in the legislation. In such case following conditions must be checked with regard to the infringement of law obligations:

- 1) Education of taxpayer;
- 2) Whether taxpayer had to pay taxes previously;
- 3) If he/she was fined;
- 4) Whether there were recent changes in light of the taxation reform and how reasonable and predictable was the ignorance of taxpayer in this regard;
- 5) The complexity of the fulfillment of tax obligation shall be taken into consideration;⁴²

It is impossible to equate legal mistake with ignorance of the law, which take place when a person entirely had no knowledge of the existence of a law enacted by the legislative authority of Georgia enforced in through established legislative procedure, whereas he/she had to have and objectively was capable to have knowledge thereof. As a rule, not knowing the law does not release person from liability.⁴³ Therefore, a person may be exempted from tax liability, if he/she was misled by explicitly ambiguous and equivocal content of the tax norm and he/she made a mistake conscientiously. Thereby, the court interprets ambiguity, equivocality and controver-

³⁶ Ibid.

³⁷ Ibid.

³⁸ *Gvaramadze T.*, Dissertation Legal grounds for Tax Liability (Comparative legal analysis), 2012, 7; See K. McG. Painter, There's no Place Like Home: Projections on the Fate of the Home Mortgage Interest Deduction and the Tentative Minimum Tax in Light of Consumer Behavior, *St John's Journal of legal Commentary Journal*, volume 22, Summer 2007, 295.

³⁹ Internal Revenue Manual- 29.1.1 Introduction and Penalty Relief, <https://www.irs.gov/irm/part20/irm_20-001-001r.html#d0e991>, [25.06.2017].

⁴⁰ Civil Code of Georgia, Published by the Legislative Herald of Georgia, [25.06.2017].

⁴¹ See Decision №bs-222-219(k-14) of October 7, 2014 Delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

⁴² Internal Revenue Manual- 29.1.1 Introduction and Penalty Relief, <https://www.irs.gov/irm/part20/irm_20-001-001r.html#d0e991>, [25.06.2017].

⁴³ See Decision №bs-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>> [25.06.2017].

sy in the taxation legislation in favor of taxpayer.⁴⁴ In the US, in cases of inability to understand complex taxation code, the court is more loyal with regard to mistakes made because of such reason,⁴⁵ whereas it treats strictly the negligent attitude of taxpayer towards the fulfillment of the obligation. For instance in the case *Striefel v. Commissioner* the taxpayer destroyed documents as he found out that he was soon going to die. Of course the court analyzed that taxpayer was nervous, but still considered, that taxpayer acted negligently and infringed the obligation to store documents related to levying.⁴⁶

3.4 Wrongful Advice from Taxation Consulting Companies, Taxation Authorities

In practice there are often occasions when taxpayer has questions with regard to the application of taxation code. Certain part of taxpayers, in light of their conscientiousness, want to fulfil tax obligation with respect to their country. However they often can not get answers from Taxation Code and the normative acts enacted based on Taxation Code, or sometimes find several alternatives of levying.⁴⁷

In the USA exemption if taxpayer from liability is prescribed under the legislation in cases when they have not deliberately hidden taxes, or the commitment of the offence was a result of wrongful explanations of taxation legislation delivered by taxation authorities.⁴⁸

As stated by the Internal Manual of the USA revenue service, an advice may be of three different types, in cases where there is a possibility to be exempted from sanction:

- 1) Written advice of the revenue service;
- 2) Oral advice of the revenue service;
- 3) Advice received from the professional of the field of taxation;⁴⁹

Advice shall not be founded on unreasonable factual or legal assumptions and there must not be unreasonable trust from the side of taxpayer.⁵⁰ Taxpayer shall not trust an advice which derives from a norm already amended or repealed.⁵¹

Taxpayer has a possibility to get in advance special interpretations on the application of taxation legislation from taxation authorities while implementing concrete agreement.⁵²

One of the widespread disputable questions is – whether trust in taxation specialist means reasonable behavior. Are education of taxpayer, business experience corresponding for determining whether it was reasonable to trust the advice? For this to be considered reasonable, taxpayer has to prove following circumstances:

- 1) Whether adviser was competent, who had sufficient experience;
- 2) Whether taxpayer have provided necessary and accurate information to the adviser;

⁴⁴ Ibid.

⁴⁵ Taxpayer Advocate Service-2013 Annual report to Congress, Accuracy-related Penalty Under IRC 662(b)(1) and (2), 342, see citation: *Armstrong v. Cimmer*, 139 T.C. No. 18 (2012).

⁴⁶ See Taxpayer Advocate Service-2013 Annual report to Congress, Accuracy-related Penalty Under IRC 662(b)(1) and (2), 343. See citation, *supra*, note 28.

⁴⁷ See *Nadaraia L., Rogava Z., Rukhadze K., Bolkvadze B.*, Commentaries on the Taxation Code of Georgia, Book First, 326.

⁴⁸ *Gvaramadze T.*, Dissertation Legal grounds for tax liability (Comparative legal analysis), 171, See Your Rights as a Taxpayer, Department of the Treasury, International Revenue Service <<https://www.irs.gov/pub/irs-pdf/p1.pdf>>, [25.01.2017].

⁴⁹ See Internal Revenue Manual- 29.1.1 Introduction and Penalty Relief, <https://www.irs.gov/irm/part20/irm_20-001-001r.html#d0e991>, [25.06.2017].

⁵⁰ 26 CFR 1. 6664-4- Reasonable Cause and Good faith Exception to Section 6662 Penalties, Cornell University Law School, <<https://www.law.cornell.edu/cfr/text/26/1.6664-4>>, [25.06.2017].

⁵¹ Ibid.

⁵² See Decision Nos-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

3) Whether taxpayer indeed conscientiously trusted the decision of the adviser.⁵³

As mentioned above, taxation legislation is characterized with certain complexity and quite often ambiguities deriving from the taxation legislation take place in this area.

In Georgia, there is a different approach with regard to this issue, the interpretation on taxation legislation delivered by the taxation authority may only be of recommending nature.⁵⁴ This excludes the existence of legitimate trust from the side of taxpayer towards the recommendation and exemption from the liability as in the US, in case of interpretation taking place in relation to the offence committed.⁵⁵ It would be logical that response of a competent authority had a legal force.⁵⁶

According to the decision of the Supreme Court of Georgia implementation of the written explanation issued by the taxation authority may represent excusable reason, which outlines position of the taxation authority with regard to the application of Georgian taxation legislation by taxpayer during implementation of economic operations carried out already or to be carried out in future. If taxpayer acts in line with such explanation, he does not have a comprehension of the offence committed. Notwithstanding the recommendation nature of the explanation, person has trust towards taxation authority and its written explanation.⁵⁷ Because of the high confidence of taxpayer in the revenue service, the entitled authorities while deciding the question of exemption from sanction, in determination of conscientiousness of taxpayer may consider the level of trust toward the recommendation issued by the taxation authority.

In the case *Meinhardt v. Commissioner* Taxpayer was not well aware of the taxation legislation and hired professional practitioner. She/he handed in all documents, which were necessary for counting taxes and provision of declaration. The court has refused the imposition of sanction as the conscientiousness of taxpayer was confirmed.⁵⁸

In comparison with the US, in light of the practice developed in Georgia the written explanation issued by taxation authority, unlike the chargeable provisional decision rendered by the taxation authority does not have legal force. The argument for this is, that the written explanation delivered by the taxation authority on the application of taxation legislation during the implementation of economic operation carried out or to be carried out by taxpayer does not represent an official act of the state and it has explanatory-recommendation nature.⁵⁹

The advice of professional taxation adviser and trust in it does not unconditionally imply conscientiousness and reasonable cause. The mentioned evolves only in cases when the trust in such advice was reasonable and taxpayer acted in bona fide.⁶⁰ The obligation of an administrative body prescribed under the General Administrative Code to deliver legal assistance is also regulated under paragraph 1 of Article 38 of the Civil Code of Georgia, according to which taxpayer is entitled to receive information from administrative body on the application

⁵³ Taxpayer Advocate Service-2013 Annual report to Congress, Accuracy-related Penalty Under IRC 662(b)(1) and (2), 344 *Neonatology Associates, P.a. v. Comm'r*, 115 T.C. 43,99(2000) (citations omitted), add'd, 299 F.3D 221(3d Cir., 2002.

⁵⁴ *Gvaramadze T.*, Dissertation Legal grounds for tax liability (Comparative legal analysis), 171, taxation Code of Georgia, Article 46, Paragraph 1, (Published by the Legislative Herald of Georgia 59. 12/12/2010) As of January 25, 2017.

⁵⁵ *Ibid*, 171.

⁵⁶ *Nadaraia L., Rogava Z., Rukhadze K., Bolkvadze B.*, Commentaries to the Taxation Code of Georgia, Book One, 326.

⁵⁷ See Decision №bs-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

⁵⁸ Taxpayer Advocate Service-2013 Annual report to Congress, Accuracy-related Penalty Under IRC 662(b)(1) and (2), 345.

⁵⁹ See Decision №bs-222-219(k-14) of October 7, 2014, delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

⁶⁰ 26 CFR 1. 6664-4- Reasonable Cause and Good Faith Exception to Section 6662 penalties, Cornell University Law School, <<http://www.law.cornell.edu/cfr/text/26/1.6664-4>>, [26.06.2017].

of taxation legislation, protection of rights of taxpayer.⁶¹

For the trust in the advice of specialist in taxation field to be considered as a ground for exemption from sanction, it is necessary to take into consideration all circumstances, for instance education of taxpayer, business experience. Trust in such advice shall not be considered as reasonable cause or action in bona fide, when taxpayer knew or had to know about insufficient qualification of the adviser in taxation legislation or in any part thereof.⁶²

3.5 Mistake

According to the Manual, mistake may not be considered as a ground for exemption from sanction, but it may represent supportive argument if the effort of taxpayer and his/her business attentiveness is confirmed. In such case the following conditions must be determined: a) when and how taxpayer found out about mistake; b) to what extent he/she corrected the mistake; c) what is the relation between taxpayer and subordinated person (if such title is delegated); d) whether he/she took steps for the correction of mistake; e) whether there are documents proving this.⁶³

4. Unjustifiably High Level of Discretion from Entitled Authorities in Case of Exemption from Sanction of Taxpayer Acting in bona fide

Where the administrative body has entitlement to settle individual cases by its own, it can use the right of discretion.⁶⁴ The ground for awarding discretionary title is impossibility to foresee all particular details during the enactment of law.⁶⁵ The legal norm on exemption from sanction of taxpayer gives comprehensive discretion to taxation authorities and court to assess an act of taxpayer in each particular case, without any preconditions, as mistake or result of ignorance.⁶⁶ Therefore, the multiple undetermined notions existing in the norm increases discretionary authority of dispute resolution body and of the court.

Discretionary power gives administrative body a possibility to decide by its own responsibility. This primarily aims at making a fair decision. The main purpose of the administrative body is rendering a fair decision. It is crucial that court comprehends the purpose of this power and understands which factual circumstances have to be considered.⁶⁷

Limitation of discretionary power happens not only on grounds of authorizing norm, but also by legal context. Decision made on grounds of discretionary power shall not contradict with legal norms. Primarily, with the constitutional principle that all people are equal before the law, which represents an important bound for the implementation of discretionary power. The nature of dependence of administrative body on its previous action derives from this norm.⁶⁸ Entitled authorities shall use the power given by this norm in light of the criteria for assessment of taxpayer's conscientiousness, with the purpose based on legality of public administration, equality

⁶¹ See Decision №bs-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

⁶² 26 CFR 1. 6664-4- Reasonable Cause and Good Faith Exception to Section 6662 penalties, Cornell University Law School, <<https://www.law.cornell.edu/cfr/text/26/1.6664-4>>, [26.06.2017].

⁶³ Internal Revenue Manual- 29.1.1 Introduction and Penalty Relief, <https://www.irs.gov/irm/part20/irm_20-001-001r.html#d0e991>, [25.01.2017].

⁶⁴ *Zippelius R.*, Doctrine of legal methods, Beck's publishing House, Munich 2006, 131.

⁶⁵ *Zippelius R.*, Doctrine of legal methods, Beck's publishing House, Munich 2006, 131.

⁶⁶ *Gvaramadze T.*, Dissertation Legal grounds for tax liability (Comparative legal analysis), Tbilisi, 2012, 169.

⁶⁷ *Nachkebia A.*, Interpretations of administrative law norms in the practice of Supreme Court, 2015, 10., Case № BS-567-557 (k-12) 26 March, 2013, Tbilisi.

⁶⁸ *Zippelius R.*, Doctrine of legal methods, Beck's publishing House, Munich 2006, 132.

before the law, right of legitimate trust of person and principle of impartiality.⁶⁹ Legal decisions made within the context of discretionary power belong to the sphere of actions which are carried out based on legal entitlement.⁷⁰ The freedom of choice of competent authorities is limited in a way that it is allowed to render decisions that are functionally fair, thus enforcing the purpose of law.⁷¹

The state generally relies on the principle of fairness, which is important not only for interpretation, but also leads to the right choice from the alternatives of actions within the scope of discretionary power. Consequently, discretionary power must legitimately make a balance between interests.⁷² Authorities entitled to decide on exemption from taxation sanction within their discretionary power may render decision with proper argumentation.⁷³ The limits of discretionary power are prescribed in the norm which itself grants the power.⁷⁴ However, in the norm in question the limits are quite extensive.

If the law entails unlimited legal notions, in that case their application creates estimated scope. In this case the question arises – what is interrelation between discretion of action and interpretation. I.e. on the one hand alternatives of actions and on the other hand, diverse possibilities of interpretation and precision.⁷⁵ In both occasions, this choice is not free, as it requires justification. It shall be place in the limits that are required by explanation of applicable norm, will of legislator and balance of optimal and fair interests.⁷⁶ However, regardless the fact that the main purpose of administrative body is to render a fair decision⁷⁷ and administrative body shall deliver a decision providing enforcement of the aim of law,⁷⁸ this does not allow to avoid delivering justified decisions, what is evidenced by the current practice with regard to the application of this norm.⁷⁹

5. Particularity of the Burden of Proof in Case of Exemption from Sanction of Taxpayer Acting in bona fide

There is no definition in the taxation legislation of what can be considered as a mistake, or who bears the burden of proof to establish whether the action of taxpayer was a result of ignorance toward the law or result of a mistake.⁸⁰ In case of considering taxpayer to have acted in bona fide one of the core roles has the issue of distribution of the burden of proof. As far as it determines decision of an administrative body.

The Code on Administrative Offences does not prescribe the distribution of the burden of proof on the administrative body in legal proceeding taking place during appeal of the decision with regard to the offence. The cassation court considers, that transferring the burden of proof with regard to the disputable question, envisaged in the paragraph 2 of Article 17 of the Administrative Procedural Code, on the administrative body shall not be used as far as in this case the disputable question and the matter to be established is not related to the legal aspect of the subject of litigation, but the existence of the fact of the offence, where the burden of proof must be

⁶⁹ See Decision №bs-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

⁷⁰ Zippelius R., *Doctrine of Legal Methods*, Beck's publishing House, Munich 2006, 130.

⁷¹ *Ibid*, 132.

⁷² *Ibid*, 133-134.

⁷³ Gvaramadze T., *Dissertation Legal grounds for tax liability (Comparative legal analysis)*, 2012, 171.

⁷⁴ Zippelius R., *Doctrine of legal methods*, Beck's publishing House, Munich 2006, 131.

⁷⁵ Zippelius R., *Doctrine of legal methods*, Beck's publishing House, Munich 2006, 134.

⁷⁶ *Ibid*, 134.

⁷⁷ Nachkebia A., *Interpretations of Administrative Law Norms in the Practice of Supreme Court*, 2015, 10, Case № BS-567-557 (k-12) 26 March, 2013, Tbilisi.

⁷⁸ Zippelius R., *Doctrine of Legal Methods*, Beck's publishing House, Munich 2006, 132.

⁷⁹ Decision №bs-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

⁸⁰ Gvaramadze T., *Dissertation Legal Grounds for Tax Liability (Comparative legal analysis)*, 2012, 169.

proportionally distributed among litigating parties.⁸¹ In case of filing an appeal on the establishment of invalidity or nullity of the administrative act the burden of proof is on the administrative body which issued the act.⁸² Consequently, the revenue service will bear the burden of proof with regard to the establishment of the authenticity of the offence. However, legislation does not define the question of burden of proof in case of exemption from sanction of the taxpayer.⁸³ The cassation court defines that according to the doctrine every procedural legislation reflects and stipulates legislative institutes, principles, purpose of relevant material fields. Through the administrative legal proceeding person realizes his/her subjective right to address the court, and the court verifies the legality of the action of administration.⁸⁴

Decision of each particular civil law case in the court is related to the relevant fact finding.⁸⁵ All parties who are participants of court assertion have diverse functions, however their actions are aimed at finding the truth. This represents necessary condition for appropriately deciding the case.⁸⁶ It shall be noted, that in comparison to the adversary proceeding principle in the civil procedure,⁸⁷ administrative legal proceeding has significant principle as: principle of formality, which determines the role of administrative justice in the administrative legal proceeding. The court is in the center of procedural activity, the principle of proportionality between public and private interests operational in administrative law obliges the court in the administrative procedural law to carry out procedural actions necessary to reach the balance within the procedural rights of parties participating in the procedural legal relations.⁸⁸

During the litigation in courts of the US the burden of proof is on the revenue service, which must provide sufficient evidence for proving the legality of the sanction, hence the fact of commitment of the offence. Later the burden of proof is transferred on the taxpayer, who must prove the existence of some exception, such as reasonable cause, conscientiousness.⁸⁹

In Georgia the court, relying on the principle of formality, is entitled to make a decision on its initiative with regard to provision of additional information or evidence. This right of the administrative court is established through imposition of obligation of administrative bodies in the article 20 of the Administrative Procedure Code to provide to the court all documents necessary for the hearing the case and delivering decision, and other information.⁹⁰ The power of the court to get evidence or information on its initiative, means that the court must determine occasions when the main principle of justice – principle of equality, the possibility of parties in the litigation to equally defend their rights deriving out of the subordinated position - in under threat.⁹¹

The norm in question outlines the title of competent authorities to exempt from the sanction the taxpayer acting in bona fide, what practically implies the possibility of taxpayer to address competent authorities, provide relevant evidence and be exempted from the sanction if managed to prove the existence of preconditions for application of the norm.

⁸¹ *Nachkebia A.*, Interpretations of Administrative Law Norms in the Practice of Supreme Court, 2015, 266, Case № BS-626-596 (k-07) Tbilisi, 2007.

⁸² Administrative Procedure Code of Georgia [25.06.2017].

⁸³ *Gvaramadze T.*, Dissertation Legal Grounds for Tax Liability (Comparative legal analysis), 2012, 169.

⁸⁴ *Nachkebia A.*, Interpretations of Administrative Law Norms in the Practice of Supreme Court, 2015, 265, Case № BS-626-596 (k-07) 25 December, 2007, Tbilisi.

⁸⁵ *Liluashvili T., Liluashvili G., Khrustali V., Dzierishvili Z.*, Publishing House “Law”, 2014, 258.

⁸⁶ *Ibid*, 260.

⁸⁷ Civil Procedure Code of Georgia, Article 4, published Legislative Herald of Georgia, [25.06.2017].

⁸⁸ See Decision №bs-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

⁸⁹ Taxpayer Advocate Service-2013 Annual report to Congress, Accuracy-related Penalty Under IRC 662(b)(1) and (2), 341, see citation: IRC 7491 (a).see also Tax Court Rule 142 (a).

⁹⁰ See Decision №bs-222-219(k-14) of October 7, 2014 delivered by the Chamber for Administrative Law Cases of the Supreme Court of Georgia, <<http://prg.supremecourt.ge/DetailViewAdmin.aspx>>, [25.06.2017].

⁹¹ *Ibid*.

6. Conclusion

Deriving from the analysis of the practice established in Georgia it is clear, that the understanding, interpretation and application of the norm by the taxation authorities and court responses the requirement of the law and complies with the purpose and aims of legal institutes.⁹² The established practice with regard to the application of the norm, and using the power prescribed by the norm is damaging on the one hand for the prestige of taxation authorities of the country and of the court, and on the other hand for the legal regulation of tax relations.⁹³

According to the presented argumentation, the existing practice, lack of the juridical literature clearly indicated on the ambiguity the issue related to the exemption of taxpayer from the sanction and the necessity to formulate the norm in different manner.

If regardless the interpretation, the application of norms leads us to the unfair, legally unacceptable results, then it is necessary to widen them and interpret properly.⁹⁴ However the mentioned norm is so wide, that in case of the interpretation it still leaves room for making unjustified decision.

Deriving from the issued in question, we may conclude, that it is necessary to limit more the discretion of actions and scope of assessment, and in such manner the possibility to control the court will be guaranteed.⁹⁵ In it essential to stipulate more specifically the norm exempting taxpayer from the sanction, different standard tot the burden of proof must exist, which will ensure the implementation of the title envisaged by the norm.

In Georgia, as well as in the US the existing practice shows that only mistake and ignorance does not give possibility to interpret the framework of the power properly. Therefore, it is necessary to specify the norm, and the competent authorities shall have power to exempt from the sanction only in case of proper justification, in order to know the facts, circumstances on which the competent authority relied while making a decision and to assess whether the preconditions prescribed by the norm were in place.

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⁹² Ibid.

⁹³ Ibid.

⁹⁴ *Zippelius R.*, Doctrine of legal methods, Beck's publishing House, Munich 2006, 15.

⁹⁵ Ibid, 135.

14. *Painter K. McG.*, There`s no Place Like Home: Projections on the Fate of the Home Mortgage Interest Deduction and the Tentative Minimum Tax in Light of Consumer Behavior, *St John`s Journal of legal Commentary Journal*, Vol.22, Summer 2007, 295.
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The Essence and General Conditions of an Off-premises Contract

The respective paper is dedicated to defining the essence and general conditions of an off-premises contract. The key objective of the paper is to discuss the essence of a contract concluded off-premises and make a contribution to developing doctrine of scholars in Georgia. Also, identify problematics of exercising consumer rights through study of Georgia's consumer market; hence, make an analyses of Georgian and European legislative frameworks on the respective matter in order to develop recommendations for approximation of these frameworks. The paper will also aim at making analyses of similar institutions in frames of the European Union Law and will develop the model, which will be adjusted to Georgia's reality to a greater extent and will be resulted from a synthesis.

Key words: an off-premises contract, consumer law, consumers' rights, protection of consumers' rights, consumer, trader (entrepreneur).

1. Introduction

An off-premises contract happens to be a quite well-spread practice in numerous countries of the contemporary world; the latter contract is closely tied to consumer law. Each one of us is a consumer, hence protection of consumers' rights is a primary objective of any legal state.

Diversity of consumer market's scope of action and a possibility to conclude a contract "in a non-contractual environment" is not a rare case in the 21st century. Nowadays, the latter contracts are quite frequent in Georgia, however, absence of legislative regulation of this matter hinders the process of ensuring high guarantees for consumers' rights protection.

An off-premises contract became part of the Civil Code of Georgia (later to be referred to as the CCG) in 1997, when the new CCG entered into force. However, the respective article has not been applied in Georgia's legal reality, which has been caused by vagueness of the respective norm's essence. The essence, location of conclusion, and the parties' rights-obligations are all vague. It shall be noted that the Law of Georgia on "Consumers' Rights Protection" of 1996 was abolished in 2012; hence, there are no laws in Georgia on consumer rights' protection.

With all due respect to the above-mentioned, the paper will offer detailed review of the essence, location of conclusion, and the parties' rights-obligations of an off-premises contract. The final chapter of the paper will focus on findings identified through analyses of the issues covered.

2. The Legislative Acts Governing an Off-premises Contract

Prior to performing analyses of the essence and general conditions of an off-premises contract, one shall review all those legal acts, which are being utilized as guides for legally governing such type of contracts; it is crucial to consider both, the way Georgian legislation governs it, as well as how countries of the European Union Law regulate the respective matter. Special emphasis shall be made on the German law, as the CCG was developed based on the model of the German Civil Code (later to be referred to as the GCC). Hence, majority of the norms were implemented from the GCC and other laws of Germany. Georgia, similarly to countries, such as Austria, Lichten-

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stein, Switzerland, Greece and other countries, has been influenced by the “German legal tradition”.¹ Therefore, Georgian civil law has also been heavily influenced by the German civil law, thus an off-premises contract derives from such practice; however, it shall be highlighted that this norm has a drastically different essence in the Georgian legislation.

Besides, focusing on the European Union Law is important due to the country’s foreign policy priorities and also, due to ensuring those obligations, which Georgia became part to in 2014. Georgia took numerous obligations, including ensuring compliance of Georgia’s legislation with the European standards to a greater extent following signing an Association Agreement on 27 June, 2014 between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (later to be referred as AA²). The part on cooperation policies of the AA, namely chapter №13 of the Title VI (Consumer Policies), (articles 345 – 347), cover the issues related to the consumer policy. As set forth in the articles 345 – 347, Georgia shall ensure a high level of consumer protection and aim at fundamental amendments to the legislation with respect to protection of consumers’ rights. The latter objective has served as the reason for initiating the draft law on “Consumers’ Rights Protection” by the Committee on European Integration of the Parliament of Georgia (later to be referred to as the draft law); the key objective of the draft law is to create the legislation focused on protection of consumers’ rights in Georgia through sharing the practice of countries of Europe.

The priority of the countries part to the European Union Law is to create the legislation, which is focused on consumers’ rights, due to the fact that “contemporary law recognizes superiority of the person, while definition of the superiority of the person is practice of one’s rights and freedoms with a greater effectiveness”.³ One shall mention that the first time an off-premises contract and the corresponding matters were governed with respect to contracts negotiated away from business premises (as set forth by the Georgian legislation – a contract concluded in the street) was through the Council Directive 85/577 EEC of 20 December, 1985 to protect the consumer.⁴

Later, the latter Directive was supplemented with the Directive 97/7/EC of the European Parliament and of the Council of 20 May, 1997 on the protection of consumers in respect of distance contracts, which did somehow complement the previous Directive.⁵

However, development of modern technologies and broadening of consumer market has resulted into the need for developing relatively new regulations. Hence, the European Parliament developed new directive and at this stage, an off-premises contracts and the corresponding matters are regulated by the countries part to the European Union Law through the Directive 2011/83/EU of the European Parliament and of the Council of 25 October, 2011 on consumer rights. (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council⁶) (Later to be referred to as the Directive).

¹ *Khubua G.*, Theory of Law, Tbilisi, 2004, 213 (in Georgian).

² Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, <https://eeas.europa.eu/sites/eeas/files/association_agreement.pdf>.

³ *Kardava. E.*, Comparative Law Analysis of the European Standards on Consumer Protection on the Example of Contracts Negotiated away from Business Premises, Georgian Law Review – special ed. Tbilisi., 2007, 122 (in Georgian).

⁴ Council Directive 85/577 EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0577:en:HTML>>.

⁵ Directive 97/7/EC of the European Parliament and of the Council of May 1997 on the Protection of Consumers in Respect of Distance Contracts, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31997L0007&from=en>>.

⁶ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing

The goal of the new Directive was to eradicate those flaws and incompliances, based on the existing practice, which did exist. Besides, the Directive established general rules in regard to contracts concluded away from business premises and in the street, which enable member states to ensure compliance of their respective legislation with the Directive and hence, guarantee high level of consumers' protection.

3. Objective and Subject-matter of an Off-premises Contract

The article 336 of the CCG sets forth that: A contract concluded in the street, at the doorstep or in like places between a consumer and a person conducting sales within his/her trade shall be valid only if the consumer has not rejected the contract in writing within a week, unless the contract is performed upon its conclusion.⁷

One shall highlight that the wording of the article 336 of the CCG completely ignores the issue of defining the subject-matter. According to the Georgian norm, a consumer may reject any type of contract, which is concluded "in a non-contractual environment", namely "in the street, at the doorstep or in like places". However, the German law sets forth that a subject-matter of a contract concluded in the street shall be a contract of sale. Such type of contracts may be bilaterally binding; also, we shall not perceive a contract of sale as a money, honorarium or award. A contract of sale lays out the terms of payment in kind as well as provision of goods. The primary essence of "a contract of sale" implies a contract of sale, however it may also be a contract of rent and etc.⁸ The Directive's article 3 indicates on those contracts, which it does not apply to, such as social services, lotteries, gambling, betting and etc.

With all due respect to the abovementioned, it becomes clear that the GCC's article 336 is incomplete and vague, hence the scope of action in it shall be expanded in a way that it shall ensure protection of both, consumers' and traders' interests to a greater extent. It shall be highlighted that creation of a legislation focused on protection of interests' of the parties of the civil circulation is a primary objective of any legal state.

An off-premises contract is a contractual ground for subject of obligation. A consumer and a trader are enabled to act in their capacity to decide whether or not to enter into contractual relationship and undertake the obligations, which derive from such relationship. The key aspect for differentiating this contract from other types of contracts is that the location of conclusion of a contract is "in a non-contractual environment";⁹ it takes place unexpectedly for a consumer, who does not have time for consideration. Hence, the effect of taking a customer by surprise (Überrumpelungseffekt) has a crucial importance in such type of contracts.¹⁰ „As a matter of fact, such contracts are concluded accidentally, so that a customer does not have a full understanding about a contract to be concluded as well as information on market prices.”¹¹ A customer does not have a possibility to make a comparison of a product with other types of products; therefore, one shall not exclude that another party may offer uneven terms of a contract. Decision of a customer to engage into contractual relationship with another party is a mere spontaneous decision.¹² Based on the latter, Georgia's legislation provides a customer with a right to reject such contract and through granting such right it somewhat protects him/her from a possible damage. As set forth in the article 336 of the CCG, a consumer may reject a contract concluded in the street in

Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_2011.304.01.0064.01.ENG>.

⁷ Civil Code of Georgia, article 336 (in Georgian).

⁸ *Zerres Th.*, Bürgerliches Recht, Eine Einführung in das Zivilrecht und die Grunzüge des Zivilprozessrechts, 6. Aufl., Berlin 2010, § 312, 109.

⁹ *Dauner-Lieb B., Heidel Th., Ring G.*, Anwaltkommentar, Band 2, Teilband 1: §§241 bis 610, Köln 2005, Rn.7.

¹⁰ *Brox H., Walker W-D.*, Allgemeines Schuldrecht, 35. Aufl., München 2011, Rn.2.

¹¹ *Chanturia L.*, Comments to the Civil Code of Georgia (CCG), Book №3, Tbilisi., 2001, 150 (in Georgian).

¹² *Tsertsvadze L.*, Contractual law, Tbilisi., 2014, 192 (in Georgian).

writing within a week; in such circumstances, the sphere of interests of a customer is protected.¹³ However, it shall be noted that due to absence of being fully informed, a customer still attracts such type of contracts, “he/she has a feeling of satisfaction while being approached with an individual attention, especially upon being visited at home”.¹⁴ Hence, in such liaisons, a customer is a “weak” party for having a little protection from any risks that may arise;¹⁵ therefore, during such type of interactions, focus shall be made on a customer, who is a less protected party of the liaison.¹⁶

According to the Georgian legislation, validity of such type of contract is based on whether or not a customer utilizes the right to object or will reject it in writing. It is also important, that a customer shall reject a contract in a writing form, since verbal refusal does not have a legal power. Despite of such right of a customer, Georgian legislation sets forth the clause, which practically opposes the objective of the norm – protection of consumers’ rights. As set forth by the article 336 of the CCG, rejecting a contract in writing has no power if a contract has entered into force upon its conclusion; such circumstances undermine consumers’ rights, since consumer contracts enter into force upon their conclusion in the vast majority of cases; the practice of concluding a contract between the parties and agreeing on enforcing it afterwards is rare.¹⁷

The Directive also serves the purpose of consumers’ rights protection, as the article 1 lays out that purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, concerning contracts concluded between consumers and traders.¹⁸

Implementing an off-premises contract in the CCG resulted into Georgian legislation being focused on consumers’ rights, however, the vague wording of the norm and artificial obstacles in the definition does not complement enforcement of the norm’s objective, but hinder application of it in practice. Therefore, approximating of this article is crucial for it to become applicable in practice to a greater extent.

4. The Parties and Possible Third Parties of an Off-premises Contract

One of the characteristics of an off-premises contract are the parties. As set forth by the article 336 of the CCG, the parties are “a consumer” and “a person conducting sales within his/her trade”.

The Law of Georgia on “Consumers’ Rights Protection” of 1996 defined a consumer as a physical entity, purchaser, customer or who orders a good (work, service) for personal consumption, or an individual having such an intention. The decree №3 (article 3, paragraph “k”) of the Georgian National Communications Commission (GNCC) of March 17, 2006 also lays out definition of a consumer, which is a physical entity, who is or intends to use and not to sell to other consumer a service delivered through electronic communication networks and means, which are in public use. As set forth by the legal encyclopedia, a customer is a citizen, who wishes to purchase or order any good, service procurer, customer or consumer for personal, household or any other need, which is not

¹³ *Jacoby F., Hinden M., Kropholler J.*, Bürgerliches Gesetzbuch, Studienkommentar, 13 neubearbeitete Auflage, München 2011, Rn.2.

¹⁴ *Kardava. E.*, Comparative Law Analysis of the European Standards on Consumer Protection on the Example of Contracts Negotiated away from Business Premises, *Georgian Law Review – special ed.* Tbilisi., 2007, 134 (in Georgian).

¹⁵ *Erman*, Bürgerliches Gesetzbuch Handkommentar mit AGG, EGBGB (Auszug), ErbbauRG, LPartG, ProdHaftG, UklG, VbVG, VersAusglG und WEG, Band 1., 13. neu bearbeitete Aufl., Köln 2011, Rn.2.

¹⁶ *Staudinger J.*, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse, §§ 311, 311a, 312, 312a-f (Vertragschluss) Neubearbeitung Berlin 2005, Rn. 1.

¹⁷ *Chechelashvili Z.*, Contractual Law, 2nd revised ed. (Comparative-Legal Study on Key Fundamentals of Georgian legislation), Tbilisi., 2010, 102 (in Georgian).

¹⁸ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 185/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Article 1.

related to carrying out trade activity.¹⁹ The banking sector defines a consumer in a completely different wording; namely, the order №35/04 (article 2, paragraph “a”) of 2011 of the President of the National Bank of Georgia on “establishing rules for providing consumers with the necessary information by the commercial banks upon providing banking service” lays out that a consumer is a physical entity, who has intentions of receiving not only banking, but also trade, entrepreneurial and professional services, upon having such an intention.²⁰

Unfortunately, the respective law on “Consumers’ Rights Protection” does not define what does “a person conducting sales within his/her trade” implies. Most probably, it means an entrepreneur (trader), also, the term “entity” is arguable as it is not clear whether it implies only a physical entity, or we shall also consider a legal entity. According to the CCG, a person can be both, physical and legal. Obviously, the essence of the terminology is not that crucial, however, it would have been desirable if Georgian legislation made direct and clear indication of the parties of a contract, thus offer definition of these. The vague terms are always “victims” of suspicious attitudes.

The above-mentioned law underlines that the parties of an off-premises contract are a consumer” and “a trader”; namely, the article 3, paragraph “a”, defines consumer as a physical entity, which is being offered or purchases, or later consumes goods or services for personal use and not for commercial or other professional purposes; while paragraph “b” of the same article defines “trader” as a an entity making an offer and/or trading goods in frames of commercial or other professional activities, also, physical or legal entity providing services. Unlike the existing norms of nowadays, the draft law already covers detailed definitions of the parties.

Unlike Georgian legislation, the German law provides a very specific definition of the norm similar to the Georgian one, and defines the parties of an off-premises contract as a consumer and an entrepreneur; these definitions are set forth in the GCC’s section 13 as a consumer (Verbraucher) and section 14 as an entrepreneur (Unternehmer). According to the German law, a consumer means every natural person who enters into a legal transaction for purposes that predominantly are outside his trade, business or profession.²¹ While an entrepreneur means a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession; a partnership with legal personality is a partnership that has the capacity to acquire rights and to incur liabilities.²²

As set forth by the Directive, the parties to such type of contract are a consumer and a trader; article 2 lays out that a consumer means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession. While a trader means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive.

As for engagement of any other party in an off-premises contract except for a consumer and a trader, the CCG does not indicate anything; while the Directive’s article 2 (2) makes a direct indication while defining a “trader”, which also means a person, who is acting, including through any other person acting in his name or on his behalf; there are no clauses of such in regard to a consumer in the Directive.

¹⁹ Tezelashvili S., Legal Encyclopedia, Tbilisi., 2008, 373 (in Georgian).

²⁰ The order №35/04 of 2011 of the President of the National Bank of Georgia on “Establishing Rules for Providing Consumers with the Necessary Information by the Commercial Banks upon Providing Banking Service”, <http://nbg.gov.ge/cp/uploads/legal_acts/35_NEW_FOR_WEB.PDF> (in Georgian).

²¹ § 13 BGB - Verbraucher ist jede natürliche Person, die ein Rechtsgeschäft zu einem Zwecke abschließt, der weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden kann.

²² § 14 BGB - (1) Unternehmer ist eine natürliche oder juristische Person oder eine rechtsfähige Personengesellschaft, die bei Abschluss eines Rechtsgeschäfts in Ausübung ihrer gewerblichen oder selbständigen beruflichen Tätigkeit handelt. (2) Eine rechtsfähige Personengesellschaft ist eine Personengesellschaft, die mit der Fähigkeit ausgestattet ist, Rechte zu erwerben und Verbindlichkeiten einzugehen.

It would be greatly appreciated if Georgian legislation considers existing practice and will regard those persons acting on behalf and in his/her name of a consumer or a trader as parties of an off-premises contract.

5. Location and Time of Conclusion of an Off-premises Contract

According to the article 336 of the CCG, an off-premises contract is in power, unless a consumer rejects a contract in writing within seven days; also, in case the latter contract didn't enter into force upon its conclusion. Contracts concluded in the street are among voidable contracts of hesitant nature, since they enter into power only after the time period given to a consumer for exercising the right to reject a contract expires.

In regard to the norm in the Georgian legislation, one shall consider two cases in regard to determining the time of conclusion of a contract: when a contract enters into force upon its conclusion and when a contract is concluded but enforced few days later. It shall not be argued that during the first case, the time of conclusion of a contract and entering into force does not coincide, since according to the article 336 of the CCG, a consumer shall no longer have a right to reject a contract. As for the second case, one shall determine from which date the seven-day period needs to be calculated, from the moment of conclusion or from the moment it has entered into force? The Georgian legislation does not provide a specific answer on the respective question, however, based on the general legal principles and objective of the article, calculating the seven-day period shall start from the moment of entering a contract into force, since the focus shall be made on a consumer as he/she is a less protected party.

Similarly to the Directive, German legislation lays out that an off-premises contract enters into force upon the period of time given to a consumer for rejecting it expires. Namely, such contract is in power, unless a consumer rejects it during a period of 14 days. Besides, article 9 of the Directive sets forth detailed description on what is regarded as the time of enforcing a contract, and the period of calculating a period of 14 days; for example: in case of service contracts, the day of conclusion of a contract; in case of sales contracts, the day on which a consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the goods; in case a subject-matter of a contract are multiple goods - the day on which a consumer or a third party indicated by a consumer acquires physical possession of the last good; in case of contracts for the supply of water, gas or electricity - the day of conclusion of a contract and etc. Also, the Directive directly indicates that States shall not prohibit the contracting parties from performing their contractual obligations during the withdrawal period; nevertheless, the States have a right maintain existing national legislation, which for example prohibits the trader from collecting the payment from the consumer during the given period after the conclusion of the contract.

According to the article 336 of the CCG, the location of a contract may be "in the street, at the doorstep or in like places", which "requires definition, as the literal perception of the street may cause numerous misunderstandings"²³. Exhibition-sales of goods may be organized in the street, at the doorstep and etc.; purchasing goods at a such location is indeed an off-premises contract, however, it cannot be governed by the article 336 of the CCG, since a consumer was ready for conclusion of a contract. The term "within his/her trade" is generally regarded as a permanent location of a person conducting sales or provider of goods, however in such case "it is not a permanent location of trade held in a specific space"²⁴.

As set forth by the draft law, a contract is regarded as an off-premises contract, if it is concluded away from business premises of a trader (away from his/her place of trade) and requires simultaneous physical presence of a trader and a consumer; also, if a contract is concluded on the business premises of a trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which are not the business premises.

²³ *Chanturia L.*, Comments to the Civil Code of Georgia (CCG), Book №3, Tbilisi., 2001, 151 (in Georgian).

²⁴ *Ibid.*

It shall be noted that on June 13, 2014 the Federal Republic of Germany enforced the law in regard to implementation of the Directive on consumer rights,²⁵ which has caused fundamental amendments into the norms governing an off-premises contracts. The German legislation has fully reflected the Directive developed by the European Union and almost made a reception of the latter into the national legislation.²⁶ The name of such type of contracts has also been changed; the new name was used as a bases for establishing the term in Georgian legislation – a contract concluded in the street. Namely, the latter contract was called *Hautsürgeschäft* (a contract concluded at a doorstep) in the German legislation, however in a current version it is referred to as *Außerhalb von Geschäftsräumen geschlossene Verträge* (a contract concluded off-premises, which is not the business premises of the trader), or as its European analogue (off-premises contracts) states.²⁷ It would be greatly appreciated if the Georgian legislation will consider the latter international practice and will review the possibility of changing name of the norm for avoiding misunderstandings in regard to an off-premises contract.

Detailed definition and location of a contract concluded in the street is discussed in the directive, which lays out that an off-premises contract means any contract between a trader and a consumer concluded in the simultaneous physical presence of a trader and a consumer, in a place which is not the business premises of a trader and can take place in a location, such as home and/or working space of a consumer. The definition of such type of contract shall also consider case, when a consumer receives an offer for concluding a contract personally and individually, in a place which “is a non-contractual environment”, however a contract was concluded immediately in a place which is not the business premises of a trader, or without simultaneous physical presence of the parties, through means of distance communication. The definition of this article shall not imply situations when a trader pays an initial visit to a consumer at his/her home for providing consultation, budgeting, or perform measuring and only after these and following a certain period of time - conclude a contract in frames of commercial work of a trader or through means of distant communication. In the latter case, a contract shall not be regarded as an immediately concluded one, since a consumer had sufficient amount of time, prior to concluding, to consider assessment delivered by a trader. A contract concluded away from business premises (in the street) also covers purchase of those goods, which are bought by a consumer during exhibitions organized by an entrepreneur, and upon making an offer for purchasing products respectively.

Unfortunately, the Georgian analogue of the respective norm doesn't lay out similar detailed definition. From a scholar perspective, the respective matter has not been studied yet. The CCG's comments do contain three cases, which explain on what does a place of concluding a contract mean. It shall be mentioned that a vague wording and title of the norm do confuse consumers a lot; these all results into application of the respective norm in practice. Therefore, usage of the article in Georgian reality does not happen, almost at all.

6. Rights-obligations of the Parties

Each one of us, is part to numerous legal relationships on a daily bases, without even realizing it. Hence, one does not even realize legal essence or possible outcome of such relationships. By all means, majority of such citizens can't imagine the consequences, which can result from violating the obligations imposed by the respective relationship. “It is absolutely natural, since people liaise with each other not because of fear of legal norms or laws, but because this is their natural need, vital for life.”²⁸

²⁵ Gesetz zur Umsetzung der Verbraucherrechtlicherichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung (VerbrRRLUG), <<http://www.buzer.de/gesetz/10934/index.htm>>.

²⁶ Prütting H., Wegen G., Weinreich G., Bürgerliches Gesetzbuch, BGB, Kommentar, 11 Aufl., 2016, §312 Rn. 1.

²⁷ German Civil Code, <https://www.gesetze-im-internet.de/englisch_bgb/>.

²⁸ Chanturia L., Comments to the Civil Code of Georgia (CCG), Book №3, Tbilisi., 2001, 23 (in Georgian).

Upon concluding any contract, each party becomes part to certain rights and obligations. The principle of freedom of contract sets forth that the parties, outside of the scope of the rights and responsibilities determined by the respective law, shall have a possibility to determine their own rights and responsibilities upon concluding any specific contract.

Based on disposition of the CCG's article 336, one may conclude that through the definition of rights and responsibilities of the latter article, we encounter only one right in an off-premises contracts – withdrawal from a contract. However, one shall mention that this right is not an absolute one – a consumer shall not withdraw from a contract if it has been implemented upon conclusion.

Unlike the Georgian legislation, the Directive offers quite a diverse list of rights and obligations; the latter focuses on an “informed consumer” – which implies that a consumer shall decide on his/her own whether or not to conclude a contract based on the relevant information. It shall be noted that the rights and obligations of the parties in contracts concluded in the street are somewhat specific; namely, the key rights and obligations of the parties arise prior to concluding a contract and are mainly connected to provision of the information to a consumer from a trader.

For instance, Chapter III (article 6) of the Directive (Consumer Information and Right of Withdrawal for Distance and Off-Premises Contracts) lays out that before a consumer is bound by an off-premises contract, a trader shall provide a consumer with the information on the main characteristics of the goods or services in a clear and comprehensible manner: the identity of a trader, such as his/her trading name; the geographical address at which a trader is established and a trader's telephone number, fax number and e-mail address, where available, to enable a consumer to contact the trader quickly and communicate with him/her efficiently; the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges that are needed for a trader to deliver goods of provide service to a consumer and etc.

The Directive's article 7 lays out additional information supplementing the above-mentioned with respect to an off-premises contracts - a trader shall give the information to a consumer on paper or, if a consumer agrees, on another durable medium. That information shall be legible and in plain, intelligible language. A trader shall provide a consumer with a copy of the signed contract or the confirmation of the contract and etc.

Also, there is a direct indication in the Directive, which sets forth that Member States may decide not to apply this paragraph. By all means, the Directive doesn't limit the Member States from the list of obligations laid down in this Directive, hence, each of the States has a full freedom to decrease or enlarge the list.

As already mentioned, the article 336 of the CCG provides little information about the parties' obligations, which has somewhat been fixed by the draft law. Namely, the parties' rights and obligations will be governed by the articles 2, 7 and 8 of the draft law. It shall be highlighted that the existing version of the draft law fully covers rights of a consumer to withdraw from a contract, as well as an obligation for a trader with respect to providing information. However, some of these articles shall be more precise, for example: the paragraph “e” of the article 7 (1) provides information on full price of goods and service, however, unlike the Directive, it does not specify whether or not the cost includes taxes; also, more clarity is required with respect to contracts concluded with an unlimited period of time, or in regard to contracts which are related to subscription (magazine, newspaper, and etc.) of anything and whether or not full costs of every reporting period shall be covered in a total price. As for the Directive, the latter determines fixed cost for the above-mentioned case, which also implies that complete monthly payments are covered in a total price.

7. Conclusion

One of the key functions of the law is to ensure equality among the parties of any type of relationship. A consumer is a less protected party with respect to an off-premises contract; therefore, the Georgian legislation utilizes self-defensive mechanisms within legal acts to make an effort for ensuring protection of consumers' rights, as they are "weak" parties of such relationship.

As mentioned above, the wording of the article 336 of the CCG is quite vague, general and incomplete; however, the efforts of the Georgian legislation to ensure protection of consumers' rights, hence, it is crucial to approximate the norm so that the latter can be applied in practice.

The issues discussed in the respective paper enable to develop certain set of recommendations, namely:

- At first, it is crucial to define a location of concluding a contract; the following wording of the article 336 of the CCG - "in the street, at the doorstep or in like places", shall be specified in order to achieve the objective of the norm. A consumer shall have an exact information on where shall a contract be concluded so that he/she can withdraw from it and what is the period of time determined for this matter;
- In order to avoid misunderstanding, it will be highly positively evaluated if a contract's title will change from "a contract concluded in the street" into "a contract concluded in a non-contractual environment";
- Also, it will be quite an important amendment with respect to changing a compulsory form of withdrawing from a contract from a consumer, which is a written form. Besides the fact that this requirement is quite a routine for consumers, it also contradicts the fundamental values of civil law, such as freedom of contract. As set forth by the general principles of the civil circulation, withdrawing from a contract shall be performed through the same form as upon concluding the latter;
- It is quite crucial to approximate the terms defining the parties of a contract. Especially, the meaning of the following wording shall be explained "a person conducting sales within his/her trade".

We may conclude stating that an effort of the Georgian legislation to ensure protection of consumers' rights is quite important; under no doubt, upon approximating the legislation, it will be widely applicable in consumer market, hence the main objective of this norm is to ensure protection of consumers' ("weak party") rights.

Consideration of the above-mentioned recommendations will support a better realization of both, traders' and consumers' rights and interests. Creation of a legislation focused on interests of consumers and guaranteeing high level of consumers' rights protection is a primary objective of any legal state.

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Analysis of Legal Nature of Bank Guarantees in the Light of the Principles of Autonomy and Strict Compliance

The Civil Code of Georgia contains rules regulating relationship originating from the means of security of a creditor's demand. These means are can be found in different chapters of the Code, according to their legal nature.

A bank guarantee is one of the means of demand security, where a guarantor undertakes to pay the amount and satisfy creditor's demand if the debtor breaches his liabilities. It is regarded as one of the quick and efficient means of satisfaction of creditor's demand. A bank guarantee, as a demand security appeared on the local market of the USA in mid-1960s, however it has been widely used in the international banking practice since 1970s.¹

The institute of bank guarantee is widely used both in international trade and economic relationships and at national level. It is associated with the fulfilment of both pecuniary and non-pecuniary liabilities. Guarantee is used to secure such contractual relationships, that are related to provision of goods or construction services.² The bank guarantees, together with documentary letters of credit, constitute the main elements of modern commercial relationships. Due to the intensity of its application in international trade relationships and the problems arising with regard to regulation, along domestic legal law it is regulated on the basis of the Uniform Rules of the International Chamber of Commerce and the Convention on Independent Guarantees and Stand-by Letters of Credit (hereinafter the Convention)³, adopted by the United National Commission on International Trade.

Despite diverse regulation, a bank guarantee has a very complex nature. Furthermore, it is both necessary and mandatory to correctly administer the demand, deriving from the bank guarantee as the existence of the rights and obligations to the parties to the relationship are directly related thereto. Such complexity of relationships gives rise to many problems in practice. The parties to an agreement are not able to fully exercise their rights, administer demands and protect their rights, what in most cases, results in a dispute.

The problems related to bank guarantee are quite abundant in Georgian reality as well. Their abundance was conditioned by the introduction of bank guarantees in public procurement relationships and their increased number.

The paper offers analysis of the legal nature of a bank guarantee and its basic principles, whose role in the administration of demands originating from bank guarantees is of paramount importance.

Keywords: *Guarantee, autonomous nature, public procurement, security mean, guarantor, principal, beneficiary, demand, demand presentation period, principle of "strict compliance", correct management of claim, advance security guarantee, contract fulfilment guarantee, terms of a bank guarantee, competition, Convention.*

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¹ *Bertrams R.*, Bank Guarantees in International trade, 3rd ed., Kluwer Law International, 2004, 1.

² *Kayembe G.L.*, The Fraud Exception in Bank Guarantee, 2008, 1.

³ Convention on Independent Guarantees and Stand-by Letters of Credit.

1. Bank Guarantee as a Demand Security Mean

Bank guarantee is the mean to secure the demand of the parties to a contract. It is mainly used in cases, when a creditor has particular interest in the fulfilment of contractual obligation. This may be investment, international sales, construction and other contracts.

A bank guarantee, as one of the means to secure the fulfilment of an obligation, was also envisaged by Georgian legislation of the Soviet period. Under Article 205 of the Civil Code of Georgia of 1964 guarantee, in fact, was a variety of suretyship, but with one difference - a guarantor could have been only a superior authority of an organisation, whilst any person could have acted as a surety⁴.

The new Civil Code provided for a different regulation of bank guarantees, however their usage in Georgia of 90-s has not significantly increased as compared with the Soviet period. The number of bank guarantees has particularly increased since 2005, what was conditioned by the mandatory application of guarantees in public procurement related relationships.

The essence of a bank guarantee is embodied in Article 879 of the civil Code. Specifically, "By virtue of a bank guarantee, a bank, other credit institution or insurance organization (guarantor), on request of another person (principal), undertakes a written obligation to pay money to principal's creditor (beneficiary)".⁵ The Code version of the guarantee conveys the content of the relationship and does not provide for the definition thereof. However, the content and parties to the relationship are clearly readable from the provision. The content of this provision is fully compatible with the internationally agreed and effective definition of the guarantee.

A similar, but longer definition is contained in the Uniform Rules for Demand Guarantees (URDG#458)⁶ developed by the International Chamber of Commerce.⁷ "For the purpose of these Rules, a demand guarantee (hereinafter referred to as "Guarantee") means any guarantee, bond or other payment undertaking, however named or described, by a bank, insurance company or other body or person (hereinafter called "the Guarantor") given in writing for the payment of money on presentation in conformity with the terms of the undertaking of a written demand for payment and such other document(s) (for example, a certificate by an architect or engineer, a judgment or an arbitral award) as may be specified in the Guarantee, such undertaking being given i) at the request or on the instructions and under the liability of a party (hereinafter called "the Principal"); or ii) at the request or on the instructions and under the liability of a bank, insurance company or any other body or person (hereinafter "the instructing Party") acting on the instructions of a Principal to another party (hereinafter "the Beneficiary")".⁸

The purpose of the guarantee is to secure creditor's demand, where the guarantor undertakes to pay the guarantee amount. In reality, the text of most bank guarantees contains the stipulation, that they are payable on "first demand" or "simple demand" without any additional documents.⁹ Simple demand may mean an oral

⁴ *Khotenashvili P.*, Legal Aspects of Bank Guarantees, Tbilisi, 2015, 7, (In Georgian).

⁵ Civil Code of Georgia, Law of Georgia, 26/06/1997.

⁶ Was adopted by the International Chamber of Commerce in 1992 and became effective since 1993. The Uniform Rules should be applied to undertakings, originating from independent guarantees. Under this undertaking a guarantor has to pay money against presentation of a written demand or documents specified in the guarantee.

⁷ International Chamber of Commerce (ICC) was founded in 1919 by several business-leaders. It is an international non-governmental organisation consisting of thousands of business entities and associations. It operates in various countries with its headquarters in Paris. The main purpose of this organisation is the promotion of open international trade and investment systems. One of its goals is the harmonization of international trade practice through establishing Uniform rules and their incorporation into contracts.

⁸ Uniform Rules for Demand Guarantees of the International Chamber of Commerce, Publication №458, Article 2.

⁹ *Kelly-Louw M.*, The Documentary Nature of Demand Guarantee and Doctrine of Strict Compliance, 2009, 309, < <http://uir.unisa.ac.za/bitstream/handle/10500/1350/thesis.pdf> >, [10.02.2018].

demand, however, as a general rule the demand should be presented in writing. Some countries also provide for the obligation to submit various documents together with the demand.¹⁰

The next version of the Uniform Rules provides for more laconic definition of a bank guarantee. Under URDG #758¹¹ a guarantee means any signed undertaking, however named or described, providing for payment on presentation of a complying demand.¹²

Convention on Independent Guarantees and Stand-by Letters of Credit (hereinafter the Convention), of the United Nations Commission on International Trade¹³ gives the description of the essence of guarantee relationship. Under Article 2 of the Convention: “An independent commitment is known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person (“guarantor/ issuer”) to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, [demand] indicating, that payment is due because of a default in the performance of an obligation, or because of another contingency.”

Common for all the definitions of a bank guarantee are the following circumstances: 1) a bank guarantee, as a general rule, is issued by persons with strong financial standing, amongst them, by banks and insurance companies, however, it is stated in both Uniform Rules and the Convention, that it can be issued by any person as well. In this case the Uniform Rules and the Convention empowers the legislation of different countries to define who can issue the guarantees; 2) a guarantee is issued on request of a Principal to secure the obligation undertaken before a beneficiary; 3) A guarantor undertakes to pay the money on presentation of a complying demand, if principal is in breach with the primary obligation¹⁴.

Based on the generalisation of the above definitions, a bank guarantee can be defined as follows: “An undertaking, which provides for the payment of money according to guarantee terms, in the case of presentation of a notice (as a general rule, such a notice should be made in writing) and other documents prescribed by guarantee (if any) within the guarantee period.¹⁵ In this case the definition of a bank guarantee is broader and three main parameters of guarantee relationships are stressed. Specifically: 1) guarantee terms; 2) Guarantee amount; 3) guarantee period. All these three parameters are of paramount importance upon settlement of a guarantee event.

2. Independent Nature of Bank Guarantee

For the determination of relationships originating from bank guarantees and correct management of the rights and obligations of the parties thereto of paramount importance is the definition of the nature of a guarantee.

When discussing the nature of a bank guarantee particular attention should be paid to its independence from fundamental law-of-obligations relationships.¹⁶ Similar to bank guarantees and standby letters of credit, docu-

¹⁰ Ibid, 310, Cited, Guide to the URDG op cit 2, 9.

¹¹ In 2007 the ICC Bank Commission launched the revision of the Uniform Rules for Demand Guarantees. When the process was accomplished, the new Rules were adopted, which were published in 1992 in Publication №758 and became effective on 1 July, 1993.

¹² URDG №758, Article 2.

¹³ In 1966, the United Nations created the UNCITRAL because it desired to play a more active role in reducing and removing legal obstacles to the flow of international trade. Its aim is to further the progressive harmonization and unification of the law of international trade and its mandate is to be the main legal body in the field of international trade law within the United Nations system Membership is structured so that a specified number of seats are allocated to each of the various geographic regions. Therefore, UNCITRAL is an intergovernmental body of the General Assembly that prepares international commercial law instruments designed to assist the international community in modernizing and harmonizing laws dealing with international trade. Various legal instruments have since been prepared by commission.

¹⁴ *De Ly.*, The UN Convention on Independent Guarantees and Stand-by Letters of Credit, Vol. 33, No. 3, Foreign Law Year in Review: 1998, fall 1999, 831-846, 1999, 831.

¹⁵ *Goode R.*, Guide to the ICC Uniform Rules for Demand Guarantees, 1992, 751.

¹⁶ Kelly-Louw M., Limiting Exceptions to the Autonomy Principle of Demand Guarantees and Letters of Credit, University of South Africa, 2008, 197,

mentary guarantees are autonomous by their nature. The foregoing means that primary undertaking embodied in a letter of credit or a bank guarantee, specifically the existence of a demand, originating from the guarantee is not dependent on the rights and obligations of the parties to primary undertaking¹⁷.

The principle of autonomy of bank guarantees is reflected in the Convention on Demand Guarantees and Stand-by Letters of Credit New-York (New-York, 1996) of the United Nations Commission on International Trades and Uniform Rules, developed by the International Chamber of Commerce. Specifically in Uniform Rules for Demand Guarantees #458 and #758¹⁸. According to Article 3 of the Convention “For the purposes of this Convention, an undertaking is independent where the guarantor/issuer’s obligation to the beneficiary is not: a) Dependent upon the existence or validity of any underlying transaction, or upon any other undertaking (including stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate); or b) Subject to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer’s sphere of operations.” Uniform Rules #458¹⁹ and #758²⁰ speak about the same autonomous nature of a guarantee in the same manner.

The Convention and the Uniform Rules stress the autonomy of the primary undertaking of the guarantee. Furthermore, they state, that guarantor’s liability should not be subject to claims or defences of primary undertaking, although the guarantee contains reference to primary undertaking. The guarantor or issuer is not obliged to authenticate the documents submitted.²¹ He would limit himself to the verification of documents, submitted thereto. Due to this reason a bank guarantee is documentary in character, in the sense that the amount and duration of the duty to pay, the conditions of payment and the termination of the payment obligation depend exclusively on the terms of the guarantee itself²². After the submission of a demand beneficiary verifies the documents, submitted thereto and does not bear the responsibility for their authenticity. Guarantor examines external parts of the demand, like breach of the undertaking by principal or the amount of damages inflicted by principal upon beneficiary through the breach of undertaking.²³ Of paramount importance for guarantee is for the presented document, of in the case of unconditional demand guarantee - demand for compensation of guarantee amount to

<https://www.academia.edu/10292595/Limiting_exceptions_to_the_autonomy_principle_of_demand_guarantees_and_letters_of_credit>, [10.02.2018].

¹⁷ *Oelofse A.*, The Law of Documentary Letters of Credit in Comparative Perspective, 1997, 354.

¹⁸ The principle of independence (autonomy) of a documentary letter of credit is contained in Uniform rules, applied with regard to them. Under Article 4 of the UCP 600, that: “A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit.” The documentary nature of a letter of credit is also mentioned in Article 5 of the same Rules, which certifies, that “Banks deal with documents and not with goods, services or performance to which the documents may relate.”

¹⁹ Subparagraph “b” of Article 2 provides for the following: “Guarantees by their nature are separate transactions from the contract(s) or tender conditions on which they may be based, and Guarantors are in no way concerned with or bound by such contract(s), or tender conditions, despite the inclusion of a reference to them in the Guarantee. The duty of a Guarantor under a Guarantee is to pay the sum or sums therein stated on the presentation of a written demand for payment and other documents specified in the Guarantee which appear on their face to be in accordance with the terms of the Guarantee”.

²⁰ According to Part 1 of Article 5: “A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary.”

²¹ *Kelly-Louw M.*, Limiting Exceptions to the Autonomy Principle of Demand Guarantees and Letters of Credit, 2008, 199.

²² *Kelly-Louw M.*, The Documentary Nature of Demand Guarantees and the Doctrine of Strict Compliance, University of South Africa, 2009, 311, <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/safmerl121&div=42&id=&page=>>>, [10.02.2018].

²³ *Eitelber E.*, Autonomy of Document Credit Undertakings in South African Law, 2002, 122.

be compatible with the terms of the bank guarantee.²⁴ Beneficiary regulates a guarantee event and makes a decision on the satisfaction or rejection of demand, commensurate with the bank guarantee terms, issued thereby.

2.1. Principle of Autonomy According to the Civil Code of Georgia

Autonomous nature of a bank guarantee is explicitly stipulated in Article 881 of the Civil Code of Georgia²⁵. Specifically, “The guarantor’s obligation before the beneficiary defined under the banker’s guarantee in their relations shall not depend for performance upon the primary obligation for which it is issued, even when the guarantee includes a reference to this obligation.”

The principle of autonomy should be considered as the main virtue of a bank guarantee. A guarantor regulates the event at its sole discretion and the rights and obligations of the parties to primary undertaking cannot affect the actions of the guarantor. Guarantor’s is equally independent both from the primary undertaking and the guarantee contract, entered between a guarantor and a principal.²⁶

Guarantor’s obligation is to pay the guarantee amount against lawful and legally valid claim of the beneficiary, however, this does not mean his passive role and absolute nature of the principle of autonomy. Fraudulent claim is an internationally accepted exemption from the principle of autonomy²⁷. In the case of a fraudulent claim the court of law is required to examine the circumstances, that became grounds for refusal to compensation. In real life it is rather difficult to prevent a fraud and sometimes non-compliant demand,²⁸ however a guarantor is required to thoroughly investigated all the circumstances to prevent the satisfaction of unlawful demands.

Autonomous nature of a bank guarantee was highlighted in a number of decisions of the Supreme Court of Georgia. Specifically, “The Civil Code regards a bank guarantee as one of the bank security means, which differs from other security means by its independence - non-accessory nature, meaning that the primary undertaking - a contract for the provision of which the bank guarantee was issued - does not affect the latter”²⁹... also “The guarantor’s obligation before the beneficiary in their relationship stemming from a bank guarantee, envisaged by Article 881 of the Civil Code of Georgia, is not dependent on primary undertaking, for the provision of fulfilment of which it was issued.”³⁰ Also, “One of the main characteristics of the bank guarantee that makes it different from other security means, is the autonomy of a bank guarantee from primary undertaking. A bank guarantee is based not on the agreement (contract) of the parties, but rather on a unilateral undertaking of its issuer (guarantor).”³¹

Through the accentuation of the autonomous nature of a bank guarantee the court differentiated between a secured obligation and guarantor’s obligation to pay the guarantee amount to the beneficiary. The guarantor is required to act only in compliance with the guarantee terms and submitted demand. Hence, a guarantor is devoid

²⁴ *Hsun Ch.H.*, The Independence of Demand Guarantees, Performance Bonds and Standby Letters of Credit, National Taiwan University Law Review, Vol. 1:2, 2006, 3.

²⁵ Civil Code of Georgia, Law of Georgia, 26/06/1997.

²⁶ *Barru D.J.*, How to Guarantee Contractor Performance on International Construction Projects: Comparing Surety Bonds with Bank Guarantees and Standby Letters of Credit, George Washington International Law Review, Vol. 37, Issue 1, 2005, 78-80.

²⁷ *Enonchong N.*, The Autonomy Principle of Letter of Credit: an Illegality Exception? Lloyd’s Maritime and Commercial Law Quarterly, 2006, 404.

²⁸ *Pugh-Thomas A.*, Letters of credit – Injunctions - the Purist and the Pragmatist: Can a Buyer Bypass the Guarantor and Stop the Seller from Demand Payment from the Guarantor? 1996, 210.

²⁹ Ruling of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia, dated October 20, 2009, Tbilisi, Case № AS-562-871-09, 10.

³⁰ Ruling of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia, dated January 20, 2001 Case №3 K-62-01 17, 3.

³¹ Ruling of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia, dated March 17, 2009, Case №AS-781-996-08, 14-15.

of the possibility to refer to some grounds, which enable the principal to refuse the payment of money within the framework of secured obligation.

In competition of contract and guarantee terms, when administrating a guarantee demand the guarantor should be guided by the terms of the document issued thereby, which binds and obliged him to pay the amount when a demand is presented.

There are many disputes, falling under the jurisdiction of general courts of Georgia, where the guarantors refuse the satisfaction of claim, submitted thereto, due to incompliance of claims with guarantee terms. The grounds for the foregoing is submission of a claim which is not compatible with guarantee terms, what excludes the obligation of pay the guarantee amount.

Specifically, one of the disputes was about the demand of the beneficiary, which was not satisfied by the guarantor. The case concerned the bank guarantee of advance payment bank guarantee, under which guarantee the principal received the contract amount in advance for the fulfilment of the obligations under public procurement contract. To secure this amount the beneficiary was presented with advance payment bank guarantee. The nature of this guarantee was the reduction of guarantee amount. Namely, owing to its general nature, the reduction of the amount of the advance payment bank guarantee is linked with the scope of fulfilled contractual obligation. Quite often a public procurement contract provides for a different procedure of reduction of advance payment bank guarantee. The guarantee amount may be reduced only by full or partial amount of fulfilled obligation. In this case the amount is reduced by different percentage amount. This very term becomes ground of a dispute between a beneficiary and a guarantor. Upon settlement of a dispute the problem of competition between the terms of the bank guarantee and those of the contract, which provide for the reduction of advance payment guarantee. Namely, according to terms of the bank guarantee the volume of the advance payment bank guarantee was to have been reduced by the amount of work, accomplished by the principal. By its Ruling the Supreme Court of Georgia³² upheld the decision of the Tbilisi Appeals Court on dismissal of the beneficiary's claim. The agreement entered between the beneficiary and the principal provided for the reduction (offset) of the amount of advance payment guarantee by 20% of the amount, stated in the invoice confirming the accomplishment of work and Form #2, whereas under guarantee terms the amount prescribed by bank guarantee is reduced by the amount of work accomplished by the principal for the beneficiary. It was established with regard to the case, that the principal had accomplished only a part of work.³³ The guarantor refused the payment of the remaining after the setoff part of the advance payment bank guarantee and stated, that the amount of bank guarantee is reduced by the amount of work, accomplished by the principal for the beneficiary. Hence, insofar as the bank guarantee was issued for GEL 861 388.07, and the fulfilment for October amounted to 994 108.71 GEL, the defendant was not entitled to satisfy the beneficiary's demand. The claimant based the claim on contract terms, under which terms the claimant was to pay 20% of the net value of the contract as an advance payment in the case of presentation of the bank guarantee for the amount of the respective advance payment. Furthermore, during the settlement the claimant would have deducted 20% of the amount, specified in the invoice and Form #2 from the amount payable to the contractor until the full amount of the advance payment was set off, meaning the accomplishment of the work to full extent. In this case the subject matter of the dispute was the clarification of the question of priority of contract and guarantee terms. The beneficiary would maintain that the advance payment was set off according to the provisions of the contract and the amount was to have been reduced by full amount of accomplished work, according to the directions of the guarantor. And here it comes to the question of independence of the guarantee from primary undertaking. A demand arising out of the guarantee is determined by the terms

³² Decision of the Supreme Court of Georgia, dated July 07, 2012, Case №AS-80, 77, 2014.

³³ The facts of the case evidence the following: a contract was entered between the beneficiary and the principal on the construction of 20-50 km. section of the main pipeline. The principal received 3 020 000 GEL as an advance payment and accomplished works within the framework of the contract worth 12 935 449.80 GEL and of which the claimant paid 12 573 871.44 GEL including the amount of the advance payment. The beneficiary requested the difference in amount of 433 710.10 GEL.

of the bank guarantee and the guarantor cannot be bound by the content of secured obligation or the rights and obligations of the parties. Although the origin of secured obligation preceded the issuance of the guarantee, the guarantor's liability arises only under the terms of the guarantee and the undertaking, envisaged by the contract (primary undertaking) could not have been imposed thereto in any case. In the case of competition of terms, the guarantor should be guided by the terms of the guarantee issued thereby and denounce the satisfaction of the claim.³⁴

It should be mentioned that the precedent, created by this decision was repeatedly sustained by courts of different instances³⁵, however, such decisions are not made with regard to all the cases of similar categories and initiated on identical grounds.³⁶ Specifically, Gurjaani District Court satisfied the guarantee demand with regard to imposition of the payment of the advance payment bank guarantee. The court explained, that "the agreement of the parties that "the guarantor has undertaken to refund the amount paid as an advance payment to the principal in the case of principal's default with advance payment obligations related to public procurement contract envisaged by the project," was to be considered together with the provision of public procurement contract, under which provision it is possible for procuring entity to make transfer for 30% of net contract value on the basis of advance bank or/and insurance guarantee for the amount identical to one, that is to be transferred, specified by the supplier. As per the contract, in the case of advance payment, the settlement will be made as follows: 30% of the value of actually supplied works, confirmed by a takeover act, will be disbursed for the coverage of the advance payment made, and the remaining 70% will be paid by the procuring entity." The court established, that the work was not accomplished, and thus imposed the payment of the full amount of the guarantee to the guarantor. In this case the court has not paid attention to the term of the bank guarantee, according to which the amount of the advance payment should have been set off not in amount of 30%, but rather in full amount of accomplished work. The court based its decision on contract provisions and ignored the guarantee terms. We do believe, that after appealing this decision, the superior instance court will adequately assess this situation and revoke it in accordance with already established practice.³⁷

3. Principle of Strict Compliance of a Bank Guarantee

Along with the major principle of autonomy the bank guarantees and documentary letter of credit is subject to Strict Compliance Principle.³⁸ Under this principle, the beneficiary's demand must be strictly compliant with the terms of the bank guarantee and be supplemented with documents mentioned in the guarantee.³⁹ Observance of the Principle of Strict Compliance is the main obligation of the beneficiary. This principle defends the interests of both parties of the relationship. In the case of accurate enforcement of a documentary demand, a creditor⁴⁰ will receive the amount without the proving the breach of undertaking and making references. A debtor⁴¹ is assured, that the

³⁴ In this case the guarantor refused the satisfaction under Part 1 of Article 887 of the Code of Civil Procedure of Georgia due to in compliance of the claim with the terms of the guarantee. The position of the guarantor was upheld by the court of all three instances.

³⁵ Decision of Khashuri District Court of September 29, 2015 №2-302-2015, №130210015001063580, which was upheld by Civil Chamber of the Tbilisi Appeals Court by its decision of February 16, 2017 №2ð/5563-15, №130210015001063580; Decision of the Tbilisi City Court of July 17, 2015, Case №2/856-15; Decision of the Tbilisi Appeals Court of November 09, 2016 №2ð/4559-15, №330210015703697, which was upheld by the Supreme Court of Georgia.

³⁶ By decision №340110015001160711 of Gurjaani district Court of December 27, 2016, the beneficiary's claim on the imposition of the payment of the bank guarantee of advance payment security was satisfied. The court explained, that the bank guarantee of advance payment security was to have been set off in amount, prescribed by the terms of the contract.

³⁷ The Decision is appealed with the Tbilisi Appeals Court, Case №2ð/2835-17.

³⁸ Principle of „Strict Compliance“.

³⁹ *Moffeh A.I.*, Abstract Payment Undertaking: To What Extent are They Truly Abstract? 2009, 10.< file:///C:/Users/Nino%20Lipartia/Downloads/U205241%20(4).pdf> [10.02.2018].

⁴⁰ A seller in the case of a documentary letter of credit and a beneficiary in the case of a guarantee.

⁴¹ An applicant in the case of a documentary letter of credit and a principal in the case of a guarantee.

payment will not be made without submission of strictly complying documents.⁴² The problem between the parties arises when there is a conflict between their differing interests. According to abstraction principle, principal/applicant bears the burden of proof with regard to fulfilment of primary undertaking. When it deems impossible to prove, the principle is entitled to rely on strict compliance doctrine and refer to refusal to satisfaction.⁴³ In the course of fulfilment of demand the beneficiary is required to be guided by adherence to the principle. Otherwise improperly presented demand may become ground to refusal to the payment of the amount.

3.1. Principle of “Strict Compliance” in Uniform Rules

In bank guarantee related relationship the main obligation of a beneficiary is to correctly present a demand. The guarantor decides to make the payment after the authentication of the demand. Based on the general principles of contract law, a beneficiary is required to present an correct and accurate demand, whereas the guarantor is required to examine the demand presented thereto with reasonable care.⁴⁴ A decision made by a beneficiary should be the result of reasonable judgement and examination. A guarantor is required to examine documents with reasonable care to ascertain whether they appear on their face to conform with the guarantee⁴⁵.

Uniform Rules of Demand Guarantees #758 clarifies and defines the terms “complying demand” and “complying presentation”⁴⁶. According to URDG #758 a guarantee should be presented in accordance with guarantee terms, or Uniform Rules or the established rules of international banking practice. According to these Uniform Rules: “A demand under the guarantee shall be supported by such other documents as the guarantee specifies, and in any event by a statement, by the beneficiary, indicating in what respect the applicant (principal) is in breach of its obligations under the underlying relationship. This statement may be in the demand or in a separate signed document accompanying or identifying the demand.”⁴⁷

The existence of Strict Compliance Doctrine serves mainly the protection of Principal’s interests⁴⁸ and empowers a guarantor with the right to waiver if the demand is incompliant with the documents. The requirements of this principle concern only the content of the demand. No minor errors or clerical mistakes may become grounds for denial the satisfaction of the demand.⁴⁹

⁴² *Mofleh A.I.*, Abstract Payment Undertaking: To What Extent are They Truly Abstract, 2009, 11. <file:///C:/Users/Nino%20Lipartia/Downloads/U205241%20(4).pdf> [10.02.2018].

⁴³ *Ibid*, 12.

⁴⁴ Article 9 of Uniform Rules of Demand Guarantees №458: “All documents specified and presented under a Guarantee, including the demand, shall be examined by the Guarantor with reasonable care to ascertain whether or not they appear on their face to conform with the terms of the Guarantee. Where such documents do not appear so to conform or appear on their face to be inconsistent with one another, they shall be refused”. The principle, envisaged by this Article also applies to a documentary letter of credit. Article 14 (a) of the Uniform Customs and Practice - UCP 600 explains, that “The [letter of credit] issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.”

⁴⁵ *Kelly-Louw M.*, The Documentary Nature of Demand Guarantees and the Doctrine of Strict Compliance, (part 2) 2009, 478, <https://www.academia.edu/27460056/The_Doctrine_of_Strict_Compliance_in_the_Context_of_Demand_Guarantees>, [10.02.2018].

⁴⁶ Under Paragraph 1 of Article 15 of the Uniform Rules of Demand Guarantees - URDG №758: “Complying demand means a demand that meets the requirements of a complying presentation, and “Complying presentation under a guarantee means a presentation that is in accordance with, first, the terms of that guarantee, these rules so far as consistent with those terms and, third, in the absence of a relevant provision in the guarantee or these rules, international standard demand guarantee practice.”

⁴⁷ *Kelly-Louw M.*, Selective Legal Aspects of Bank Guarantees, 2008, 126.

⁴⁸ *Khatiashvili A.*, Bank Guarantee as an Independent Security for the Fulfilment of Obligation and Liability of the Parties to the Contract, 36, 2011, (in Georgian).

⁴⁹ *Barru D.J.*, How to Guarantee Contractor Performance on International Construction Projects: Comparing Surety Bonds with Bank Guarantees and Standby Letters of Credit, *George Washington International Law Review*, 2005, 74-75.

3.2. Principle of “Strict Compliance” Under the Convention

The Convention refers to the obligation of the parties to act in good faith when exercising their powers when settling a guarantee event. It obliges a guarantor to act in good faith and exercise reasonable care. Specifically, a guarantor is required to discharge its obligations in good faith and without a gross negligence. Abidance by this principle in the course of fulfilment of an obligation is prescribed by several articles of the Convention. Under Article 13, in settling relationship, the regard shall be taken of generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice, and under Article 14, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.⁵⁰ The convention refers to the obligation to abide by the principle of strict abidance and imposes the duty of complying presentation.⁵¹ The guarantor verifies the soundness and makes satisfaction according to established international standard of banking practice (ISBP).⁵² Respectively, the Convention admitted the principle of strict compliance through reference to these standards. Consequently, the Convention stressed the submission of complying demand by beneficiary and satisfaction of the demand complying with guarantee terms by the guarantor.⁵³ The Court strictly controls the fulfilment of beneficiary’s obligation to present complying and sound demand.

Integral part of the principle of strict compliance is not only the obligation to observe the content requirement, but also to present complying documents. Non-presentation of relevant and exhaustive documents may become grounds for refusal the payment of the amount by the guarantor. Furthermore, complying demand and accompanying documents should be presented before the expiry of the guarantee.⁵⁴ Respectively, overdue demand, non-complying or incomplete documents or/and deficient demand constitute grounds for rejection of demand.⁵⁵

Requirement, based on the principle of strict compliance applies both to the content of the demand and the accompanying documents. No grammatical, spelling or other clerical errors constitute grounds for refusal the satisfaction of the demand. In the Decision in case *Seaconsar Far East Limited v. Bank Markazi Jomhouri Islami Iran*,⁵⁶ the letter of credit provided for the indication of the name of the buyer on every page, what was not observed in the demand. This requirement was not observed upon presentation of the demand, what became grounds for refusal the payment by guarantor. The Court explained, that a technical error like that could not have become grounds for refusal the payment of the amount⁵⁷

⁵⁰ *Kelly-Louw M.*, The Documentary Nature of Demand Guarantees and the Doctrine of Strict Compliance, (part 2), 2009, 481.

⁵¹ *Dolan J.F.*, The UN Convention on International Independent Undertakings: Do States with Mature Letter-of- Credit Regimes Need it, *Banking and Finance Law Review*, 1998, 13.

⁵² As per Article 16 of the Convention the guarantor is required to examine the demand and any accompanying documents in accordance with the standard of conduct referred to in Article 14 of the Convention. And in the demand is compatible with the terms of a bank guarantee, the guarantor is required to satisfy the demand in accordance with the applicable international standards of independent guarantee or stand-by letter of credit practice.

⁵³ *Kelly-Louw M.*, The Documentary Nature of Demand Guarantees and the Doctrine of Strict Compliance (Part 2), 2009, 481.

⁵⁴ According to Article 19 of the Uniform Rules: A demand shall be made in accordance with the terms of the Guarantee before its expiry, that is, on or before its Expiry Date and before any Expiry Event as defined in Article 22. In particular, all documents specified in the Guarantee for the purpose of the demand, and any statement required by Article 20, shall be presented to the Guarantor before its expiry at its place of issue; otherwise the demand shall be refused by the Guarantor.” The same principle is prescribe by Article 6 of the UCP 600 with regard to documentary letter of credit.

⁵⁵ *Kelly-Louw M.*, The Documentary Nature of Demand Guarantees and the Doctrine of Strict Compliance (Part 2), 2009, 482.

⁵⁶ *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*: HL 15 Oct 1993.

⁵⁷ *Kelly- Louw M.*, Selective Legal Aspects of Bank Demand Guarantees, University of South Africa, 2008, 65.

3.3. Interpretation of the Principle of “Strict Compliance” by Courts

The principle of “strict compliance” was interpreted more than once by the countries of various countries. It is explained in decision in case *Howe Richardson Scale Co. Ltd. V. Poli-Mex-Cekop*⁵⁸, that “A demand should be strictly complying with the terms of the bank guarantee and the documents. Also the demand arising out of e letter of credit should be strictly complying with its terms.” In the case *Frans Maas (UK) Ltd v. Habib Bank AG Zurich* the British court interpreted Strict Compliance Principle in a manner, that under the terms of the guarantee the guarantor has undertaken to pay the amount to the beneficiary against the presentation of a written demand in the case of breach of the obligation by the principal. It was stated in the demand, presented by the beneficiary, that “Principal failed to fulfil the contractual obligation and demanded the payment of 500,00£.” The court stated that the demand failed to prove the grounds of payment of the amount - breach of the primary undertaking by the principal.⁵⁹ Respectively, the court ruled that the demand was not compliant with the terms of the guarantee.

The courts have interpreted the presentation of a demand in compliance with the terms of a bank guarantee in case *I.E. Contractors Ltd v. Lloyds Bank PLC and Rafidain Bank*⁶⁰. The judge explained that the obligation to observe the compliance of demand under guarantee depends on the terms of a bank guarantee.⁶¹ According to the terms of the guarantor has undertake “to pay, unconditionally, the said amount on demand, being the claim for damages brought about by the [account party]”. The primary obligation concerned the construction of poultry slaughterhouses by principals in Iraq. On December 4, 1984 the beneficiary stated, that the principal failed to perform the works and demanded the payment of the guarantee amount. The demand mentioned no damage that followed the breach of obligation. The Guarantor (Rafidian Bank) forwarded the demand to the counteragent (Lloyd’s Bank). The first and second instance courts made different decisions on this case. Specifically, the first instance court has not satisfied the demand of the beneficiary (I.E. Contractors) on the imposition of the payment of guarantee amount on the Guarantor on the basis of Strict Compliance Doctrine and explained, that: 1) the Guarantor has not received the demand compliant with terms of the contract guarantee, 2) the counter-guarantor has not received the demand compliant with the terms of the guarantee⁶².

The Appeals Court interpreted the guarantee demand more broadly, what became grounds for changing the decision. The Appeals Court stated, that in the case of a demand guarantee it is less necessary to apply the principle of strict compliance. “In the case of a guarantee, of major importance is the demand, being the material grounds of payment of the amount and not its exact compliance with the terms.⁶³ Respectively, the court ruled that the demand was compliant with the guarantee terms and that the guarantor was to pay the amount.”

The opinion, offered by the above decision was criticised by various legal writers.⁶⁴ Specifically, it is presumed, that after the presentation of a demand by the beneficiary, the guarantor is not required to conduct thorough and complex “investigation” with a view to establishing the compliance of the demand with guarantee terms, however, he is liable to examine the material grounds of the demand. As the author of the comments to Uniform Rules, R. Goode puts it, “[t]he standard must be applied with a measure of common sense.”⁶⁵

⁵⁸ Decision of the Appeals Court of South Africa.

⁵⁹ *Elliot F.*, Project Security: Bonds and Guarantees, 10, <https://www.fenwickelliott.com/sites/default/files/nick_gould_-_project_security_bonds_and_guarantees_paper_for_university_of_vienna.indd_pdf>, [15/07/2017].

⁶⁰ *I.E. Contractors Ltd v. Lloyds Bank Plc and Rafidian Bank*, Lloyd’s Bank 1990 2 Lloyd’s Rep.496, <<https://www.i-law.com/ilaw/doc/view.htm?id=150222>>, [15/07/2017].

⁶¹ In the opinion of Lord Justice Staughton more or less strictness of exact compliance towards a documentary letter of credit depends on the construction of the undertaking. Cited from: *Kelly-Louw M.*, Selective Legal Aspects of Bank Demand Guarantees, University of South Africa, 2008, 2

⁶² Hein online, Citation: 9 Const. L. Int’l 13 2014. The usage of on-demand bonds has become more prevalent and calls more frequent, 2014,17., Citation: 9 Const. L. Int’l 13 2014, last visited on: 10/12/2016.

⁶³ *Moffeh A.I.*, Abstract Payment Undertaking: To What Extent are They Truly Abstract?, University of Leicester, 2005, 35.

⁶⁴ Compare Goode R., Commercial Law, 1026, and Jack r. Documentary Credits, 2001, 366.

⁶⁵ *Goode R.*, Abstract Payment Undertakings and the Rules of the International Chamber of Commerce, Saint Louis university Law Journal, 1995, 740.

Consequently, there are two contradictory opinions concerning the nature of a bank guarantee and principle of strict compliance of a demand. According to the first opinion, a bank is required to examine only formal compliance of the demand and satisfy the beneficiary.⁶⁶ In this case the “The guarantor bears lesser risk to be misled and the risk of principal is vested with the principal. According to second opinion the guarantor is required to thoroughly and exhaustively examine the compatibility of a guarantee demand with guarantee terms and make payment after the establishment of compliance. Otherwise the guarantor will not be able to claim reimbursement from principal.”⁶⁷

Introduction of the Principle of Strict Compliance” by Uniform Rules and Convention aims at the protection of Principal’s interests. Based on the guarantee, there is only one obligation to be borne by the beneficiary - specifically, to present accurate, compliant and timely demand to the guarantor. Losing the right to claim reimbursement from the guarantor in the case of breach of this obligation is absolutely lawful.

3.4. Principle of “Strict Compliance” under the Civil Code of Georgia

The obligation to adhere to the Principle of Strict Compliance is provided for by the Civil Code of Georgia as well. Specifically, under Part 1 of Article 885 “The beneficiary’s claim [demand] for payment of the monetary amount due under the banker’s guarantee shall be presented to the guarantor in a written form, with the documents indicated in the guarantee enclosed. In the demand or in the enclosure the beneficiary shall indicate the incident of breach by the principal of the primary obligation for the securing of which the guarantee was issued.”

Furthermore, the compliant demand of the beneficiary should be presented within timelines, prescribed by the bank guarantee. Observance of these two requirements is beneficiary’s duty and its breach empowers the guarantor to refuse the compensation.

Judicial practice, related to the assessment of the duty to adhere to the Principle of Strict Compliance, has developed for the past few years. However, attention is not paid to formal compliance of the demand upon determination of compliance. The court explained the compliance of material grounds of the demand with guarantee terms.⁶⁸ The Tbilisi City Court has reviewed the dispute on imposition of payment of the amount under the advance payment bank guarantee.⁶⁹ The guarantor referred to several grounds for refusal the satisfaction of the demand: a) presentation of the guarantee demand after the expiry of the deadline; b) reduction of advance payment guarantee in amount of accomplished works, c) accuracy of the demand content, what includes the absence of any reference to a breach. Despite the imperative stipulation of Article 885, the beneficiary failed to provide the description of the essence of the breach of obligation by principal and the documents specified in the guarantee (certifying the breach). The beneficiary has not provided full information to the guarantor. The court ignored the question of formal compliance of the demand and discussed the other grounds of refusal of the demand. The beneficiary’s demand was not satisfied by the courts of either instance. The court was required to pay attention to the content of the demand and explain, whether such demand constituted one of the grounds for refusal to satisfaction.

Worth mentioning with regard to presentation of a guarantee demand is another important decision.⁷⁰ The guarantor stated that principal had not duly inform him about the breach of obligation. Specifically, the benefi-

⁶⁶ This opinion was upheld by Staughton L.J. and is contained in the decision, made in 1981.

⁶⁷ *Mofleh A.I.*, Abstract Payment Undertaking: To What Extent are They Truly Abstract?, University of Leicester, 2005, 36.

⁶⁸ Decision of the Tbilisi City Court of July 17, 2015, Case №2/856-15; Decision of the Tbilisi Appeals Court of November 09, 2016, №2B/4559-15, №330210015703697, which was upheld by the Supreme Court of Georgia.

⁶⁹ Decision of the Tbilisi City Court of June 21, 2016 №2/7526-15; Decision of the Tbilisi Appeals Court of April 10, 2017 №2B/4510-16, Ruling of the Supreme Court of Georgia of July 11, 2017.

⁷⁰ Ruling of Civil Chamber of the Tbilisi Appeals Court №2B7114/14, №330210014403740, dated May 20, 2015.

ciary was required to specify in the demand, whether what was meant under the breach of primary undertaking and what was the amount of damages inflicted to the beneficiary by the principal, following what the guarantor would have paid the guarantee amount to the plaintiff within the framework of the guarantee amount. One of the grounds of guarantor's refusal to pay compensation was failure to present complying demand. The court explained, that guarantor is entitled to refuse the fulfilment of the obligation undertaken before the beneficiary only when the demand or accompanying documents are not compliant with the guarantee terms, or if they were presented to the guarantor after the expiry of the guarantee period,⁷¹ what was not the case in the case concerned.

Specifically, it was established in this case that the guarantor refused to pay compensation under none of the these grounds: 1) incompliance with the terms of the guarantee and/or 2) presentation of the demand after the expiry of the guarantee. The court explained, that the only mandatory precondition, set by the parties for the payment of compensation was the presentation of the demand within established timelines. The parties have not agreed upon any special condition for the presentation of a demand. Insofar as the guarantee has not provided for some special provision and neither the refusal to the payment of the compensation was duly substantiated in this regard, there was no need to research and establish the reasons of breach of the obligation by principal. Respectively, the court imposed the payment of the compensation on the guarantor. The court has not interpreted the imperative obligation, prescribed by Article 885 of the Civil Code of Georgia, which imposes the duty to duly inform the guarantor upon the beneficiary. In the case of presentation of a demand, Part 1 of this Article obliges the beneficiary a) to present a demand in writing, b) supplement it with the documents, mentioned in the guarantee, 3) explain the essence of breach of primary undertaking. Non-compliance with any of these three requirements means the presentation of a demand in breach of the Principle of Strict Compliance, what, according to internationally accepted practice, exempts a guarantor from the obligation to pay money. Despite this stipulation of law, the court has linked the absence of special rules on presentation of a demand with party agreement, thus neglecting the very important Principle of Strict Compliance.

It is difficult to say how Georgian judicial practice will develop in the future, however it should be mentioned, that the position of the Civil Code of Georgia is similar to that of the Convention and Uniform Rules and this position fully upholds the approach dominating in the international practice. The beneficiary is required to abide by the principle of Strict Compliance upon presentation of a demand. The main purpose of this principle is the protection of the interests of the principal against the of "fraudulent" and unlawful demand of the beneficiary.

4. Conclusion

A bank guarantee as a demand security mean is widely applied both in international and domestic trade and economic relationships. It can be said boldly, that in modern business transactions there is almost no major economic project where a guarantee is not used as a security mean. The existence of various legal problems upon regulation of these large-scale relationships can never be excluded. Since the second half of the twentieth century the international organisations and states have been intensively involved in the regulation of the scope of guarantees. As a result of the foregoing various Uniform rules were developed, which are of recommendatory nature and the parties to contractual relationships are free to apply them for the settlement of their relationships.

Of paramount importance for the determination of the nature of bank guarantees are the basic principles developed according to Uniform Rules and the Convention of the UN Commission on International Trade. The principles of autonomy and Strict Compliance make guarantees different from the other security means and constitute their main virtue. However the foregoing should not be interpreted so as if it is a binding factor for the parties to relationship.

⁷¹ Civil Code of Georgia, Article 887, Part 1, 26/06/1997.

The principles of autonomy and strict compliance stress that a guarantor does not have only a ministerial function. His main duty is to examine presented documents, establish their compatibility with the terms of the guarantee.⁷² There is a certain correlation between these two principles, as the principle of autonomy makes principal to face the risk of abuse of power by the beneficiary. Its sole protector is just the principle of strict compliance. Hence these two principles are applied for the balancing of the interests of the parties to the main contract.⁷³

The principle of autonomy of a bank guarantee has been frequently interpreted by courts and according to the established practice, the guarantor is required to act in accordance with the terms of the guarantee, however, upon settlement of a demand, he is supposed to settle the situation in accordance with the principles of reasonable care and good faith. Unlike the autonomous nature of guarantee Georgian judicial practice does not pay attention to the content of the demand and importance of the principle of strict compliance.

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⁷² *Khatiashvili A.*, *Bank Guarantee as an Independent Security for the Fulfilment of Obligation and Liability of the Parties to the Contract*, 2011, 35 (in Georgian).

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General Framework of Fault-based Liability and Reasonability of Its Modification upon Covering of Injuries, Stemming from Labour-Law Relationship

The Labour Code of Georgia does not provide for some special rule regarding damages in labour law context. The procedure of coverage of injuries arising from employment relationships is regulated by Georgia law. The article discusses specificities of fault upon coverage of injuries arising from employment relationships. In general, what is typical for fault, as one of the grounds of liability in labour disputes. Specifically, against a backdrop of subordination principle, modification of fault in employment relationships often results in different legal consequences in the context of damages.

Key Words: Legal Status of Employee, Vicarious liability, Contributory negligence, Shifting the burden of proof, Source of abnormal hazard.

1. Introduction

When there exists the principle of subordination it is impossible for the regulation of the coverage of injuries stemming from employment relationships to fall only within the standard framework of contractual or tort liability. When researching the problem of coverage of workplace injuries incurred during the working process, particular attention is accorded to the question - whether or not it is adequate to apply the general principle of fault-based liability upon occurrence of such injury and whether or not there exist specific circumstances, in the light of which circumstances it would be reasonable to justify the relevance of application of alternative or mixed schemes of liability to strike balance between the interests of both the employees and the employers.

2. Fault as a Precondition of Liability

According to Article 44¹ of the Labour Code of Georgia (LLG)² the question of coverage of injury stemming from labour-law relationships falls within the scope of regulation of the Civil Code of Georgia (CCG).³

CCG, like German Civil Code (BGB)⁴ is traditionally based on the principle of fault-based liability.⁵

However the second sentence of Section 276 of the BGB provides for an exemption from this general rule in terms of provision for a higher or lower degree of liability. Similar regulation is also provided by Article 395

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¹ As per Article 1 II of the LLG the employment relationship related problems, that are not regulated by this Law or some other special law, are regulated by provisions of the Civil Code of Georgia.

² The Labour Code of Georgia, SSM (Legislative Herald of Georgia), 75, 27/12/2010 (in Georgian).

³ Sakartvelos Parliamentis Utskebani (Reports of the Parliament of Georgia), Legislative Appendix, 1997, №31 (in Georgian).

⁴ German Civil Code, <https://www.gesetze-im-internet.de/englisch_bgb/>, [24.07.2017].

⁵ Under Section 276 I (1) of the BGB, also as under Article 395 I of the CCG, as a general rule, the basis of liability is an intentional or negligent action of a person. *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 153 (in Georgian).

I of the CCG.⁶ This principle applies to cases of both contractual and tort liability,⁷ however in tort law the scope of application of the principle of strict liability is wider owing to the scope of its regulation.⁸

According to CCG the essence of the elements of fault is different from the meaning of similar terms of intent and negligence, applied in criminal law. The foregoing is particularly striking with regard to the concept of negligence.⁹ The degree of violation of reasonable case, characteristic for civil circulation, maybe extremely high (gross negligence) or relatively low (ordinary negligence). Negligence is the most common form of fault in civil law.¹⁰ The same can be said is the case of coverage of injury stemming from labour-law relationships.

2.1 The Scheme of “Pure” Fault-based Liability in Employment Relationships

In the context of labour-law relationships the grounds of liability may become injury, incurred as a result of breach of a pre-contractual obligation or an employment contract, also the liability for the breach of a tort obligation.

2.1.1 Liability for Breach of Pre-contractual Obligations

The solution of the question of liability in the case of breach of a pre-contractual obligation differs from a legal system to legal system. While German law relies on *culpa in contrahendo* principle,¹¹ the French law regulates the problem of injury coverage in the case of breach of pre-contractual relationship on the basis of tort law;¹² however, it can be said, that in both cases the basis of liability is the principle of good faith, which means not only the fact that the parties are required to provide information to each other, but also that they are obliged not to impair the interests of the other party.¹³

Article 317 III of the CCG provides for the imputation of liability for the breach of pre-contractual obligation in the case of faulty action of the other party. Worth mentioning is the implication of the concept of “fault” upon the breach of a pre-contractual obligation. It should be mentioned, that upon breach of a pre-contractual obligation fault can be defined as an action which breaches the provision on duty to exercise reasonable care. A plaintiff is not required to prove an intent. Bad faith action and failure to exercise reasonable care is regarded as a fault.¹⁴

⁶ See: Article 395 I of the CCG, which, unlike parallel provision of the BGB does not directly refer to the application of higher or lower degree of liability, but the stipulation “unless otherwise envisaged” means the admissibility of an exemption from general rule.

⁷ See: Article 992 of the CCG.

⁸ With regard to wider application of the principle of no-fault liability See: *Van Dam C.*, *European Tort Law*, Oxford University Press, New York, 2006, 237.

⁹ If in the definition of an intent the CCG relies on the concept elaborated in criminal law (knowledge of the outcome and desire with understanding of unlawfulness), it makes certain amendments to the concept of negligence. The concept of negligence does not depend on the degree of care, that may be demonstrated by an individually liable person. Negligence in civil law is determined according to impartial scope of claim. See *Zoidze B.*, *Commentary to the Civil Code of Georgia*, Book III, Tbilisi, 2001, 384 (in Georgian).

¹⁰ See: *Zoidze B.*, *Commentary to the Civil Code of Georgia*, Book III, Tbilisi, 2001, 384 (in Georgian).

¹¹ *Culpa in Contrahendo* - was developed by German scholar Jhering, which can be defined as an interstice between contractual and tort law regulating pre-contractual relationship. See: *Sturua N.*, *Compensation of Damage in the Case of Breach of a Pre-contractual Obligation in Labour Law, Employment Law (Collection of Articles)*, I, Tbilisi, 2011, 237 (in Georgian).

¹² According to French law, for the imposition of liability in the case of breach of a pre-contractual obligation all the pre-conditions necessary for the application of tort liability should be present, amongst them, the existence of fault. The fault should be essential and unconditional. See: *Sturua N.*, *Reimbursement of damage caused by breach of a pre-contractual obligation in Employment Law, Employment Law (Collection of Articles)*, I, Tbilisi, 2011, 272 (in Georgian).

¹³ See: *Sturua N.*, *Reimbursement of Damage Caused by Breach of a Pre-contractual Obligation in Employment Law, Employment Law (Collection of Articles)*, I, Tbilisi, 2011, 237 (in Georgian).

¹⁴ *Nedzel N.E.*, *A Comparative Study of Good Faith, Fair Dealing and Precontractual Liability*, *Tulane European and Civil Law*, Vol. 12, 1997, 6, <<http://heinonline.org>>, [20.06.2017].

However, some authors regard a party to a contract, which is liable to compensate damages due to breach of pre-contractual obligation as a bad faith party.¹⁵ What is more, some believe, that in the case, envisaged by Article 317 III of the CCG, a “faulty action” is equal to “bad faith action”.¹⁶

There is no exact analogue of Article 317 III of the CCG in BGB. Section 311 of the BGB provides for liability for a breach of pre-contractual obligation, however with regard to fault for the breach of obligation BGB makes reference to Sections 276-278.¹⁷

For the breach of obligation envisaged by Article 317 of the CCG, the damages mainly cover the interest related to infringement and legal trust. In labour law, worth mentioning is the question of discrimination in the light of breach of pre-contractual obligation. Despite the absence of contractual binding the persons engaged in negotiation are regarded as parties. Initiation of negotiations aiming at the execution of a contract gives rise to relationship based on contractual trust.¹⁸ Respectively, in the case of discrimination during pre-contractual phase, an aggrieved party may claim compensation for property damage in accordance with Article 294 I of the CCG,¹⁹ and in the case of violation of personal rights - compensation can be claimed both for property and non-property damage under Article 18 VI of the CCG. In both cases, the precondition for the success of a claim is good justification of faulty action.²⁰

According to general principle prescribed by the Code of Civil Procedure of Georgia, in the case of a dispute for compensation of damages caused by a discriminatory question, the burden of proof is vested with the aggrieved party as the LCG does not provide for a different procedure, what places a candidate in an unfavourable position in the light of specificities of employment relationships.²¹

2.1.2 Liability for Breach of Contractual Obligations

Under BGB an employer is liable for injury incurred to an employee in the course of performance of work, only when breaches obligation intentionally or by negligence, which obligation implies the provision with safe working environment, equipment and working materials, also when he does not undertake preventive measures to protect the health and life of an employee. The foregoing is a derivative obligation of an employer, which stems from an employment contract and is regulated by Section 618 of the BGB.

¹⁵ Comp. *Chanturia L.*, Commentary to the Civil Code of Georgia, Book III, Tbilisi, 2001, 51 (*in Georgian*). Comp. Also *Ioseliani A.*, Principle of Good Faith in Contract Law (Comparative Law Study), Georgian law Review, special edition, Tbilisi, 2007, 40 (*in Georgian*), where the author directly states, that “it would have been more reasonable for Article 317 III of the CCG to mention the concept of “bad faith action” instead of the vague one - “faulty action””.

¹⁶ See: *Ioseliani A.*, Principle of Good Faith in Contract Law (Comparative Law Study), Georgian law Review, special edition, Tbilisi, 2007, 40 (*in Georgian*).

¹⁷ *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 198 (*in Georgian*).

¹⁸ See: *Kereselidze T.*, Legal Consequences of Discriminatory Question of Employer to a Candidate Before Conclusion of Employment Contract, Employment Law (Collection of Articles), I, Tbilisi, 2011, 221 (*in Georgian*).

¹⁹ If a candidate was rejected due to her pregnancy and she hoped that she would get that job because of her qualification, experience and best compatibility with the announced vacancy as compared with the other candidates and owing to the foregoing she rejected an alternative proposal, the aggrieved party is entitled to demand the compensation of property damage incurred owing to discriminatory circumstances, what according to German literature, is admissible within the limits of the amount of wages before the first hypothetical termination of employment contract. See: *Kereselidze T.*, Legal Consequences of Discriminatory Question of Employer to a Candidate Before Conclusion of Employment Contract, Employment Law (Collection of Articles), I, Tbilisi, 2011, 224 et seq. (*in Georgian*).

²⁰ See: Articles 18 VI, 413 I of the CCG.

²¹ Comp. *Kereselidze T.*, Legal Consequences of Discriminatory Question of Employer to a Candidate Before Conclusion of Employment Contract, Employment Law (Collection of Articles), I, Tbilisi, 2011, 221 (*in Georgian*). “In Germany the content of Article 22 of the Law on Equal Treatment evidences, that if in the case of a dispute a party proves sufficient grounds to doubt discriminatory circumstance, the other party will be vested with the burden to prove the absence of inconsistency with non-discrimination provisions. The foregoing simplifies referral to a court of law and proof of the statement of claim for a discriminated person.”

Injury incurring to an employee by an employer is subject to requirements stemming from the breach of a contract (§280).²² The provisions on tort liability may also apply. Insofar as injury is incurred within the framework of company activities delegated upon an employer, the account should be taken of the fact, that the organization of company activities has a major impact on the risk of employee's liability.²³

In the case of breach of duty, stemming from an employment contract, the principle of fault-based liability applies as a general rule. Specifically, except for the termination of an employment contract on grounds, envisaged by law, an employee may demand his reinstatement in a job and reimbursement of forced idleness caused by loss of work.²⁴ In the case of satisfaction of an action, grounds for claiming damages is the idleness of an aggrieved party by fault of an employer.²⁵

2.1.3 Liability for Breach of Tort Obligation

The grounds for tort liability in labour-law relationships is the breach of statutory rule,²⁶ or strict liability owing to increased risk, Article 992 et seq. of the CCG do not provide for special regulation of fault insofar as statutory obligations are regulated by Article 992 of the Civil Code and other grounds of claim under tort law, in such cases the provisions regulating obligations, stemming from a contract, additionally apply - as Article 992 et seq. of the Civil Code do not provide for otherwise regulation.²⁷ Hence in the case of fault, the first paragraph of Article 395 may apply, under which paragraph a person inflicting damage is liable both for intentional and negligent behaviour.²⁸

Apart from being a contractual obligation, provision with safe working environment and conditions is a statutory duty of an employer. This fundamental rule, related to the life and health of an employee, is contained in more than one public acts,²⁹ as this duty has already become a part of public law, which can be presumed as a standard, accurately describing the breach of contractual duty according to Section 618 I of the BGB.

Apart from contractual liability, an employer is required to create safe working environment and protect employees and consumers against risks again under the tort law.

²² *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 460 (in Georgian).

²³ *Ibid.*

²⁴ According to the interpretation of the Tbilisi Appeals Court, "Forced idleness is also the situation, when as a result of unlawful termination of employment contract an employee is deprived of the possibility to perform his/her contractual duties as, at the same time, there exists the will of an employee to perform his/her contractual duties and receive respective remuneration. Consequently, the period from unlawful termination of an employment contract until the reinstatement to job is regarded as forced idleness, caused by fault of the employer. The Appeals Court also explained that invalidation of the grounds of an employment contract, in the light of consequences, results in the restitution of the situation existing before the invalidation of the contract and compensation of damages incurred to an employee by an employer through unlawful dismissal thereof. Respectively, in the light of Articles 408 and 411 of the LCG reinstatement to a job and compensation for forced idleness are the legal consequences of unlawful actions of an employer." See: Ruling of the Supreme Court of Georgia on October 10, 2014 on Case №AS-762-730-2014 (in Georgian).

²⁵ See: LCG, Article 32.I.

²⁶ In tort law a breach of statutory rules provides for the application of the principle of strict liability instead of the principle of fault-based one. See: *Van Dam C.*, European Tort Law, Oxford University Press, New York, 2006, 237.

²⁷ *Luttringhaus P.*, Tort Law, Tbilisi, 2011, 18 (in Georgian).

²⁸ To assess the fault of a person it is necessary to undertake an objective test, where the general standard of reference is a neutral, reasonable person. In private law, unlike criminal law, fault is not defined individually, from the viewpoint of a person inflicting damage as in the case of an injury, the tort law is not about punishing someone, but rather the compensation of injury. Also important is the social goal, meaning acting in compliance with adequate behavioural standard dominating in the society and the one who neglects this standard pays for this breach. See: *Van Dam C.*, European Tort Law, Oxford University Press, New York, 2006, 221.

²⁹ Health and Safety at work Act, §3, <<http://www.legislation.govt.nz>>, [20.07.2017].

According to BGB a breach of a statutory duty becomes grounds for compensation of injury only when an aggrieved party belongs to defined class, protected by law.³⁰ For example in the case of *Hartley v. Mayoh & Co* a fireman was killed by electrocution while fighting a fire at the factory. The court of law has not satisfied the action of fireman's widow against the owner of the factory, which action was based on the breach of safety rules on the part of the owner. The court held that such safety rules aim at the protection of safety of the employees and not that of the firemen. Hence, the widow's action, which was based on the breach of statutory rule, was dismissed, however the court of law satisfied the tort action, based on negligence. It is also important for the breached interest of a person to fall within the scope of protective rule.³¹

As established by German judicial practice, if a defendant breached a statutory rule, and this rule prescribed a special standard of conduct,³² it is presumed, that the defendant acted negligently. In his turn, the defendant can rebut this presumption by proving that he did not act negligently.³³

In its Recommendations the Supreme Court of Georgia considers neglect or inadequate performance of the requirements of labour law, labour protection rules, regulations and other normative acts as a faulty behaviour of a company. Respectively, the employer is to fully cover incurred injury.³⁴

Injury inflicted to life and health of an employee in the course of employment is regarded as a breach of absolute rights and thus, the action, as a general rule, is regarded as a tort. Consequently, the person, who committed the action, is required to prove the lawfulness of his actions.³⁵ This legal relationship is still a liability arising through infliction of injury (tort), insofar as a liability is a consequence of breach of absolute civil rights, it is of non-contractual nature and aims at compensation of injury inflicted on non-property wealth (life and health). Based on the foregoing all the principles, distinctive of a tort liability applies to these legal relationships and it is necessary for a causal link to exist between the fault of the perpetrator and inflicted injury and action - grounds prescribed for the origin thereof.

Coverage of psychological injuries also fall within the scope of tort liability. In some systems the obligation to compensate exists only when the psychological injury is a result of physical injury. Under the legislation of some states the precondition for compensation is for the psychological injury to stem from the same accident as the physical injury.³⁶ According to BGB, as a general rule, only the injured person is entitled to claim compensations. There are only two exemptions from this rule, that are prescribed by Sections 844-845. As for the shock suffered by a relative due to the fact, that he/she became the witness or unexpectedly became known of the injury or death of a person, this exemption is created by judicial practice.

The Majority of the USA states denies recovery for stress-induced psychological injuries unless the injuries are caused by extraordinary or unusual stress.³⁷ Barriers for compensation of psychological injuries are necessary to prevent sham actions. For example, in the case of *Bedini v. Frost* the Vermont Supreme Court imposed

³⁰ See: Section 823 II of BGB.

³¹ Comp.: In French tort law violation of a written legal rule does not additionally require the proof of fault, the breach of interests, protected by law is quite sufficient. The argument is that the purpose of statutory rules is the protection of the persons in general, i.e. the class of persons is not specified, respectively it applied to any person. Statutory duties are absolute ones. However, this absoluteness is limited by the requirement to prove causal link. See: *Van Dam C.*, European Tort Law, Oxford University Press, New York, 2006, 245.

³² *Van Dam C.*, European Tort Law, Oxford University Press, New York, 2006, 245.

³³ Ibid.

³⁴ See: Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, 88-99, <<http://www.supremecourt.ge>>, [20.07.2017] (in Georgian).

³⁵ *Lutringhaus P.*, Tort Law, Tbilisi, 2011, 16 (in Georgian).

³⁶ *Janutis R.M.*, The New Industrial System Crisis: Compensating Workers For Injuries In The Office, Loyola of Los Angeles Law Review, 2008-2009, 39, <<http://heinonline.org>>, [20.06.2017].

³⁷ Extraordinary or unusual stress is a stress that is of a greater magnitude than the ordinary stress distinctive for the workplace in general. In the case of compensation of a psychological injury, unlike ordinary physical injury, problematic is the difficulty with diagnosing. See: *Janutis R.M.*, The new Industrial System Crisis: Compensating Workers For Injuries In The Office, Loyola of Los Angeles Law Review, 2008-2009, 41, <<http://heinonline.org>>, [20.06.2017].

a heightened standard of proof on workers seeking benefits for psychological injuries. The court concluded that such a heightened standard was reasonable because of the greater uncertainty in the diagnosis of such injuries.³⁸ There is another, no less bitter problem along with diagnosing: Is the psychological injury always caused by employment-based stress? This question is particularly pressing with regard to psychological stress developed under the influence of permanent employment-based stress, than injury caused by unexpected stress factor. As a general rule, the risk of suffering a psychological injury is commonly borne by an employee on a daily basis unlike the system of compensation of employees, where the employee never bears a risk caused by health injury at a workplace, even in everyday and ordinary situation.

2.2 Contributory Negligence - Apportionment of Liability

Contributory negligence is an exemption from the general scheme of fault-based liability insofar as it, as a general rule,³⁹ causes the distribution of liability pro rata to the fault of the person, causing injury.⁴⁰ Article 415 of the CCG, like Section 254 of the BGB concerns cases when full compensation of injury is limited.

The implication of the principle of contributory negligence is mainly manifested in the assumption of risk, however in labour-law relationships the meaning of contributory negligence is somewhat different. For example, this difference, in cases when an injury is inflicted on an employee by an employer, is conditioned by employer's duty to organize company management. The foregoing results in the assumption of liability risks.⁴¹ Under Section 254 of the BGB the principle of contributory negligence applies.

The rule of assumption of liability is not limited to cases, when industrial jeopardy is evident or the risk is increased, respectively, the risk of injury should be assumed both by the employer and the employee, accounting for all the circumstances.⁴² However, it should as well be taken into consideration, that the degree of negligence plays an important role in the determination of employee's liability.⁴³

³⁸ It should be mentioned that in 1980 the Association of American Psychiatrists developed the criteria of accurate diagnosis for those mental disorders, that may develop in the course of employment, See: *Janutis R.M.*, The new Industrial System Crisis: Compensating Workers For Injuries In The Office, *Loyola of Los Angeles Law Review*, 2008-2009,42, <<http://heinonline.org>>, [20.06.2017].

³⁹ In Roman Law contributory negligence would deprive an injured party the possibility to claim damages. To this end the account was taken even of ordinary negligence. See: *Shudra T.*, Responsibility of an Employer for the Damages caused by Employee, *Employment Law (Collection of Articles)*, II, Tbilisi, 2013, 254 (in Georgian).

⁴⁰ The doctrines of contributory negligence and assumption of the risk limited workers' ability to recover against their employers in tort suits for workplace injuries. The doctrine of contributory negligence completely barred recovery if the injured worker was determined to have been negligent in any way. Recovery was also barred under the doctrine of assumption of the risk if the worker either reasonably knew or could have been expected to know about the risk of injury. Not surprisingly, most workers were unable to recover damages. Due to this reason the doctrines of contributory negligence and assumption of the risk almost disappeared. See: *Forte G.*, Rethinking America's Approach To Workplace Safety: A Model for Advancing Safety Issues in the Chemical Industry, *Cleveland Law Review*, 2005-2006, 517, <<http://heinonline.org>>, [20.06.2017].

⁴¹ *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 460 (in Georgian).

⁴² *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 460 (in Georgian).

⁴³ According to judicial practice of Federal Labour Court of Germany, employer's claim against a worker for ordinary (light) negligence is fully excluded; in the case of moderate negligence the injury is apportioned according to quotas, taking account of specific circumstances, and in the case of gross negligence, as a general rule, a worker is held fully liable. An exemption from this rule is the situation, when there is a gross incompatibility between the income (wages) of a worker and the risk of injury For details See: *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 460-461 (in Georgian).

As regards the injury of worker's health at a workplace, unlike workers' compensation system,⁴⁴ the court takes account of worker's fault upon the determination of damages.⁴⁵

According to the interpretation of the Supreme Court of Georgia in the case of contributory negligence "The existence of company's fault in the infliction of injury is already the grounds for company liability. The existence of employee's fault is the grounds for the reduction of the amount of recovery and not company's exemption from the liability."⁴⁶

The principle of contributory negligence operates in the case of plaintiff's (injured party's) suits against an independent contractor or a company. If the court finds that both were proximate causes of the plaintiff's injury, the liability will be apportioned pro rata to the fault.⁴⁷

No less important is the principle of contributory negligence with regard to Article 997 of the CCG as well. If the fault of injured party is apparent, this will influence the degree of employer's liability.⁴⁸

2.3 Vicarious Liability

A tort committed by an employee within the scope of his/her employment gives rise to employer's vicarious liability for faulty behaviour of the other person (employee). The rationale underpinning this principle is not fault theory, but rather the fact, that there is a contractual relationship between an employer and an employee, within the framework of which relationship the employer gets benefits from the performance of the employee.⁴⁹ At the same time, the latter, being the strong party of employment relationship is in the better position to bear the expenses. It is worth mentioning, that vicarious liability traditionally arises where an employee commits a tort within the scope of his or her employment.⁵⁰

The rationale underpinning employer's liability for faulty behaviour of an employee is the subordination principle, and more specifically - the right to control and direct. This is the difference between employment

⁴⁴ The workers' compensation system is based on strict liability system. In the USA it dates back to 1910. According to this system employers assume liability for workplace injuries from the very outset to automatically provide with compensation for workplace injuries, regardless of the employee's fault. According to this very feature workers' compensation system works much like a contract between workers and their employers in which workers give up their rights to sue in return for access to adequate compensation.

⁴⁵ According to the law of some USA states (e.g. Arizona, Arkansas, Colorado, Georgia, Idaho, Nebraska) if a plaintiff (injured party) is found to be 50% negligent, he recovers nothing, while a plaintiff who is found to be 33.3% negligent recovers 66.6% of his/her damages. See: *Burns J.J.*, *Respondeat Superior as an Affirmative Defence: How Employers Immunize themselves from Direct Negligence Claims*, Michigan Law Review, 2010-2011, 665, <<http://heinonline.org>>, [20.06.2017].

⁴⁶ Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, 88-99, <<http://www.supremecourt.ge>> (in Georgian).

⁴⁷ See: *Burns J.J.*, *Respondeat Superior as an Affirmative Defence: How Employers Immunize themselves from Direct Negligence Claims*, Michigan Law Review, 2010-2011, 669, <<http://heinonline.org>>, [20.06.2017].

⁴⁸ The position of the Supreme Court of Georgian with regard to damages for injuries inflicted to employee's health takes account of the degree of company's fault upon determination the amount of payable damages. In the case of contributory negligence the existence of the fault of the injured party becomes grounds for the reduction of damages and not for company's exemption from liability. Essentially the same may apply to vicarious liability as we. Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, 89, <<http://www.supremecourt.ge>>, [20.07.2017] (in Georgian).

⁴⁹ *Neild D.*, *Vicarious Liability and the Employment Rationale*, 2013, 707, <<http://heinonline.org>>, [20.06.2017].

⁵⁰ Determination of the "scope of employment" is very important for the imposition of liability to the employer. In Germany a tort is regard as committed within the scope of employment, when an employee was performing assigned duties when inflicting damage. See: *Markesines B.S., Unberath H.*, *The German Law of Torts, A Comparative Treatise*, Hart Publishing, Oxford, 2002, 696. In its Recommendations, the Supreme Court of Georgia explains, that "an official duty may be the duty, delegated upon an individual on the basis of a normative act, employment contract or an assignment of the administration." For details See: Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, 89, <<http://www.supremecourt.ge>>, [20.07.2017] (in Georgian).

relationship and an independent contractor case⁵¹ and contract of hiring work, where a principal is not entitled to control the work to be performed by the contractor.

In its interpretation of Article 997 of the CCG the Tbilisi Appeals Court states, that the precondition for application of this Article, along with general preconditions of imposition of damages, is the employment (or contractual) relationship with the defendant. It is worth mentioning that fault, the existence of which is the mandatory precondition for damages, should be committed by a company employee and not the company itself.⁵²

Worth mentioning is German law regulation, which unlike CCG, focuses on employer's fault instead of that of the other person (employee).⁵³ Employer's fault is manifested in his negligence while selecting the performer of the assignment or inadequate control of the employee's performance. The peculiarity of liability is that the fault of a principal upon selection of a performer and his connection with the occurrence of injury is presumed.⁵⁴

It is of interest whether Article 997 can be applied in the context of contract of hiring work, moreover the wording of Article 997 of the CCG contains the phrase "while performing official duties".⁵⁵

A person, liable to compensate damaged incurred as a result of unlawful action of his worker, can be both legal or natural person (employer).⁵⁶ In this case a natural person employer may be a sole entrepreneur. An employer is liable for his/her fault and not for that of some other person.⁵⁷ In this case the performance of a worker should be regarded as the performance of the employer himself.⁵⁸ It should be mentioned, that BGB uses the term "employee (in the meaning of jobholder)" (Arbeitnehmer). Word-for-word interpretation of this Article and assumption of an employee only as a party to employment relationship would have limited the scope of application of this provision. The scope of application of the Article extends to relationships similar to employment one, which may arise even outside employment relations, e.g., within a family.

In German law the term "employee" implies any person who is hired by another person for the performance of some activity, and the former falls under the influence an "employer" and becomes subordinated thereto to some extent.⁵⁹ Typical for these relationship is that the auxiliary person depends on "master's" directions. With such employed persons one faces direction-dependent relationship. An auxiliary cannot be an independently operating company.

For Article 997 to apply the fault of an auxiliary/employee/worker should be evident. Respectively, in cases envisaged by Article 997 of the CCG the burden of proof of non-faultiness of an auxiliary/employee/worker is vested with the employer.⁶⁰

Under Section 831 of the BGB employer's liability is not strict and absolute. He possessed two defences: firstly, he is not liable if he proves that he has exercised reasonable care in the selection of an employee, and in

⁵¹ Independent Contractor.

⁵² Decision of the Supreme Court of Georgia, December 16, 2013, Case №as-660-627-2013, Available at: <<http://prg.supremecourt.ge/DetailViewCivil.aspx>> (in Georgian).

⁵³ The wording of Para. 1 of Section 831 of the BGB is as follows: A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised." *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 653 (in Georgian).

⁵⁴ See: *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 653 (in Georgian).

⁵⁵ Comp.: Article 997 of the CCG "A person shall be bound to compensate the harm caused to a third person by his employee's unlawful act when the latter was on duty. The liability shall not accrue if the employee acted without fault."

⁵⁶ *Akhvlediani Z.*, Law of Obligations, Tbilisi, 1999, 267 (in Georgian).

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, 27

the procurement of tools and the supervision of the employee. Secondly, he is not liable if the injury would have also been caused if he had taken such reasonable care.⁶¹ Hence, Section 831 implies a negligence liability with reversed burden of proof.⁶²

The Courts generally require the employer to act with high level of care which, in fact, causes Section 831 in its application to be close to a rule of strict liability.⁶³ It should as well be mentioned, that if employer's liability is also established, e.g., the employer hired a worker, who is an alcohol addict and it is typical for him to through things down from scaffold holding, then employer's personal liability will additionally arise, this time, under Article 992 of the CCG.⁶⁴

2.3.1 Main Factors Providing for Employer's Liability

2.3.1.1 Element of Subordination

The element of subordination is one of the major argument for imposition of liability upon an employer.⁶⁵ The right to give directions to an employee and control his/her performance stems right from the principle of subordination, what, in its turn, creates grounds for employer's liability.⁶⁶ However, the right to control is rather broad in itself, hence the application of control test with regard to certain occupations (doctors, ship captains) is somewhat limited.⁶⁷

There are counterarguments against the application of the element of subordination as the main ground of liability. Specifically, when an employer employs the other person's employee for the performance of his activities, is he able to apply the subordination mechanism to full extent or not? Some jurisdictions, e.g. the UK believe, that the right to dismiss an employee is a part of subordination, what is really impossible in the case of other person's employee.⁶⁸ In Germany the resolution of a dispute depends on whether which employer was able to exercise control and give directions.⁶⁹ Unlike the foregoing French judicial practice delimits according to the field of activities of the workers and defines the employers' liability on the basis of the foregoing.⁷⁰

⁶¹ *Van Dam C.*, *European Tort Law*, Oxford University Press, New York, 2006, 448.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Luttringhaus P.*, *Tort Law*, Tbilisi, 2011, 27 (in Georgian).

⁶⁵ The analogue of the principle of subordination in common law system is the so-called a "control text".

⁶⁶ According to French law an employer is responsible not only for control, but also for incorrect selection of an employee. In the first case the employer would have always been able to prove, that he exerted adequate control however, it is far more difficult to prove anything with regard to selection. See: *Shudra T.*, *Responsibility of an Employer for the Damages caused by Employee*, *Employment Law (Collection of Articles)*, II, Tbilisi, 2013, 216 (in Georgian).

⁶⁷ See: *Zweigert K., Kotz H.*, *Introduction to Comparative Law*, Vol. II, Tbilisi, 2002, 330 (in Georgian).

⁶⁸ See: *Shudra T.*, *Responsibility of an Employer for the Damages caused by Employee*, *Employment Law (Collection of Articles)*, II, Tbilisi, 2013, 218 (in Georgian).

⁶⁹ See: Section 831 of the BGB.

⁷⁰ "If a freight forwarder lends its driver to a construction company for some earthwork, the employer's liability depends on whether the injury was incurred through the breach of driving rules or incorrect unloading of the truck body. In the first case the liability is borne by the company, whilst in the second one - by the construction company as it was its personnel who managed and supervised the unloading". See: *Zweigert K., Kotz H.*, *Introduction to Comparative Law*, Vol. II, Tbilisi, 2002, 327 (in Georgian).

2.3.1.2 Opportunity to Gain the Economic Benefit

One of the grounds of employer's liability is the opportunity to derive economic benefit as a result of employee's performance, however this opinion can be justified with regard to those employers whose activities are related to gaining the economic benefit.⁷¹

The alternative theory, according to which the better solvency of an employer is the grounds for employee's action, is worth mentioning and rather persuasive right in the context of an employer oriented on gaining benefit.⁷²

2.3.1.3 Respondeat Superior Doctrine

It is of interest whether or not the *respondeat superior* Doctrine is the sole grounds against faulty action of an employee and if there is some alternative, which, in its turn, taken by itself will be sufficient for the imposition of liability on the employee.⁷³ Can negligent entrustment, displayed in the course of selection of an employee, becomes independent ground for *respondeat superior* liability?⁷⁴ However, focusing on this issue contradicts the theory of comparative fault. In this case the court will be induced to take account of the employer's liability and ignore its proximity cause.

Many of courts believe, that negligent entrustment is just another way to find an employer vicariously liable for an employee's conduct, and regard it as an independent ground for liability based on this argument.⁷⁵

According to comparative negligence doctrine,⁷⁶ in the case of a car accident, when there is a plaintiff driver on the one part and a defendant (employed driver) on the other, their faults are compared as proximate causation stems from their behaviour. Insofar as the basis of employer's liability is the employee's fault, the negligence of the employer upon selection of a driver is of no importance within the framework of comparative negligence doctrine.⁷⁷ All the aforementioned proves that employee's fault is the basis of employer's vicarious liability; however, employers fault is not taken into consideration in the case of contributory negligence.

No action against an employee is admissible without employee's faulty behaviour. But the only reason of the foregoing is that the absence of employer's liability excludes proximate causation. As regards negligent entrustment, this is the direct basis of employer's fault-based liability. It is not necessary for an employer, who is vicariously liable for faulty behaviour of the employee, to be also at fault himself. His liability is conditioned by the fact, that this happened within the scope of employment,⁷⁸ and the conduct of business places him in a

⁷¹ *Qui sentit commodum debet sentire et onus* – "He who derives a benefit ought also to bear a burden." Cited from: *Zweigert K., Kotz H.*, Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 335 (in Georgian).

⁷² See: *Shudra T.*, Responsibility of an Employer for the Damages caused by Employee, Employment Law (Collection of Articles), II, Tbilisi, 2013, 223 (in Georgian).

⁷³ *Burns J.J.*, Respondeat Superior as an Affirmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 665, <<http://heinonline.org>>, [20.06.2017].

⁷⁴ *Ibid.*

⁷⁵ Basis of responsibility is the owner's own negligence in permitting his motor vehicle to become a dangerous instrumentality by putting it into a driver's control with knowledge of the potential danger existing by reason of the incompetence or reckless nature of the driver. See: *Burns J.J.*, Respondeat Superior as an Affirmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 665, <<http://heinonline.org>>, [20.06.2017].

⁷⁶ Comparative Negligence Doctrine.

⁷⁷ See: *Burns J.J.*, Respondeat Superior as an Affirmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 667, <<http://heinonline.org>>, [20.06.2017].

⁷⁸ According to the interpretation of the Supreme Court of Canada in the case of *Vazleys v. Curry*, insofar as the employer created the risk, enforced by the employee, it will be fair for the employer to pay damages incurred as a result of realization of the risk. Comp.: *Shudra T.*, Responsibility of an Employer for the Damages caused by Employee, Employment Law (Collection of Articles), II, Tbilisi, 2013, 221 (in Georgian).

more favourable condition as compared with the employee.⁷⁹ If compared with fault for negligent entrustment, here the focus of the claim is the fault of the employer.⁸⁰

2.3.2 Legal Status of an Employee

An employee does not mean only a person employed within the frame of employment relationship. The term has broader meaning for the purposes of Article 997 of the CCG. The persons working in a household are also regarded as employees owing to the possibility to give them directions and control their performance. It is of interest whether which criteria are taken into consideration for the determination of the status of an employee in cases, when the scope of application of control test is minimised. In this respect mentioned should be made of the category of highly-qualified workers, who are more like contractors owing to high level of independence demonstrated thereby in the course of performance of their activities, however it is the employer who makes decision about their leave, working schedule. The principle of subordination is revealed in this manner in relationships like that.⁸¹

This category of employees does not include the sole entrepreneurs, who personally decide upon the course of their performance even in the case of fulfilment of detailed assignment of an employer.

2.3.3. Principal's Non-delegable Duty

Insofar as the existence of the element of subordination is one of main factors of delimitation between the legal statuses of a contractor and an employer. Organizational independence and ability to perform own activities independently and without directions makes a contractor liable for own faulty behaviour. However, exempted from this rule is employer's non-delegable duty, which excludes contractor's liability.

The context of non-delegable duty allows for the employer to be held liable for injury inflicted by an independent contractor, similar to compensation of injury inflicted by an employee. The situation is different to the extent that an independent contract does not fall within the scope of the concept of an employee.

Given to its nature, non-delegable duty cannot be assigned to any other person. In the case of *Lewis v. British Columbia*⁸² the Canadian Supreme Court held liable the Ministry of Transportation and highways for injury inflicted by contractor company, engaged to remove rocks from a cliff bordering a highway. The work was done negligently and one of the remaining rocks fell and killed a passing motorist. Because the work was done by contractor company and not by the Ministry employees, the court held that the Ministry was not vicariously liable. The court regarded repair works conducted to the highway as non-delegable duty of the Ministry and respectively considered the action as a negligence on the part of the Ministry regardless the fact, that the works were done by an independent contract and not the employee. The main rationale of the court underpinning the imposition of non-delegable duty was that Ministry derived its powers to repair the road from statute and the non-delegable duty arose from the statutory framework.⁸³

⁷⁹ See: *Burns J.J.*, Respondeat Superior as an Affirmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 668, <<http://heinonline.org>>, [20.06.2017].

⁸⁰ The same approach is taken in the case of negligent entrustment, for breach of duty to adequate care, proof of employer's fault results in his direct and vicarious liability. For details See: *Burns J.J.*, Respondeat Superior as an Affirmative Defence: How Employers Immunize themselves from Direct Negligence Claims, Michigan Law Review, 2010-2011, 668, <<http://heinonline.org>>, [20.06.2017].

⁸¹ *Shvelidze Z.*, Characteristics of Legal Status of Employee According to the Labour Code of Georgia, Employment Law (collection of articles), I, Tbilisi, 2011, 93.

⁸² See: *Neild D.*, Vicarious Liability and The Employment Rationale, 2013, 711, <<http://heinonline.org>>, [20.06.2017].

⁸³ *Ibid.*

Under a contract for works “a principal bears not a common duty of care, but rather more strict duties, proving that the duty of care is taken”.⁸⁴ A principal is liable only when delegating the fulfilment of “abnormally dangerous works” upon a contractor.⁸⁵

2.3.4 The Scope of Employment

The precondition of application of Article 997 of the CCG is inflicting injury on a third person by an employee in the course of employment.⁸⁶

The analysis of judicial practice is of particular importance for the determination of the scope of the course of employment.⁸⁷ Employee’s trip to his/her workplace and back - to his/her home is not related to the course of employment and consequently, an employer is not liable for any accident that may happen during this period. As regard the case, when a worker receives wages after the accomplishment of work and injures a colleague by negligence on the territory of the enterprise, it is presumed that a tort is committed in the course of employment.⁸⁸

The fact that injurious action was committed directly on the territory of employer’s enterprise, does not mechanically allows for the presumption, that there might be the preconditions for application of Article 997 of the CCG. Furthermore, it is not mandatory for an action to breach official duty, it is sufficient for it to be done in the course of employment and what is more, should be related to the essence of job to a certain extent. For example, smoking during working hours, what results in braking out of fire - if the worker’s duty is to perform fire-related tasks, to what end special safety rules should be followed, the liability will be borne by the entrepreneur, as he/she assigned tasks to his/personnel, which were associated with major fire risk.⁸⁹

According to Recommendations of the Supreme Court of Georgia “A car accident involving a vehicles allocated by company is regarded as an industrial accident. Awarding a free travel ticket, or other travel benefits for taking specific transportation means does not mean the allocation of a vehicle.”⁹⁰

According to German law the mandatory precondition for application of Section 831 of the BGB is inflicting injury by a deployed person in the course of performance of assigned duties.⁹¹ According to judicial practice of general courts it is still the course of employment when an employed person proceeds with the fulfilment of commercial purposes of the employer.⁹²

There is quite a number of cases of broad interpretation of Article 997 of the CCG in judicial practice of the Supreme Court of Georgia, when the Court rules that the injury of an employee himself (injured party) in the course of employment is a precondition for application of Article 997 without taking account of the fact, that grounds for liability under Article 997 of the CCG is inflicting an injury on a third person by an employee (a

⁸⁴ See: *Zweigert K., Kotz H.*, Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 332 (in Georgian).

⁸⁵ “The fault of a contractor, engaged in construction works, breaking down the buildings, assembling appliances, spraying pesticides from aircrafts, explosive works, laying high-voltage cables or oil pipelines nearby the highways with intensive traffic, will be imposed on the other person who entrusted the fulfilment of these “ultra-hazardous activities” upon the contractor”. See: *Zweigert K., Kotz H.*, Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 333 (in Georgian).

⁸⁶ Under Section 831 of the BGB “A person deployed to perform a task is required to act in compliance with the instruction, and the principle continuously defines the type, content and scope of the activity.” For details See: *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 655 (in Georgian).

⁸⁷ In the course of employment.

⁸⁸ See: *Zweigert K., Kotz H.*, Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 330 (in Georgian).

⁸⁹ Ibid.

⁹⁰ See: Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, p.89, <<http://www.supremecourt.ge>>, [20.07.2017] (in Georgian).

⁹¹ See: *Zweigert K., Kotz H.*, Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 323 (in Georgian).

⁹² Change of the route by a hired driver of a trailer under the pretext of taking freight to the place of destination on time, what results in an accident and injury of a pedestrian, will be presumed to be committed in the course of employment. See: *Zweigert K., Kotz H.*, Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 320 (in Georgian).

tort is always committed by an employee). Respectively, there are at least three parties to the above dispute: an injured party (a third person), an employee and an employer.⁹³

2.3.5 Fault - a Precondition of Employer's Regressive Claim

Whereas an employer is entitled to make an employee return paid remuneration in terms of a regressive claim, if we assume the presumption of the necessity of employer's fault, the possibility of raising regressive claim may cause unfair consequences for an employee.

Under common law, the right of an employer to regression is not limited to some specific form of fault of an employee,⁹⁴ whilst under German judicial practice⁹⁵ an entrepreneur is required to exempt a worker from liability when the latter caused damage through ordinary negligence.⁹⁶ The reason of the foregoing is said to be the risk of employer's business-activity.⁹⁷

2.3.6 Liability for Agent's/Auxiliary's Actions

Article 396 of the CCG provides for liability of an obligor for his representative or a person he employs for the performance of his obligations. In this case as well the wording of the Article is *prima facie* similar to the composition, prescribed by Article 997 of the CCG and the principle of vicarious liability applies. However there still is a difference.

The case envisaged by Article 396 of the CCG is the demonstration of distribution of actions, to be performed on the basis of an obligation, between an obligor and an auxiliary person, when the actions of an auxiliary is regarded as those of the obligor. "Insofar as (contractual) obligations do not directly refer to auxiliary persons, as non-obligors, the attention should be focused on the personality of the obligor when establishing the scope of either the liability or reasonable care. As auxiliary person is liable only for actions outside the scope of reasonable care."⁹⁸

For the purposes of Article 396 of the CCG the social dependence or accountability of an auxiliary person is not a determinant criterion unlike Section 831 of the BGB; also of minor importance is the extent of influence an obligor may have on the performance of an auxiliary person (through control or supervision).

In the case of section 831 of the BGB, when an auxiliary person is in breach of own duties, he is personally committing a tort.

Some scholars believe, that in cases, envisaged by Article 396 of the CCG the obligor's liability is prescribed brought about by his fault, manifested in the failure thereof to demonstrate reasonable care during the selection of an agent or a conveyor of his will and to duly supervise them.⁹⁹

2.4 . Shifting the Burden of Proof

These days, the elements of fault-based and strict liability have so assimilated, that it is rather difficult to make a strict delimitation between them. Their explicit division into two different systems has become obsolete for a long time now. The legislators and judiciary aim at striking balance between the elements of fault-based and strict lia-

⁹³ See: Ruling N BS-1156-1156-118 (K-08) of the Chamber of Administrative and Other Cases of the Supreme Court of Georgia, dated December 11, 2008.

⁹⁴ See: *Zweigert K., Kotz H.*, Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 331 (in Georgian).

⁹⁵ Comp. Section 840 (2) of the BGB.

⁹⁶ *Shudra T.*, Responsibility of an Employer for the Damages Caused by Employee, Employment Law (collection of articles), II, Tbilisi, 2013, 221 (in Georgian).

⁹⁷ See: *Zweigert K., Kotz H.*, Introduction to Comparative Law, Vol. II, Tbilisi, 2002, 326 (in Georgian).

⁹⁸ Cit. *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 157 (in Georgian).

⁹⁹ See: *Amiranashvili G.*, Features of Recovery for Damages to the Third Person Caused by Employee Performing Work Duties, Employment Law, (collection of articles), II, Tbilisi, 2013, 199.

bility and quite often they try to attain this goal through shifting the burden of proof from a plaintiff to a defendant.

Upon modification of the scope of liability, of particular importance, along with the fault, is shifting of the burden of proof in such a manner, that one of the parties may find itself in a far more favourable position as a result of the foregoing. In employment relationship the shift of the burden of proof for the protection of the interests of an employee as a weak party is a rather powerful defence.

Based on the negative wording of the second sentence of the first paragraph of Section 280 of the BGB, as a general rule, the burden to prove his innocence is vested with an obligor.

The BGB allows for an exemption in labour disputes. Specifically Section 619a states, that sentence one of Section 280 (1) (reversal of the burden of proof) does not apply to claims stemming from the breach of contract.¹⁰⁰

According to Para. 7 of Article 38 of the LCG, in labour disputes, when appealing an unjustified termination of a labour contract under the initiative of an employer the burden of proof of the facts of the case is borne by the employer. The LCG does not admit the explicit shift of the burden of proof to the employer in any other case.

As a general rule, a plaintiff is required to prove, that a person who inflicted injury is to be blamed, however there are exemptions, when a plaintiff is not able to prove the fault of the perpetrator. Hence, for such cases the necessity of special type of burden of proof becomes evident - *Res Ipsa Loquitur*.¹⁰¹ This rule is applied in cases, when the aggrieved party (plaintiff) is definitely in an disadvantageous position as compared with the perpetrator. The aggrieved party is not able to prove the fault of the perpetrator based on the evidences. Hence, the burden of proof, that the person was acting without any fault, shifts to the perpetrator.¹⁰²

The main precondition for the application of the principle of shifting the burden of proof to the defendant is the existence of the exclusive right of the perpetrator or an employee thereof to control the object or an action.¹⁰³ Furthermore, the plaintiff's injury must be of a type, that ordinarily would not have happened unless negligence were involved. It should be mentioned, that the defendant must be in the better position to prove his/her lack of negligence than the plaintiff is to prove the defendant's negligence.

For the burden of proof to be shifted to the defendant, it is necessary for the events, that led to the injury of a person, to be under the defendant's exclusive control. This includes the actions of the employee, for whose actions the employer is vicariously liable.¹⁰⁴ Under BGB employer's liability for damage caused by his employer is also a negligence liability with a reversed burden of proof, whereas in England and France strict liability rules apply.¹⁰⁵

According to BGB a reversal rule can be found in the framework of the violation of a statutory rule and the breach of a safety duty. In any of these cases the causal connection between the breach and the accident is assumed; it is then up to the defendant to prove that there is no causal connection.¹⁰⁶

¹⁰⁰ See: *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 461 (in Georgian).

¹⁰¹ *Res Ipsa Loquitur* – “The thing [res] speaks [loquitur] for itself [ipsa]” - for example, the surgical nurse failed to remove all the sponges from the patient after the surgery. The patient was unconscious during the surgery and now is unable to prove, whether who is faulty of the accident: nurse, surgeon or assistant surgeon. See: Buckley W.R., Okrent C.J., *Torts&Personal Injury Law*, New York, 2004, 49.

¹⁰² See: *Buckley W.R., Okrent C.J.*, *Torts&Personal Injury Law*, New York, 2004, 49.

¹⁰³ *Ibid*, 50.

¹⁰⁴ The following example is an interesting illustration to this situation: The employees had stacked crates of merchandise and the stacks rose thirty feet high in the shop warehouse. The plaintiff was injured when a top crate fell upon him, but nobody except the plaintiff was present in that part of the building, respectively there was nobody for him to point finger toward as having been negligent. Using *res ipsa loquitur* the plaintiff would shift the burden of proof to the defendant (warehouse owner) to show that the crates had been safely stored, because the crates were under the defendant's exclusive control. Respectively the question of application of *res ipsa loquitur* is beyond doubt. In this case the owner is to prove that reasonable care was used when storing the boxes, to ensure the safety. See: *Buckley W.R., Okrent C.J.*, *Torts&Personal Injury Law*, New York, 2004, 250.

¹⁰⁵ See: *Van Dam C.*, *European Tort Law*, Oxford University Press, New York, 2006, 263.

¹⁰⁶ *Ibid*, 282.

In the case of application of Section 831 of the BGB the burden of proof is borne by an employer. He is to prove that he has not breached the duty to exercise reasonable care when selecting the person deployed and provide relevant arguments. Furthermore, he may refute the presumption of existence of causal link giving rise to liability, demonstrating that the injury would have occurred in the event of careful selection as well.¹⁰⁷ In such a situation another defence is to claim the release from decentralized liability,¹⁰⁸ as the mechanism of personal selection of all the performers of principle's assignment and direct control is employed only by small companies.¹⁰⁹

An employer may prove that he is not at fault and thus exclude his own liability, however this cannot be economically beneficial for him as in this case he will have to demand the release of the employee from the liability before the aggrieved person.¹¹⁰

3. Strict Liability

Unlike fault-based liability, which necessarily implies liability for intentional or negligent conduct, the principle of strict liability¹¹¹ is also employed in private law relationships, including labour law relationships. Respectively, the liability is to be established independent from the tortfeasor's conduct.¹¹²

Irrespective of cooperation of the employees it is almost impossible to ensure fully secure working conditions. Especially with regard to the source of increased risk. Although an employer is conducting his activities under the direct supervision of the employer, this control and supervision is not always possible.¹¹³

It is reasonable to apply the principle of strict liability in the case of increased risk. Firstly, the employer is better positioned than the employee to gather information about occupational hazards and to control them by taking precautions. The employer controls the use of machinery and other equipment, time, duration, and environmental conditions of dangerous activities.¹¹⁴ The abuse of right and fraud are major risk-factors for strict liability-based insurance schemes.¹¹⁵

The employers' duty to take reasonable care for the safety of their workers is non-delegable and personal duty thereof.¹¹⁶

¹⁰⁷ See: *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 654 (in Georgian).

¹⁰⁸ Ibid.

¹⁰⁹ Based on judicial practice of the Supreme Court of Germany, it was presumed admissible to delegate the duty to care to a subordinated personnel in a manner for the records management to be justified in the case of delegation of duty to a one level lower employee. Larenz/Canaris SchR II/2, §79,III,3b. With further reference to *Kropholler I.*, See: *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 654 (in Georgian).

¹¹⁰ See: *Kropholler I.*, German Civil Code, Study Comments, Tbilisi, 2014, 654 (in Georgian).

¹¹¹ Strict liability, objective liability or risk liability.

¹¹² See: *Van Dam C.*, European Tort Law, Oxford University Press, New York, 2006, 255.

¹¹³ Through the introduction of the principle of strict liability the system of compensation of the employees fully exempts an employee from liability in the case of contributory negligence. This may as well be another factor for the employer not to be interested in taking all the necessary measures for the introduction of safety rules at workplaces, to prevent the injuries.

¹¹⁴ See: *Wagner, G.*, Tort, Social Security, and No Fault Schemes: Lessons from Real-World Experiments, Duke Journal of Comparative and International Law, 2012-2013, 18, <<http://heinonline.org>>, [20.06.2017].

¹¹⁵ It is noteworthy that no "employer's privilege" is employed in the United Kingdom which would have protected him against a tort action. On the contrary, the compensation system does not exclude the possibility of filing a tort action by an aggrieved employee. See: *Wagner G.*, Tort, Social Security, and No Fault Schemes: Lessons from Real-World Experiments, Duke Journal of Comparative and International Law, 2012-2013, 36, <<http://heinonline.org>>, [20.06.2017].

¹¹⁶ *Fordham M.*, A New Era of Employer Liability in Negligence, Singapore Journal of Legal Studies, 2010, 200, <<http://heinonline.org>>, [20.06.2017].

3.1. Source of Abnormal Hazard

One of the grounds of strict liability is the risk associated with the source of abnormal hazard.

Paragraph 520 of the Restatement of Torts (Second) defines the source of abnormal hazard as an unit with high degree of risk, with the likelihood that harm that results from risk will be great and the risk could not have been eliminated by exercising reasonable care. There are several preconditions for the imposition of strict liability, amongst them, it is important for the abnormally dangerous activity¹¹⁷ should give rise to high degree risk for potential injury. It should be impossible to totally eliminate such risk despite the exercise of reasonable and necessary measures.

The wording of Article 1000 (I) of the CCG¹¹⁸ is general and provides for strict liability of the owner of a building/substances with abnormal degree of hazard consequences of realization of this hazard. The content of Part 2 of the same Article evidences, that the only possibility for the exemption of the person envisaged by Article 1000 from his duty to compensate damages is the existence of some force majeure circumstances. Based on the foregoing, determination of fault upon application of Article 1000 is important to the extent, that based on the principle of contributory negligence, if the aggrieved party is at fault, the amount of damages could be reduced pro rata to the fault of thereof.

According to Georgian legal doctrine,¹¹⁹ the specificity of application of Article 1000 of the CCG is that the existence of three preconditions is sufficient for the imposition of liability: a) injury; b) unlawful action; c) causal link between unlawful action and occurred injury.

Essential for the application of Article CCG is the determination of injury and causal link.

With regard to compensation of damages caused by abnormal hazard in the light of employment relationship of particular interest is Decision N AS-477-1110-03 of the Supreme Court of Georgia, dated October 15, 2003, which concerns the compensation of injury caused source of abnormal hazard in the course of employment by a.

In 1988, when pouring down caustic soda from a railcar at Borjomi factory the plaintiff took off his protective glasses and proceeded with his work without glasses, as a result of what a drop of soda hit his eye and his right eye was injured, i.e. he suffered industrial accident due to his own negligence, as a result of what he was diagnosed with 50% disability.

It is noteworthy, that the company was paying subsistence to the employee at its own free will, but stopped the payment of the subsistence in 2002 based on the fact, that the injury was caused by the employee's own negligence, what excluded the possibility of compensation of damages under the Ordinance of the President of Georgia of 1999, under which Ordinance the precondition of compensation was the fault of the enterprise.

The Appeals Court rules that the company was not liable for the occurrence of injury, as it has not breached or inadequately fulfilled the law, labour protection rules or other normative acts. The injured employee received special training about labour protection rules about working with abnormal hazard. Hence Article 992 of the

¹¹⁷ The courts in the USA often apply a balancing test to decide in an activity is abnormally dangerous. Such an analysis compares the dangers created by the activity with the benefits that the community derives from the activity. For example, suppose a local builder is building a new road to improve access between hospitals and an isolated rural town. The construction crew uses dynamite to clear the area for the road. A nearby homeowner suffers structural damage to her house as a result of the blasting and sues the builder under strict liability theory. The courts would balance the benefits derived against the risks involved and the public interests may outweigh the interests of one specific homeowner. See: *Buckley W.R., Okrent C.J., Torts&Personal Injury Law*, New York, 2004, 266.

¹¹⁸ "If there is an increased danger associated with some structure because of the energy power, inflammable, explosive, poisonous or toxic substances produced by, put in or supplied through this structure, then the possessor of the structure shall be obligated to pay compensation if the realization of this danger causes the death, bodily injury or disability of an individual or damage to a thing. The same liability shall be put on possessors of inflammable, explosive, poisonous or toxic substances when there is an increased danger associated with these substances."

¹¹⁹ *Chikvashvili S.*, Commentary to the Civil Code of Georgia, Book IV, Vol. II, Tbilisi, 2001, 412 (in Georgian).

CCG should have been applied. Consequently, insofar as in this very case, there existed no company fault, the composition of Article 992 cannot serve as grounds for liability when there is no fault.

The Cassation Court has not sustained the opinion of the Appeal Court about the application of Article 992 of the CCG,¹²⁰ as it considered that there existed no grounds for refusal to compensation under the new law as well - Article 1000 (III) of the CCG. There existed no grounds for exemption from liability - no force majeure circumstances. However, the justification of the Cassation Court is controversial to a certain extent because of the following: on the one part, the court states that “Based on the content of this provision (meaning Article 1000 of the CCG), in this very case the administration was required to compensate injury sustained by the worker, as it was caused by caustic soda, abnormal hazardous substance under the ownership of the company and not by force majeure circumstances.”

It is quite clear from this paragraph that there is no need to additionally prove the fault of the administration as otherwise the difference between Article 992 and 1000 almost disappears. However, the Court states, that “Company administration admitted worker’s inadequate awareness of working with chemicals of abnormal hazard and thus ordered the repetition of the training, i.e. admitted its fault in the occurrence of the accident”.

When proving employer’s fault as a precondition of application of Article 1000 the Cassation Court presumably aimed at proving the connection of this Article with Ordinance N48 of the President of Georgia of February 9, 1999. The below deliberations of the Court speaks just for the foregoing. According to Paragraph 15 of the above Ordinance, “An injury to worker’s health is regarded to be incurred by fault of the employer, if it was caused by neglect, inadequate fulfilment of the requirements of labour law, labour protection rules, standards and other normative acts.”

The Cassation Court considered that insofar as it became necessary to repeat training for workers with regard to the source of abnormal hazard, they were not properly trained in due time, i.e. this is the case of poor education in labour protection rules when working with substances of abnormal hazard on the part of the administration - i.e., the fault of the administration.

Mention should as well be made of the fact that under Ordinance N48 of the President of Georgia negligence of an aggrieved party does not result in the termination of the compensation of damages. If the negligence of the aggrieved person promoted the occurrence of the injury, the compensation for injury may be reduced pro rata to the fault of the aggrieved party.

Based on the foregoing, it can be concluded, that the existence and proving of employer’s fault was regarded as a mandatory precondition for application of Article 1000 of the CCG not under CCG, but rather a sublegal act.

As of to date Resolution №45 of the Government of Georgia On Approval of the Procedure of Granting Allowance for the Compensation of Injury Incurred to the Health of an Employee in the Course of Employment, dated March 1, 2013,¹²¹ does not require the existence of employer’s fault in the case of worker’s occupational disease, sufficient is just an excerpt from medical-social examination report, which establishes causal link, while in the case of occupational injury (mutilation) the employer’s fault is regarded as a necessary precondition for compensation of injury. In opposite to the foregoing, the failure of tort actions in modern world and the cases of

¹²⁰ According to Article 463 of the Civil Code of Georgia (1964) effective for the moment of inflicting injury the organizations and citizens, whose activities are related to increased danger for wider public (carrier companies, industrial companies, construction sites, car owners, etc.) are obliged to compensate damages caused by the source of increased danger unless they prove that the injury was caused by some force majeure or the will of the injured person himself. According to this provision there existed two grounds for the exclusion of administration’s liability and insofar as none of them existed the company was entitled not to compensate injury sustained by worker.

¹²¹ Resolution №45 of the Government of Georgia On Approval of the Procedure of Granting Allowance for the Compensation of Injury Incurred to the Health of an Employee in the Course of Employment, dated March 1, 2013, <www.matsne.gov.ge>, [04/03/2013] (in Georgian).

mass death and injury of employees at workplaces by the end of the nineteenth century (called “industrial accident crisis”)¹²² promoted the development of the system of compensation of employees based on the principle of strict liability.¹²³

3.2. Impossibility to Fully Neutralize the Risk

Absolute liability resembles insurance. Defendants are insuring, or guaranteeing the safety of plaintiffs, who come into contact with that tort law calls abnormally dangerous (ultrahazardous) instrumentalities.¹²⁴ These activities or objects are dangerous by their very nature. Even if all precautions are taken, an injury might still occur.

According to benefit theory,¹²⁵ an employer’s strict liability is associated with the fact, that employers get income through abnormally dangerous instrumentalities. As their use generates a risk factor, the liability for consequences thereof is borne by the employer to this very end.

Employer’s duty to ensure the safety of the employees and create adequate conditions is abided by the reasonable care is exercised in good faith and all the measures he was supposed or was aware that he was supposed to undertake, were undertaken. Insofar as the employer disposes of much more information about potential risks, he has to undertake more than average number of measures for their prevention. Respectively, he has the duty to evaluate risks in the light of potential injuries and undertake adequate preventive measures. In the case of failure to do so, it is considered that is a negligence in employer’s actions.¹²⁶

The scope of the statutory duty to care is established on the basis of the wording of the provision itself. Respectively, the degree of care may be difference and in some cases means provision for safety measures and in others - the existence of safety guarantees. Higher is the care standard with regard to some specific jeopardy, lesser is the difference/boundary between fault-based and strict liabilities.

Generally, when there is no evidence of person’s fault, and what is more, when all the reasonable measures were undertaken to minimise the risk of occurrence of injury, it is unfair to apply the principle of absolute liability. Hence, the strict liability is also subject to restrictions and is limited to cases, which are associated with abnormally high risk and it is reasonable to take this risk due to potential benefit.¹²⁷

¹²² “Industrial accident crisis” See: *Janutis R.M.*, The new Industrial System Crisis: Compensating Workers For Injuries In The Office, *Loyola of Los Angeles Law Review*, 2008-2009, 49, <<http://heinonline.org>>, [20.06.2017].

¹²³ According to social law the procedure of granting compensation is different from the basic principles of civil law. The compensation system is very flexible and quick, and what is of paramount importance - for both parties. The compensation is paid irrespective of the conditions of occurrence of injury and the faulty party.

¹²⁴ See: *Buckley W.R., Okrent C.J.*, *Torts & Personal Injury Law*, New York, 2004, 263.

¹²⁵ Benefit theory.

¹²⁶ *Fordham M.*, A New Era of Employer Liability in Negligence, *Singapore Journal of Legal Studies*, 2010, 195, <<http://heinonline.org>>, [20.06.2017].

¹²⁷ When describing abnormally dangerous activities Paragraph 520 of the Restatement (Second) of Torts also refers to the fact that such substances (e.g. noxious gases, chemicals, explosives), as a general rule, are not intended for common use, there are special rules for their use and it can be said, that the most part of the community does not use them. In contrary to the foregoing inflammable substances like gasoline are also the sources of abnormal danger, however, they are widely used. Hence it depends how the gasoline is used. If we compare the activities of oil processing company and the premises, where a specific person keeps gasoline for his lawnmower, it is evident that the first one is the source of abnormal danger, and the other is not. For details See: *Buckley W.R., Okrent C.J.*, *Torts & Personal Injury Law*, New York, 2004, 265.

4. Conclusion

As a summary, it can be said, that there are special conditions in labour law relationships, taking account of which for the sake of balancing the interests of the employers and the employees, often results in substitution of standard liability scheme with the alternative one. Higher is the care standard with regard to some specific jeopardy, lesser becomes the difference between fault-based and strict liabilities.

The legislators and judiciary try to attain the aforementioned balance of interests through shifting the burden of proof from a plaintiff to a defendant (reversal of burden of proof). What is more, shifting of the burden of proof in labour law context, for the protection of an employee as a weaker party, is a very powerful defence. The scope of application of the reversal of burden of proof in Georgian legal space is far more limited than, say, in Germany. However, there still are some advancements in this direction. Finally, it can be said, that decisive in this situation is the opinion of a judge, who can ensure the striking of fair balance through correct interpretation of rules, taking account the interests of an employee, as a weaker party.

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State Supervision of Labour Legislation in the Light of Association Agreement

Labour legislation plays the essential role in the life of each and every citizen and this is conditioned by the phenomenon of labour itself. The enforcement of law in this field is associated with the economic welfare of men to a certain extent, respectively, when employees and employers take full advantage of the opportunities, prescribed by labour legislation, this results in well-balanced employment relationships which are directly linked with the productivity of public and civil entities, organizations, enterprises. In certain cases, to keep the balance, it becomes necessary for the state to interfere and to introduce the state supervision of the legislation. The paper below discusses such cases and offers the justification of the importance of control over the enforcement of labour legislation both at national and international level.

Key words: labour, legislation, safety, inspection, Association Agreement, contract, investment.

1. Introduction

This paper offers the overview of legislative challenges of state supervision of labour legislation in the light of Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (hereinafter the “Association Agreement”). The paper aims at revealing specific challenges in the field of state supervision of labour legislation, initiating scholarly dispute and offering the following issues for open discussion: 1) Importance of state supervision of labour legislation; 2) International commitments under Association Agreement in the area of perfection of labour legislation and state supervision; 3) Intersection of the interests of attraction of investments and state supervision of labour legislation.

According to EU-Georgia Association Agenda, the parties will cooperate to create efficient Labour Inspection in the spirit of ILO¹ standards, to ensure the supervision of administrative and enforcement authorities over the protection of health and safety at work and labour legislation.²

Under Paragraph 2 of Article 227 of Chapter 13 of EU-Georgia Association Agreement the Parties reaffirm their commitment to pursue sustainable development and recognise that economic development, social development and environmental protection are its interdependent and mutually reinforcing pillars. They underline the benefit of considering trade-related labour and environmental issues as part of a global approach to trade and sustainable development.³

The question discussed in this paper may prove to be topical for any practitioner or theoretician lawyer interested labour administration, as well as for any person interested in proper enforcement of labour legislation, whose domain of interest covers issues like: enforcement of labour legislation and state mechanism of enforcement, international commitments under the Association Agreement, which should ensure the sustainable devel-

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¹ International Labour Organisation, <<http://www.ilo.org/global/lang-en/index.htm>>.

² Association Agenda Between Georgia and EU, <www.3dcftas.eu/system/tdf/georgia-agenda_0.pdf?file=1&type=node&id=65&force=>>.

³ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one Part, and Georgia, of the other Part, Adopted on 27.06.14, published on 11.09.14, registration code 480610000.03.030.016275.

opment of the country, interrelationship of investments and labour legislation, draft of legislation, which ensures the creation of legal framework for international commitments assumed under the Association Agreement.

In the present paper are the methods of comparative-law, critical and historical analysis.

For the analysis of the above issues the main body of the paper is divided into the following Chapters: Chapter I. State supervision of labour legislation (general overview). This Chapter will discuss the institutional importance, necessity of creation, basic duties and historical background of labour inspection; Chapter II. Commitments under Association Agreement in the area of improvement of labour legislation and state supervision. This Chapter offers the overview of commitments assumed by Georgia within the framework of Association Agreement and the timelines for their fulfilment; Chapter III. Interception of the interests of attraction of foreign direct investments and state supervision of labour legislation. This is a crucial question, which is frequently applied as an argument by sceptics, opponents to state supervision of labour legislation. Discussed is the relationship between foreign investments and regulation of the enforcement of labour legislation; Chapter IV. Legislative regulation of state supervision of labour legislation and challenges for Georgian state. Chapter IV is subdivided into two sub-chapters: 1) Legislative regulation of state supervision of labour legislation, which offers the analysis of both positive and negative steps taken by the State in this direction from 2015 till present; 2) Challenges of state supervision of labour legislation for Georgian state. This sub-chapter offers a draft of legislation as a recommendation, which should ensure the reaction to the legislative challenge of the Association Agreement in the area of state supervision of labour legislation.

The paper is summarised in the Conclusion with the idea that state supervision of labour legislation is the European basis of sustainable development of the state, amongst them, in the field of attraction of foreign investments and if the state wants to duly respond to these legislative challenges, envisaged by international commitments (meaning the Association Agreement), it necessary to elaborate a draft of legislation: 1) The Organic Law of Georgia - Labour Code should incorporate a stipulation about the enforcement of labour legislation and the state authority to supervise the enforcement; 2) Paragraph 1 (b) of Article 2 of the Law of Georgia on Control of Entrepreneurial Activities should stipulate that control over entrepreneurial activity should include the activities undertaken for the prevention of forced labour and labour exploitation and for addressing these violation, also the activities aiming at the prevention of and addressing cases of violation of labour legislation and labour protection rules; 3) It is important to adopt a special law in labour safety area, which will transform standards, envisaged by Article 35 into rights and obligations; 4) It is necessary for the Code of Administrative Infringements of Georgiatio provide for warnings and other sanctions (suspension of operation, pecuniary fine, etc.) for violation of labour rights and labour safety rules; respectively a special procedure should be incorporated into the Code of Administrative Procedure.

2. State Supervision of Labour legislation (General Overview)

Labour inspection is a public function of labour administration that ensures the application of labour legislation in the workplace. Its main goal is to convince the social partners in the need to observe the law at the workplace and their mutual interest in this regard, through preventive, educational and, where necessary, enforcement measures. Ever since the appointment of the first labour inspectors in the United Kingdom in 1833, labour inspectorates have been established in almost every country in the world. For about 175 years, labour inspectors have gone about their work improving working conditions.⁴ Labour legislation is the consequence of industrial revolution that began in Europe by the end of the eighteenth century and continued throughout the nineteenth. The whole of the nineteenth century was marked by numerous strikes and riots, often degenerating

⁴ Labour Inspection: What It Is and What It Does A Guide for Employers, International Labour Office, Geneva, 2010, 8.

into violent revolts which led Governments to realise that the State should intervene in the organisation of labour relations and the determination of working conditions. The earliest national legislation for improving working conditions dates from 1802, when British Parliament passed an “Act to Preserve the Morals of Apprentices”, where “morals” were defined in terms of safety, health and welfare, and the “apprentices” were child workers. Voluntary committees made up of local notables supervised the application of the Act. For various reasons, the application of the Act was ineffective and in 1833, the British Government appointed the first four inspectors. In 1844 the inspectors became civil servants. This system was subsequently copied throughout Europe, with variations due to the national administrative custom. In 1890 representatives of 15 countries attended a conference in Berlin to adopt the first standards for improving working conditions and for inspection services. The conference affirmed, that laws in each State should be supervised by an adequate number of specially qualified officers, appointed by government and independent of employers and workers. This initiative was given further impetus with the creation of the ILO in 1919.⁵ The Versailles Treaty stated that it was particularly important that “each State should make provision for a system of inspection, in order to ensure the enforcement of the laws and regulations for the protection of the employed”.⁶

Proper application of labour legislation depends on efficient labour inspection. Labour inspectors inspect how properly the state labour standards are applied at workplaces and give advices to employers and employees how to improve the application of national legislation with regard to working time, wages, labour protection and child work. Furthermore, the labour inspectors inform state authorities about the gaps in national legislation and the ways of overcoming them. They play an important role for labour legislation to be equally applied with regard to each and every employer and employee. As far as international community acknowledges the great importance of labour inspection, ILO gave priority to the promotion of the ratification of two Conventions on labour inspection (N81 and N129). As of to date the Convention of Labour Inspection (1947, N81) is ratified by 138 states (over 75% of Member States), and Convention N129 - by more, than 4 States. Despite the foregoing the problems are still maintained in countries, where labour inspection systems operate without adequate funding and personnel and respectively are not able to duly perform their work. Specific assessments demonstrate, that in some developing counties less than 1% of the country budget is allocated for regulation of labour issues and labour inspectors receive only small part of these funds. The other researches evidence, that costs and expenses related to industrial traumatism and occupational diseases, non-appearance at work, inadequate treatment of employees and labour disputes may happen to be much higher. Labour inspection may prevent all these problems and promote the enhancement of productivity and economic development.⁷

In the world of work, labour inspection is the most important of state presence and intervention to design, stimulate, and contribute to the development of a culture of prevention covering all aspects potentially under its purview: industrial relations, wages, general conditions of work, occupational safety and health, and issues related to employment and social security.⁸

Nowadays, labour inspectorates perform their duties in a challenging environment involving important changes in the economic and social context.⁹

The primary mission of any system of labour inspection is to ensure compliance with relevant labour laws meaning the set of national standards designed to protect all workers and where appropriate, their families. Modern systems also cover the self-employed and the environment from certain work-related hazards. The main purposes of labour inspection include the need to ensure that: relevant labour legislation is respected in workplaces

⁵ Ibid, 9.

⁶ Ibid, 9.

⁷ *Richthofen V.F.*, Labour Inspection: A guide to the Profession, ILO, Geneva, 2002, 121-133 and 146, by reference in: Rules of the Game, a Brief introduction to International Labour Standards, International Labour Organisation, revised edition, 2009, 40.

⁸ Labour Inspection: What It Is and What It Does A Guide for Employers, International Labour Office, Geneva, 2010, 8.

⁹ Ibid, 8.

with a view to achieving decent employment and working conditions; employers and workers get information and guidance about how to comply with legal requirements; enterprises adopt adequate measures to ensure that work practices and environment do not put employees into safety and health risks; and feedback information and lessons learnt from the practice are used as a means of developing legislation to improve the legal coverage, taking into account new social, physical and psychological work-related risks. There is a range of means at the disposal of labour inspection to achieve the desired result of decent working conditions.¹⁰

Inspection services ensure the effective application of legal provisions through two main functions: (1) securing enforcement and (2) supplying information and advice to employers and workers. These tasks of inspection, information and the provision of advice are closely connected and are often found together. The enforcement functions of labour inspectorates vary considerably from country to country, but labour inspectorates tend to perform both proactive (planning monthly and annual, national, field and sectoral inspection activities, identifying cases of non-compliance and taking corrective action), and reactive functions (dealing with complaints, accidents, incidents and disputes). Enforcement has a dual nature: it includes an advisory as well as an inspectorial function.¹¹

For example, in Brazil, the intervention of labour inspectors has not only helped firms bring their practices into compliance with the law but has also promoted innovative legal and/or technical solutions which in some cases enhanced firms' competitiveness and productivity.¹²

3. Commitments Under Association Agreement in the Area of Improvement of Labour Legislation and State Supervision

International legal acts in the field of labour law of particular importance are the ILO Conventions, ratified by Georgia, also the International Covenant on Economic, Social and Cultural Rights (ICESCR) and European Social Charter. Apart from that Georgia has committed itself to many international contractual obligations in the area of labour rights, of which, particular mention should be made of country's commitments under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part.¹³

As already mentioned in the introduction part, under Paragraph 2 of Article 227 of Chapter 13 of EU-Georgia Association Agreement the Parties reaffirm their commitment to pursue sustainable development and recognise that economic development, social development and environmental protection are its interdependent and mutually reinforcing pillars. They underline the benefit of considering trade-related labour and environmental issues as part of a global approach to trade and sustainable development.¹⁴

The labour and employment policy should equally guarantee the rights of both an employee and an employer, who is the essential actor in the field of production and commerce.¹⁵ Chapter 13 concerns the key aspects like trade and sustainable development, that are vital elements for Georgia. It is worth mentioning, that the very first

¹⁰ Ibid, 14.

¹¹ Ibid, 15.

¹² Ibid, 16.

¹³ Research - Evaluation of Labour Inspection Mechanism and the Situation with Labour Rights of Employees in Georgia, Human Rights Training and Monitoring Centre, Tbilisi, 2017, 105 (in Georgian).

¹⁴ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, adopted on 27.06.14, published on 11.09.14, registration code 480610000.03.030.016275.

¹⁵ *Jgerenaia E., Kardava E.*, Protection of Labour Rights as a Part of European Integration Policy - Development Perspectives Within the Framework of the Association Agreement, Visa Liberation Action Plan and Social Charter, Friedrich Ebert Foundation, Fountain Georgia, Tbilisi, 2016, 8 (in Georgian).

articles of Trade and Sustainable Development Chapter mention the obligation to adopt the European labour and environmental standards. For example, Under Article 229 of the Association Agreement, the implementation of the standards in the field of labour law is related with the promotion of productive employment and decent work for all, as key elements for managing globalisation, on the one part and on the other - the enhancement of trade.¹⁶

Under Chapter 13 of the Association Agreement, Georgia should be guided by fundamental principles set by ILO and incorporate the standards, contained in ILO Conventions into their laws and practice. Georgia is already committed to internationally recognised obligation to respect, promote and realise the freedom of association and effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labour; effective abolition of child labour, and elimination of discrimination in respect of employment and occupation.

Annex XXX of the Association Agreement, in its turn, is divided into three parts: Labour Law; Anti-discrimination and Gender Equality; Health and Safety at Work. The Labour Law section lists 8 EU Directives, for the implementation of which Georgia is given 4-6 years' period. Anti-discrimination and Gender Equality section provides for the implementation of 6 EU Directives during a period of 3-4 years. Health and Safety at Work section lists 26 EU Directives to be implemented within 3-9 years.¹⁷

Georgia has undertaken to develop concurrent with the international standards labour policy, and amongst them to create the efficient labour inspection by virtue of a number of international agreements. In this respect, the Association Agreement is the important framework document providing cooperation format for Georgia to ensure conditions for decent work, also the health and safety at workplaces along with the other components of labour field.¹⁸ According to EU-Georgia Association Agenda the parties will cooperate in order to establish an effective labour inspection system in line with ILO standards in order to ensure administrative and enforcement capacities in the area of health and safety at work, and labour law.¹⁹

Labour law has specific characteristics. Income, earned through work is one of the most important parts of the everyday life of each citizen of a state. A product, produced through work is the means of efficient operation of state and business, growth of economy. Rules, prescribed by labour law, as well as domestic and international agreements and conventions, require efficient enforcement mechanism, which in this case is the state authority supervising labour. To make it clear, it will be reasonable to discuss the experience of the EU Member States in the area of supervision of labour legislation.

For example, The Austrian Labour Inspectorate comes as a section under the Federal Ministry of Labour, Social Affairs and Consumer Protection as laws enforced by the labour inspectorate fall within the federal competency (Austria is a federal State). The labour inspectorate is represented at central and regional level: It comprises five departments at central level: one on construction and mining industries, on technical safety and health at work, legislation and legal affairs, occupational medicine and health, and on innovation for labour inspectorates and international occupational safety and health. It is headed by a Director General, to whom the departments report. The labour inspectorate ensures compliance with occupational safety and health laws, laws on working hours and the protection of young and pregnant workers. It covers all possible workplaces, also within public administration. It does not cover self-employed workers and private households, public educational institutions, workplaces within the ambit of church and other religion related institutions. In the case of imminent danger to the health and safety of workers labour inspectors may impose measures with immediate executory

¹⁶ Ibid, 8.

¹⁷ Ibid, 9-10.

¹⁸ Research - Evaluation of Labour Inspection Mechanism and the Situation with Labour Rights of Employees in Georgia, Human Rights Training and Monitoring Centre, Tbilisi, 2017, 107-108 (*in Georgian*).

¹⁹ Association Agenda between Georgia and EU, Brussels, 2014, UE-GE 4656/14, 9, <www.3dcftas.eu/system/tdf/georgia-agenda_0.pdf?file=1&type=node&id=65&force=>.

force, such as the prohibition of work and suspension of operation, also in the absence of the management, and, if necessary, seek assistance of the police in the case of obstruction or resistance on the site. When the danger is not imminent, the labour inspectorate applies to the competent administrative body for the imposition of the necessary measures. In this case, the labour inspectorate becomes party to the administrative procedure.²⁰

Like Austria labour issues are managed by Federal Ministry of Labour and Social Affairs of Germany. This covers industrial relations, social security, employment and vocational training, occupational safety and health, respectively, the enforcement of labour law is ensured by central government.²¹

The mandate of Labour inspectorate of another EU Member State - Latvia extends to the enforcement of labour law related to general working conditions and occupational safety and health as well as any obligations derived from individual employment contracts and/or collective agreements. Inspectors must also provide advice to employers and workers on how to comply with national legislation.²²

Also worth mentioning is the mandate of Italian Labour Inspectorate, which covers the implementation of all labour laws and regulations on social security in industrial, commercial and agriculture as well as in all cases of wage earned situations. There are certain exceptions in heavy industry, where special department ensure the supervision. It should be mentioned, that Labour Inspectorate is also responsible for the application of labour laws in the public sector.²³

In February 2013 the European Commission submitted Visa Liberation Action Plan (VLAP) to the Government of Georgia, which provided for the benchmarks to be fulfilled by Georgia in order to gain short-term visa-free access to Schengen Area for Georgian citizens with biometric passports. Georgia-EU visa dialogue proved to be very important and particularly efficient instrument for the implementation of long-term and complex reforms, moreover in the area of administration of labour rights protection, labour migration and employment policy... Accounting for the importance of the wide range of issues, related to visa liberalisation and action plan, Georgia was assigned to implement measures in various fields and fulfil the necessary preconditions. The Action plan was related to respective four blocks of factors identified within the framework of the dialogue: document safety; integrated management of borders, migration management, asylum policy; public order, foreign relations and basic human rights. Amongst above blocks the main focus was accorded to labour field, specifically to the aspects of regulation of labour migration and labour inspection.²⁴

4. Intersection Between the Interests of Attraction of Investments and State Supervision of Labour Legislation

Under Article 235 of the Association Agreement it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental or labour law.²⁵ Article 235 in a way defines the basic principles of future investment and trade policy of the state. The interpretation of this Article says that the EU attitude towards labour standards is equal to domestic interest in attracting foreign investments, what in its turn is of paramount importance for the enforcement of labour law.

²⁰ <http://ilo.org/labadmin/info/WCMS_122449/lang--en/index.htm>.

²¹ <http://www.ilo.org/labadmin/info/WCMS_209470/lang--en/index.htm>.

²² <http://ilo.org/labadmin/info/WCMS_209359/lang--en/index.htm>.

²³ <http://ilo.org/labadmin/info/WCMS_126019/lang--en/index.htm>.

²⁴ *Jgerenaia E., Kardava E.*, Protection of Labour Rights as a Part of European integration policy - Development Perspectives Within the Framework of the Association Agreement, Visa Liberation Action Plan and Social Charter, Friedrich Ebert Foundation, Fountain Georgia, Tbilisi, 2016, 92-93 (in Georgian).

²⁵ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, adopted on 27.06.14, published on 11.09.14, registration code 480610000.03.030.016275.

It can be said, that inflow of foreign investments is important for every country and this is proved by impressive growth in the number of bilateral investment agreements²⁶ since 1990s. If only about four hundred such agreements were executed in 1959-1989, over 2400 agreements were added to them for the past fifteen years and their number is constantly increasing. China, Switzerland and Germany have more than 100 bilateral investment agreements in place. As of 2012 overall some 3000 bilateral investment agreements were executed worldwide. If during the cold war bilateral agreements were executed between developed and developing countries, more than quarter of such agreements executed by the end of 2007 accounted just for developing countries.²⁷

The above statistics backs up the presumption, that both developing and developed countries try to attract as much foreign investments as possible, in order to ensure the sustainable development of their countries. When attracting foreign investments a state tries to create the most comfortable investment environment, to what end it introduces relevant treatments: 1) fair and equitable treatment; 2) legitimate expectation; 3) national treatment; 4) most-favoured nation treatment; 5) full protection and safety of investments.²⁸

The existence of stipulation of Article 235 speaks for permanent straggle between the attraction of investments and improvement of labour law standard.

Chinese Republic has very interesting experience with intersection of the interests of foreign direct investments²⁹ and those of labour law.

In 2007 China enacted three laws that reformed its labour market and amended specifically the 1994 Labour Law: the Labour Contract Law, the Law on Mediation and Arbitration of Labour Disputes, and the Labour Promotion Law. The objective was to promote “social harmony” and end widespread abuse of workers who had no contracts and hence no rights.³⁰

Together, the laws made China’s labour market more rigid and transform the formal work relationship to standards that are similar to many modern European countries. For example: Labour Contract Law requires that 1) basically any labour relationship should have a written contract; 2) any employment relationship must be formalized in writing within a month after work begins, otherwise the employee receives double pay starting in the second month until the contract is drawn up and signed. If there is still no contract after a year, the labour relationship is automatically considered to be indefinite or open-ended, with all the benefits associated with this kind of contract. The new Law on Mediation and Arbitration of Labour disputes left in force the same approach: “one mediation, one arbitration and two trials”, meaning that any labour dispute has to be solved first by mediation, then by arbitration if the mediation fails, and finally by courts if the arbitration fails. It opens the range of disputes that can be referred to arbitration to almost any issue: Article 2 refers to potential disputes arising from the employment relationship, working hours, rest and holidays, medical cost for injury at work, economic compensation or damages. The period of time for bringing a claim is extended from 60 days to one year from the time a dispute arises (Article 27). In addition to the Labour Contract Law and the Law on Mediation and Arbitration of Labour Disputes, the Standing Committee enacted a “Labour Promotion law” in 2007 that is a further step toward the objective of achieving social harmony. Following the Chinese legal tradition of considering law more as a policy tool than a normative act, the two first chapters invite the government at all levels (national, provincial and local) to “treat the expansion of employment as a major objective of economic

²⁶ Bilateral and multilateral investment agreements create the international standard of regulation investments, by reference in: *Tsertsvadze G.*, Introduction to International Investment Law, Meridiani, Tbilisi, 2013, 60 (in Georgian).

²⁷ *Tsertsvadze G.*, Introduction to International Investment Law, Meridiani, Tbilisi, 2013, 60 (in Georgian).

²⁸ *Ibid*, 171, 178, 182, 184, 195.

²⁹ <<http://www.investopedia.com/terms/f/fdi.asp>> Foreign direct investment (FDI) is an investment made by a company or individual in one country in business interests in another country, in the form of either establishing business operations or acquiring business assets in the other country, such as ownership or controlling interest in a foreign company.

³⁰ *Allard G., Garot M.*, The Impact of the New Labor Law in China: New Hiring Strategies for Foreign Firms?, *Revista Direito*, Sao Paulo, 2010, 527, <<http://www.scielo.br/pdf/rdgv/v6n2/a09v6n2.pdf>>.

and social development, include it in the national economic and social development plan and formulate the medium- to long-term plans and annual working plan for employment promotion". Article 17 foresees preferential tax treatment to encourage companies to comply with the law. The law also outlaws discrimination in the workplace against women, ethnic groups, disabled persons, carriers of infectious diseases and rural workers (Articles 27-31). Governments at all levels are to provide employment assistance to persons with difficulties obtaining employment and disabled persons (Articles 52 and 55). Workers may present a complaint to the people's court if they encounter discrimination in employment that violates the provisions of this Law (Article 62). Finally, the law obliges firms to set aside training budgets for staff and workers according to relevant state provisions, to provide vocational training and continuing education (Article 47).³¹

According to UN World Investment Report of 1998 China's current Foreign Direct Investment boom, in its sixth consecutive year, was showing signs of coming to an end and one of the main reasons of the foregoing was said to be the investments oriented on cheap labour.³² The same report sets out labour market regulations as one of the determinants of FDI. Some studies have found a clear negative association between labour costs and FDI (see, for instance, Cooke and Noble, 1998 or OECD, 2000). Rigid labour market regulations are often considered to be a negative feature of countries in the eyes of potential foreign investors. There is also evidence that labour-market flexibility improves financial performance and raises productivity at the firm level. However, it is impossible to overlook the fact that much of the world's FDI flows to countries with strong employment rights and relatively rigid labor markets.³³

5. Legislative Regulation of State Supervision of Labour Legislation and Challenges for Georgian State

5.1 Legislative Regulation of Supervision of Labour Legislation

Administration of labour rights protection in Georgia started through protection of labour conditions at enterprises. Introduction of the new model of labour inspectorates in the country within the framework of VLAP, with due consideration of new practical approaches, in its turn, is an unprecedented case, unlike the practice of the countries in the world. The Labour Inspection operated until 2006 using Soviet standards, but the Inspectorate was abolished and unfortunately, no new alternative structure was set up for the enforcement of labour legislation. The reason of the abolition was said to be the corrupted nature of the system, however the system was subjected to no reform, unlike Road Inspection, which was later transformed into Patrol Police.³⁴

It should be said, that based on achieve data, statistics of industrial accidents, reported by Labour Inspection in 1197-2005 clearly evidence the decreasing tendency maintained for years. Unfortunately, after the abolition of Labour Inspection in 2006 no accident statistics is gathered any more.³⁵

After nine years of institutional gap, on February 5, 2015 the Government of Georgia approved the State Programme for Monitoring Labour Conditions by its Resolution N38 (hereinafter the "State Programme").³⁶ By

³¹ *Allard G., Garot M.*, The Impact of the New Labor Law in China: New Hiring Strategies for Foreign Firms?, *Revista Direito*, Sao Paulo, 2010, 529-532, <<http://www.scielo.br/pdf/rdgv/v6n2/a09v6n2.pdf>>.

³² World Investment Report Trends and Determinants, Overview, United Nations, 1998, 21.

³³ *Allard G., Garot M.*, The Impact of the New Labor Law in China: New Hiring Strategies for Foreign Firms? *Revista Direito*, Sao Paulo, 2010, 534, <<http://www.scielo.br/pdf/rdgv/v6n2/a09v6n2.pdf>>.

³⁴ *Jgerenaia E., Kardava E.*, Protection of Labour Rights as a Part of European Integration Policy - Development Perspectives Within the Framework of the Association Agreement, Visa Liberation Action Plan and Social Charter, Friedrich Ebert Foundation, Fountain Georgia, Tbilisi, 2016, 113 (in Georgian).

³⁵ *Ibid*, 111.

³⁶ State Programme for Monitoring Labour Conditions adopted by the Government of Georgia, adopted on 05.02.2015,

this Resolution the so-called pilot programme was launched, which was to play an important role during the transition period in the development on state supervision of labour legislation. According to Resolution of 2015 the State Programme aimed at the creation of safe and healthy working environment. The tasks of the Programme were as follows: a) prevention of violation of labour safety rules; b) raising awareness of the employers and employees, provision of information and advice to them about revealed violations; c) raising awareness of the employers and employees about human trafficking hazards with a view to prevention of forced labour; d) development/revision of relevant labour safety and health protection standards; e) determination of the needs of institutional reformation of the protection of labour safety. The Programme target groups were the employers who agreed to participate in the Programme and the employees of these employers. The decisions about the priority and timelines of monitoring was taken by working group composed of the representatives of social partners,³⁷ international and local organisations along with the representatives of the Ministries.

According to State Programme 2015, the working group would send a 5-days prior written notice to an employer, in whose working premises the monitoring was planned. After the monitoring non-public reports/opinions and recommendations were drafted and handed over only to the employer. These opinions were to reflect systemic violations for the state and business sector to analyse challenges of the enforcement of labour legislation was facing in the area of labour safety and health. Quite important were the steps taken in the field of combating trafficking.³⁸

It is noteworthy, that Pilot Programme 2015 said nothing about statutory labour rights. Furthermore, the question of non-public reports was also problematic from legal point of view. A question may arise about the legality of this stipulation and whether or not it contradicts the regulation of Chapter 3 of General Administrative Code.

Resolution N19 of the Government of Georgia of January 18, 2016 extended Monitoring Programme (hereinafter State Programme 2016) approved by Resolution of 2015. Resolution of 2016 approved the State Programme for the Inspection of Working Conditions. This Resolution contained minor changes, specifying that after the accomplishment of the Pilot Programme 2015 the state tried to develop this field, however there are almost no institutional, or result-oriented differences between these two Resolutions.

It should be mentioned, that the Pilot State Programme had a break. It was approved on January 18, what again speaks about the prudence on the part of the State. Unlike Resolution of 2015 the basic regulations contained in Regulation of 2016 concerned the following issues: the stipulation about giving 5-days prior notice to involved employers disappeared, the implementation of Labour Inspection Programme was delegated upon the respective entity of the Ministry of Labour, Health and Social Security, the Department for the Inspection of Labour Condition was allowed to purchase measurement devices from allocated budget.³⁹

By its Resolution N627 of December 29, 2016 the Government of Georgia approved State Programme 2017 for the Inspection of Working Conditions (hereinafter - State Programme 2017).⁴⁰ It should be mentioned, that this time the Inspection Programme had no break, what can be regarded as a positive step forward. Paragraph 3 of Article 2 of this Resolution is another positive step forward, which Paragraph introduced the concept of remonitoring, meaning repeated monitoring of the employer during the year to analyse, whether or not the em-

published on 09.02.2015.

³⁷ Organic Law of Georgia - Labour Code. Adopted by the Parliament of Georgia, adopted on 27.12.2010, published on 27.12.2010.

³⁸ State Programme for Monitoring Labour Conditions, adopted by the Government of Georgia, adopted on 05.02.2015, published on 09.02.2015.

³⁹ State Programme for Inspection of Working Conditions, adopted by the Government of Georgia, adopted on 18.01.2016, published on 21.02.2016.

⁴⁰ State Programme for Inspection of Working Conditions, adopted by the Government of Georgia, adopted on 29.12.2017, published on 30.12.2017.

ployers involved in the programme took account of the opinions and recommendations of the Inspection.⁴¹

The State Programme, approved by Resolution of 2017 also provided for material and technical equipment of the Department for the Inspection of Labour Conditions.

It is noteworthy, that along with progressive stipulations Paragraph 6 of Article 2 of the State Programme 2017 provided for the obligation to give 5-days prior notice to the employer, what should be regarded as detrimental for institutional development of the state supervision of labour legislation.

5.2 Challenges of state supervision of labour legislation for Georgian state

2015, 2016 and 2017 Programmes of State supervision of labour conditions can be analysed collectively and the following four institutional problems can be identified: a) Giving prior notice to employer about the inspection of labour conditions; 2) Absence of sanctions; 3) Goodwill of an employer to participate in the Programme; 4) Absence of state supervision of the enforcement of statutory labour rights.

The solution of the above institutional problems can be found in the Conventions of the International Labour Organization.

ILO General Conference, convened in Geneva by the Governing Body of the International Labour Office and assembled on June 19, 1947 at its thirtieth session, decided to approve proposals with regard to the organization of labour inspection in industry and commerce, which proposals constituted fourth item of session agenda. The Conference determined that these proposals should take the form of an international convention and adopted the Convention on July 11, 1947, which can be cited as the Labour Inspection Conventions, 1947 (hereinafter the Convention 81).

Under Article 1 of Part I of the ILO Convention 81 each Member of the International Labour Organisation for which this Convention is in force shall maintain a system of labour inspection in industrial workplaces.

According to 81: 1) The functions of the system of labour inspection shall be: a) to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors; b) to supply technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions; c) to bring to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions; 2) Any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers.

Interesting stipulation is contained in Article 4 of Part I of ILO Convention 81- So far as is compatible with the administrative practice of the Member, labour inspection shall be placed under the supervision and control of a central authority. Respectively under Article 6 labour inspectors shall be composed of public officials, assured of stability of employment.

The most important from institutional point of view stipulation is contained in Paragraph 1(a) of Article 12 of Convention 81, according to which labour inspectors shall be empowered to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection, also carry out any examination, test or enquiry which they may consider necessary in order to satisfy themselves that the legal provisions are being strictly observed.

Under Article 18 of Convention 81 adequate penalties for violations of the legal provisions enforceable by labour inspectors and for obstructing labour inspectors in the performance of their duties shall be provided for by national laws or regulations and effectively enforced. Article 27 further specifies, that legal provisions includes, in addition to laws and regulations, arbitration awards and collective agreements upon which the force of law is

⁴¹ Ibid.

conferred and which are enforceable by labour inspectors.

The basic provisions of Convention 81 are sufficient for national legislation to provide for such regulations that will jointly create the institutional model of state supervision of labour legislation.

Based on the considerations, offered in this paper, it can be said, that the draft of legislation, which will set up the legislative framework for labour inspection, should include the following draft laws: 1) The Organic Law of Georgia - Labour Code should incorporate a stipulation about the enforcement of labour legislation and the state body supervising the enforcement. Such a stipulation will create legal grounds for the supervision of labour safety (Article 35 of the Labour Code) and labour rights; 2) Paragraph 1 (b) of Article 2 of the Law of Georgia on Control of Entrepreneurial Activities should stipulate that control over entrepreneurial activity should include the activities undertaken for the prevention of forced labour and labour exploitation and for addressing these violation, also the activities aiming at the prevention of and addressing cases of violation of labour legislation and labour protection rules; 3) It is important to adopt a special law in labour safety area, which will transform standards, envisaged by Article 35 into rights and obligations;⁴² 4) It is necessary for the Code of Administrative Infringements of Georgia to provide for warnings and other sanctions (suspension of operation, pecuniary fine, etc.) for violation of labour rights and labour safety rules; respectively a special procedure should be incorporated into the Code of Administrative Procedure.

6. Conclusion

Based on the above discussion, critical, comparative law and historical analysis it can be said, that state supervision of labour legislation is the important part of the Georgia's European way. The foregoing is provided for by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, which in its turn is the key document for the development of the state. Based on the facts and deliberations, offered in this paper, it can be concluded that the obligation to enforce labour legislation and the organisation of the enforcement by the state is the important part of sustainable development. It can also be said, that sceptic's argument that Labour Inspection and in general, the enforcement of labour legislation is an obstructing factor for the attraction of foreign direct investments, is very weak; on the contrary, it is impossible to overlook the fact that much of the world's FDI flows to countries with strong employment rights and relatively rigid labour markets.⁴³

And finally, for the state to address the legislative challenges envisaged by the Association Agreement it is necessary to elaborate the draft of legislation, which should include the following draft laws:

1) The Organic Law of Georgia - Labour Code should incorporate a stipulation about the enforcement of labour legislation and the state body supervising the enforcement. Such a stipulation will create legal grounds for supervision of labour safety and labour rights; 2)) Paragraph 1 (b) of Article 2 of the Law of Georgia on Control of Entrepreneurial Activities should stipulate that control over entrepreneurial activity should include the activities undertaken for the prevention of forced labour and labour exploitation and for addressing these violation, also the activities aiming at the prevention of and addressing cases of violation of labour legislation and labour protection rules; 3) It is important to adopt a special law in labour safety area, which will transform standards, envisaged by Article 35 into rights and obligations;⁴⁴ 4) It is necessary for the Code of Administrative Infringe-

⁴² It should be mentioned, that the Government of Georgia submitted draft law on Labour Safety to the Parliament of Georgia on June 1, 2017.

⁴³ *Allard G., Garot, M.*, The Impact of the New Labor Law in China: new Hiring Strategies for Foreign Firms?, *Revista Direito*, Sao Paulo, 2010, 534, <<http://www.scielo.br/pdf/rdgv/v6n2/a09v6n2.pdf>>.

⁴⁴ It should be mentioned, that the Government of Georgia introduced the draft Law on Labour Safety to the Parliament of Georgia on June 1, 2017.

ments of Georgiato provide for warnings and other sanctions (suspension of operation, pecuniary fine, etc.) for violation of labour rights and labour safety rules; respectively a special procedure should be incorporated into the Code of Administrative Procedure.

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The Importance of Regulating Contracts Concluded Through Electronic Means in Georgia's Legislative Framework

The respective article is related to the essence of the contracts concluded through electronic means, as well as parties and their rights and obligations. The article will also review those similarities and differences, which are common for the respective type of contracts. The definitions will also be provided from those international acts, which specifically relate to the meaning, essence, parties and other matters of the abovementioned contracts.

Determination of contract's parties, as well as featuring and marking boundaries of their rights and obligations is an important aspect of any contract. Due to the fact that the parties do not meet in person upon concluding a contract through electronic means (distance contracts), there may arise certain type of obstacles. Hence, taking the respective circumstances into consideration, it is twice as important to determine the parties' rights and obligations, whereas special emphasis shall be made on a supplier's obligation to provide information to a consumer, hence form, amount and scope of such information is also important. The article will also touch upon a slightly specific, but very important aspect of such contract – time and location of conclusion and a law applicable for resolving any argument, which may arise.

Key words: *electronic means, contract, parties, providing information, consumers' rights, law applicable, directives, convention.*

1. Introduction

The rapid development of technologies throughout the recent decades has become an integral part of public life. People do timely catch up and familiarize with novelties of technologies and make a good use of it. Development of electronic technologies has significantly changed and even eased daily life of each one of us in many ways. The 21st century is regarded as a century of technologies, thus it has become almost impossible to exist without wide range of electronic devices. Computers and various technical appliances have enabled to search for and process data, exchange desired information between humans in the shortest period of time. Digital technologies have become assisting tools and as one of the best means for people in any field when it comes to their work, interests, research and even leisure.

In the contemporary world and through internet, millions of matters are solved daily, which did require big amount of time and human resources years ago. One of these eased matters is concluding contracts through utilizing electronic means. Based on the statistics, 80% of the population, which has access to internet – concludes such contracts through computer, phone and other electronic means. One shall mention that throughout the world and only in 2013, the amount spent on internet trade was 1, 2 trillion USD, while in 2016 it equalled to 1, 9 trillion USD.¹

The primary good of concluding a contract through electronic means is that it supports saving time, strengthening trade linkages and growth of effectiveness of commercial business. The latter and not limited to are the causes of worldwide popularity and demand to conclude contracts through electronic means throughout

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¹ The Statistics Portal "Statistics", Statistics and Market Data about E-commerce', <<https://www.statista.com/markets/413/e-commerce/>>, [25/07/2017].

the recent decades. Despite of the fact that both, world's and Georgia's consumer markets have witnessed significant growth of concluding contracts through electronic means, Georgia has not regulated this matter through legislative framework up to this moment.

The Directive 97/7/EC of the European Parliament and of the Council of 20 May, 1997 on the protection of consumers has launched the beginning of legislative regulation of contracts concluded through electronic means.²

Absence of legislative norms in Georgia may be an obstacle for a proper development of contractual relationship that are formed through using electronic means.

In order to make it clear for a customer on what does it imply to conclude a contract through electronic means, the following shall be explained: what is the main precondition that shall be observed prior to entering into contractual relationships, and what are the rights and obligations of the parties. The respective article will discuss on what is an essence, time and location of concluding a contract, as well as errors and challenges, which have arisen from such contractual relationships for Georgian customers. The article will also feature other countries' practices, as well as definitions from those international acts, which are specifically related to such type and essence of a contract. A separate chapter will be dedicated to a more or less specific topic – the issue of choosing a law applicable in case arguments arise between the parties.

2. The Essence of a Contract Concluded Through Electronic Means

A contract concluded through electronic means is different from contracts formed in other ways since it is performed without physical presence of the parties in the same place neither before nor after signing it. Instead of physical presence and handling negotiations in a traditional manner – a consumer can utilize electronic means for concluding a desired contract. In such circumstances, the parties might even be in different countries while concluding a contract through electronic means. Due to physical absence, consumers do not have a possibility to fully assess their desired product or service.

Nowadays, concluding a contract through electronic means is one of the most well-known and convenient ways for various types of contracts. It includes sale, exchange, loan, insurance, delivery, task and other type of contracts. However, the vast majority of the contracts formed electronically are ones on sale, financial service and delivery.

Contracts concluded through electronic means refer to this practice in various terms, such as “electronic contracts”, which is widely used within the legislations of the United States of America and France³, the German Civil Code (later – GCC) regards it as distance contracts⁴. In the vast majority of international norms, such as the European Union's directives, United Nations' conventions and other agreements refer to the contracts concluded in the abovementioned manner as - electronic commerce.

The first international legal act, which relates to a contract concluded through electronic means is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce⁵, which was adopted in 1996. The latter was followed with the Directive 97/7/EC of the European Parliament and of the Council of 20 May, 1997 on the protection of consumers in respect of distance contracts;⁶ in 2001, the Model Law on “Electronic Signatures” of the UNCITRAL was enforced.⁷

² Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, <<http://eur-lex.europa.eu/legal-content/DE/TXT/?uri=celex%3A31997L0007>>.

³ *Thurlow W.*, Electronic Contracts in the United States and the European Union: Varying Approaches to the Elimination of Paper and Pen, Halifax, Nova Scotia, 2001, 12, <<http://www.ejcl.org/53/art53-1.html>>, [27.07.2017].

⁴ See paragraph 312(c) of the GCC amendment 13.06.2014).

⁵ United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html>.

⁶ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, <<http://eur-lex.europa.eu/legal-content/DE/TXT/?uri=celex%3A31997L0007>>.

⁷ The Model Law on “Electronic Signatures” of the UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/elec

In October 2011, a new directive was adopted by the European Parliament and the Council on consumer rights,⁸ ordering that every Member State (28) shall harmonize national legislation with the directive by December 2013. The article 2 (7) of the respective directive determines the definition of the distance contract, which means any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the parties, with the exclusive use of one or more means of distance communication.⁹

Means of electronic communication for concluding a contract can be tools for exchanging information, such as internet, phone, fax, telegram, telescope and any other similar electronic, magnetic or alike appliances.

Offering various services and products to consumers through electronic means started in Georgia few years ago. Numerous companies utilize their personal internet pages for providing consumers with an offer to enter into contractual relationships. Despite of the fact that Georgia's legislation does not set forth anything in regard to the contracts concluded through the respective means, it still does not pose any obstacle to consumers, who want to procure a desired service. The vast majority of consumers hold either none or very limited information about their rights and obligations while concluding a contract through electronic means.

On a way to create solid investment environment and develop economy, Georgia faces serious challenge when it comes to concluding contractual relationships through electronic means, both with foreign companies, as well as supporting business within the country. Thus, improving legislation in this regard is not just desirable for Georgia, but also mandatory, as it has taken an obligation upon signing the European Union (EU) Association Agreement (AA) in June 2013 to comply its legislation with the European Union's legislation and international legal instruments. The latter agreement implies creation of the Deep and Comprehensive Free Trade Area (DCFTA). The sub-section 1 of the section 6 of the AA is related to electronic commerce and based on the article # 127 – the parties, recognising that electronic commerce increases trade opportunities in many sectors, agree to promote the development of electronic commerce between them. Based on the article # 128 of the same agreement, Georgia has taken an obligation that it shall maintain a dialogue on regulatory issues raised by electronic commerce, including the protection of consumers in the ambit of electronic commerce. For fulfilling the latter and other numerous obligations as set forth by the agreement, Georgia was given a period of five years from the moment of enforcing the AA.¹⁰

Large number of consumers conclude contracts through electronic means instead of traditional ones due to numerous reasons. Entering such contractual relationships has a benefit for both, consumers and providers; one of the main gains is saving time, while parties and subject of the contract may be present in different countries and populated areas, therefore, assessment of the contract's subject and handling negotiations requires big amount of time and financial expenditure. Concluding contracts through electronic means does not require physical interaction, however it offers an opportunity to consumers to compare a desired service of product's price and quality to other goods, without leaving home. Such circumstances make the whole process quite convenient and effective.¹¹ It shall also be highlighted that online shops are accessible anytime during day or night, thus supplier can gain benefit even when he/she is asleep.

tronic_commerce/2001Model_signatures.htm>.

⁸ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/ECC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/ECC and Directive 97/7/EC of the European Parliament on the Council, <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1>>.

⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council;

¹⁰ The EU and Georgia signed an Association Agreement, articles 127 and 128.

¹¹ Pricing and Payments, <http://europa.eu/youreurope/citizens/consumers/shopping/pricing-payments/index_en.htm>, [13/06/2107].

Concluding contract through electronic means also enables supplier to expand business and make it more accessible for wider audiences. Having a shop or even a chain of shops cannot be as large-scale as performing electronic trade from any part of the world.

3. Parties of the Contract and Their Rights and Responsibilities

The articles 1 and 2 of the directive of the European Parliament and of the Council on the protection of consumers in respect of distance contracts determines that parties of a contract are a supplier and a consumer.¹² As set forth in the directive, supplier means any natural or legal person who, is acting in his commercial, business, entrepreneurial or professional capacity; consumer means any natural person who, in contracts covered by this directive, is acting for purposes which are outside his trade, business or profession.¹³

As set forth in the GCC's article 312, paragraph c, parties of a contract is a trader and a consumer. An entrepreneur means a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession.¹⁴

According to the fact that upon concluding a contract through electronic means the parties do not meet in person, thus a consumer is deprived with a possibility to preview or check subject of contract. It shall also be highlighted that engaging into such contractual relationships does not have a regular business pattern for consumers and it puts them into a non-beneficial condition.

Exhaustive and trustworthy fulfilment of the responsibilities set forth in contract is one of the most important principles of the Civil Code of Georgia, hence, comprehensive fulfilment of these it a primary obligation for parties of any contract.

One of the main obligations of a supplies in regard to a contract concluded through electronic means is providing consumers with information.

As set forth in the article 1 of the directive of the European Parliament and of the Council "on consumer rights", a trader should give a consumer clear and comprehensible information before the consumer is bound by a contract concluded through electronic means. The information to be provided is the following:

- The main characteristics of the goods or services;
- The identity of the trader, such as trading name, address and telephone number;
- The total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional charges;
- The arrangements for payment and delivery;
- The duration of the contract and the conditions for terminating the contract.¹⁵

The Principles, Definitions and Model Rules of European Private Law developed by the Study Group on a European Civil Code discusses the obligation of disclosing information, which is an integral part of concluding a contract. The Study Group believes that before the conclusion of a contract, the business has a duty to disclose to the other person information concerning the goods, such as quality and characteristics. In general, parties of a

¹² <<http://eur-lex.europa.eu/legal-content/DE/TXT/?uri=celex%3A31997L0007>>.

¹³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/ECC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/ECC and Directive 97/7/EC of the European Parliament on the Council, art. 2.

¹⁴ See GCC, paragraph 14, (18/08/1896).

¹⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/ECC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/ECC and Directive 97/7/EC of the European Parliament on the Council, art. 1.

contract shall be able to obtain factual and legal information on a good or service they wish to procure.

The study also highlights that the vocabulary used shall be clear and understandable; usage of technical terminology shall be avoided at a maximal extent, however even if using these – they shall be explained adequately.¹⁶

According to the directive of the European Parliament and of the Council on the protection of consumers in respect of distance contracts obliges supplier to provide with even more information. Similarly to the wording of an introductory act of the GCC¹⁷, the directive obliges a supplier to provide consumer with the following information concerning: business of the supplier, location, as well as identity of the representative of the supplier established in consumer's Member State of residence, registration number, financial service, total price to be paid by the consumer (including all related fees, charges and expenses), notice of the possibility that other costs may exist that are not paid via the supplier or imposed by the latter, arrangements for payment and for performance, as well as duration of the contract. Besides, the party shall receive information on any rights and terms the parties may have to terminate the contract.¹⁸

The abovementioned norm makes it obvious that upon conclusion of a contract through electronic means, a supplier has an obligation to provide much more information, which opens a floor for an idea that on an international level there is a strict approach to the latter topic.

In regards to the respective topic, Georgia's recent experience with so called "online loans" is an interesting practice to review. Due to the fact that the latter loans are concluded through distance contracts, such relationship is a typical contract concluded through electronic means. As numerous noted in the article, there are no legislative norms in Georgia, which could regulate conclusion of such contracts or rights and obligations of the parties afterwards. However, such circumstances do not pose any challenges to suppliers.

In the process of development of the article, web-pages of five "online loans" operating in Georgia were studied. It shall be highlighted that the situation in this regard is quite alarming. A consumer shall mobilize as much as one can to simply receive information on key terms of a contract, let aside additional ones; a consumer shall also be aware of technical and financial terminology, as well as he/she shall visit other links to acquire crucial information. None of the web-pages studied provide consumers with a clear and understandable information on future financial obligations, let aside total sum of the amount to be paid, fines or interest rate imposed. Despite of the fact that every web-pages' front site does provide information that during the first month of getting a loan, interest won't be imposed on the original sum, however, it is either impossible to get comprehensive information on financial liabilities to be expected in the upcoming months, or a customer shall have enough competence in these matters. Such reality exists in an environment where large number of consumers of these "online loans" are persons close to retirement age, students or persons who do not possess skills needed for going through the respective procedures easily.

Instead of creating additional obstacles for consumers to get familiar with the key terms of contracts, a democratic state shall aim at establishing a practice which is focused on consumers.

For achieving the respective goal, ensuring the respective legislative amendments is obligatory and shall be timely. Despite of the fact that the initiative group has already produced the Draft Law on "Consumers' Rights Protection"¹⁹, however, it has been years after development of the latter and it didn't make it to being discussed or adopted within the Parliamentary hearings. The draft law was developed based on the directive 2011/83/EU of

¹⁶ *Bar Ch., Clive E., Schulte-Nölke H.*, Principles, Definitions and Model Rules of European Private Law - Study Group on a European Civil Code and the Research Group on EC private Law Munich, 2009, 245, <http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf>, [23.07.2017].

¹⁷ Introductory act of the GCC, paragraph 240.

¹⁸ Directive 2002/65/EC of the European Parliament and of the Council 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.

¹⁹ See <http://www.momxmarebeli.ge/images/file_771576.pdf>.

the European Parliament and of the Council on consumer rights.²⁰ The draft law relates to all the peculiarities of long distance (distance) sales, as well as contracts concluded in streets; there is a separate chapter on obligation of disclosing information, the scope and form of the latter. Development of the draft law is a very positive sign, however completion and timely adoption of it will be a strong leverage enacted in response to these abovementioned “online loans”, which will also create grounds for effective resolution of disputes through litigation or mediation; hence, the final outcome all of these will ensure protection of consumers’ rights.

4. Peculiarities Related to Determination of Time and Location of Conclusion of Distance Contract

4.1 Time of a Contract

Accurate determination of a moment and location of a contract concluded is one of the most important matters, which requires special attention not just in distance contracts, but also in those ones that are concluded in physical presence of the parties.

From the moment of concluding a contract, the parties are bound and without the respective ground, they are deprived with a possibility to reject or terminate it.²¹ Agreement on terms of a contract among the parties is a ground for creating contractual rights and responsibilities, however a moment of conclusion is quite crucial. As set forth in the article 327 of the Civil Code of Georgia, a contract shall be considered entered if the parties have agreed on all of its essential terms in the form provided for such agreement.²²

As already mentioned, while physical presence of the parties, the moment of conclusion of a contract is a moment when parties make an agreement. Due to the fact that in cases of distance contracts, there is absence of not just physical presence, but in many cases there is no verbal (via phone) negotiation, therefore, determination of a contract’s conclusion moment is performed differently. Agreement on contract’s terms between the parties takes place upon exchanging information through electronic communication channels. After exchanging information, a party confirms engagement into contractual relationship upon agreeing to the rules set forth by the respective supplier. In case of physical absence of the parties, an expression of willingness to contract is regarded, on one hand, an invitation for an offer and later on receiving and accepting the latter offer. Determination of contract’s conclusion moment has an essential meaning also because it is the moment from when one party transfers to another one ownership and risks. Determination of exact time becomes especially crucial when we have two or more simultaneous (competitive) offers.²³

As set forth in the article 10 of the “United Nations Convention on the Use of Electronic Communications in International Contracts”, the time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator.

The time of receipt of an information is the time when addressee is capable of retrieving information sent to the address he/she has indicated. An electronic communication is regarded as received, when it has reached the addressee’s electronic address.

Following exchange of information, which equals to negotiations on contractual terms held upon physical presence of parties, results into an offer and acceptance being carried out. Hence, making acceptance by a con-

²⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/ECC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/ECC and Directive 97/7/EC of the European Parliament on the Council.

²¹ *Bar Ch., Clive E., Schulte-Nölke H.*, Principles, Definitions and Model Rules of European Private Law - Study Group on a European Civil Code and the Research Group on EC private Law, Munich, 2009, 347, <http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf>, [23.07.2017].

²² See article 327 of the Civil Code of Georgia.

²³ *Kierkegaard M.S.*, E-Contract Formation: U.S. and EU Perspectives, Washington, 2007, 10.

sumer and receiving the latter by a supplier is regarded as the moment of conclusion of a contract. Due to specifics of distance contract conclusion, time of sending and accepting does not coincide. Sending and receiving offer through electronic means requires more time than making an offer while holding negotiation upon physical presence of the parties. From a technical point of view, it shall be highlighted that it only takes few minutes to send and receive an e-mail by an addressee, however it does not imply that the latter addressee has indicated assent of an offer. For example, if parties are performing offer and accept through an e-mail, an addressee may only check his/her e-mail few hours later due to being present in a different time zone. Therefore, this is a sole reason why it was mentioned that information is regarded as received when it was sent, but when an addressee was capable of retrieving information send to that address, which he/she had indicated.

Based on the abovementioned, a moment of contract's conclusion through electronic means is not when a party indicates assent of an offer, but when supplier receives the latter. The respective fact is also strengthened by the article 18 (2) of the "United Nations Convention on Contracts for the International Sale of Goods", which sets forth that an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.²⁴

4.2 Location of a Contract's Conclusion

As mentioned earlier, the main characteristic of contract's distant conclusion is that there is absence of physical interaction of parties. On one hand the latter aims at saving time, however the essence of such contract is that location of parties in a moment of conclusion does not coincide.

Therefore, any personal computer can be utilized through internet access to visit internet shops and hold negotiations with an offeror and in case of willingness – indicate assent; however, it is crucial to accurately determine location of conclusion of a contract.

It becomes easy to determine location of conclusion of a contract, as well as laws applicable when a contract is concluded within a country and through electronic means. For example, if a person in Germany is purchasing a good from an internet shop, whose Internet Protocol address (IP address) is in Germany, hence, location of conclusion of a contract will be Germany and any conflicts between parties will be regulated through the relevant articles of GCC.

However, as we speak about international trade, we do imply contractual relationships among parties, who are present in different countries. In such circumstances one shall take the following matters into consideration:

- Which country's legislation shall be applied upon conclusion of a contract;
- Does a legislation of consumer's or supplier's country of residence regard a contract in force;

As set forth in the "Convention on the Law Applicable to Contractual Obligations 1980", or the "Rome Convention", the parties are free in their choice to which country's legislation shall be applied for governing legal relationship between them. This choice may be directly expressed or derive from the respective circumstances. Upon electronic conclusion of a contract, either offeror shall indicate which country's legislation is used, or a consumer shall be given a possibility to choose. The respective matter becomes hard to govern in case the parties have not agreed on the respective matter; the latter situation is further discussed in the article 4 of the Rome Convention, which outlines that to the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected;²⁵ The second paragraph of the same article also explains what does the "most closely connected" implies – it is a party, which is obliged to perform an action (for example: pay bills) and has a permanent residence in the country upon conclusion of a contract.

²⁴ United Nations Convention for the International Sale of Goods, art. 18.

²⁵ Convention on the Law Applicable to Contractual Obligations, Rome 1980.

4.3 Choice of a Law Applicable

As easy and convenient it is to shop through internet, as difficult and complex it is to choose a law, which shall be applicable while resolving arguments between the parties.

Jurisdiction requires to determine which court shall discuss a conflict. Choosing court and applicable law is a crucial issue in international trade relations, especially when it comes to contracts concluded through electronic means.

In case of contracts concluded through electronic means and when goods are delivered to residential address of a client – it is relatively easy to select court and applicable law; however, if a contract is concluded in absence of physical interaction (for example: downloading a book purchased electronically), than this matter becomes difficult to resolve.²⁶

Nowadays, there are neither model laws, nor conventions, which are exclusively related to internet jurisdiction. Neither United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce and nor the “United Nations Convention on the Use of Electronic Communications in International Contracts” set forth anything about jurisdiction, however it does provide information on location of parties, which may be used while determining choice of jurisdiction and law applicable.

“The Hague Convention of 30 June, 2005 on Choice of Court” is a multilateral agreement, which is related to choice of court. As set forth in the article 3 of the convention, exclusive choice of court agreement means an agreement concluded by two or more parties, for the purpose of deciding disputes at courts of one of the contracting state.²⁷

The choice of court, which shall discuss a dispute is related to those disputes, which have either already arisen or may arise in the future. Obviously, choice of a court by parties does not imply that a dispute will definitely be resolved by this very court. There are certain circumstances, when a court may exercise a right to refuse to resolve a dispute. Firstly, a court shall be in a capacity to discuss a dispute, moreover, parties shall have legal rights to have a dispute resolved through courts; subject matter of a dispute shall not be clearly unjust or against public order.²⁸

After deciding on issue of choosing a court, court comes across yet another and quite important matter, which is to decide on which country's legislation shall be applicable while dispute resolution. Since, contracts concluded through electronic means are performed between residents of different countries (companies), it may become needed to apply legislations of even two countries. Naturally, every party would like to see a dispute being resolved through national legislation, which is more familiar to him/her/it, thus it becomes crucial to balance their interests; for avoiding the latter difficulties, it is desirable to ensure that parties have agreed in advance on which court and which country's legislation shall be utilized for resolving a dispute. However, if there is no pre-agreement as such, a court itself shall decide on the most applicable law.

According to the article 7 of the Hague Convention 1986, a contract shall be governed by the law chosen by the parties. The parties' agreement on this choice must be expressed clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. The parties may also, after concluding a contract to partly or fully change their indication of a law applicable.

The article 8 of the same convention governs situations when the law applicable has not been chosen by the parties. The article also sets forth that in such situations a contract is governed by the law of the State where the seller (trader) has his place of business at the time of conclusion of the contract.²⁹

²⁶ Wang F.F., *Internet Jurisdiction and Choice of Law*, Cambridge, 2010, 8.

²⁷ Convention on Choice of Court Agreements, art.3.

²⁸ Wang F.F., *Internet Jurisdiction and Choice of Law*, Cambridge, 2010, 24-25.

²⁹ Convention on the Law Applicable to Contracts for the International Sale of Goods, art.7-8.

During the last 30 years, Member States of the European Union use the Rome Convention as a guidance of law applicable to contractual obligations, which has resulted into the Rome I Regulation of June 2008;³⁰

Both, the Rome Convention, as well as national legislations of the Member States of the European Union and in general, along with all the legal norms operating in the world, is based on the principle of party autonomy. Article 12 of the Convention sets forth that “The parties’ freedom to choose the applicable law should be one of the cornerstones of the system of conflict of law rules in matters of contractual obligations. Parties have the utmost freedom to whatever law they want to be applied. However, parties’ choice is limited to either party’s national law.”³¹

In the process of selection of a law applicable in regard to electronic trade, location of the parties becomes a crucial aspect, both in regard to concluding a contract, as well as prior period; there is no specific international regulation when it comes to a law applicable on contracts concluded between suppliers (B2B) or a supplier and a consumer (B2C). The directive of the European Parliament and of the Council on consumer rights is without a reservation on a law applicable in regard to distance contracts, however there is a well-established principle of “country of origin” in practice, which implies the country of production. This principle might be utilized in those circumstances, when the parties have indication of neither international, nor national legislations.³²

5. Conclusion

The respective article has reviewed the essence of a contract concluded through electronic means, as well as the parties, their rights and obligations, and the moment of creation of contractual relationships. The article touched upon the well-established principle of contracts concluded through electronic means – an obligation of providing information, amount/ways/methods of providing the latter by a supplier to a consumer, as well as time, location of conclusion and an issue of choosing a law applicable while resolving a conflict arisen between the parties.

Due to an increase of utilizing electronic means for conclusion of contracts and high demand of the latter on a daily bases, it becomes desirable to manage all those matters on a legislative level, which will more or less serve as an exhaustive regulation over the situation, which may arise between the parties.

Aiming at integrating to the European Union, Georgian State has undertaken several crucial obligations, one of them related to reflection of the legal norms of the Directive of the European Parliament and of the Council regarding conclusion of distance contracts through electronic means in national legislation. The latter obligation is reflected in the European Union (EU) Association Agreement’s (AA) 6th chapter, hence during the period of 2018 – 2020, Georgia shall implement the respective norm; for this matter, Georgian State shall undertake the following steps:

50. Legislative regulation of contracts concluded through electronic means; (timely adoption of the law on “Consumers’ Rights Protection”, making corresponding amendments to the civil code);
51. Strict control of widely spread internet shops or so called “online-loans” companies in order to ensure that the risk of these violating consumer rights is diminished to a minimal extent.

It has been numerously mentioned that protection of consumer rights in contractual relationships is a quite crucial matter for the Member States. For ensuring the abovementioned, Georgia shall apply the European countries’ best practices, including the ones of the United Nations and the European Parliament and the Council to a greater extent. Georgia shall also profess interest in reviewing the matters of litigation. After accurate analyses

³⁰ *Wang F.F.*, *Internet Jurisdiction and Choice of Law*, Cambridge, 2010, 100-101.

³¹ *Behr V.*, *Rome I Regulation A Mostly Unified Private International Law of Contractual Relationships Within Most of the European Union*, *Journal of Law and Commerce*, Vol.29, May 2011, 240, <<http://jlc.law.pitt.edu/ojs/index.php/jlc/article/view/3/3>>.

³² *Wang F.F.*, *Internet Jurisdiction and Choice of Law*, Cambridge, 2010, 98.

of the respective practice and adjustment to Georgia's reality, the outcome shall be ensuring the reflection of these into national legislation.

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Irakli Kandashvili*

Mediation - New Form of Alternative Dispute Resolution and the Prospect for Its Legal Regulation in Georgia

(Institutional Arrangement of Mediation)

Purpose of the Article is development of recommendations for improvement of legal regulations of new alternative dispute resolution form in Georgia, such as mediation. Based on the purposes of the issue of study, we review hereby existed legal regulation of mediation and emphasize such needs, as the necessity to develop framework - legal document – Law of Georgia on Mediation. Opinions of the author are represented in the thesis.

Key words: mediation, legal regulation, civil procedure code of Georgia, amicable settlement, mandatory judicial mediation, advantages of mediation.

1. Introduction

Mediation, as alternative mechanism of dispute resolution is innovation in Georgian legal system. Mediation is new institution of human right protection in Georgian legislation, application of which by will allow disputed parties to settle conflict more efficiently and rapidly¹, via amicable settlement.

Based on the statistics of application to court in Georgia and, on the other hand, lack of trust to each other is noted in Georgian society, when in the process of forming civil society people are important to take decision directed towards essential solution of issue, instead of extended legal proceedings, introduction of mediation shall play positive role, however, this will take place in case if the state, society and all actors involved in the process establish respective terms for development(vial legal settlement) of this new mechanism, though, in the first place, it is important to promote new legal institution and providing full information about such institution to the ordinary “users”, i.e. citizens and legal entities².

Different from other alternative means of dispute resolution, main purpose of mediation is elimination of disagreement between the parties by the Parties, with their involvement, when the Parties make decision itself and the mediator shall be the executor of their desires, only facilitator of the process, who, in his/her turn, is the person with special knowledge and skills, enclosing positions of the Parties to each other, showing positive sides of timely resolution of dispute to the Parties with less expenditures; saying in other words, mediation is assistance to the process of negotiations, its associated process³. On the other hand, based on the fact that mediation is not necessary to complete dispute by settlement, this mechanism shall be used before actual commencement of judicial dispute, as well as arbitration proceeding, to allow the Parties understand interests and genuine desires of each other, and if they still fail to reach agreement on the disputed issues, to initiate legal dispute at the

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¹ *Kandashvili I.*, Mediation As New Method of Alternative Means for Dispute Resolution, on the Example of Labor Mediation, Human Rights Protection and Legal Reform in Georgia, Collection of Articles; Tbilisi, 2014, 200-208.

² *Kandashvili I.*, Mediation – New Alternative Dispute Resolution Form in Georgia, The magazine of the Georgian Bar Association “Advokati”, №2-3, Tbilisi, 2016, 19-24.

³ *Stitt A. J.*, Mediation: a practical Guide, Cavendish Publishing, London/Sydney/Portland/Oregon/2004, 1.

court, when the decision maker is not the party in the form and content, allowed by the mediation process. It shall necessarily be noted that mediation is considered to be used in period⁴ before commencement of judicial and arbitration processes⁵.

Mediation is used in multiple judicial court disputes in modern world; there were times, when experts considered application of mediation inappropriate for solution of particular legal relation; however, during last years, mediation has been effectively used for completion almost all types of dispute by settlement, precondition to which is the advantages of mediation process; moreover, along with the fact that the positive sides of mediation is becoming available to the wide circle of people, this conditions wide application of mediation⁶. Mediation, as the mechanism for dispute resolution is one of the most ancient forms for completing dispute by settlement, when third neutral person assists others (disputed parties) in reaching agreement⁷., Mediation is the future oriented mechanism of dispute resolution⁸., within framework of which, third party is comprised of two disputed parties enclosing interests of the person participating in the negotiations and trying to agree common position⁹, based on mediation principles¹⁰.

Since January 1, 2012, one of the forms of mediation, as mandatory judicial mediation was validated de jure, by entering of respective amendments and additions to the Civil Procedure Code of Georgia, particularly, the Law was added with the Chapter XXI1, assuming resolution of civil dispute of particular category¹¹. It is noteworthy that at this stage no common legal act particular legal framework regulator of this institution has been established; however amendments to the Civil Procedure Code gave impulse to the introduction of mediation, including non-judicial mediation at germinal level in Georgia¹².

It is noteworthy that the Parties have never been prohibited to settle disagreement between themselves via amicable settlement of the issue, by application of respective procedures existing in current legislation; however, when said solutions were not legally regulated, we shall assume that the facts of application of such means was insignificantly identified. It is noteworthy that regulations of judicial mediation validated on January 1st 2012, automatically admitted extensive application of non-judicial mediation and in a parallel mode mediation mechanism was developed in notarial, enforcement, medical proceedings, and at the same time, Labor Code foresaw mediation to be one of the methods for resolution of collective labor disputes.

It shall be noted that mediation is not new for Georgian gene, it has deep historic roots in Georgia; particularly, mediation court was the part of Georgian legal culture at the initial stage of social development¹³.

⁴ *Tsertsvadze G.*, Mediation, Publishing House “Meridiani”, Tbilisi, 2010,34.

⁵ *Goldsmith J., Ingen-Housz C., Pointon A., Gerald H.*, (eds.), ADR in Business, Practice and Issues across Countries and Cultures, Kluwer Law International, New-York, 2006.

⁶ *Kovach K.K.*, Mediation in a nut shell, 2nd ed., Thomson West, United States of America, 2010, 38-39.

⁷ *Ibid.*, 19.

⁸ *Tsertsvadze G.*, Mediation, Publishing House “Meridiani”, Tbilisi, 2010, 156.

⁹ *Kelly D., Holmes A., Hayward R.*, Business Law, 5th ed., Cavendish Publishing Limited, London, 2005,95.

¹⁰ *Uzelac A.*, Paths of Mediation in Bosnia and Herzegovina, International Finance Corporation, Sarajevo, 2009, 24.

¹¹ Subject to the Article 1871 of the Civil Procedure Code of Georgia, after a claim has been filed with the court, a case that falls within the jurisdiction of a judicial mediation may be transferred to a mediator (a natural or legal person) in order to conclude the dispute by a settlement between the parties, and according to the Article 187iii, A judicial mediation may apply to:

- a) matrimonial disputes, except adoption, annulment of adoption, restriction and deprivation of parental rights;
- b) inheritance disputes;
- c) neighborhood disputes;
- d) any dispute – with the consent of the parties.

¹² Paragraph “d” of the First Section of the Article 187iii of Civil Procedure Code of Georgia assumed Mediation for the dispute of any category, if the Parties reach agreement on it; in such case, subject to the Section two of the same Article the dispute will be possible to transfer to the mediator at any stage of proceeding.

¹³ *Tkemaladze S.*, Mediation in Georgia, Tbilisi, 2016, 13.

Today, mediation institute faces huge challenges in legal terms, the need for adoption of the unified legal act regulating mediation is on the agenda, which shall determine future of mediation in Georgia.

2. Advantages of Mediation

Mediation is characterized with several advantages, which shall be comprehensively communicated to the society in particular form, based on the fact that it is difficult to develop alternative dispute resolution judicial mechanism in the country, which is not distinguished in high level of trust to the government by the court, if, on the one hand, it is not characterized with the preferences different from the proceedings, herewith, on the other hand, potential parties of the disputes, i.e. each member of society, as representatives of business have no comprehensively information¹⁴ about the mediation. It is very important that the representatives of the parties of the dispute, who are as usual lawyers, themselves have knowledge about the alternative dispute resolution form such as mediation, as only if they have full knowledge of this form they can advice to clients about the advantages of mediation¹⁵.

In favor of mediation, it shall be noted that it is absolutely informal “process” different from the judicial process, which is not bound with procedure and is oriented towards interests of the parties, to identify mutually beneficial positions for proactive actions of the parties and reach agreement, i.e. different from the judicial process and arbitration, where, correspondingly, mandatory decisions are made by judge and arbitrator, it is not necessary to reach final agreement, and in case of doing this, this outcome shall meet interests of both parties and it shall be the decision made by both parties, continuing trust to decision made with mutual agreement to the parties; the parties are devoted to the outcome created with own forces¹⁶and they are interested in continuance of amicable and future business relation.

Mediation is completely confidential. Mediator and parties are illegible to divulge the information, which became known to them in course of mediation. Herewith, the information disclosed under the term of confidentiality within mediation and the documents represent inadmissible evidence in the court. It shall be noted that mediator, performing facilitating all above and assisting the parties in dispute resolution by means of settlement, according to the Subparagraph “d” of the Article 141 of the Civil Code of Georgia, persons may not be called and examined with respect to such circumstances of which they became aware in their capacity as mediator; parties are important to feel themselves comfortable when disclosing confidential information in the process of negotiation¹⁷and be confident with mediator and second party¹⁸.

Along with the above positive sides, mediation¹⁹is the most preferential form of dispute resolution; particularly, in case of mediation, legislation foresees important benefits from the point of state court fee. Particularly, according to the First Section of the Article 39 of the Civil Procedure Code of Georgia, instead of 3% paid by a party in case of hearing of the dispute at the court (only at the court of original jurisdiction), in case of mediation, the party is to pay only 1% as the court fee, and 70% of which (of 1%) shall be refunded to the plaintiff, if the dispute in the process of judicial mediation is completed by settlement, subject to the Article 49 of the Civil Procedure Code of Georgia.

It shall also be noted that the agreement reached in mediation may be approved by the court and thus become subject to enforcement; and, in case of disagreement, the party shall loose constitutional right for ap-

¹⁴ *Kandashvili I.*, Mediation – New Alternative Dispute Resolution Form in Georgia, The magazine of the Georgian Bar Association “Advokati”, №2-3, Tbilisi, 2016, 19-24.

¹⁵ *Kovach K.K.*, Mediation in a Nutshell, 2nd ed., Thomson West, United States of America, 2010, 2.

¹⁶ *Kelly D., Holmes A.*, Hayward R. Business Law, 5th ed, Cavendish Publishing Limited, London, 2005, 99.

¹⁷ *Tsertsvadze G.*, Mediation, Publishing House “Meridiani”, Tbilisi, 2010, 321.

¹⁸ *Ibid.*, 322.

¹⁹ The term Mediation (in this particular case) means mandatory judicial mediation.

pealing court by complying to the general rule; for the purpose of increasing efficiency of mediation, regulatory framework regulating mediation does not lose actuality, thus giving rise to the mediation agreement, including, opportunity for effective mechanism of enforcement of the cases of non-judicial mediation²⁰.

And finally, it shall be noted that in case of completing dispute by mediation, disputing parties shall maintain better opportunity for continuing existed business and personal relations²¹, in other words, by using mediation, the Parties have opportunities and desires to have positive relation with each other in the future.

3. Prospects of legal regulation of Mediation in Georgia

Adoption of legal framework regulatory document represents necessary precondition to further introduction of mediation and its development in Georgian legal system from institutional point of view, which will make warranty for judicial, and non-judicial commercial mediation in Georgia.

Currently, no regulation of enforcement procedures of agreement achieved in the format of non-judicial mediation exists, preventing business sector to use such informal, though – profitable process to them as mediation, in case of dispute. At the same time, actually there is no unified register of mediators, and the standards who the mediator is or shall be; actually there are no regulatory norms of accreditation, training and responsibilities of mediator, making preventing preconditions for wide application of this institute and it requires respective attention, as from the actors concerned in the subject, so, in the first place, from the representatives of the government.

It is ideal environment for the purpose of supporting mediation currently in Georgia. Particularly, adoption of the framework document regulating mediation represents one of the main issues of the agenda for EU association of Georgia; on the other hand, public awareness and interest in mediation is being increased day by day²², on the third hand, the fact that there is no alternative to the mediation mechanism as judicial system discharging and precondition to the perspectives for completing dispute by settlement has become evident, making warranty for 2017 to become the year of mediation in Georgia, which mostly depends on the common position of the legislative branch of government of Georgia and the institutions operating in the field of mediation²³.

With already existed practical and theoretical experience in the field of mediation, we may consider extension of jurisdiction of mediation, legislative basis, while practically several years ago, cautious and moderate approach towards this new institution was justified, when planning of application of judicial mediation throughout entire Georgia and its implementation would be the decision embodying risk²⁴. It is noteworthy that new notarial act is necessary “to recognize court-independent²⁵” process of mediation, planned and organized by disputed parties and provide procedural and legal warranties of the process.

For the purposes of further development of mediation in Georgia, it is purposeful to apply institutional regulation of the mediation; particular there shall be specific institution, union, organization, regulating mediation

²⁰ *Kandashvili I.*, Mediation – New Alternative Dispute Resolution Form in Georgia, The magazine of the Georgian Bar Association “Advokati”, №2-3, Tbilisi, 2016, 19-24.

²¹ *Kovach K.K.*, Mediation in a nutshell, 2nd ed., Thomson West, United States of America, 2010, 42-43.

²² On November 21-22, 2016, the first international conference “Mediation Day 2016” was held in Georgia for the first time in Georgia, where they reviewed the content of the draft law of Georgia on mediation, and reports of the international experts working in the field of mediation were heard. These event was organized by the European project, UNDP, USAID project with the financial support of PROLOG and German Foundation FIZ.

²³ Author. I mean, in the first place, the organizations functioning in mediation direction, particularly, non-profit organization “Judicial Mediators Association”, non-profit organization “Georgian Mediators Association”, and, on the other hand, parties participating in mediation, especially Lawyers’ Corps.

²⁴ *Tsertsvadze G.*, Mediation, Publishing House “Meridiani”, Tbilisi, 2010, 216.

²⁵ *Ibid.*, 123.

process²⁶ and the profession of mediation; it is about management of elementary process of the category, such as hiring a person to mediate, granting status of mediator to him/her, development of continuous professional education program of mediators and its management, prescribing rules of conduct of mediator and their monitoring. Organization of such category shall be the institution established on legal basis (there is several such examples in Georgia, for example: Georgian Bar Association), which, on the one hand shall be the manager of the said process, however, on the other hand, it shall provide absolute independence and non-interference of the profession. It is important for improvement on the legislative level of the principle regarding enforcement of the agreement reached within the bounds of mediation to be equalized to the enforcement standard for the decision made within the bounds of judicial proceedings²⁷.

3.1. The Procedure for Granting the Status of Mediator

Granting the status of mediator is an important process and this shall take place in compliance with the standard prescribed by applicable legislation; particularly, there shall be specific rule according to which granting of the status of mediator shall be provided and regulated by the particular institution. I consider it to be expedient, as if the said issue will be the subject to management of simultaneously several institutions, in such case, there is high risk of decreasing effectiveness of the standards prescribed for the profession; The professional trainings of mediators, as well as all needs associated with the profession should be carried out by the regulatory body, in our case – the institution that will be established on legal basis, and will as well provide verification of past process and making decision to each particular person (mediator) based on it.

3.2. The Mandatory Continuous Education Program for Mediators and Monitoring of the Rules of Professional Conduct of Mediators

Mandatory continuous education of mediator should be the subject of legal regulation in new law and mediator should be liable complete minimal requirements foreseen with continuous professional educational program, as well as the mandatory need of standard of rules of conduct of mediators shall be prescribed on legislative basis; however, it shall be noted that particular standard and content of mandatory education and code of conduct rules shall represent internal decision of professional union of mediators²⁸, and therefore amendment and adjustment of which will not be related with the amendment of legislation, thus simplifying the process and, on the other hand, provide its conformity to the current challenges and needs. It is obvious and undisputed that on the stage of introduction and institutional establishment of mediation, existence of the standards of ethic is important, according to which future mediators will act; it shall be taken into account that self-regulating professions are in need of subordination to the rules of ethic by their representatives²⁹; though, in this direction, we shall be cautious, especially at the embryonic stage of institutional introduction of mediation, to prevent losing of efficiency and flexibilities of mediators by extremely strict ethic regulations³⁰, which is based on the informal nature of the process itself.

²⁶ Author. I speak about legal entity of public law or noncommercial legal entities founded on law, which shall be professional union of mediation.

²⁷ *Austermiller S.*, Paths of Mediation in Bosnia and Herzegovina, International Finance Corporation, Sarajevo, 2009, 98.

²⁸ See *Tanski M.*, Way to Mediation, 2013, 56, (citation: except mediation organizations and higher institutions, mediation trainings are also conducted by professional organizations of lawyers. For example, National Board of Lawyer-Advisors, Association of Notaries of the Republic of Poland, Mediation Center Existed with the Main Board of Lawyers – all these organizations conduct mediation trainings for own members).

²⁹ *Kovach K.K.*, Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 395.

³⁰ *Ibid.*, 400.

4. Conclusion

Mediation, as alternative mechanism for dispute resolution, is particular innovation in the Georgian legislative system, however its positive role and efficiency may be considered to be already confirmed and its outcomes are clear to the society; though, for more effective operation of this institute and its becoming strong instrument of public, from the point of dispute resolution by settlement, this institution is necessary to have respective environment for proper development, in the first place, by the government and, on the other hand, primary beneficiaries of this institution, in person of the representatives of society and legal profession.

Inclusion of mediation in the unified legal regulatory framework shall take place on particular stage; that is establishment of regulated normative act of mediation, giving accurate information on the essence of this institution and features of its already widely developed forms and kinds; herewith, for establishment of higher level of trust and benevolence to this institution, it is necessary to promote this institution, which shall be undertaken by the representatives of legal profession, especially Lawyers' Corps³¹ before legal formalization of the union of the persons concerned in this field takes place in the organizational legal form.

Role and functions of Georgian Bar Association in regards to the introduction of mediation in the country, is one of the main issue; referring to the examples of different US states³², we may say that organized assistance of mediation institution by the bar associations, including its teaching in the continuous legal education programs for lawyers, had its outcomes and it made multiple lawyers and judges, who did not believe in mediation, change their mind regarding this institution during their career.³³

Mediation cannot be developed in the country if it does not have full and unequivocal assistance of bar association, as the lawyers are the persons, who have special functions for protection of their clients' rights and the disputed parties make decision based on their selection, including from the point of holding proactive position in the process of mediation. Correspondingly, to give a client correct advice for trusting mediation, in the first place, a lawyer shall believe in positive sides and success of mediation.

It is noteworthy that, when speaking about promotion of mediation, as institution, it shall be comprised of introduction of its advantages to the direct customers, i.e. citizens, legal entities, as well as detailed information of the representatives of different directions of legal profession involved in this process, which shall become strong instrument for effective, timely and successful resolution of multiple future legal disputes in their hands. This is grounded on the first labor mediation case³⁴, which showed to Georgian society, including legal circles that, involvement of the third neutral person in dispute resolution process, notwithstanding the extent of disagreement of disputed parties, is always able to bring advantages, based on the fact that mediator is necessary to express common interests of the parties and show mutual advantages of settlement to them.

And finally, if taking into account "traditional inclination of Georgian society to the social institute of alternative dispute resolution"³⁵, this latest shall make precondition to wider introduction of mediation in our reality

³¹ *Kandashvili I.*, Mediation – New Alternative Dispute Resolution Form in Georgia, The magazine of the Georgian Bar Association "Advokati", N2-3, Tbilisi, 2016, 19-24.

³² *Kovach K.K.*, Mediation in a nut shell, 2nd ed., Thomson West, United States of America, 2010, 34-35. [American Bar Association (ABA) played great role in promotion and development of mediation of the United States of America, as well as bar associations of different states; for example: in Texas, Huston Bar Association established committee for alternative dispute resolution, giving impulse to establishment of the so-called Neighborhood Justice Center, to serve for development of dispute resolution by agreement in the region)

³³ *Kovach K.K.*, Mediation in a nut shell, 2nd ed., Thomson West, United States of America, 2010, 33.

³⁴ The first labor mediation in Georgian legal domain was concluded on March 10-23, 2014 between employees of village Kazreti Fold Deposit and the employer RMG Gold, RMG Copper.

³⁵ *Tsertsvadze G.*, Mediation, Publishing House "Meridiani", Tbilisi, 2010, 217.

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Interrelation Between the Piercing the Corporate Veil and Limited Liability Principles in Corporate Law

The limited liability principle is one of the essential and, at the same time, most intensively discussed institutes of corporate law. The paper offers the analysis of this fundamental issue on a contextual level in system-comparative context and reveals its virtues and shortcomings in close connection with veil piercing doctrine. The liability and fate of the persons behind a juristic person, as an artificial formation created by natural persons (as a rule) on the basis of a fiction theory, has been and still is intensively discussed by legal systems of the antic world - Roman Law, Islamic Law and Italian Law of Medieval centuries on the one part and by almost every contemporary leading legal system on the other. Because of this very reason the paper provides the analysis of historical prerequisites, virtues and shortcomings, forms, preconditions, factors and challenges of practical use of these institutes in system-comparative context. All the foregoing will promote the correct practical application of characteristic for Georgian corporate law veil piercing, as an exc from limited liability rule.

Key words - limited liability, piercing the veil, piercing, preconditions of piercing the veil, types of piercing, corporate veil, voluntary creditors, involuntary creditors.

1. Introduction

The modern society is marked by the multiplicity and diversity of relations. Most of these relations aim at the attainment of certain result, however, quite often the initial, agreed goal of some relations fades later what, ultimately, does not lead to desirable for all the participants outcomes. In this very case the question of liability becomes particularly important - whether or not the person is responsible for the occurred consequences and to what extent. Therefore, the question of liability is one of the most complicated and multi-faceted topics for law - for the mechanism regulating the major part of the relations between the persons. In business relations this question, owing to its specificity, is moreover complicated and quite often even becomes a dilemma. In profit-oriented relations everything comes to figures, hence the parties to such relations try to explicitly identify all the possible consequences, which may occur in any direction of development of the relation. The persons make their investments and incorporate their companies in these extremely protected and guaranteed conditions. The principal instrument for the protection of the interests of the shareholders is the limitation of their responsibility through paid-in endowments.

Hence the paper aims at focusing on the purpose and essence of limited liability, as one of the fundamental principles of corporate law, reveal the mechanisms of operation of the piercing the veil doctrine as an exempted from the general rule standard. At the same time, it should be mentioned that the research also offers the overview of these two doctrines on principle level and their niche in law. Hence the piercing the veil doctrine will be analysed only in the light, that is necessary for its generalised theoretical study. Its detailed, practice-based analysis is beyond the goals and potential of this paper... The research is topical to the extent that unlike Anglo-American legal space, where the interrelation and balance between these two doctrines is fiercely debated, the Georgian legislator limits itself only to general stipulations, and neither the academic community favours the theoretical examination of this question.

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The research is mainly based on normative and comparative-law methods. The paper consists of 11 chapters and respective subchapters.

2. General Characteristic of the Principle of Limited Liability

Recent scholarship often emphasizes the divergence among European, American, and Japanese corporations in corporate governance, share ownership, capital markets, and business culture. But, notwithstanding the very real differences across jurisdictions along these dimensions, the underlying uniformity of the corporate form is at least as impressive. Business corporations have a fundamentally similar set of legal characteristics - and face a fundamentally similar set of legal problems - in all jurisdictions. Based on the foregoing the following basic legal characteristics of the business corporation can be listed, that are easily recognizable to anyone familiar with business affairs: legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership. These characteristics respond to the economic exigencies of the large modern business enterprises and corporate law everywhere must, of necessity, provide for them. It follows that a principal function of corporate law is to provide business enterprises with a legal form that possesses these five core attributes. These are the provisions that comprise the legal core of corporate law that is shared by every jurisdiction.¹

Limitation of liability is the basis of corporate law. Modern relations are marked by strict formation of the rights and obligations of the participants and outlining the scope of liability to the extent practicable. In any relation, and mainly in business relations, a party tries to clearly define its obligations from the very outset, as well as the scope of liability in the case of their violation *nolens volens*.

Relevant and important for the doctrine of limited liability is the discussion of the concepts of *entity shielding*² and *owner shielding*³. Without entity shielding a company cannot subsist as a separate juristic person. Entity shielding arises in three particular forms, namely “weak entity shielding”, “strong entity shielding” and “complete entity shielding”. Owing to the liability, intrinsic for a corporation, we deal with complete entity shielding. The latter protects company assets against non-company creditors, amongst them against the creditors of company owners. Hence, personal creditors of company shareholders and managers cannot have any claims against company assets, unless some relations were negotiated on behalf of the company. The concept of complete entity shielding is explicitly accepted by England, other European countries and all the states of North America, it is regarded as an unique principle qualifying company status and falls within the category of questions, which cannot be amended even by a series of agreements. Limited liability is the mirror image of entity shielding. In this context it may be called the owner (shareholder) shielding. This means that the creditors are not entitled to levy execution over personal assets of shareholders, directors and managers, apart from company assets. Like entity shielding, owner shielding may as well be strong and weak. In the latter case company creditors are able to gain access to personal assets of company shareholders in certain cases. In the case of strong owner shielding the creditors cannot claim satisfaction from their shareholders, directors or managers, apart from company assets.⁴

The concept of limited liability, as a policy question has become the basis of serious debates between the representative of the academic community. *Easterbrook* and *Fischel* support the limited liability doctrine based

¹ *Armour J., Haansmann H., Kraakman R.*, The Essential Elements of Corporate Law: What is Corporate Law? Harvard, John M., Olin Center For Law, Economics, and Business, Discussion Paper №643, 7/2009, 2.

² Entity Shielding.

³ Owner Shielding.

⁴ *Cabrelli D.*, The Case Against ‘Outsider Reverse’ Veil Piercing in Corporate law, University of Edinburgh, School of Law, Working Paper Series, №2010/03, 3-4.

on economic theory.⁵ The other two, also renowned scholars *Hansmann* and *Kraakman* oppose the argument of justifying the concept of *Easterbrook* and *Fischel* based on economic efficiency and propose the substitution of limited liability with *pro rata* liability for shareholders in tort creditor cases.⁶

The limited liability doctrine is the logical continuation of recognition of a corporation as an independent legal entity. Systemically the Civil Code of Georgia divides persons into two equally important types - natural persons and juristic persons. Falling within the status of a juridical person, in the meaning of Article 24 of the Code, a corporation acquires independence and separates itself from the persons who founded it; however, its purpose - to operate for the benefit of these persons, for them to profit - remains unchanged. Hence, if we presume that a corporation is founded as an independent (juristic) person and derives from other persons (both natural and juristic persons), limitation of company liability, as a person, solely to its assets, constitutes quite clear stipulation without any exemption.

For more than 150 years in the United States and Continental Europe, and for more than 100 years in England, limited liability for shareholders has been the firmly established legal principle underlying corporation law. This fundamental policy emerged after large-scale political and economic struggle. It was intended to stimulate economic activity by encouraging widespread investment in corporate shares. Such investment would result from protecting investors against liability to corporate creditors and by limiting their risk to the loss of their investment in the corporation.⁷

“I analyse my words, when I say, that in my opinion, the limited liability corporation⁸ is the greatest single invention of modern times... even electricity is less important as compared with limited liability company.” - Such an attitude of *Nicholas Butler*⁹ and this importance of limitation of liability of the shareholders can be overenthusiastic, however not only *Butler* thought so; his contemporary *Eliot*¹⁰ also believed, that the limitation of liability was the most distinguished and the best attribute of corporation and the most efficient legal invention of the nineteenth century.¹¹

However, the problem of limitation of liability, like almost every point of law, is not explicit. Recognition of the fact, that the limited liability doctrine is the core of corporate law does not mean that there are no reasonable arguments against it. Even when this doctrine was regarded as a discovery of the contemporary life *Dewing* admitted in his book,¹² that the limitation of liability was not the necessary attributes of a corporation and constituted just one of many legal features, attribution of which to modern corporation seemed desirable only for social reasonability.¹³ Discussion of the shortcomings of limited liability, as qualifying principle of corporate law becomes ever more intensive in modern legal literature. Many authors demand the abolishment of this principle with more or less persistency, however the principle of piercing the veil doctrine as the means of piercing the corporate veil and exempted rule of limited liability, has many opponents too... Eventually, the limited liability doctrine is alive and feels well irrespective or well-reasoned criticism. Upon introduction of new forms¹⁴ of

⁵ *Easterbrook* and *Fischel* have many supporters who express their opinion about the doctrine of limited liability with more or less pungency. E.g. one of the authors believes, that restriction of the rule of limited liability is killing the American corporation. *Presser S.B.*, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, And Economics*, 87 Nw. U.L. Rev. 148, 1992, 2.

⁶ *Ibid*, 424.

⁷ *Blumberg P.I.*, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573 1985-1986, 33.

⁸ Should mean the limitation of liability of a company, in general and not a specific organisational legal form.

⁹ *Nicholas Murray Butler*, President, Columbia University, 1911.

¹⁰ *Eliot Ch.W.*, President, Harvard University, 1869-1909.

¹¹ *Meiners R.E.*, *Mofsky J.S.*, *Tollison R.D.*, *Piercing The Veil of Limited Liability*, 4 Del. J. Corp. L. 351 1978-1979, 351.

¹² *Dewing A.S.*, *The Financial Policy of Corporations*, 5th ed., 1953.

¹³ *Meiners R.E.*, *Mofsky J.S.*, *Tollison R.D.*, *Piercing The Veil of Limited Liability*, 4 Del. J. Corp. L. 351 1978-1979, 357.

¹⁴ Unlike Georgian corporate-law reality, the legislator in the United States of America and the EU Member States tries to create better conditions for incorporation because of many reasons and precedent, what is naturally conditioned by the

doing business almost every new form shares the concept of limitation of liability as the principal reason of their existence. This flow and development of events demonstrate, that the legislators and the policymakers of this field still appreciate the concept of limitation of liability despite the appeal of the representatives of the academic community to social expenses of this doctrine.¹⁵ We do believe, that of essential importance here is the outcome of a specific approach and what is preferential for a specific relation when weighing up the values. *Manne* and *Posner* explain in their works,¹⁶ that the limitation of liability doctrine may result is certain undesirable consequence for involuntary creditors.¹⁷ Unlike voluntary creditors, who have the contractual protection mechanisms, involuntary creditors do not enjoy the freedom of selection of creditors. However, *Posner* concludes, that limited liability is socially inefficient, unfavourable status of several tort creditors¹⁸ is outweighed by reduced transaction expenses and enhancement of investments.¹⁹

3. Historical Predecessors of Limited Liability Doctrine

3.1. Limited Liability Principle in Ancient Roman Law

In Roman Law relatively advanced methods were developed to limit liability in contract or for wrongful acts. The most important of the techniques employed was the institute of the so-called *peculium*, which achieved wide usage by the middle of Republican times. The *peculium* consisted of assets entrusted to a slave by his master or to a son by his father. However the *paterfamilias* still remained the owner of the assets used for *peculium*. Furthermore, where the slave, or son, traded with his *peculium*, debts and liabilities incurred in such trading could only be enforced by third parties against the master or *paterfamilias* to the extent of the *peculium*, and not against all of the latter's property. Thus, any Roman seeking to invest in a business would trade through his slave or son and limit his liability by fixing the size of the *peculium*. Over time, a new special form of action - *actio de peculio et in rem verso* - was developed for the purpose of rendering the *paterfamilias* liable for actions of the family subordinate. The mentioned should be made of Byzantine *chreokoinonia*, which was the most popular mediaeval contract to pool capitals in sea ventures, where the liability was limited to invested assets. It is believed, that *chreokoinonia* was a sine of mediaeval sea trade.²⁰

3.2. Limited Liability Principle in Islamic Law

As regards Islamic Law, as set forth in the *Qurān* profits went with liability, meaning that only a person willing to bear a risk of loss was entitled to claim a profit. The first technique - the "licensed slave", which resembled the Roman *peculium*, implied the engagement of a slave in business relationship under the authorisation of the master. These relationships were rather diversified. The key point here was that only the slave was responsible for claims arising from the business. If the slave was unable to satisfy the claims from his earnings, he could be sold, with the proceeds used to settle claims. A second and more important means of achieving limited liability was the *qirād*, which is not mentioned in the *Qurān*. As drawn from the other sources *qirād* was created from a profit-sharing arrangement in which a merchant would take money from his colleague - the investor in order to work with it

interests of investments and economic circulation. It was the British LTD, which provoked the implementation of legal reform in relation to a limited liability company in Germany. See: Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG), 23.10.2008.

¹⁵ *Millon D.*, Piercing The Corporate Veil, Financial Responsibility and the Limits of Limited Liability, Washington & Lee Public Law and Legal Theory Research Paper Series, Working Paper № 03-13, 09-2003, 3.

¹⁶ *Manne H.G.*, Our Two Corporation Systems: Law and Economics, Virginia Law Reviews, Vol. 53, 1967, №2; *Posner R.A.*, The Rights of Creditors of Affiliated Corporations, 43 U. Chi. L. Rev. 499 1975-1976.

¹⁷ Mainly a creditor in tort cases is meant, a tort creditor.

¹⁸ Tort Creditor.

¹⁹ *Ibid*, 359.

²⁰ See: *Hillman R.W.*, Limited Liability in Historical Perspective, 54 Wash. & Lee L. Rev. 615, 1997, 621.

without any liability to himself. The merchant had complete discretion on trading policy, but the investor could assert control over broader matters such as the nature of goods that the merchant could buy and sell and locations where the agent could travel. Profits were evenly divided between the merchant and the investor. As so described, the *qirād* presents an interesting twist on modern limited partnership,²¹ in which it is the passive investor rather than the active manager enjoyed the benefits of limited liability.²²

3.3. Limited Liability Principle in Italian Law of Mediaeval Centuries

In Mediaeval centuries the leading role with respect to limited liability was played by *commenda* of the eleventh century Italy, which has much in common with Islamic *qirād*. It is believed, that Italian *commenda* is the transformed version of *qirād* and derives from it. It was largely used in sea commerce and had the characteristics of modern limited partnership. The passive partner would provide capital to active partner (the so-called travelling, managing partner) to finance an overseas commercial venture. The active, partner, who did not necessarily provide capital, was responsible for all aspects of management of the venture; and the passive partner enjoyed limited liability.²³ As a result of this type of liability of a passive partner and consequently, the development of entrepreneurship in this form the passive partners (investors) have managed to diversify their assets and make investments into different business, what, ultimately ended up with intensive development of the economy. However, it should as well be mentioned that *commenda* was mainly used in overseas commerce, whilst for *compagnia*, used for overland trade, limitation of liability was not characteristic; although insurance had more or less similar functions here, in the combination of these two mechanisms it is still believed, that limited liability associated with the *commenda* should be regarded as the exception rather than the rule for the time.²⁴

4. Economic Benefit of Limited Liability Doctrine

4.1. General

A shareholder with limited liability is an anomalous animal. He has a title, without liability with regard to this property. Allowing his existence (of this type of a shareholder) is a material divergence from centuries-standing principle of property and agreement, on which principle the growth of trade and industry depended before the introduction of the concept of limited liability. What was the reason of this assumption and what were consequences thereof?²⁵ The Times of London wrote on 25 May, 1824, that nothing could be so unjust as for a few persons abounding in wealth to offer a portion of their excess for the information of a company, to play with that excess

²¹ For Georgian corporate law space - limited partnership.

²² See Hillman R.W., Limited Liability in Historical Perspective, 54 Wash. & Lee L. Rev. 615, 1997, 621.

²³ Limitation of the liability of a passive partner is apparent in "The Merchant of Venice" by Shakespeare, where the merchant Antonio clearly states that he has nothing to worry about his ship due to the limitation of his liability and lesser risk.

²⁴ See: Hillman R.W., Limited Liability in Historical Perspective, 54 Wash. & Lee L. Rev. 615, 1997, 625; For better understanding of historical development of limited liability principle see: Watson A., Roman Slave Law, 1987; Johnston D., The Development of Law in Classical and Early Medieval Europe: Limiting Liability: Roman Law and the Civil Law Tradition, 70 Chi-Kent L. Rev 1515, 1995; Perrot D.L., Changes in Attitude to Limited Liability - The European Experience, in Limited Liability and the Corporation 81, 86, 1982; Udovitch A. L., At the Origins of the Western *Commenda*: Islam, Israel, Byzantium?, 37 Spectrum 198, 201-02, 1962; Hasanuzzaman S. W., Limited Liability of Shareholders: An Islamic Perspective, 28 Islamic Stud. 353, 1989; Lieber A. E., Eastern Business Practices and Medieval European Commerce, 21 Econ. Hist. Rev 230, 1968; Lopez R. S., Italian Leadership in the Medieval Business World, 8 J. Econ. Hist. 63, 1948.

²⁵ Hicks J., Limited Liability: the pros and cons, in Orhnia T. (ed.), Limited liability and the corporation, London, 1982, 11.

- to lend the importance of their whole name and credit to the society, and then should the funds prove insufficient to answer all demands, to retire into the security of their unhazarded fortune and leave the bait to be devoured by the poor deceived fish.²⁶ Despite intensive criticism of those times,²⁷ there naturally exists the rational explanation for the establishment of this principle (what resulted in its unconditional spread) and the leading role in this explanation is attributed to economical benefits and the analysis of this concept. Hence the subchapters to follow will offer the analysis of the factors, which conditioned the introduction of the principle of limitation of liability into corporate law in general:²⁸

4.2. Incentives for Investments²⁹

Limited liability principle provides for separation and dissociation of shareholder's assets from those of the company. There is a thick and non-transparent shielding - entity shielding - between the company and the shareholders. It is impossible to overcome and pierce through this shielding except for rare exemptions. It is the limited liability doctrine that promotes passive and inexperienced investors to make investments, gain profit through dividends, alienate shares in company management without direct intervention and jeopardizing their assets. Hence, limited liability plays the role of a "capital attraction instrument." It enables companies to mobilise large capital and maximise profit.³⁰

4.3. Share³¹ Transferability³²

The most important feature of limited liability is that it accommodates transferable shares. Any extension of liability beyond the assets of the firm to the personal assets of the shareholders must, in order to be enforceable, impair transferability of shares. When numerous investors cooperate in large, long-lived investment projects, free transferability of shares makes this project more desirable for them than it would have been without this assumption. The link between the liability issue and transferability of shares can easily be seen through the imagination

²⁶ Halpern P., Trebilcock M., Turnbull S., An Economic Analysis of Limited Liability In Corporation Law, The University of Toronto Law Journal, Vol. 30, №2, Spring 1980, 117-150, 117.

²⁷ However, 30 years later, in 1 July edition of The Economist the principle of limited liability was analysed in quite an opposite - positive manner.

²⁸ Apart from general reasons, listed below, determining limited liability, the corporate law of the United States of America is marked with one historical difference from the other legal systems, what is conditioned by its federal arrangement. It is a well-known fact, that corporate law is the law of the states, meaning that each states remained free to develop its own regulation in this field. Hence each was potentially in competition with the other states to create the optimal bodies of corporate law, to ensure the best environment for the operation of the enterprises and thus increase the number of incorporations. In sum, the specific history of corporate law in the United States has had a profound effect on the development of the doctrine of limited liability. The seeds were sown for a powerful economic engine that could give stability to investors by limiting their potential liability to the assets of the corporation. Hence the maintenance of this doctrine conditions the protection of the property of the shareholders. All other things being equal, one would expect that shareholders and corporate managers would be attracted to states with strong doctrines of limited liability. There is some evidence that this is the case Delaware, the most successful jurisdiction in terms of attracting incorporators, has a particularly strong doctrine of limited liability and stringent requirements for piercing the corporate veil. Not only are there substantive barriers to imposing liability on shareholders for the actions of the corporation, but there are also procedural barriers that make it a desirable jurisdiction for both corporate shareholders and managers - *Smith D.G.*, A Federalism-Based Rationale For Limited Liability, 60 Ala. L. Rev. 649, 2008-2009, 667-669.

²⁹ Incentive for Investors.

³⁰ *Malik M.K.*, International Aspects of Corporate Law and Governance, University of Warwick, UK, partial fulfilment of the requirements of LLM for the session 2005-2006.

³¹ Whereas the limitation of liability is characteristic for limited liability companies, joint-stock companies, and limited partnerships, a share for these purposes means the shareholders participation in capital and society in general.

³² Share Transferability.

of such society, where the liability is extended to personal assets of the shareholders and where the shares are unconditionally alienable. In such and enterprise, in the eventuality of bankruptcy those partners, who have sufficient personal property for the satisfaction of creditors, would rather alienate their shares, than satisfy the interests of the creditors. The applicants for such shares would only be the pool of persons, whose property will be too minimal for the satisfaction of the creditors. Hence, when a creditor will try to gain access to personal property of the shareholders beyond the company assets, there will be the group of shareholders with such amount of assets, which will not be worth claiming. Hence, if a share is unconditionally alienable and liability extends only to the current owner, the extended liability will simply become inoperable. The simple answer to the question why opting for limited liability in this context is that freely transferable share results in *de facto* limited liability... However, it is possible to bring to effect the institute of extended (unlimited) liability through the restriction of alienation of shares; meaning that, the company is capable of such various combinations of liability and free transferability of shares, as for unlimited liability not to become meaningless. The fact that the foregoing never happens in practice, has its explanation; specifically, extended liability results in additional costs because the circulation of assets will depend on personal property of the shareholders. This dependence makes equally important both for creditors and the shareholders to search for information about the shareholders and side-activities to control the actions of each other. Limited liability, which loosens the dependence of the company assets on shareholder's assets, is capable of reduction of the costs of transactions and search for information for all the parties and particularly in relationships, where there is a multitude of shareholders...³³ Hence, if shareholders cannot be held liable for the debts of the corporation, the wealth of individual shareholders is irrelevant in valuing those shares. As a result, each share of the corporation may be valued equally and all shares are fungible. Without limited liability, the value of shares in the corporation would not be determined by cash flows of the corporation, but rather would be dependent in part on the wealth of the shareholder that happens to hold the particular share. It is apparent that without limited liability, there would be a significant danger that organized markets could not function efficiently.³⁴ At the same time, this principle reduces the costs of determination of real value of the share in this light. Insofar as shares are equivalent in a company operating on the basis of the principle of limited liability, each of them has equal value what enables an investor to purchase them without searching for expensive information.³⁵

4.4. Monitoring Costs³⁶

It is presumed that limited liability also reduces the costs associated with shareholders' "need to monitor" the corporation. The less likely it is that shareholders will be responsible for the liabilities of the corporation, the less time and effort they must expend in ensuring that the corporation does not incur unwarranted liabilities. These cost reductions, in turn, encourage economic investment and the growth of organized markets. If limited liability were abandoned or eroded, the risk of shareholder freeriding³⁷ would dramatically increase. In a world in which shareholders were held responsible for the liabilities of the corporation, thereby necessitating greater monitoring of corporate activities, "only a fraction of the gains expected from effective monitoring [would] go to the monitor."

³³ Woodward S.E. Limited Liability in the Theory of the Firm, *Journal of Institutional and Theoretical Economics*, 141, 601-611, 1985, 601-602.

³⁴ Smith D.G., A Federalism-Based Rationale For Limited Liability, 60 *Ala. L. Rev.* 649, 2008-2009, 654.

³⁵ Sollars G.G., An Appraisal of Shareholder Proportional Liability, *Journal of Business Ethics*, Vol. 32, №4, Aug. 2001, 329-345.

³⁶ Monitoring Costs.

³⁷ "Freeriding" - literally this term means a person, who travels without tickets, contextually it refers to someone who relies on the efforts of others to benefit - *Levmore S.*, Monitors and Freeriders in Commercial and Corporate Settings, 92 *Yale L. J.* 49, 1982, 49. In this case it means a shareholder who tries to reduce monitoring costs through monitoring activities carried out by the other shareholder without doing anything personally and carrying no expenses.

Accordingly, shareholders would have an incentive to freeride off of other shareholders' monitoring activities.³⁸... shareholders would also be forced to incur the costs of "monitoring other shareholders." Because, in the absence of limited liability, the holdings of all shareholders are potentially available to satisfy any judgments against the corporation, shareholders would have an incentive to monitor the wealth of all the other shareholders to ensure that adequate funds will be available to satisfy any judgments. This might further add to monitoring costs.³⁹

4.5. Facilitation of Diversification⁴⁰

It is widely recognized that one of the virtues of limited liability is that it facilitates diversification. Without limited liability, shareholders would be unlikely to hold a wide array of stocks. Because their personal holdings would be put at risk with each corporate investment, shareholders would avoid exposing themselves to the additional risk of liability that would accompany investing in a wide range of corporations. Instead, they would seek to confine their investments to companies with which they were familiar or that were simply less costly to monitor. Critics argue that a rule of proportional liability would eliminate the need for limited liability to ensure diversification.⁴¹

4.6. Rejection of Risky, But at The Same Time Beneficial Projects⁴²

In the absence of limited liability, corporate managers may reject projects that have a positive net present value because they are overly risk averse. According to *Easterbrook* and *Fischel*, avoiding such a problem is the real benefit of limited liability. Projects may not be undertaken solely because managers fear that the risk of potential shareholder liability for a particular project will outweigh the benefits. Under such circumstances, it is conceivable that projects may be rejected even though the benefits might otherwise outweigh the costs.⁴³

5. Alternative Doctrines of Shareholders' Liability

5.1. Concept of Proportional Liability

The concept of proportional liability of a shareholder is regarded as one of the alternatives of the principle of limited liability. There are several mechanisms of its definition and operation. According to one of the versions proportional liability means personal liability of each shareholder for company debts and this liability is determined according to correlation of the share of the shareholder concerned with the other shares. Furthermore, this liability extends only to a victim of a tort, the same involuntary creditors.⁴⁴ *Sollars*⁴⁵ calls this modification the "symmetry of gains and losses (SGL)".⁴⁶ In his opinion, those, who have the chance to gain certain profit from the activities undertaken on their behalf, should also bear the potential losses associated with these activities. This concept is based on equity principle, it is equitable, when gains and losses associated with one and the same activity are

³⁸ *Smith D.G.*, A Federalism-Based Rationale For Limited Liability, 60 Ala. L. Rev. 649, 2008-2009, 654.

³⁹ *Ibid*, 655.

⁴⁰ Facilitation of Diversification.

⁴¹ *Ibid*, 655.

⁴² Corporate managers may reject projects that have a positive net present value because they are overly risk averse.

⁴³ *Ibid*.

⁴⁴ However, the idea of application of proportional, i.e. *pro rata* liability, even with respect to involuntary creditors, was fiercely criticised. It was presumed, that in this case problematic is the question of identification of involuntary creditors, identification of shareholders, determination of costs, etc. For details see: *Coffey M.P.*, In Defense of Limited Liability - A Replay To Hansmann and Kraakman, 1Geo. Mason L. Rev. 59, 1994.

⁴⁵ *Sollars G.G.*, Assistant professor in the Management Department of Fairleigh Dickinson University's College of Business Administration In Teaneck, New Jersey, Ph. D. from the Darden School of the University of Virginia.

⁴⁶ Symmetry of Gains and Losses (SGL).

equally borne by a shareholder. If a person does not want to bear the risk of potential loss, he may protect himself through refusing potential gain.⁴⁷ Classical and historical model of the principle of proportional liability operated in California State for a rather long period of time, in 1849-1931. It comes, that at the beginning of the twentieth century this principle was still topical against the background of the development of economic relationships and was still operable in one of the successful states in the light of doing business.

5.2. Double liability concept

For three quarters of a century - between, roughly, the Civil War and the Great Depression -shareholders in American banks were responsible not only for their investments, but also for a portion of the bank's debts after insolvency.⁴⁸ If a bank failed, the receiver⁴⁹ would determine the extent of the insolvency and then assess shareholders for an amount up to and including the par value of their stock. This system of "double liability"⁵⁰ was actively and vigorously enforced throughout the period of its existence, generating an enormous volume of litigation, including nearly fifty decisions by the United States Supreme Court and hundreds more in the state courts and lower federal courts.⁵¹ After adopting the National Banking Act by the Congress the legislator provided, that "each shareholder shall be liable to the amount of the par value of the shares held by him, in addition to the amount invested in such shares" (according to one author, the par value of a share of most of the banks amounted to 100 USD). Apart from the protection of the interests of the creditors, the principle of double liability also protected stockholders and bank director from the engagement in hazardous operations... Senator Sherman explained that in addition to providing security for creditors, the double liability provision "tends to prevent the stockholders and directors of a bank from engaging in hazardous operations."⁵²... Although this type of liability existed for quite a long period of time for banks, nowadays it is already a past and forgotten approach. Its elimination was conditioned by several factors, amongst them: ultimately, it was presumed, that it failed to protect the interests of the creditors; failed to maintain public confidence in the banking system; as a result, the growth of the number of insolvent shareholders, who no more participated in the management of failed banks, failure of the banking system for the past years and the discovery of the deposit insurance system as the better alternative for the attainment of specific goals conditioned the elimination of the principle of double liability.⁵³ However, some scholars still believe, that American Banking policy picked up the wrong course when eliminated double liability and introduced deposit insurance instead of it.⁵⁴

⁴⁷ *Sollars G.G.*, An Appraisal of Shareholder Proportional Liability, *Journal of Business Ethics*, Vol. 32, № 4, Aug. 2001, 334.

⁴⁸ Although a bank is a somewhat different and special entity in corporate law, the corporate-law liability of banks will also be shortly discussed as it is important to analyse all the forms of corporate-law liability and its historical types in this part of the paper.

⁴⁹ Here a creditor should be meant in the broad sense of the word - the one, who is entitled to receive something from the bank, as from the debtor.

⁵⁰ Double Liability.

⁵¹ *Macey J.R., Miller G.P.*, Double Liability of Bank Shareholders: History an Implications, Yale Law School Faculty Scholarship Series, 1-1-1992, 31.

⁵² Senator's opinion was later proved by empirical researches. *Grossman R.S.*, Fear and greed: The Evolution of Double Liability in American Banking, 1865-1930, *Explorations in Economic History* 44, 59-80, 2007, 62

⁵³ For details about double liability principle and the reasons that conditioned its elimination see: *Marquis R.W., Smith F.P.*, Double Liability for Bank Stock., *The American Economic Review* Vol. 27, №3, Sep., 1937, 490-502; *Grossman R.S.*, Fear and greed: The evolution of double liability in American banking, 1865-1930, *Explorations in Economic History* 44, 59-80, 2007; *Macey J.R., Miller G.P.*, Double Liability of Bank Shareholders: History an Implications, Yale Law School Faculty Scholarship Series, 1-1-1992; *Grossman R. S.*, Double Liability and Bank Risk Taking, *Journal of Money, Credit and Banking*, Vol. 33, №2, Part 1, May 2001, 143-159.

⁵⁴ In their opinion (meaning *Jonathan Macey* and *Jeffrey Miller*) the concept of double liability is the best method to give incentive to managers to minimise hazardous activities to balance the problem of ethical hazard. *Blumberg P.I.*, *Blumberg on Corporate Groups*, 2nd ed. Vol. 3, 122-60.

6. General Overview of the of Piercing Liability Doctrine

“*Piercing* seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled. There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.”⁵⁵ It is believed, that predictability and consistency⁵⁶ is one the main goals of modern jurisprudence. These twin principles, which stem back from the period of *Magna Carta*,⁵⁷ underlay the doctrine of *stare decisis*⁵⁸ case-law. Predictability and consistency in judicial judgments are important for obvious reasons. They promote public confidence in the law; foster certainty; enhance stability in the law; create efficiency; promote unbiased, meritorious decisions; and encourage judicial restraint. However, predictability and consistency are particularly important in the context of business law, an in this realm they encourages citizens to conduct business, leading to a more viable economy. Inversely, unpredictability and inconsistency discourage business by generating a lack of reliance. These integral twin principles do not exist in the piercing doctrine. Instead, as stated earlier, the piercing doctrine operates in a factually intensive vacuum that is wholly removed from traditional notions of *stare decisis*. The most of the current piercing formulations provide an extraordinary degree of discretion to the judiciary, thus stepping away from the above mentioned principles. Consequently, a number of scholars work on a variety of mechanisms to alleviate the predictability and consistency problem.⁵⁹

The leading argument in the criticism of limited liability doctrine is unfair position of involuntary, tort creditors, in contrast to voluntary, contractual creditors, which have certain protective mechanisms at their disposal and are in the position to determine the terms and conditions of the contract. A creditor is very restricted in tort relations. Actually, he “involuntarily” got involved into these relations and he is blocked by insuperable shielding of the corporation as a separate entity when he tries to find a fair escape from these relations... It is believed, that historically doctrine was meant to protect the shareholders from corporate contract liability and claims brought by voluntary creditors. The rule that was efficient for contract creditors was, it appears, simply adopted for both, without much concern about the possibility of distinguishing between the two. Hence several authors⁶⁰ support the elimination of limited liability in the case of corporate torts⁶¹... Hence corporate and tort law created a certain exemption from limited liability of a shareholder and then developed this exemption into the veil-piercing doctrine. However, irrespective of the use of this doctrine in tort cases, its unconditional application in mass and large-scale torts (like, environment) is devoid of any logic. It is largely disputed whether who bears the burden in this case. Striking a balance between a tort victim (creditor) and shareholders requires specific analysis and assessment of potential of diversification, risk and transaction costs.⁶²

The commentators are unanimous that the main purpose of veil-piercing doctrine is the reinstatement of equity. However, the notion of equity is one of the most problematic and hard-to-defined concepts of law. Hence the enforcement of piercing by judiciary to this end and under this motivation will always give rise to disputes

⁵⁵ *Easterbrook F.H., Fischel D.R.*, Limited Liability and the Corporation, 52 U. Chi. L. Rev., 1985, 89.

⁵⁶ Predictability and Consistency.

⁵⁷ The doctrine was then transformed to the United States.

⁵⁸ *Stare decisis* - “keep to the determined decision and maintain the calm” - the doctrine according to which the courts are required to abide by the case-law of the supreme court.

⁵⁹ See *Marcantel J.A.*, Because Judges are not Angels Either: Limiting Judicial Discretion By Introducing Objectivity Into Piercing Doctrine, Kansas Law Review, Vol.59, №2, 2011, 12-15.

⁶⁰ *Hansmann H., Kraakman R.*, The End of History Corporate Law, 89 Geo. L.J., 439, 2001, 466-67.

⁶¹ *Kahan D.R.*, Shareholder Liability for Corporate Torts: A Historical Perspective, The Georgetown Law Journal, Vol. 97:1085, 1087.

⁶² See *Alexander J.C.*, Unlimited Shareholder Liability Through a Procedural Lens, 106 Harv. L. Rev. 387, 1992, 3. We will not further concentrate on the aspects of competition of corporate and tort law at federal and state levels as these issues is not relevant for Georgian corporate law.

and difference of opinions. It is far easier to develop such a doctrine in Anglo-American case-law, to interpret it on a case-by-case basis and even to change the direction according to the circumstances of the case, but the foregoing seems more or less complicated for the legal system of continental law owing to its specific nature.... In one of the cases⁶³ the English court explained that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. Also, it is asserted in the judgment, that in the exercise of a discretion in relation to injunctive relief ‘the eye of equity’ can, I think, look behind the corporate veil in order to do justice.⁶⁴

These days, veil piercing is allowed and imposed only under exceptional circumstances in English courts. However, until the late 1970s, the courts demonstrated considerable willingness to pierce the veil when justice so required. In this context most notable is the single economic unit theory, propounded by Lord Denning,⁶⁵ which allows a court to treat a corporate parent and its wholly owned subsidiaries as a single entity, a theory that would be considered expansive even under U.S. law.

7. Types of Veil Piercing

7.1. According to Subjects

According to subjects, there are two main types of piercing: the first is one in which the separate corporate personality is disregarded and the shareholders are held liable for the corporation’s debts. Such cases may be called shareholder liability cases. There are the other types of corporate veil cases in which separate corporate personality is disregarded without the imposition of shareholder liability. In these cases, as a general rule, the court ignores a subsidiary as a separate legal entity, does not recognise it as a separate legal entity to allow a court to exercise jurisdiction over the corporate parent. Such cases in judicial practice are called the cases of a separate legal entity. It is worth mentioning, that while the bulk of the corporate veil cases in the United States have been shareholder liability cases, shareholder liability is rarely imposed in the English cases.⁶⁶

7.2. According to Forms

In addition to the above gradation the literature⁶⁷ is aware of different classification of piercing. Specifically, according to form, there are the following cases of piercing: 1) tort versus contract cases, 2) horizontal versus vertical piercing cases, 3) reverse piercing cases and 4) triangular piercing cases. Piercing in tort and contract cases concerns the liability arising from contract relations between a company and a creditor on the one hand, and on the other the liability, arising from inflicting damage; Horizontal piercing involves a plaintiff’s attempt to pierce the veil of one subsidiary to reach the assets of another subsidiary. For example, a corporation A, a parent corporation, owns shares in three subsidiary corporations, B, C, and D. A horizontal piercing claim would involve a plaintiff attempting to pierce the veil of B to attack the assets of C. Hence, the plaintiff attempts to simultaneously attack two corporations of equal power. Consequently, this type of piercing is called horizontal piercing. As regards ver-

⁶³ In re a Company.

⁶⁴ Atlas-Maritime Co. v. Avalon Maritime Ltd., - *Cheng T.K.*, The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines, Boston College International and Comparative Law Review, Vol. 34, Issue 2, Art. 2, 5-1-2011, 354.

⁶⁵ Single Economic Unit Theory.

⁶⁶ See *Cheng T.K.*, The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines, Boston College International and Comparative Law Review, Vol. 34, Issue 2, Art. 2, 5-1-2011.

⁶⁷ The further types and forms of piercing the veil are discussed according to *Marcantel’s* work: *Marcantel J.A.*, Because Judges Are Not Angels Either: Limiting Judicial Discretion By Introducing Objectivity Into Piercing Doctrine, Kansas Law Review, Vol. 59, № 2, 2011.

tical piercing, it occurs when a plaintiff attempts to pierce through the corporate shield of a subsidiary to reach the assets of a parent. Unlike the previous case the plaintiff is now attempting to pierce an inferior corporate entity - a subsidiary - in an attempt to reach the assets of a superior corporate entity - the parent. This type of piercing is called vertical one; Reverse piercing cases⁶⁸ can occur both in cases of shareholder's liability and cases of separate corporate entity discussed above. In the common corporate context where there is a single corporate entity and a number of shareholders, a reverse pierce would be an attempt by the plaintiff to pierce through the shareholder to reach the corporation, the assets of the corporation. In the cases of separate corporate entity, in the context of a multicorporate structure, a reverse pierce would occur where a plaintiff attempts to pierce a parent to reach a subsidiary, the assets of a subsidiary. Triangular piercing cases are the most complicated of the piercing structures. They can arise from tort or contract cases, have elements of horizontal and vertical structures, and involve reverse piercing. Ultimately, Triangular piercing cases exist where a plaintiff attempts to pierce a parent corporation to reach a shareholder of the parent, in an attempt to reach an otherwise unrelated corporation of which the shareholder owns an interest. Thus, imagine a parent company, A, is solely owned by a shareholder, B. Furthermore, imagine that B owns shares in an unrelated corporation, C. Now imagine that while the plaintiff has only dealt with A and B, the plaintiff has had no direct relationship with C. Nevertheless, both A and B are insolvent. Thus, the plaintiff seeks to pierce A to reach B to reach C. This, of course, forms a triangle, giving rise to the name.

8. Main Factors of Piercing the Veil

In one of the cases⁶⁹ the California Court of Appeals offered the exhaustive list of preconditions for referral to piercing the veil: 1. commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; 2. the treatment by an individual of the assets of the corporation as his own; 3. the failure to obtain authority to issue stock or to subscribe to or issue the same; 4. the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities; 5. sole ownership of all of the stock in a corporation by one individual or the members of a family; 6. the use of the same office or business location; 7. the employment of the same employees and/or attorney; 8. the failure to adequately capitalize a corporation; 9. the total absence of corporate assets, and undercapitalization; 10. the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; 11. the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; 12. the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; 13. the use of the corporate entity to procure labour, services or merchandise for another person or entity; 14. the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; 15. the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; 16. the formation and use of a corporation to transfer to it the existing liability of another person or entity; 17. the holding out by an individual that he is personally liable for the debts of the corporation; 18. the identical equitable ownership in the two entities; 19. identification of the directors and officers of the two entities in the responsible supervision and management; 20. the identification of the equitable owners of the two entities with the domination and control of the two entities.⁷⁰

⁶⁸ Reverse piercing is also called as voluntary piercing, because in most cases a shareholder instigates this type of liability himself. *Cheng T.K.*, The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines, Boston College International and Comparative Law Review, Vol. 34, Issue 2, Art. 2, 5-1-2011, 371.

⁶⁹ *Assoc. Vendors, Inc. v. Oakland Meat Co.*, 26 Cal. Rptr. 806, 813-815 (Ct. App. 1962).

⁷⁰ There are numerous piercing the veil tests in American and English judicial practice (judicial practice identifies some 85 potential factors, which are categorised according to several groups. *Millon D.*, The Still-Elusive Quest to Make Sense of

9. Criticism of Veil-Piercing

Three prominent theories exist for elimination of the doctrine: the Bainbridge Proposal, the Mandatory Insurance Proposal, and the Mandatory Capitalization Proposal... Professor *Bainbridge* has been an outspoken critic of the piercing doctrine⁷¹ and has explicitly advocated its abolition for two reasons: first, he posits that the doctrine is unprincipled and uncontrollable and second, he argues the doctrine has predictability costs without serving any policy goals. As to the first reason, the author argues that veil piercing lacks any objective criteria and are mostly composed of a variety of factors that a court, retrospectively, will review to determine whether piercing is appropriate in a case concerned. This obviously leads to uncertainty and unpredictability from a corporate planning perspective. The problem becomes particularly exacerbating when courts seize on one aspect of the factors test and consider it dispositive, even when that aspect, standing alone, is simply a common virtue of even legitimate corporations. As to the second reason, Professor *Bainbridge* argues that this unpredictability has social costs without any social benefit.⁷² As regards mandatory insurance approach, the concept behind it, that a corporation, as a matter of legislative requirements, should always carry “sufficient insurance, aiming at the protection of creditors’ interests”... However, this approach was also heavily criticised as a factor obstructing the incorporation of a corporation, because a new corporation may fail to secure adequate insurance.⁷³ It seems, that those corporations who do nothing wrong and unlawful would pay enhanced premiums for insurance they do not need to pay as a result of those who game the system by engaging in risky conduct. From a public policy perspective, this result is undesirable.⁷⁴ The mandatory capitalization, or the same mandatory minimal capital doctrine is one of important and disputed aspects of corporate law, and in this context is the means of satisfaction of creditors’ claim in the event of liability... However, this concept is also widely criticizes, as a regulation creating a barrier to incorporation.

10. Perspective of Application of Piercing the Veil Doctrine in Georgian Corporate law

In our opinion, granting such wide discretion to the court in Georgian corporate law and respectively in business environment to pierce the corporate veil - as to the provision created by the heavy hand of the legislation, characteristic for the countries of Continental Europe - is not justified, even under the pretext of equity. As already mentioned, one of the leading motives of application of veil piercing doctrine in tort-based relations in

Veil-Piercing, *Texas Law Review* See Also, Vol. 89:15, 2009, 16); however, owing to specific features of Anglo-American legal system, they are not exhaustive. Almost in every case judges try to develop the perfect test of piercing the veil. Worth mentioning is the first attempt of the English judge, *Atkinson* to determine the 6 criteria of piercing the veil in one of the cases (*Smith, Stone & Knight Ltd. v. Birmingham*, 1939, 4 ALL E.R. 116(K.B.) at 121 Eng); Also interesting is *Frederic Powerll’s* three tests of piercing in parent-subsidiary relationships (see *Powell F.J.*, Parent and Subsidiary Corporations, 1931). The list of piercing the veil criteria cannot be exhaustive also due to the fact, that when making a decision about piercing the veil the American courts (unlike the English courts) take account of the trends and factors of general policy with regard to specific fields of law (e.g. labour and tax law). Hence the thorough study of the case-law may provide for a very large list, consisting of many items, but this paper aims at focusing on the interrelationship between limited liability and piercing the veil doctrines, hence the paper does not discuss in details *alter egos*, *instrumentality* and other theories, providing for piercing the veil, with their benefits and shortcomings. The above listed criteria of California Appeals Court more or less concern every thesis, that is relevant in the case of piercing the veil, hence this time we limited our research only to general review because, at in the case concerned we need them with regard to the discussion of the attributes of a legal entity.

⁷¹ See *Bainbridge’s* works on this issue: *Bainbridge S.M.*, Abolishing Veil Piercing, 26 J. Corp. L. 479 (2001); *Bainbridge S.M.*, Abolishing LLC Veil Piercing, *University of Illinois Law Review*, Vol. 2005 №1.

⁷² *Marcantel J.A.*, Because Judges Are Not Angels Either: Limiting Judicial Discretion By Introducing Objectivity Into Piercing Doctrine, *Kansas Law Review*, Vol. 59, № 2, 2011, 16.

⁷³ *Wix G.W.*, Piercing the Corporate Veil: Should Michigan Consider Statutory Solutions? 79 U. Det. Mercy L. Rev. 637, 9.

⁷⁴ *Marcantel J.A.*, Because Judges Are Not Angels Either: Limiting Judicial Discretion By Introducing Objectivity Into Piercing Doctrine, *Kansas Law Review*, Vol. 59, № 2, 2011, 19.

Anglo-American legal system is the restitution of justice; it should be mentioned that perception of justice is particularly intensified in such cases as a tort creditor is an involuntary creditor and has not gone through the phase of negotiation of contract terms and conditions with the company. Hence, piercing the veil in tort cases *prima facie* seems more equitable. However, we believe, that this should not be acceptable for Georgian reality. Despite the grave condition of a victim of tort, this should not become the factor conditioning and influencing the piercing of corporate veil in a specific case. Here the starting point is the principle of principles, characteristic for corporate law - the status of a corporation, a separate person, a separate legal entity. A creditor, be it a contract or tort creditor, enters into relationship (either voluntarily or involuntarily) with a specific entity, who has all the characteristics of an entity. And the motivation that is was created by specific persons (founders) can in no way become the factor influencing piercing the veil, even in the case of a tort victim. But in cases when actually there is no person, with the attributes of a legal entity, one should not speak about any kind of veil-piercing - as the existence of a legal entity is itself doubtful. Closer scrutiny of the above list of the factors of piercing the veil will demonstrate, that almost every point explicitly speaks for the absence of some important attribute of a separate formation, legal entity. e.g. separate assets, record-keeping, management, personnel. Hence, if in a specific case a company fails to meet these criteria, there does not exist a corporate veil, as an object of piercing, as there is no *de facto* corporation and the society is misled. I.e. the function of the court is to establish on a case-by-case basis, whether it is dealing with a skeleton, devoid of content. If it is proved, that this is the case, it means that the company has never acquired the status of limited liability as it is not a company in fact and nothing is to be pierced... The fact, that limited liability stems from and is actually conditioned by the status of a legal entity is also proved by the situation, that piercing the veil is applied only in cases, when the existence of a company as a separate person becomes doubtful. It is quite natural - if the existence of a legal entity (with all its characteristics) is not doubtful, it is apparent for everyone, that the company is an independent person and irrespective of whether or not it is financially successfully, it is clear from the very outset, that no other person, even its founder (or a person, who joined it later), be it a natural or juristic person entity, is not liable for their liabilities. It should be mentioned, that the status of a corporation as a separate and independent person was first admitted in the renown case from judicial practice of Great Britain - *Salomon v. Salomon*.⁷⁵ Lord Summers interpreted this precedent in one of the cases⁷⁶ in the light of liability: "Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial, the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or the capital of the shareholders. Assuming, of course, that the company is duly formed and is not a sham...the idea that it is mere machinery for affecting the purposes of the shareholders is a layman's fallacy. It is a figure of speech, which cannot alter the legal aspect of the facts." The law can say, "Treat your subsidiary like an independent, profit-making enterprise, and we will give you limited liability. That is what we ask of other corporations, and we ask it of you, too."⁷⁷

11. Conclusion

The Law of Georgia on Entrepreneurs provides for a general rule, that a special partner of a limited partnership, a shareholder of a limited liability company, a joint-stock company and a cooperative are not liable to creditors for company debts.⁷⁸ As regards piercing the corporate veil doctrine, the Law offers its most general and *prima facie* passive definition. A limited partner of a limited partnership, partners of a limited liability company, a joint-stock company and a cooperative are personally liable to company creditors in the event they abuse the legal forms of limitation of liability.⁷⁹ The scope and depth of development of the doctrine within Anglo-American legal system

⁷⁵ *Salomon v. Salomon & Co. Ltd* AC 22, 1897.

⁷⁶ *Gas Lighting Improvement Co Ltd v IRC* AC 723, 1923.

⁷⁷ *Rands W.J.*, Domination of a Subsidiary By A Parent, *Indiana Law Review*, Vol. 32:421, 1999, 456.

⁷⁸ Law of Georgia on Entrepreneurs, 28 October, 1994 3.4.

⁷⁹ *Ibid*, 3,6.

in this light was clearly demonstrated above. Limited liability doctrine and the concept of piercing the veil in connection with the former have taken a very remarkable rout of development in this legal system. Worth mentioning are the variations of approaches to these two controversial doctrines from the end of the nineteenth century until present days, or to be more precise, to piercing the veil as the exemption rule of limitation of liability. Initially, the limitation of the shareholders's liability to their endowments to the corporation was considered as a magnificent achievement of legal intercourse; later the development of relationships and social environment brought the interests of a creditor to the forefront; the accumulated judicial practice conditioned the actualization of the question of combination of the absolute nature of limited liability - insuperable to a certain extent restriction for creditors, with fair legal and economic intercourse. Hence the courts started to intensively pierce the corporate veil, what conditioned considerable development of this doctrine both in court-rooms and academic works. As regards the present days, they are apparently marked with toughening of the criteria of overcoming corporate form and exceptional care in application of the piercing of the veil doctrine.

Such development of legal forms of doing business was inconceivable for Georgia, as a former Soviet country due to historical reasons. After gaining independence, the Law of Georgia on Entrepreneurs, adopted in 1994, introduced limited liability as the milestone of corporate law from the very outset; it also provided for the provision about piercing the corporate veil (3.6), but with general and ambiguous stipulation. This general stipulation should better refer to cases when a creditor requests piercing the corporate veil of a company to access personal assets of the shareholders. As regards the other type of piercing the veil, characterised with greater number of disputes and case-law in legal systems, meaning parent-subsidiary relationship, Georgian Law says nothing about it. However, the practice gradually becomes aware of the cases of transferring assets from a company to a subsidiary without liabilities; this particularly concerns the construction business. Hence although the promotion of launching the economic activity and simplification of statutory requirements with this regard (meaning the elimination of statutory minimal authorised capital, optional nature of most rules of law, etc.) is of particular importance for Georgia as a newly-democratic country, again to ensure the fair economic environment, provision of creditors with such protective mechanisms, that are prescribed by the economic and legal systems of leading countries, should also be topical.

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Davit Gvenetadze*

Risks and Corporate Management Problems Related to Them

The role of entrepreneurship in the international community is steadily rising, which is caused by economic conversions, with the constant growth and changing of consumer interests. This, along with many useful results, leads to an intensive competition between companies, irreversible renewal of business standards and additional normative regulations. Taken as a whole, legal corporative relations are becoming more complex, creating permanent risks for companies, business sectors, internal and external markets (including the states).

Absolute exclusion of the risks is impossible in business enterprise. Consequently, within the corporate management, risk detection/evaluation and management, is the most important prerequisite for business stability and growth. In addition, consistent and systematic implementation of this process is necessary, in order to minimize the negative impact of different types and scales on companies.

Considering the importance of the issue, the present article will discuss corporate risks and their types, analyze the specific cases of risk management and following consequences, as well as trends in different states and international markets.

The purpose of the article is to provide readers with information about the modern problems of risk management, to determine ways to solve them. A comparative-legal analysis method is used to achieve this goal.

Keywords: *Production conditions, Risk Management, Strategic, Compliance, Operational, Financial, Reputational, Value at Risk, Risk Management Officer, Risk Management System, International and National Standards of Risk Management, Financial Stability Board; Federation of European Risk Management Associations, Enterprise Risk Management Concept.*

1. Introduction

Risks are one of the driving force of the business, but their timely/complete assessment and management still remain problematic. Risk management problem is not so actual in companies where there are few partners, it mostly touches large companies whose shareholders are scattered in different countries (especially corporations).¹

It is impossible to get revenue on the competitive capital market without taking risks, which is often accompanied by hidden illegal actions,² and this, along with many other risks, is a major problem of internal corporate governance. Risk misuse often leads to companies' financial losses, reputation losses, etc. The liquidation of the results needs years to spent and requires a great effort.

Naturally, in corporate governance, board's activities have a decisive impact on the quality of strategic decisions and the company's development,³ which also includes the formation of the risk management system and its constant perfection. In the Legal literature, there is a perception that the risk of liability will force the leaders to fulfill their duties in the interests of shareholders, but the heads are also responsible directly to the company⁴, this standpoint is testified for example: by the 2008 world financial crisis, cases of companies' financial fraud

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¹ *Fernando A.C.*, Corporate Governance: Principles, Policies and Practices, Pearson Education, 2009, 52.

² *Jonathan R.M.*, Corporate Governance. Promises kept, Promises broken. Princeton University Press, Princeton and Oxford, 2008, Published by Princeton University press, 41 William Street. Princeton, New Jersey 08540, 47.

³ *Kenneth R.A.*, Rigid rules will not Make Good Boards, Harvard Business Review, November-December 1982, 35, 44.

⁴ *Chanturia L.*, Corporate Management and Responsibilities in Corporate Law, Tbilisi 2006, 68 (In Georgian).

(Olympus)⁵, bribery cases reveal's (Siemens),⁶ which was mainly caused by the corporate management of large-scale faults, when the risks were not properly assessed. Despite these and other widely rumored events, forced companies to pay more attention to risk management, still fundamental changes in companies management procedures have not been made rapidly.

It is noteworthy that the risk management policies of many companies focuses on internal control and audit, it implies an analysis and reaction to some of the outcomes⁷, which is often delayed, expensive and less efficient. Therefore, there is a need for timely and effective prevention of risks.

One of the reasons for maintaining the growth and stability of the modern economy is corporative regulations. The principle function of the corporate law is to provide legal entities with legal and organizational forms,⁸ in the same way, is important the companies' efforts to provide financial and non-financial, strategic and operational risks. In corporate management, it is necessary to develop risk assessment and management leverage⁹ to enable companies with different profile and production volume, effectively manage risk in different situations.

It should be noted that, during risk assessment, the practice of various corporations differs according states: some consider the risk management is completely the board's activity. The second group believes that this is the audit's competence and others name special committees as an authorized body for risk management. This indicates a variety of risks management practices that may be natural, although the risk management errors are not resulted from these different approaches, they are mainly caused by companies' inefficient risk policies.

Due to the above mentioned, identification of risks faced by companies (especially corporations, as corporations are the most important organizational associations in corporate law)¹⁰; An adequate assessment of their economic, financial and social impacts and analyzing the corporate management problems generated from them, is an urgent issue. Moreover, the comparative-legal analysis of practices and trends in foreign states is interesting.

2. The Essence of Risk and Its Types

Generally defined, risk is the probability to fall into the disadvantage during an economic activity; possibility of market price reduction; chance of deterioration of production conditions; expectation of receiving sudden loss of income, property and monetary means. The risks arises from the transformation of economic relations, the permanent change of the national and international normative-legal basis, it follows to the accelerated tempo of

⁵ Six banks filed a lawsuit against the Japanese digital cameras manufacturer company Olympus. Banks requested 27.9 Yuan's (273 million US dollars) remuneration from the company, to compensate for damages caused by a 13-year fraud. As a result, in 2012 the court sentenced former CEO and two executive officials to imprisonment (on the grounds of covering the loss of Olympus since 1990), the company was fined the amount of 700 million yen, <<https://www.bloomberg.com/news/articles/2014-04-09/olympus-sued-for-273-million-after-13-year-fraud>>, [11/04/2017].

⁶ In 2006 an investigation held in the largest German engineering and electronics company Siemens, found that the company issued fake checks, paid a large amount of bribes to win contracts, created Shell Firms and fake funds that were used for unlawful transactions. As a result, in 2001-07 period the company won contracts cost of 1.3 billion Euro. For the long-term bribery and corruption scheme, Siemens was fined 1.34 billion Euro payment to American and European states, <<https://www.theguardian.com/business/2008/dec/16/regulation-siemens-scandal-bribery>>, <<https://www.theguardian.com/business/2008/may/27/technology.europe>>, [12/04/2017].

⁷ Corporate Governance Guide, Georgia, September 2010, IFC / International Finance Corporation, Consulting Program in Europe and Central Asia, 203, 204 (In Georgian).

⁸ *Makharoblishvili G.*, Implementing Fundamental Changes in the Structure of Capitalist Societies on the Basis of Corporate-legal Actions (Acquisition, Merger), Comparative Legal Analysis, Dissertation Thesis, Ivane Javakhishvili Tbilisi State University, Faculty of Law, Tbilisi, 2014, 12 (In Georgian).

⁹ Risk Management and Corporate Governance, Corporate Governance. OECD (The Organization for Economic Co-operation and Development) (2014), OECD Publishing, 8, <<http://dx.doi.org/10.1787/9789264208636-en>>, [11/04/2017].

¹⁰ *Maisuradze D.*, Corporate legal-defensive measures during the reorganization of capitalist societies (Comparative-legal research preferably on the example of Delaware state and Georgian corporate law), Dissertation Thesis, Ivane Javakhishvili Tbilisi State University, Faculty of Law, I., Tbilisi, 2014, 7 (In Georgian).

scientific-technological progress, the strengthening of competition, appears after the dynamic growth of consumer interests.¹¹

In general, the following types of risk are allocated: **Banking, Currency, Credit, Investment Risks** and etc.¹² As regards to the corporate risks, its' important types are: 1. **Strategic risk**-when the company has an incorrect or less effective business strategy (e.g. the company lag behind the technological development and can not update the production devices). The classic example of strategic risk are the cases of companies - Kodak and Xerox. Kodak has been operating in the photography market for years. In 1975, one of its' engineers Seven Sasson invented a digital camera that provided a better photo shoot than a ordinary camera. However, the company thought that this innovation was a risky project that could endanger its business. Accordingly, Kodak did not develop this invention.

In this case, if strategic risk were entirely assessed (its financial and social effects analysed, technical development prospects foreseen, etc.) the company should have concluded that the digital camera would soon be invented and manufactured, which could lead to rival competitiveness and market dominance. Exactly, underestimation of this strategic risk led Kodak to bankruptcy. Although the company still exists today, it operates with much smaller scale. One of the giants of digital printing technologies-Xerox,¹³ acted in a different way. Xerox knew that the development of laser copy technology was a strategic risk, but managed to adapt to new technology and changed the business model. The company has made a laser copy a multi-billion business and a strategic risk succeeded.¹⁴

2. **Compliance Risk**-is related to legislative regulations, standards in various fields, as well as investment practices.¹⁵ Compliance risk has different Sub-categories (**risks associated with environmental protection, workplace safety, health care, corruption practices, social responsibility, quality and procedural activities**)¹⁶ Naturally, the majority of successful corporations are in line with current legislation, regulations and different standards, although these norms are often changing and the company may be subject to additional regulations in the future. That's why business needs to correspond with the new regulations. For example, California-based Farm sells products within the state's gastronomic shops, if it decides to enter the European market, it will challenge the compliance risk, as European countries have their own rules of food safety, different tax and accounting regulations, which can cost the company more expensive.

For assessing and managing compliance risk, it's necessary to analyze legislation and regulations in force, entrepreneurial and trade traditions of the country or administrative territory, where the company aims to operate. This action significantly reduces the compliance risk and defines the company's action plan.

3. **Operational risk** - includes internal corporate governance procedures and systems. It often relates to the quick decision made by the corporation on how to operate the company and what is its priority in a specific time or circumstances.¹⁷ The following subgroups of operational risk exist: 1. Regulatory penalties, 2. Terrorism, 3. Information technology (IT) failure, 4. Employee hiring and their maintenance 5. Participation of third parties

¹¹ The problem of Enterprise Risk Management, 2017, (In Russian), <http://arbir.ru/articles/a_3902.htm>, [11/04/2017].

¹² The Essence of Risk, the Causes of Risk Creation, National Parliamentary Library of Georgia, <<http://www.nplg.gov.ge/gsd/cgi-bin/library.exe?e=d-01000-00---off-0ekonomik-00-1----0-10-0---0---0prompt-10---4-----0-11-11-ka-50---20-about---00-3-1-00-0-0-11-1-0utfZz-8-00&a=d&cl=CL2.13&d=HASH6bac00dbf13ee602739cac.3.fc>>, [11.04.2017], (In Georgian).

¹³ Xerox Corporation - an American corporation. Produces digital printing technologies and delivers services to over 160 countries worldwide. In 2016 the company's annual revenue amounted to 10.77 billion, US. dollar. The company employees 131, 800 persons, <<https://en.wikipedia.org/wiki/Xerox>>, [11.04.2017].

¹⁴ <<https://business.tutstplus.com/tutorials/the-main-types-of-business-risk--cms-22693>>, [11.04.2017].

¹⁵ <<http://smallbusiness.chron.com/types-business-risk-99.html>>, [11.04.2017].

¹⁶ <<http://simplicable.com/new/compliance-risk>>, [11.04.2017].

¹⁷ <http://www.investopedia.com/terms/o/operational_risk.asp>, [11.04.2017].

in company activities (Outsourcing), 6) organizational changes, 7). Combat Money laundering (AML) and Anti-Terrorist Financing (CTF), 8. Behavior of companies and employees, 9. Cyber-risk.¹⁸

4. Financial risk - includes company's expected financial losses. It is mainly caused by the instability of the financial market, which in turn is provoked by the changing of share prices, currency and interest spheres. Financial risk is a priority for all kinds of businesses and can be divided into following types: Market, Credit, Liquidity and Operating,¹⁹ which is already mentioned above. Separately should be noted about the Diversifying Risk, which involves the danger of losing patent or license by the company; also contains possibility of reserve reduction. In order to avoid this outcome, oil companies typically try to distribute assets to different regions and countries, ensuring diversification of risks.²⁰

5. Reputational risk-is the credibility of losing trust of the company, brand or entrepreneur group. It may

¹⁸ Since operational risk is a serious problem for corporate governance, attention must be focused on its several sub-categories, namely: **1. Regulatory Fines** - As a result of low guarantees of real estate assets and global financial manipulations on currency markets before financial crisis, legal sanctions become frequent. It pressed heavily on financial companies. E.g. fines imposed by US Securities and Currency Exchange Commission in 2009-14 have increased by 50%; Banks and brokers participating in the London Interbank Offered Rate (LIBOR) Scandal, were ordered to pay 9 billion Euro. In 2015, banks: Barclays, Citi, JP, Royal Bank of Scotland and UBS were penalized for participating in financial fraud in the Foreign Exchange Market (Forex Market), they paid 5.6. billion euro to Britain and the US. This number of fines forced companies to evaluate operational risks and to take appropriate measures. **2. Terrorism** - In 2015, terrorist acts took place in Ottawa (Canada) and San Bernardino (USA), the Russian passenger plane crashed in Egypt, in the same year on November 13th terrorists committed attack in Paris. These events caused a widespread international response, including from the companies. After establishing the Islamic State (IS), financial companies are exceptionally prudent, because terrorists often target big financial centers. Naturally, such events are threatening not only states and societies, but also businesses. The survey conducted by Institute for Economics and Peace estimated the value of terrorism. It is considerable that, if the value of terrorism in 2000 was 4.93 billion dollar, this figure reached \$ 52.90 billion in 2014, that exceeds an index of 2001 after the 9/11 terrorist attacks in the US (\$ 51.51 billion). **3. Information Technology (IT) Failure** - Many trading companies have complex electronic platforms, which complete thousands of transactions per minute, respectively, during online trade arises high risks of safety. Banks are also facing these risks, as they frequently complete non-cash transfers. E.g. the largest bank in Germany-Deutsche Bank was fined 7.8 million Euro by the UK regulatory body, for misrepresentation of transactions fulfilled in 2007-2013 period. This fact indicates how important it is to manage IT risks and how expensively software failures are eliminated. **4. Employee hiring and their maintenance**-At present, many industries find hard to select appropriately qualified staff and employing them in the company. This especially refers to PR managers (including sales and investment managers, so-called "front office staff") as well as risk managers. **5. Participation of third parties in company activity (Outsourcing)** - In the financial industry, delivering the auditory, legal, financial, lobbying and other services are wide spread practice for companies. Although this process creates additional risks (called "Third Party Risks") and needs adequate management. During the management of such risks, the company must identify the service provider at the initial stage; must determine how absolute, reliable, timely, and protected information is provided by it; How qualitative its service is. **6. Organizational changes**-The risk of organizational change is often arising from changes in regulations, such as the introduction of a new legislative norm which establishes increased capital for banks. At this time banks with small capital have to restructure, otherwise they will lose a license. It is difficult to predict legislative changes in advance, but according ongoing market trends, and analyzing the state's economic policies, companies can identify the organizational risks and act adequately beforehand (e.g. reflecting extra charges in the company's operating budget, etc.) **7. Cyber Risk**-In 2014, 83 million customer's personal information, was stolen from American company GP Morgan, which is still considered the largest cyber attack until today. After this and other similar attacks, companies started to arrange cyber systems and tightened security measures because they could not function properly anymore and lost the trust of the society. In 2015, the Georgia State Institute of Technology conducted research on Cyber Security. It found that in the financial sector, the highest number of **Senior Information Security Officers** (Cisco) are employed, than in other sectors. This indicates on increased attention to cyber risks, <<http://www.risk.net/risk-management/2441306/top-10-operational-risks-2016#top>>, [11.04.2017].

¹⁹ <<https://www.simplilearn.com/financial-risk-and-types-rar131-article>>, [11.04.2017].

²⁰ Specific corporate risks of capitalization, <<http://proizvodim.com/specifichnye-korporativnye-riski-kapitalizacii.html>>, [12.04.2017] (In Russian).

arise directly as a result of actions of the company employees or third parties. To manage reputation risks, the Company must take social responsibility, be transparent, determine the impact of its activities on the environment and society.²¹ One of the worst incident of bad management of reputation risk is the Brazilian state oil giant Petrobras's case. The company's managers, its related service/products supplier companies and politicians have accused to deliver the services and goods with inadequately increased price, which was carried out according to the special plan. Increased earnings from contracts were distributed as a bribe to participants in the corruption scheme. Following the scandal disclosure, the company's reputation seriously disgraced, which was added to financial losses - alone in 2016, the company lost 358 million U.S. dollars.²² during 2 years many employees have remained without jobs, small companies dependent on the company went bankrupt. An investigation still continues on this case. The company has hired **Compliance Officer** to rectify the results, who leads the company's compliance program.

Due to the severe consequences, it is clear that hiring the special officer is not enough. In addition, it is recommended to review the company management model and launch a long-term strategic plan for risk management, which requires more complex measures. This will facilitate the management of operational, reputational, financial and compliance risks of the company in the future.

3. Risk Management Standards and Mechanisms

An important phase in the risk assessment, control and management sphere was the 1990s, when a method of financial risk assessment - "Value at Risk" (VaR) was developed, it was recognized by the large financial institutions, followed by the trust of financial market regulators. The largest American bank J.P. Morgan has already used VaR method during risk management process in 1994. From the 90s there has been a tendency of risk management-standardization, which was distributed at the domestic and international level, contributing to the development of a common risk management method. Important from these international standards are: the Risk Assessment Technic (ISO/IEC31010, 2009); Manuals for Risk Management Standards (ISO/IEC Guide 73); Enterprise Risk Management (USA); Risk Management Standard (ALARM 2002). Significant national regulations are: British, Australian, Canadian, and Japanese standards.²³

According to the **Federation of European Risk Management Associations (FERMA)**,²⁴ risk management is the strategic direction of any company, serving timely identification and management of various impacts on those. It is a continuous and developing process that should be incorporated into the company's action policy, relevant goals and tactical actions should be written. In addition, it's important that any employee of the company, within his/her competence, should bear the responsibility on risk management, not only head officials and bodies. Risk management is divided into the following stages: risk assessment (includes identification and description of risks); response to risks (determination of hazards and capabilities, decision making, risk management, report, monitoring). Risk identification should be done methodically to ensure that all existing risks are

²¹ Reputation Risk. A Set of Economic and Financial terms, <<http://investocks.ru/reputacionnyx-risk-reputational-risk/>>, [12.04.2017] (In Russian).

²² <<http://www.ethicalcorp.com/business-strategy/corruption-reputation-risk-and-opportunity>>, [12.04.2017].

²³ International Standards of Risk Management: according to Basel unit - Alexander Baranov, Deputy of General Director of the Assets Management Chamber, Chairman of the "ПАРТАД" Committee for Internal Control and Risk Management, 2015, 25, 26, 30, (In Russian), <<http://partad.ru/UploadFiles/GetUploadedPdfFile?uploadFileId=113>>, [18.04.2017].

²⁴ Federation of European Risk Management Associations (FERMA) unites Spain, Great Britain, Luxembourg, France, Italy, Portugal, Czech Republic, Belgium, Germany, Denmark, Turkey, Finland, Holland, Norway, Poland, Russia, Slovenia, Switzerland, Malta Risk Management Associations. The Federation cooperates with various trade and business organizations, it develops risk management methodology, organizes special seminars and reviews, publishes editions. FERMA is a leading organization across Europe in the field of risk management, <<http://www.ferma.eu/about/mission-and-objectives/what-is-ferma/>>, [18.04.2017].

identified. During risk identification the following methods are used (fill the questionnaires, study of different business sectors, investigation of incidents, conduct audit and inspection). The risk description has a special significance, it's aim is to convert already identified risks in the structural format, for example show them in graphs. This allows to allocate priority risks and relevant responses (e.g. strategic, tactical, operational).

In order to effectively manage risks at internal level, the company related subjects need to own different categories of information. The board of directors should know the most important risks, their expected effects, as well as how the company manages the situation, how the confidential information is protected, how to proceed in relationship with the investors. The ordinary employees of the company should also be aware of the individual risks, and recognize their own role in the risk management. They should systematically and urgently inform the management about new or newly revealed risks and possible control mechanisms. Publicity is also extremely important during risk management - the company must regularly provide information to its shareholders on the company's existing or expected risks.

Risk management system, especially in the banking industry, was criticized at the state, European and international levels, which reflected on the basic principles²⁵ of the British corporate governance code. According to these principles, the company board should, at least once a year, review internal control and risk management system.²⁶ Effective corporate governance requires that the executive team's role in risk management must be clearly defined. Since 2013, European "Listing Companies" whose shares have been placed on different stock exchanges, are obliged to reflect annual and relevant information on risk management. The board is responsible for identifying, evaluating and managing all risks. It should be taken into consideration that the risk scale differs not only according the business type and size, but also according the stages of business. As a rule, the new or growing business confronts more risks than the older business.²⁷

Usually, the board of directors carries out the risk management, although this function may be partially assigned to the audit committee. The role of internal audit is different in various companies, and practically its function may be: identification and assessment of risks; training the company employees in risk management and control procedures; internal audit of risk management process; coordinate with the board of directors and various committees. Depending on the company's size, risk management can be performed by one or more full-time/part-time employee, or by risk management department.²⁸ In analytical publication of the **Organization for Economic Co-operation and Development (OECD)** - "Risk Management and Corporate Management", it is suggested that not only banks, but also other companies may employ a **Chief Risk Officer** or his/her equivalent personnel, who directly operates risk management²⁹. According to the **Basel III**³⁰ **Framework Document**, large banks, banks operating in the international banking market and other financial companies are obliged to have a separate senior executive, with separated responsibility on risk management (e.g. Risk Management Officer). These companies must also have a risk management guide. It is important that the functions of the risk manager should be separated from functions and responsibilities of other executives, i.e. **Dual Competences** should be

²⁵ The UK Corporate Governance Code, FRC/Financial Reporting Council, April 2016, 9, 16-18.

²⁶ The Corporate Governance Review-Reproduced with permission from Law Business Research Ltd. This article was first published in The Corporate Governance Review, 4th ed., (published in march 2014, Calkoen J.L.W. ed.), Published in the United Kingdom by Law Business Research Ltd. London, 87 Lancaster Road, London W11 1QQ, UK, 2014, 85.

²⁷ A Guide to Corporate Governance Practices in the European Union – IFC (International Finance Corporation, World Bank Group) 2121 Pennsylvania Avenue, NW, Washington, DC 20433, 2015, 64.

²⁸ A Risk Management Standard – Federation of European Risk Management Associations. AIRMIC, ALARM, IRM: 2002, translation copyright FERMA: 2003, 3, 5, 7, 11, 13, 15.

²⁹ Risk Management and Corporate Governance, Corporate Governance. OECD (The Organization for Economic Co-operation and Development) (2014), OECD Publishing, 12, <<http://dx.doi.org/10.1787/9789264208636-en>>, [11/04/2017].

³⁰ Basel III – An International Agreement, which enhanced regulations, supervision and risk management procedures in the banking sector. The first version of the agreement was published by the Basel Committee of Banking Supervision in 2009, which determined banks with a three-year term to meet new regulations. <<http://www.investopedia.com/terms/b/basel-iii.asp>>, [18/04/2017].

eliminated. Banks are especially needed to properly ensure risk management officer (planning and finance of risk management mechanisms; provide with personnel; access to the information technology system; and so forth.) Naturally, the risk management officer is required to have high qualifications and experience; especially, awareness in the company, the market and products; thorough knowledge of risk management disciplines.³¹

From the issues discussed in this chapter it becomes clear, that the effective risk management requires not only reasonable governance but also the existence of effective analytical structures. They will evaluate how precisely the risks are determined, ascertain the compliance of companies' standards with the internal and/or international requirements, supervise the correct implementation of risks management standards. The constant and active implementation of these measures is crucial, since companies are dynamically developing and constantly changing environmental conditions, which in turn are linked with new risks. As already mentioned, it is not necessary the risk management officer to perform these functions solely, it's possible to attach such competence to other structural unit. The main thing is to keep the quality and duration of the process.

4. Problems Related to Risk Management

In 2011, American, British, Swiss, Australian, Belgian, Danish, French, German, Greek, Czech, Israel, Hungarian, Italian, Irish, Japanese, Norwegian, Saudi Arabian and other countries' **Listing Companies** were researched. According to the study, only 14% of the business time was spent on business risk management and only 14% of respondents knew what kind of risk confronted their companies.³² Today, in a number of companies, Risk Management Systems is managed by computers and is mainly aimed at external risks. Normally, only a few internal risks are allocated in the companies and attention is drawn to them (such are: IT malfunction, regulatory violations, industrial cases, fires, etc.). It is also problematic that the company top management neglects risks. Often, the company's lower structure employees do not even attempt to detect the expected/obvious risks and inform about them, because they are afraid of negative response from the top management.³³

The research conducted by the **Financial Stability Board (FSB)**³⁴ in 2013, found that most of the company boards did not pay enough attention to the risks (e.g. did not have the Risk Management Committee) did not conduct a thorough analysis of the company's risky conditions, so most of them did not use risk management plans. In addition, internal standards of corporate governance inadequately regulated risk management. A research conducted in 60 countries with 760 interviewed, showed that negative trends in risk management process still existed-banks had short-term risk management levers, priorities often changed in the banking sector, that caused development of "reactive" risk management model.³⁵ Nowadays, in response to these challenges the regulatory bodies are reviewing the risk management norms, an attention is paid to modernization of enterprise risk management models.

According to a survey by the **American Institute of Public Accountants (AICPA)**³⁶ in 2015, companies

³¹ <<http://www.chief-risk-officer.com/>>, [18/04/2017].

³² From Companies to Markets, Global Developments in Corporate Governance - International Finance Corporation. Copyright 2016, All rights reserved., 2121 Pennsylvania Avenue, NW, Washington, DC 20433, 30- 32, 34.

³³ <<http://www.agcs.allianz.com/insights/expert-risk-articles/looking-forward-future-risks/the-risk-management-system/>>, [24.04.2017].

³⁴ **Financial Stability Board (FSB)** an international organization founded in 2009. Its function is to facilitate global financial stability as a result of coordination of financial and supervisory sectors. Member states are: France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Holland, Russia, Saudi Arabia, Singapore, Spain, Switzerland, Turkey, Great Britain, USA and other countries, <<http://www.fsb.org/what-we-do/>>, <<http://www.fsb.org/about/fsb-members/>>, [18/04/2017].

³⁵ Key Risk Management Challenges for 2013/2014, <<https://www.sungard.com/resources/capital-markets/white-papers/adaptiv-key-risk-management-challenges-for-2013-2014-sungard>>, [24.04.2017].

³⁶ American Institute of Certified Public Accountants (AICPA), an attorney organization of certified public accountants.

are increasingly managing industrial risks. According to the survey, 59 percent of interviewed 1000 companies think that the complexity and scope of risks have greatly increased in recent years, 68% of the board of directors requests the involvement of higher officers in the risk oversight process. This figure is even higher for large companies (86%) and public companies (88%). Accordingly, at this moment the situation has changed; many of the codes, including corporate governance principles, of the Organization for Economic Cooperation and Development (OECD), have established and strengthened risks management standards.

However, the situation in the banking sector differs to a certain degree, for example, the **Basel Committee on Banking Supervision** has ascertained that even after the financial crisis, banks have inadequate control over senior officers, have very complex organizational structures and do not properly manage risks. The situation is similar in Russia's small and medium-sized banks, where problematic are: **1. Not having the integral system of risk management** - consequently banks don't have a full picture about diverse risks; **2. Ignoring the instructions of the Central Bank of Russia** - in small banks risk management is often carried out by less effective internal regulations and not according to the Central Bank's instructions; **3. Conflict of interest** - Sometimes risk manager does not obey the decision of the bank's head, because the decision itself is risky; **4. Insufficient information on risks assessment** - banks experience deficit of internal and external statistical information, which hinders the adequate assessment of risks. In contrast, for example, in the United States companies' statistics and datas are regularly published in different directions of the economy, which promotes risk management. **5. Uncertainty of the functions of the Risk Management Unit** - sometimes the risk management unit has to perform the functions of other units; **6. Copying the Western models of banking risks management** - usually, small and medium sized banks in Russia lend risk management models from Western companies without adaptation them to actual situation; **7. Inadequate development of information technologies for risk management** - as a rule, the IT divisions of banks are carrying out routine activities: personnel computer services, management accounting, etc. They are less likely to cooperate with the risk management department.

To settle the problems discussed above, it is advisable to use the concept of **Enterprise Risk Management (ERM)**, its implementation completes the bank's strategic and operational objectives, intensifies communication between the bank's management and risk management units.³⁷

The difficulties of managing corporate risks, still remains in the US. Years after the US mortgage market damage, some company directors and executives are still responsible for the past decisions and actions. This generally affected the legislators who developed new legal approaches and introduced appropriate regulations. As a result, today's directors and executive officers are under strict observation, actively is being used the **"Foreign Corrupt Practice Act" (FCPA)**, which was adopted in 1977. It is important that nowadays the largest financial institutions of the United States have been established **"Enterprise scale Risks"** management mechanisms at all levels of the company, that helps correct and stable risk management. In 2011, the Global Risk Management Survey found that 79% of financial service companies have "enterprise-scale risks" management programs.³⁸

Establishes standards for private company auditors, produces manual and training materials for members, and monitors the compliance with accountants' professional and technical standards, <<http://www.aicpa.org/About/MissionandHistory/Pages/default.aspx>>, [18/04/2017].

³⁷ Usually, when using traditional methods of risk management, risks are considered as internal threats; they are identified and assessed unsystematically; risks are being restricted; company employees avoid risk management responsibility. **Enterprise Risk Management/ ERM** has developed an advanced risk management method that differs from the traditional risk management system. Accordingly the risks are considered as part of the bank's strategy; risk portfolio is drawn; they are optimized; risk management strategy is written; management of specific risks entrusts to the relevant persons; the process is regularly monitored and evaluated; responsibilities of risk are imposed on everyone. Risk management in small and medium-sized banks: problems and prospects - Evgenevna G., Associate Professor of Chair of Economic Analysis, Statistics and Finance, Kuban State University, Banking Management, Financial Prospect No. 2 (6) 2012, 8-10 (In Russian).

³⁸ Financial Institution Risk Management Issues - White paper, January 2014. sponsored by AIG. ADVISEN LTD (Insurance Intelligence), 2, 6, 7.

5. Conclusion

As a result of the financial crisis of 2008, it became clear that the lack of a complex approach to risks, directly affected companies, industries and economies of the states. naturally, this has led to the creation of new problems in the management of corporate risks, the solution to which proved to be a long-term process.

Risk management policy has been defined; risk management methodologies, action plans, and recommendation proposals have been developed due to financial crisis, rumored corporate scandals, companies' financial losses and consequent negative social-economic events. For companies of many industries, risk management is a priority at this moment. In addition, risk management is urgent at national, regional and international levels.

Viewpoint is spread that the correct management of risks should create a stable and reliable reputation of the company (which ultimately results in material profits); the circle of entities interested with company should increase; risk management should be an integral part of decision making. Regrettably, until recently risk management has been seen as an extra cost for many entrepreneurs, but it should be noted that expenses arise only when risk management is incoherent. This process not only decreases the costs of the company; but also reduces negative financial, economic and/or reputational impacts, risk management benefits the company, increases its competitiveness and profits. Considering this, risk management should be considered not only as an important direction for corporate governance (as systematic preventive activity) but also as a common dividend for companies, markets and states. Therefore, it can be said that the concept of "risk management" has acquired a new meaning.

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Theories of Corporate Governance: A Legal Analysis

The purpose of those who rule is to lead the society to a better future, which can only be achieved via the methods and principles of good governance. One of the primary instruments via which good governance occurs in practice, is the adoption of legal acts by the branches of government. However, in order for the laws to have a positive effect on the future of the society, they must be based on solid theoretical bases.

In light of the aforesaid, it is quite problematic that quite often rules are adopted, which are based on theories, that the authors of such laws neglected to study and comprehend in depth. It is imprative that the fundamentals be understood better for good governance to occur. One of the fields in which there is somewhat of a lack of understanding of the basics in Georgia is that of corporate governance.

We can encounter extensive regulation in the field of corporate governance, both on the primary legislative level as well as in secondary legislation, in Georgia. Despite this, there is all but no academic literature available, which would analyze the differing, yet currently accepted theories of corporate governance. It is exactly the filling of this hole and the support for introducing the principles of good governance in the said field that is the primary aim of the research at hand.

Key words: Corporate, Governance, Theories, Analysis.

1. Introduction

The purpose of those who rule is to lead the society to a better future¹, which can only be achieved via the methods and principles of good governance². One of the primary instruments via which good governance occurs in practice, is the adoption of legal acts by the branches of government^{3,4}. However, in order for the laws to have a positive effect on the future of the society, they must be based on solid theoretical bases⁵.

Quite often, when working to create laws, the end result is based on the principles which are well analyzed and understood by both the legislator as well as third parties⁶. Unfortunately, this is not always the case and quite often new rules are adopted on the basis of theories which have not been studied and analyzed by the authors⁷. Alternatively, there are often occasions, when the legislative acts are being “transplanted”, which means that the national legal framework has laws of different states transferred into it, simply translating them instead of deeply and comprehensively studying them as well as the underlying principles thereof⁸. The practice of

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¹ *De Vries M.S.*, The Challenge of Good Governance, *The Innovation Journal: The Public Sector Innovation Journal*, 18.1., 2013, 2-9.

² *Hubbard R.*, Criteria of Good Governance *Optimum*, *The Journal of Public Management*, 30.2., 1999, 37-50.

³ *Weiss F., Steiner S.*, Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison, *Fordham International Law Journal*, 30.8., 2013, 1545-1586.

⁴ *Lane J.*, Good Governance: The Two Meanings of “Rule of Law”, *International Journal of Politics and Good Governance* 1.1., 2010, 1-27.

⁵ *Kessler F.*, Theoretic Bases of Law, *The University of Chicago Law Review*, 9, 1941, 98-112.

⁶ *Brust S.*, Ancient and Modern: Natural Law and Universal Moral Principles. *The Catholic Social Science Review*, 14, 2009, 65-74.

⁷ *Kessler F.*, Theoretic Bases of Law, *The University of Chicago Law Review*, 9, 1941, 98-112.

⁸ *Hendley K.*, Telephone Law and the Rule of Law: The Russian Case, *Hague Journal on the Rule of Law*, 1, 2009, 241-262.

legal transplantation was especially widely used in the republics of the former Soviet Union in the last decade of the twentieth century as well as the first decade of the twenty-first century⁹. In accordance with this existing practice, it is not particularly surprising that a number of Georgian legislative acts were adopted as a result of this instrument as well¹⁰. The field of corporate governance was not an exception here, where the original laws were created by mixing the legislative frameworks of Germany and Austria, which was later amended to include elements of the American rules as well¹¹.

The fact that a law is being adopted without its theoretical basis being comprehended, just by sharing the best practice of a different nation, does not mean that this very law must automatically be considered to be a bad one¹². Despite this, it is most definitely desirable, that the fundamental ideas be better understood, in order for good governance to be present¹⁴. Therefore, such a fact would better support and possibly even ensure that the brighter future for the state and the society is guaranteed¹⁵.

In practice, the level of understanding the theoretical fundamentals is everchanging¹⁶. It depends on the both on the country in question, as well as the topic which the laws at hand are to cover¹⁷. One of the fields in which there is somewhat of a lack of understanding of the basics in Georgia is that of corporate governance.

Corporate governance is defined as a system, via which a company is governed and controlled¹⁸. Any medium-sized and large company (as well as quite a few smaller companies) requires, for effective governance to be achieved, that the rights and competences of owners and managers be well defined and separated from each other¹⁹. A paramount aspect of corporate governance is the study of how, on what level, must the rights and obligations of the people involved be defined and the interests of which party should be considered to be the most important^{20,21}. In order for the approaches and the positions on these matters to be communicated well, the theories of corporate governance are created and evolved²². These theories are an important aspect of law and it is with their support that the relevant legislative acts are drafted in the best possible manner²³.

⁹ *Nichols P.M.*, The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code, University of Pennsylvania Journal of International Economic Law, 18.4., 1997, 1235-1279.

¹⁰ *Jupp J.*, Legal Transplants as Tools for Post-Conflict Criminal Law Reform: Justification and Evaluation, Cambridge Journal of International and Comparative Law, 3.1., 2014, 381-406.

¹¹ *Goshkheteliani N., Galdava D.*, Authorized Capital in Georgian Legislation – A Comparative Legal Analysis and an Alternative Regulation, Young Barristers Scientific Journal, 4, 2015, 33-42 (in Georgian).

¹² *Pangendler M.*, Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil, The American Journal of Comparative Law, 60, 2012, 805-850.

¹³ *Chiba M.*, Other Phases of Legal Pluralism in the Contemporary World, Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law, 11.3., 1998, 228-245.

¹⁴ *Ballard M.J.*, Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations, Berkeley Journal of International Law, 28.2., 2010, 462-496.

¹⁵ *De Vries M.S.*, The Challenge of Good Governance, The Innovation Journal: The Public Sector Innovation Journal, 18.1., 2013, 2-9.

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¹⁷ *Pejovic C.*, Civil Law and Common Law: Two Different Paths Leading to the Same Goal, Victoria University of Wellington Law Review, 32, 2001, 817-842.

¹⁸ *Aggarwal P.*, Impact of Corporate Governance on Corporate Financial Performance, IOSR Journal of Business and Management, 13.3., 2013, 1-5.

¹⁹ *Kral P., Tripes S., Pirozek P., Pudil P.*, Corporate Governance Against Recommendations: The Cases of the Strong Executive and the Strong Ownership, Journal of Competitiveness, 4.3., 2012, 46-57.

²⁰ *Alam A., Shah S.*, Corporate Governance and its Impact on Firm Risk, International Journal of Management, Economics and Social Sciences, 2.2., 2013, 76-98.

²¹ *Marshall S., Ramsay I.*, Stakeholders and Directors' Duties: Law, Theory and Evidence, UNSW Law Journal, 35.1., 2012, 291-316.

²² *Abdullah H., Valentine B.*, Fundamental and Ethics Theories of Corporate Governance, Middle Eastern Finance and Economics, 4, 2009, 88-96.

²³ *Schleifer A., Vishny R.*, A Survey of Corporate Governance, The Journal of Finance, 52.2., 1997, 737-783.

We can encounter extensive regulation in the field of corporate governance, both on the primary legislative level as well as in secondary legislation, in Georgia. Despite this, there is all but no academic literature available, which would analyze the differing, yet currently accepted theories of corporate governance. It is exactly the filling of this hole and the support for introducing the principles of good governance in the said field that is the primary aim of the research at hand.

Theories of corporate governance can be separated into two specific types – primary and secondary theories²⁴. The primary theories are: Agency Theory, Stewardship Theory and Stakeholder Theory²⁵²⁶. As for secondary theories, they can be defined as follows: Resource Dependency Theory, Transaction Cost Theory, Political Theory, Legitimacy Theory, Social Contract Theory, Enlightened Stakeholder Theory and Ethics Theories²⁷²⁸²⁹.

In practice, it is the three primary theories that see usage both when drafting legislation, as well as with companies conducting business³⁰³¹. Despite this, the secondary theories are hugely important as well and in no way should they be ignored³²³³. Therefore, all of the aforementioned theories need to be critically analyzed and all relevant academic literature be scrutinized, in order for the information regarding this hugely important instrument of corporate law be more accessible in the academic literature of Georgia. This would, in turn, lead to the filling of the gap, which, as previously mentioned, is characteristic of the said field in the country.

The research at hand will critically analyze the primary as well as the secondary theories of corporate governance. They will be studied and both the positive and the negative aspects thereof be revealed. Additionally, this research will compare the current Georgian legislative framework and the existing realities to the demands of certain theories, in order to better define which of the principles can be seen in our laws, so to understand which theory the Georgian legislation is based on (as it is impossible to find information regarding this). Finally, if there are problems and inconsistencies with the legal basis of laws, the research at hand will provide recommendations regarding needed legislative amendments.

2. Methodology

There are two dominant approaches in academic literature regarding the methodology of research – qualitative and quantitative³⁴. The quantitative method primarily requires deductive reasoning, which means that when employed, it leads to the checking of merits of certain positions using hard, rigid data. As for the qualitative method, it has a

²⁴ *Letting N., Wasike E., Kinuu D., Murgor P., Ongeti W., Aosa E.*, Corporate Governance Theories and their Application to Boards of Directors: A Critical Literature Review, *Prime Journal of Business Administration and Management*, 2.12., 2012, 782-787.

²⁵ *Mamun A., Vasser Q., Rahman A.*, A Discussion of the Suitability of Only One vs More than One Theory for Depicting Corporate Governance, *Modern Economy*, 4, 2013, 37-48.

²⁶ *Donaldson L., Davis J.*, Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns, *Australian Journal of Management*, 16.1., 1991, 49-65.

²⁷ *Yusoff W., Alhaji I.*, Insight of Corporate Governance Theories, *Journal of Business & Management*, 1.1., 2012, 52-63.

²⁸ *Yilmaz A.*, Management Strategies for Resource Dependency Risk in Aviation Business, *International Review of Management and Business Research*, 3.3., 2014, 1551-1563.

²⁹ *Hung H.*, A Typology of the Theories of the Roles of Governing Boards, *Scholarly Research and Theory Papers*, 6.2., 1998, 101-111.

³⁰ *Connely B., Hoskisson R., Tihanyi L., Certo S.*, Ownership as a Form of Corporate Governance, *Journal of Management Studies*, 47.8., 2010, 1561-1589.

³¹ *Schleifer A., Vishny R.*, A Survey of Corporate Governance, *The Journal of Finance*, 52.2., 1997, 737-783.

³² *Letting N., Wasike E., Kinuu D., Murgor P., Ongeti W., Aosa E.*, Corporate Governance Theories and their Application to Boards of Directors: A Critical Literature Review, *Prime Journal of Business Administration and Management*, 2.12., 2012, 782-787.

³³ *Mamun A., Vasser Q., Rahman A.*, A Discussion of the Suitability of Only One vs More than One Theory for Depicting Corporate Governance, *Modern Economy*, 4, 2013, 37-48.

³⁴ *Wood M., Welch C.*, Are 'Qualitative' and 'Quantitative' Useful Terms for Describing Research? *Methodological Innovations Online*, 5.1., 2010, 56-71.

basis in inductive reasoning and is utilized in order to facilitate the building of theories, so that certain matters are better analyzed³⁵.

The quantitative method is most often used when research is being conducted in the field of exact sciences, while the qualitative approach is dominant with social sciences. This fact stems from the qualitative method having the more philosophical undertones, while its counterpart is most concerned with analyzing hard data³⁶. Jurisprudence is, of course, much closer to social sciences, so, unsurprisingly, it is the qualitative method that is considered to be the way to go with legal research³⁷. Considering the aforesaid, the research contained within the present document is conducted utilizing the qualitative method.

There are two types of instruments which tend to be used as a basis of academic research = primary and secondary sources³⁸. The primary sources are obtained by the researcher or their associates on the basis of sociological questionnaires, interviews and other similar methods. As for secondary sources, they consist of documents and instruments, that were previously created, independent of the research utilizing them and without the researcher's involvement³⁹. Due to the subject at hand, it would have been inexcusable to base the research on primary sources, as obtaining enough data is quite difficult and would have led to an absurdly huge waste of time and resources. Therefore, an optimal way would be the utilization of primarily secondary sources (laws, academic literature, court decisions etc.) when developing the research at hand.

There is one problem associated with using secondary sources – the issue of reliability⁴⁰. Since the author of the research and the source thereof are distinct individuals, there is always the threat that when writing, the given data will be incorrectly understood. Additionally, the source itself can be wrong, biased or incomplete⁴¹. Fortunately, in the era of the internet, it is much simpler to check and verify any given statement. Nevertheless, this research will endeavor as much as possible to utilize only those sources which are trustworthy and reliable. As a result, this potential issue should be remedied within this research.

As for the positive aspects of secondary sources, the simplicity of using them should be mentioned. This ease makes their utilization more effective, which affects the quality of the end product as well. The sources are created with the involvement of a number of scientists and researchers, which means that when using such documents, the author is presented not only with hard data, but also with the positions and approaches, which can have a considerable positive influence⁴². Additionally, the usage of the documents created by individuals working in a variety of fields helps the author in looking at the problem in a different light and to widen their horizon, which, of course, will be a positive development⁴³.

Finally, it must be noted that the majority of the research shall be conducted in the English language. As it has already been stated, there is a severe lack of relevant literature in Georgia. Additionally, since the theories of corporate governance have an international nature, it is more desirable for the research to be conducted in an

³⁵ *Johnson-Laird P.N.*, Deductive Reasoning, Annual Review of Psychology, 50, 1999, 109-135.

³⁶ *Hoepfl M.C.*, Choosing qualitative research: A Primer for Technology Education Researchers, Journal of Technology Education, 9.1., 1997, 47-63.

³⁷ *Johnson-Laird P.N.*, Deductive Reasoning, Annual Review of Psychology, 50, 1999, 109-135.

³⁸ *Long-Sutell T., Sque M., Addington-Hall J.*, Secondary Analysis of Qualitative Data: A Valuable Method for Exploring Sensitive Issues With an Elusive Population? Journal of Research in Nursing, 16.4., 2010, 335-344.

³⁹ *Church R.M.*, The Effective Use of Secondary Data, Journal of Learning and Motivation, 33, 2001, 32-45.

⁴⁰ *Drost E.A.*, Validity and Reliability in Social Science Research Education Research and Perspectives, 38.1., 2011, 105-122.

⁴¹ *Thomas S.L., Heck R.H.*, Analysis of Large-Scale Secondary Data in Higher Education Research: Potential Perils Associated with Complex Sampling Designs, Journal of Research in Higher Education, 42.5., 2001, 517-540.

⁴² *Choy L.T.*, The Strengths and Weaknesses of Research Methodology: Comparison and Complimentary between Qualitative and Quantitative Approaches, IOSR Journal Of Humanities And Social Science, 19.4., 2014, 99-104.

⁴³ *Andersen J.P., Prause J., Silver R.C.*, A Step-by-Step Guide to Using Secondary Data for Psychological Research, Social and Personality Psychology Compass, 5.1., 2010, 56-75.

international language as well. This, of course, can best be done in English. Despite of this, since mixed views and positions are a good thing for the research, it will also use Georgian, German, Russian and French sources.

3. Primary Theories of Corporate Governance

3.1. Etymology of Primary Theories

As it has already been clarified, there is almost no research conducted in Georgian on the subject of corporate governance theories. Therefore, there is no settled position on what exactly they should be called as well. The position of this research is that for the reader to be best able to understand the topic, the exact terms must be well thought-out. Therefore, this sub-paragraph exists in order to clarify which are the best the titles of corporate governance theories, as they are provided in the document at hand.

The agency theory is translated into Georgian as “Tsarmomadgenlis teoria”. This slightly differs from the exact translation from English, as that would have been “Agentobis teoria”. This very term can be seen as the “Principal-Agent-theorie”⁴⁴ in German, “Théorie de l’agence”⁴⁵ in French and “Теория агентства”⁴⁶ in Russian. They all sound similar to the rejected exact translation, so the reader may be confused as to why such a choice was made.

In the Russian language, the terms “агент” (agent) and “представитель” (representative), are, essentially, synonyms⁴⁷. The similar situation can be encountered in English as well^{48,49}. This considerably differs from Georgian, as the term directly corresponding with “agent” is not used in the same vein and mostly happens with insurance⁵⁰. Therefore, making a minor alteration is best advised so that the term makes most sense^{51,52}.

As for the stewardship theory, it can be seen in French as “théorie dite de l’intendance”⁵³ in German as “Stewardship Theorie”⁵⁴ and in Russian as “Управленческая теория”^{55,56}. The Georgian equivalent chosen “msakhuris teoria” or the “theory of a servant”, can also seem off-putting to some.

First, it needs to be emphasized that the term “steward” is, essentially, synonymous to “servant” in Georgian, so, if we rule out using foreign words, this would be an acceptable change. Also, when juxtaposing the theories of agency and stewardship, we often see the argument that according the latter, the director “serves”

⁴⁴ *Wenger E., Terberger E., Die Beziehung Zwischen Agent und Prinzipal als Baustein einer Ökonomischen Theorie der Organisation, Wirtschaftswissenschaftliches Studium, 17.10., 1990, 506-514.*

⁴⁵ *Numa G., Théorie de l’agence et Concessions de Chemins de fer Français au 19^{ème} siècle, Revue D’économie Industrielle, 125, 2009, 105-128.*

⁴⁶ *Капогузов Е., Вклад Новой Институциональной Экономической Теории в Реформирование Общественного Сектора, Журнал институциональных исследований, 3.4., 2011, 6-17.*

⁴⁷ *Юрова К.И., Особенности Классификации Коллекторских Агентств и Организации Коллекторских Компаний, Научно-практический журнал Государство и право в XXI веке, 1, 2016, 27-31.*

⁴⁸ *Emirbayer M., Mische A., What Is Agency? The American Journal of Sociology, 103.4., 1998, 962-1023.*

⁴⁹ *Jensen M.C., Meckling W.H., Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, Journal of Financial Economics, 3, 1976, 305-360.*

⁵⁰ *Georgian Civil Code, 1997, Article 805.*

⁵¹ *Tchanturia L., Akhvlediani Z., Zoidze B., Jorbenadze S., Ninidze T., Commentary on the Georgian Civil Code, Book One, Tbilisi, Publishing House Samartali, 2002, 276-279.*

⁵² *Georgian Civil Code, 1997, Articles 103-114.*

⁵³ *Cornforth C., La Gouvernance des Coopératives et des Sociétés Mutuelles: Une Perspective de Paradoxe, Économie et Solidarités, 35.6., 2005, 81-99.*

⁵⁴ *Wald A., Corporate Governance als Erfolgsfaktor? Industrielle Beziehungen, 16.1., 2009, 67-86.*

⁵⁵ *Васильев Ю.В., Парахина В.Н., Увицкий Л.И., Теория Управления, Издание Второе, Москва, Издательство Финансы и Статистика, 2005.*

⁵⁶ *Чернышев М.А., Тяглое С.Г., Теория Организации, Ростов-на-Дону, Издательство Феникс, 2008.*

the company^{57 58 59}, while the former considers that they generally do no such thing⁶⁰⁶¹⁶²⁶³. Therefore, since the role of the director is foremost for these theories, using the term that best underlines their position should be the way to go.

As far as the stakeholder theory is concerned, it is translated into German as “stakeholder-theorie”⁶⁴⁶⁵, into French as “théorie des parties prenantes”⁶⁶ and into Russian as both “теория заинтересованных сторон”⁶⁷ and, alternatively, as “теория соучастников”⁶⁸.

As before, when discussing the term used by the research (“dainteresebuli pirebis teoria” or “theory of interested parties”), there can be questions raised by the readers. This is the best translation of the word “stakeholder” that we see in Georgian and best encapsulates its meaning, so the research considers it to be the best idea to utilize it⁶⁹.

In light of the aforesaid, this research considers that the terms used for the three primary theories are the best options available at this time.

3.2 Agency Theory

One of the primary topics covered by corporate law is the need for a rigid border between owning a share of the capital of a company and governing the said entity⁷⁰. The creation and delimitation of this rigid border in such a manner that the interests of the shareholders are best protected by the directors is the entire *raison d'être* of the agency theory⁷¹.

Company governance is defined as a broad array of matters related to the activity of a corporation⁷². It covers the planning of long-term matters with significant importance for the company, both large and small⁷³.

⁵⁷ Fox M.A., Hamilton R.T., Ownership and Diversification: Agency Theory or Stewardship Theory, *Journal of Management Studies*, 31.1., 1994, 69-81.

⁵⁸ Van Slyke D.M., Agents or Stewards: Using Theory to Understand the Government-Nonprofit Social Service Contracting Relationship, *Journal of Public Administration Research and Theory*, 17, 2006, 157-187.

⁵⁹ Tudose M.B., Corporate Finance Theories, Challenges and Trajectories, *Management & Marketing Challenges for the Knowledge Society*, 7.2., 2012, 277-294.

⁶⁰ Letting N.K., Wasike E.R., Kinuu D., Murgor P., Ongeti W., Aosa E., Corporate Governance Theories and Their Application to Boards of Directors: A Critical Literature Review, *Prime Journal of Business Administration and Management*, 2.12., 2012, 782-787.

⁶¹ Pérez-González F., Inherited Control and Firm Performance, *American Economic Review*, 96.5., 2006, 1559-1588.

⁶² Boshkoshka M., The Agency Problem: Measures for Its Overcoming, *International Journal of Business and Management*, 10.1., 2015, 204-209.

⁶³ Davis J.H., Schoorman F.D., Donaldson L., Toward a Stewardship Theory of Management, *Academy of Management Review*, 22.1., 1997, 20-47.

⁶⁴ Göbel E., Der Stakeholderansatz im Dienste der Strategischen Früherkennung, *Zeitschrift für Planung*, 1, 1995, 55-67.

⁶⁵ Schaltegger S., Bildung und Durchsetzung von Interessen zwischen Stakeholder der Unternehmung, Eine Politisch-ökonomische Perspektive, *Die Unternehmung*, 53.1., 1999, 3-20.

⁶⁶ Mullenbach-Servayre A., L'apport de la Théorie des Partiesprenantes à la Modélisation de la Responsabilité Sociétale des Entreprises, *Revue des Sciences de Gestion*, 223, 2007, 109-120.

⁶⁷ Благоев Ю.Е., Классика Теории Менеджмента, *Вестник Санкт-Петербургского Университета*, 1, 2012, 109-116.

⁶⁸ Леванов Л.Н., Теоретико-Методологические Подходы к Понятию “Корпоративное Управление”, *Известия Саратовского Университета*, 12.1., 2012, 54-60.

⁶⁹ Wang B., Theme in Translation: A Systemic Functional Linguistic Perspective, *International Journal of Comparative Literature & Translation Studies*, 2.4., 2014, 54-63.

⁷⁰ Fama E.F., Jensen M.C., Separation of Ownership and Control, *Journal of Law and Economics*, 26.2., 1983, 301-325.

⁷¹ Bonazzi L., Islam S.M.N., Agency Theory and Corporate Governance: A Study of the Effectiveness of Board in Their Monitoring of the CEO, *Journal of Modelling in Management*, 2.1., 2007, 7-23.

⁷² Стрекалова А.А., Второе Поколение Фискального Федерализма, *Журнал Human Progress*, 2.3., 2016, 1-12.

⁷³ Namazi M., Role of the Agency Theory in Implementing Management's Control, *Journal of Accounting and Taxation*, 5.2., 2003, 38-47.

In light of all this, it is quite clear that corporate governance is of tremendous importance and the fundamental theories thereof need to be wholly understood so that a field of law covering such matters does not become similar to a castle built on sand⁷⁴.

The agency theory has been used in economics and law for quite some time⁷⁵. Despite this, there are quite a few parties who oppose this instrument, as they believe that the agency theory dehumanizes the individuals involved in corporate governance, because of which this theory is considered to be dangerous and undesirable⁷⁶.

The Agency theory is often seen as an instrument which should be utilized in order to fix the problems which arise in three specific situations. These are:

1. When the interests of the company and its shareholders are not concurrent with each other;
2. When the members of the company are unable to effectively monitor those governing the corporation;
3. When the positions of the shareholders and the directors differ on certain risky actions that the company may need to undertake⁷⁷.

This following research was undertaken in order to describe the positions on these matters, in accordance with the agency theory, as well as to critically evaluate the positive and negative aspects thereof.

3.2.1 The Agency Theory and the Conflict of Interest

As far as the agency theory is concerned, the conflict of interests is generally caused by the fact that a company is a distinct entity and should not be considered to be the sum of its shareholders⁷⁸. More specifically, a problem arises from the fact that, quite often, the interests of the shareholders do not coincide with that of the company itself. The shareholders often prefer short-term gains while neglecting the long-term goals⁷⁹. This may become a problem as, without a deep comprehension of the theories of corporate governance, it is immensely difficult to discuss which side should the director side with and who's positions must be protected by them, shareholders or the company itself⁸⁰.

The agency theory has a concrete standing on this matter. It stems from the primary idea of the theory that the director is an agent, a representative of the shareholders⁸¹. This means that, according to this doctrine, the director needs to worry about the interests of the shareholders, not the company at large⁸². In light of this, one can say that the company itself becomes a third party for the director, as they are always obliged to emphasize the interests of their principals – the shareholders⁸³ (This position is shared in Georgian academic literature as well⁸⁴), and, therefore, it becomes clear that the director must only care for the well-being of the shareholders.

⁷⁴ *Baiman S.*, Agency Research in Managerial Accounting: A Second Look Accounting, Organization and Society, 15.4., 1990, 341-371.

⁷⁵ *Spence A.M., Zeckhauser R.*, Insurance, Information and Individual Action, American Economic Review, 61, 1971, 380-387.

⁷⁶ *Perrow C.*, Complex Organizations, New York, Random House, 1986.

⁷⁷ *Eisenhardt K.*, Agency Theory: An assessment and a review, Academy of Management Review, 14.1., 1989, 57-74.

⁷⁸ *Daly H.*, Conflicts of Interest in Agency Theory: A Theoretical Overview, Global Journal of Human-Social Science: Economics, 15.1., 2015, 17-22.

⁷⁹ *Fama E.F., Jensen M.C.*, Separation of Ownership and Control. Journal of Law and Economics, 26.2., 1983, 301-325.

⁸⁰ *Fama E.F.*, Agency Problems and the Theory of the Firm, Journal of Political Economy, 88, 1980, 288-307.

⁸¹ *Baiman S.*, Agency Research in Managerial Accounting: A Second Look, Accounting, Organization and Society, 15.4., 1990, 341-371.

⁸² *Eisenhardt K.*, Agency Theory: an Assessment and a Review, Academy of Management Review, 14.1., 1989, 57-74.

⁸³ *Keser C., Willinger M.*, Theories of Behavior in Principal-Agent Relationships with Hidden Action, European Economic Review, 51., 2007, 1514-1533.

⁸⁴ *Tchanturia L., Akhvlediani Z., Zoidze B., Jorbenadze S., Ninidze T.*, Commentary on the Georgian Civil Code, Book One, Tbilisi, Publishing House Samartali, 2002, 276-279.

As for the company at large, it is important as well, but when presented with the need to protect it or the shareholders, the director must always stick with the latter⁸⁵.

In light of the aforesaid, one should note that when there is a conflict of interests between the shareholders and the company, the agency theory offers a simple solution. The director must always do anything in their power to make sure that the outcome is favorable to the shareholders, no matter the cost thereof for the company.

3.2.2 The Agency Theory and the Control of the Directors by the Shareholders

One characteristic of the Agency theory is that it assumes the directors to be self-serving and self-interested. It considers that without supervision and control, those governing a company will strive to ensure the outcome of any action to be most desirable for themselves, not the shareholders⁸⁶. In light of this, an effective supervision structure to be employed by the shareholders becomes paramount⁸⁷.

In accordance with the agency theory for the directors to govern the company in a way that the shareholders would prefer, it is important for effective supervision mechanisms to be put into force⁸⁸. Without them there will be a considerable chance that the director will take steps which are selfish and go against the shareholders' needs⁸⁹ or, at the very least, will not do everything in their power to support the interests of their principals⁹⁰.

The agency theory states that the shareholder will never be able to protect their interests perfectly via individuals hired and employed⁹¹. Therefore, the owners of the company will need to play an active role in the life of the organization⁹², or, if this is impossible, they should at least use the instruments that will allow them to often check the work of the directors in an efficient manner⁹³. Both alternatives require for the shareholders to use additional resources (their time or finances), but, as far as the agency theory is concerned, these are justified since this will help ensure the effective governance of the company, so that the shareholders' interests are best protected⁹⁴. The theory also considers the possibility that additional oversight instruments will diminish the effectiveness of governance, but this is seen as an acceptable sacrifice⁹⁵, so that the directors' loyalty and dedication to the company is ensured.

One other matter, which deals with the directors working to ensure the shareholder's best interests being met is that, in accordance with the agency theory, the directors require additional incentives in order for them to do their duty effectively⁹⁶. As it has already been stated, the director is considered to be selfish⁹⁷. Therefore, for the company to be governed in the best manner, it is imperative that the interests of the corporation coincide

⁸⁵ *Jensen M.C., Meckling W.H.*, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, *Journal of Financial Economics*, 3, 1976, 305-360.

⁸⁶ *Pfeffer J.*, *Power in Organizations*, Marshfield, Massachusetts, Pitt-Man Publishing, 1981.

⁸⁷ *Aggarwal S., Goel R., Vashishtra, P.K.*, A Literature Review of Agency Theory, *Indian Journal of Research*, 3.5., 2014, 51-52.

⁸⁸ *Caers R., Du Bois C., Jegers M., De Gieter S., Schepers C., Pepermans R.*, Principal-Agent Relationships on the Stewardship-Agency Axis, *Nonprofit Management & Leadership*, 17.1., 2006, 25-47.

⁸⁹ *Allen F., Bernardo A.E., Welch I.*, A Theory of Dividends Based on Tax Clienteles, *The Journal of Finance*, 55.6., 2000, 2499-2536.

⁹⁰ *Eisenhardt K.*, Agency Theory: an Assessment and a Review, *Academy of Management Review*, 14.1., 1989, 57-74.

⁹¹ *Rose P.*, Common Agency and the Public Corporation, *Vanderbilt Law Review*, 63.5., 2010, 1355-1417.

⁹² *Davis G.F., Thompson T.A.*, A Social Movement Perspective on Corporate Control, *Administrative Science Quarterly*, 39.1., 1994, 141-173.

⁹³ *Al-Matari M., Al-Swidi A.K., Fadzil F.H.B.*, The Effect of the Internal Audit and Firm Performance: A Proposed Research Framework, *International Review of Management and Marketing*, 4.1., 2014, 34-41.

⁹⁴ *Shapiro S.P.*, Agency Theory, *Annual Review of Sociology*, 31, 2005, 263-284.

⁹⁵ *Hadani M., Horanova M., Khan R.*, Institutional Investors, Shareholder Activism, and Earnings Management, *Journal of Business Research*, 64, 2011, 1352-1360.

⁹⁶ *Prendergast C.*, The Provision of Incentives in Firms, *Journal of Economic Literature*, 37.1., 1999, 7-63.

⁹⁷ *Pfeffer J.*, *Power in Organizations*, Marshfield, Massachusetts, Pitt-Man Publishing, 1981.

with those of the directors⁹⁸. Additional incentives can be used to ensure this, such as their payment being “tied” to the success of the company⁹⁹ or any other outcome that the shareholders find desirable¹⁰⁰.

Despite the aforesaid, the proponents of the agency theory also emphasize that the directors’ incentives should not be tied to any specific details of the company’s work. This stems from the simple fact that if there is one concrete goal that the directors are required to achieve, they will only focus on it, neglecting their other duties, which will be to the detriment of the corporation¹⁰¹. In light of this, the best approach would be to tie the directors’ pay to the income the shareholders accrue from the company¹⁰², without specifying anything else. This, according to the agency theory, will lead to the corporation being governed in a manner most desirable to its owners, despite them having a relatively small role in its governance.

3.2.3 The Agency Theory and Risk Allocation

A major dilemma for corporate law is that of risk allocation among the directors and the shareholders¹⁰³. An issue presents itself when discussing which party should be the responsible one with the decisions which stem from risky actions¹⁰⁴.

This subject is relevant partly because, even if the payment of the directors is tied to the success of the company, there is still a chance that they will take unacceptably big risks when doing their work¹⁰⁵. While the interests of the shareholders and the company itself are not always in alignment¹⁰⁶, they are still more interested in the success of the corporation, more so than the directors¹⁰⁷. This stems from the fact that the shareholder has invested time, energy and capital in the company, while the investment of the director is limited to the former two¹⁰⁸. As a result, while the agency theory postulates that tying the directors’ salary to the success of the company is a good idea, this does nothing to diminish the possibility of them taking steps that are too risky.

This problem can be somewhat mitigated with the responsibility for such actions being shifted to the directors themselves¹⁰⁹. With such an approach, when the director feels that, if they take undue risks, they will be likely to bear the results as well, they will become more conservative in their actions and take no undue risks, which will benefit the company¹¹⁰. This is the position provided by the agency theory, which states that it would be the best approach to take if the success of the company determines the director’s salary and, at the same time, saddles them with the outcomes of the risks they are to take. This will ensure that the directors are as responsible as possible and fulfill their fiduciary duties as effectively and efficiently as can be expected¹¹¹.

⁹⁸ *Prendergast C.*, The Provision of Incentives in Firms, *Journal of Economic Literature*, 37.1., 1999, 7-63.

⁹⁹ *Eisenhardt K.*, Agency Theory: an Assessment and a Review, *Academy of Management Review*, 14.1., 1989, 57-74.

¹⁰⁰ *Prendergast C.*, The Provision of Incentives in Firms, *Journal of Economic Literature*, 37.1., 1999, 7-63.

¹⁰¹ *Milgrom P.*, Employment Contracts, Influence Activity and Efficient Organization, *Journal of Political Economy*, 96, 1988, 42-60.

¹⁰² *Eisenhardt K.*, Agency Theory: an Assessment and a Review, *Academy of Management Review*, 14.1., 1989, 57-74.

¹⁰³ *Goel A.M., Thakor A.J.*, Overconfidence, CEO Selection and Corporate Governance, *The Journal of Finance*, 63.6., 2008, 2737-2784.

¹⁰⁴ *Jensen M.C., Meckling W.H.*, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure. *Journal of Financial Economics*, 3, 1976, 305-360.

¹⁰⁵ *Prendergast C.*, The Provision of Incentives in Firms, *Journal of Economic Literature*, 37.1., 1999, 7-63.

¹⁰⁶ *Fama E.F., Jensen M.C.*, Separation of Ownership and Control, *Journal of Law and Economics*, 26.2., 1989, 301-325.

¹⁰⁷ *Bitler M.P., Moskowitz T.J., Vissing-Jorgensen A.*, Testing Agency Theory with Entrepreneur Effort and Wealth, *The Journal of Finance*, 60.2., 2006, 539-576.

¹⁰⁸ *Wright P., Mukherji A., Kroll M.J.*, A Reexamination of Agency Theory Assumptions: Extensions and Extrapolations, *Journal of Socio-Economics*, 30, 2001, 413-429.

¹⁰⁹ *Васильев Ю.В., Парахина В.Н., Ушвицкий Л.И.*, Теория Управления, Издание Второе, Москва, Издательство Финансы и Статистика, 2005.

¹¹⁰ *Palia D., Porter R.*, Agency Theory in Banking: An Empirical Analysis of Moral Hazard and the Agency Costs of Equity, *Banks and Bank Systems*, 2.3., 2007, 142-156.

¹¹¹ *Eisenhardt K.*, Agency Theory: An Assessment and a Review, *Academy of Management Review*, 14.1., 1989, 57-74.

3.2.4 Summary of the Agency Theory

The aforesaid ideas and opinions are the primary characteristics of the Agency theory, which are relevant to corporate governance. As a result, they can be summarized in this sub-paragraph as follows:

1. The director represents and protects the interests of the shareholders, not the company itself.
2. Those doing the governance of the company are responsible towards the shareholders, but they hold their own interests more dear, which means that they require supervision. This can be done personally by the shareholders, or by creating alternative mechanisms.
3. Supervision may be insufficient to ensure the fiduciary duties being met, because of which it is required for the directors to be granted additional incentives in order for their interests to coincide with those of the shareholders. This can be done by “tying” the directors’ salaries to the success of the company.
4. The director can take undue risks when leading the company, therefore, it is imperative that the results of these risks reflect upon the individual taking them. Therefore, it is the directors who should bear responsibility for the risky actions undertaken by the company.

3.3 Stewardship Theory

The stewardship theory was first established in the treatises in the fields of psychological and sociological studies¹¹², unlike the agency theory, which was formulated by economists¹¹³. Considering this fact, it is unsurprising that the two theories often have radically different approaches¹¹⁴. When analyzing the stewardship theory, it is often juxtaposed with the agency theory, in order to emphasize the differences and incompatibilities between the two doctrines¹¹⁵.

The stewardship theory has a number of opponents, who criticize its ideas and proposals, as well as its underlining motives¹¹⁶. These individuals hold that, the stewardship theory is naïve, overly optimistic¹¹⁷ and fails to appreciate the self-centered and self-interested nature of the directors¹¹⁸. It should be noted, that when comparing it to the agency theory, it has somewhat fewer critics¹¹⁹, but this should not be misconstrued to mean that, due to fewer people disliking it, the stewardship theory is in any way superior.

As it has been stated above, the stewardship theory puts an emphasis on the relationship between the shareholders and the directors. This differs from the agency theory, where the dynamic between the company and those governing it is more prominent¹²⁰. The stewardship theory discusses a number of matters, which stem from this relationship, and attempts to solve the issues which arise in the following situations¹²¹:

¹¹² *Donaldson L., Davis J.*, Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns, Australian Journal of Management, 16.1., 1991, 49-65.

¹¹³ *Al-Mamun A., Yasser Q.R., Rahman A.*, A Discussion of the Suitability of Only One vs More than One Theory for Depicting Corporate Governance, Modern Economy, 4, 2013, 37-48.

¹¹⁴ *Van Slyke D.M.*, Agents or Stewards: Using Theory to Understand the Government-Nonprofit Social Service Contracting Relationship, Journal of Public Administration Research and Theory, 17, 2006, 157-187.

¹¹⁵ *Fox M.A., Hamilton R.T.*, Ownership and Diversification: Agency Theory or Stewardship Theory, Journal of Management Studies, 31.1., 1994, 69-81.

¹¹⁶ *Davis J.H., Schoorman F.D., Donaldson L.*, Toward a Stewardship Theory of Management, Academy of Management Review, 22.1., 1997, 20-47.

¹¹⁷ *Tourani-Rad A., Ingley C.*, Handbook on Emerging Issues in Corporate Governance, Singapore, World Scientific Publishing Co, 2011.

¹¹⁸ *Du Plessis J., McConvill J., Bagaric M.*, Principles of Contemporary Corporate Governance, New York, Cambridge University Press, 2005.

¹¹⁹ *Tourani-Rad A., Ingley C.*, Handbook on Emerging Issues in Corporate Governance, Singapore, World Scientific Publishing Co., 2011.

¹²⁰ *Yusoff W., Alhaji I.*, Insight of Corporate Governance Theories, Journal of Business & Management, 1.1., 2012, 52-63.

¹²¹ *Donaldson L., Davis J.*, Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns, Australian

1. When the interests of the shareholders differ from those of the company itself (just like the agency theory);
2. When the shareholders are attempting to limit the freedom to act of the directors of the company;

3.3.1 The Stewardship Theory and the Conflict of Interest

Just like the agency theory, the stewardship theory recognizes the possibility that the interests of the shareholders differ from those of the company¹²². In such cases, the doctrine at hand postulates that the shareholders are obliged to work in the interests of the company, not the shareholders¹²³, which stems from the central idea of the stewardship theory, which states that the director is not a representative or an agent of the shareholders, instead being a steward of the company itself¹²⁴.

The agency theory emphasizes the fact that when governing the corporation, the director must always be striving to protect and support the interests of the shareholders¹²⁵. This can be juxtaposed with the stewardship theory, which takes up a directly opposing view¹²⁶. It postulates that the function of the individuals governing the corporation is to ensure that the company is as successful as it can ever be, obtaining the maximum possible income¹²⁷, but this does not always mean that the director will undertake actions which the shareholders like the most¹²⁸. The stewardship theory states that the director must serve the company and protect its interests, considering the corporation as an entity wholly separate and independent of its shareholders¹²⁹. The interests of the company and its owners often coincide, as both would like to gain as much capital as possible, but the stewardship theory demands, that once this correlation is no longer there, the director must always side with the company against its shareholders¹³⁰.

3.3.2 The Stewardship Theory and the Trustworthiness and Freedom of the Directors

A central idea of the agency theory is that of shareholders controlling the directors¹³¹, as, in accordance with this doctrine, a director who is not tightly controlled, will cease to act in the interests of their employers and will only serve their own personal interests¹³². The stewardship theory disagrees and postulates that the director, generally, is a trustworthy person, who needs freedom and support instead of being controlled¹³³.

Journal of Management, 16.1., 1991, 49-65.

¹²² *Muth M.M., Donaldson L.*, Stewardship Theory and Board Structure: A Contingency Approach, Scholarly Research and Theory Papers, 6.1., 1998, 5-28.

¹²³ *Nordberg D.*, The Ethics of Corporate Governance, Journal of General Management, 33.4., 2008, 35-52.

¹²⁴ *Quinn E.*, The Complex Relationship between Corporate Management, Stakeholders and Accounting, International Journal of Academic Research in Accounting, Finance and Management Sciences, 4.3., 2014, 80-88.

¹²⁵ *Eisenhardt K.*, Agency Theory: An Assessment and a Review, Academy of Management Review, 14.1., 1989, 57-74.

¹²⁶ *Виханский О.С., Наумов А.И.*, Размышления о Менеджменте - "Другой" Менеджмент: Время Перемен, Российский Журнал Менеджмента, 3, 2004, 105-126.

¹²⁷ *Biesenthal C., Wilden R.*, Multi-level Project Governance: Trends and Opportunities, International Journal of Project Management, 32.8., 2014, 1291-1308.

¹²⁸ *Hiebl M.R.W.*, Peculiarities Of Financial Management In Family Firms, International Business & Economics Research Journal, 11.3., 2012, 315-322.

¹²⁹ *Van Slyke D.M.*, Agents or Stewards: Using Theory to Understand the Government-Nonprofit Social Service Contracting Relationship, Journal of Public Administration Research and Theory, 17, 2006, 157-187.

¹³⁰ *Quinn E.*, The Complex Relationship between Corporate Management, Stakeholders and Accounting, International Journal of Academic Research in Accounting, Finance and Management Sciences, 4.3., 2014, 80-88.

¹³¹ *Caers R., Du Bois C., Jegers M., De Gieter S., Schepers C., Pepermans R.*, Principal-Agent Relationships on the Stewardship-Agency Axis, Nonprofit Management & Leadership, 17.1., 2006, 25-47.

¹³² *Allen F., Bernardo A.E., Welch I.*, A Theory of Dividends Based on Tax Clienteles, The Journal of Finance, 55.6., 2000, 2499-2536.

¹³³ *Albrecht W.S., Albrecht C.C., Albrecht C.O.*, Fraud and Corporate Executives: Agency, Stewardship and Broken Trust, Journal of Forensic Accounting, 5, 2004, 109-130.

The stewardship theory considers it a settled fact that the director serves the company. This means that they are obliged to act in the interests of the corporation and, no less importantly, that they will be willing to do so even without any meaningful supervision. The stewardship theory considers that the director is more likely to serve the company than themselves¹³⁴. The director is considered to be the person who sees the well-being of the company as their personal mission¹³⁵. The stewardship theory, essentially, sees the director as an honest and kind individual, who will use all of their powers to support the company and its interests¹³⁶. Therefore, there is no basis for the shareholders to doubt the director or the fact that this individual will fulfill their fiduciary duties. This means that the stewardship theory does not see the supervision of the director to be needed in any way¹³⁷.

This approach is directly opposite to the one adopted by the agency theory¹³⁸. While the agency sees them as selfish, the stewardship theory essentially considers the directors to be entirely selfless¹³⁹. In light of this, the stewardship theory is against the shareholders using their powers to control the directors¹⁴⁰. It postulates that such mechanisms are an unacceptable waste of the company's resources¹⁴¹. Additionally, the stewardship theory is opposed to the shareholders' interference on the basis of such actions not only failing to improve anything, but also their involvement actively harming the company and reducing its income¹⁴² and lowering the efficiency of its actions¹⁴³, something that harms to company and, therefore, is unacceptable to the doctrine at hand¹⁴⁴.

In light of the aforesaid, it can be stated that, according to the stewardship theory, even an attempt to control the director should be considered a bad thing and there is no need whatsoever for the shareholders to get directly involved in the daily life of the company¹⁴⁵. No resources should be wasted to create and maintain a mechanism which would be acting as an intermediary between the shareholders and the director, simply for it to better facilitate the shareholders playing a larger role in the running of the company as, in accordance with the stewardship theory, them being involved is not great for the interests of the company¹⁴⁶.

One other issue that needs to be emphasized is that of trust and risk. The stewardship theory states that the director deserves all the trust they can get from the shareholders. This includes the shareholders accepting the fact that the director will always work for the interests of the company, therefore, not needing any additional

¹³⁴ *Al-Mamun A., Yasser Q.R., Rahman A.*, A Discussion of the Suitability of Only One vs More than One Theory for Depicting Corporate Governance, *Modern Economy*, 4, 2013, 37-48.

¹³⁵ *Quinn E.*, The Complex Relationship between Corporate Management, Stakeholders and Accounting, *International Journal of Academic Research in Accounting, Finance and Management Sciences*, 4.3., 2014, 80-88.

¹³⁶ *Albrecht W.S., Albrecht C.C., Albrecht C.O.*, Fraud and Corporate Executives: Agency, Stewardship and Broken Trust, *Journal of Forensic Accounting*, 5, 2004, 109-130.

¹³⁷ *Muth M.M., Donaldson L.*, Stewardship Theory and Board Structure: A Contingency Approach, *Scholarly Research and Theory Papers*, 6.1., 1998, 5-28.

¹³⁸ *Spahaj E.*, Empirical Data on the Correlation between CEO Duality and the Performance of a Corporation, *European Journal of Interdisciplinary Studies*, 2.1., 2015, 55-61.

¹³⁹ *Al-Mamun A., Yasser Q.R., Rahman A.*, A Discussion of the Suitability of Only One vs More than One Theory for Depicting Corporate Governance, *Modern Economy*, 4, 2013, 37-48.

¹⁴⁰ *Donaldson L., Davis J.*, Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns, *Australian Journal of Management*, 16.1., 1991, 49-65.

¹⁴¹ *Costa M.D.*, Impact of CEO Duality and Board Independence on FTSE Small Cap & Fledgling Company Performance, *World Review of Business Research*, 5.1., 2015, 1-19.

¹⁴² *Moscu R.G.*, Does CEO Duality Really Affect Corporate Performance? *International Journal of Academic Research in Economics and Management Sciences*, 2.1., 2013, 156-166.

¹⁴³ *Ugwoke R.O., Onyeamu E.O., Obodoekwe C.N.*, Duality Role of Chief Executive Officer (CEO) in Corporate Governance and Performance of Quoted Companies in the Nigerian Stock Exchange: An Appraisal of the Perception of Managers and Accountants, *Global Journal of Management and Business Research Accounting and Auditing*, 13.5., 2013, 1-10.

¹⁴⁴ *Vo T.N.T.*, To Be or Not to Be Both CEO and Board Chair, *Brooklyn Law Review*, 76.1., 2010, 65-129.

¹⁴⁵ *Masry M.*, The Impact of Ownership Duality on Firm Performance in Egypt, *International Journal of Accounting and Taxation*, 3.1., 2015, 54-73.

¹⁴⁶ *Vo T.N.T.*, To Be or Not to Be Both CEO and Board Chair, *Brooklyn Law Review*, 76.1., 2010, 65-129.

incentives or anything of the kind to facilitate their wishes being in line with those of the corporation¹⁴⁷. This doctrine states that the potential bonuses and awards do not correlate with the success of the company because, as it has been stated numerous times, the director already does their best for the corporation¹⁴⁸.

As far as risk is concerned, the stewardship theory opposes the agency theory in this as well. Since the director is assumed to always be acting in the best interest of the company, there is no need to put any blame on them should some risks that have been taken turn out to be detrimental to the company¹⁴⁹. If unwarranted steps are taken, this will result in the corporation suffering, but this should not result in the director being made a scapegoat.

3.3.3 Summary of the Stewardship Theory

The positions that have been discussed above, are considered to be the primary aspects of the stewardship theory in the current academic literature. In light of this, the stewardship theory can be summarized as follows:

1. The director serves the company, instead of being a representative of the shareholders.
2. The director always strives to serve the corporation's interests, seeing them as more important than their own selfish desires.
3. The shareholders should trust the director to act in accordance with the company's needs.
4. There is no need for the shareholders to get involved in the life of the company in order to control the director.
5. It is inexcusable for new instruments and mechanisms to be created and the company's resources being wasted on them just because the shareholders can oversee the director.
6. The salary of the director does not correlate with their wish to serve the company, therefore, there is no need for additional incentives to be given to them.
7. The director always works for the company, so they will never take unwarranted risks. Therefore, saddling them with the consequences of these risks is unacceptable, as this will limit the much-needed freedom of the directors.

3.4 Stakeholder Theory

The stakeholder theory differs from both the stewardship theory as well as the agency theory in a major way. These two essentially discuss similar matters, but take opposing views¹⁵⁰, while the stakeholder theory emphasizes completely different issues¹⁵¹. The two aforesaid theories are focused on the relationship between the shareholders and the director, while the stakeholder theory involves a number of additional entities¹⁵². There is some similarity between the stakeholder and stewardship theories, but, as stated before, they have completely different approaches to the fundamental matters of corporate governance¹⁵³. Unlike its counterparts, the stakeholder theory discussed matters such as the purpose of corporate governance, interests of third parties and the ethical dimension of the directors' actions¹⁵⁴.

¹⁴⁷ *Felicio J.A., Rodrigues R., Study on The Influence of Governance Mechanisms on Performance: Evidence of Nonlinear Relationships of Listed Companies in Different Contexts, Corporate Ownership & Control, 11.2., 2014 429-532.*

¹⁴⁸ *Васильев Ю.В., Парахина В.Н., Ушвицкий Л.И., Теория Управления, Издание Второе, Москва, Издательство Финансы и Статистика, 2015.*

¹⁴⁹ *Aduda J., Chogii R., Maguta P.O., An Empirical Test of Competing Corporate Governance Theories on the Performance of Firms Listed at the Nairobi Securities Exchange, European Scientific Journal, 9.13., 2013, 107-137.*

¹⁵⁰ *Fox M.A., Hamilton R.T., Ownership and Diversification: Agency Theory or Stewardship Theory, Journal of Management Studies, 31.1., 1994, 69-81.*

¹⁵¹ *Чернышев М.А., Тяглое С.Г., Теория Организации, Ростов-на-Дону, Издательство Феникс, 2008.*

¹⁵² *Белобородова А.Л., Специфика Применения Теории Заинтересованных Сторон В Управлении Субъектами Малого Предпринимательства, Казанский Экономический Вестник, 5.7., 2013, 78-82.*

¹⁵³ *Freeman R.E., Strategic Management: A stakeholder Approach, Boston, Pitman Publishing, 1984.*

¹⁵⁴ *Sundaram A.K., Inkpen A.C., Stakeholder Theory and The Corporate Objective Revisited: A Reply Organization Sci-*

The stakeholder theory is considerably newer than other primary theories of corporate governance¹⁵⁵. This means that there has been much less usage thereof in practice, something that is often emphasized in academic literature¹⁵⁶. Despite this, it has already accrued a number of opponents who prefer using the more traditional mechanisms, while considering the stakeholder theory an unwanted and unprofitable novelty¹⁵⁷.

Unlike the previously discussed two instruments, there is no settled discourse regarding stakeholder theory in academic literature¹⁵⁸, something that makes deliberating about it quite difficult. This research provides an analysis of the more widespread and recognized positions regarding the doctrine at hand.

3.4.1 The Stakeholder Theory and the Purpose of Corporate Governance

Both the agency and stewardship theories agree that the purpose of the director is to make it so that the economic activities led by him result in as much income as possible (differing only on who should be accruing the wealth)¹⁵⁹. The only primary corporate governance theory that disagrees with this is the stakeholder theory¹⁶⁰.

The stakeholder theory holds that the directors must make decisions which are aimed at not just making money for someone, but at ensuring the well-being of all parties that have a stake in the company¹⁶¹. This stems from the approach that, according to the stakeholder theory, the purpose of corporate governance is not to make money. It rejects such an attitude and postulates that the purpose of corporate governance is to balance the interests of all parties involved, so that the outcome is favorable to all¹⁶². This means that, in accordance with the doctrine at hand, the dominant “value maximization” approach is rejected¹⁶³ and a wider definition of the directors’ duties is used¹⁶⁴.

These attitudes stem from the fact that, in accordance with the stakeholder theory, a company and, as an extension thereof, its director has the obligation to the wider society. It states that the business has a duty to care for third parties, while rejecting the “value maximization” theory as immoral and unacceptable¹⁶⁵. Additionally, those in favor of the stakeholder theory believe that the economic crises of the twentieth and the twenty-first centuries were the “fault” of the agency and stewardship theories¹⁶⁶, which stems from these instruments being focused on accruing money, which leads to those leading businesses to becoming greedy, something that harms the global economy¹⁶⁷. Therefore, they see the “value maximization” theory as a problem in itself and propose

ence, 15.3., 2004, 370-371.

¹⁵⁵ *Rensburg R.R., De Beer E.*, Stakeholder Engagement: A Crucial Element in the Governance of Corporate Reputation, *Communitas*, 16, 2011, 151-169.

¹⁵⁶ *Setyorini C.T., Ishak Z.*, Corporate Social and Environmental Disclosure: A Positive Accounting Theory View Point, *International Journal of Business and Social Science*, 3.9., 2012, 152-164.

¹⁵⁷ *Reynolds S.J., Schultz F.C., Hekman D.R.*, Stakeholder Theory and Managerial Decision-Making: Constraints and Implications of Balancing Stakeholder Interests, *Journal of Business Ethics*, 64, 2006, 285-301.

¹⁵⁸ *Donaldson T., Preston L.E.*, The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications, *The Academy of Management Review*, 20.1., 1995, 65-91.

¹⁵⁹ *Виханский О.С., Наумов А.И.*, Размышления о Менеджменте - “Другой” Менеджмент: Время Перемен, *Российский Журнал Менеджмента*, 3, 2004, 105-126.

¹⁶⁰ *Brown J.A., Forster W.R.*, CSR and Stakeholder Theory: A Tale of Adam Smith, *Journal of Business Ethics*, 112.2., 2011, 301-312.

¹⁶¹ *Jensen M.C.*, Value Maximization, Stakeholder Theory, and the Corporate Objective Function, *Business Ethics Quarterly*, 12.2., 2002, 235-256.

¹⁶² *Hitt M., Freeman E., Harrison J.*, *Handbook of Strategic Management*, Oxford, Blackwell Publishing, 2001.

¹⁶³ *Allen W.T.*, Contracts and Communities in Contract Law, *Washington Lee Law Review*, 50, 1993, 1395-1407.

¹⁶⁴ *Clarkson M.B.E.*, A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance, *Academic Management Review*, 20, 1995, 92-117.

¹⁶⁵ *Ferrero I., Hoffman W.M., McNulty R.E.*, Must Milton Friedman Embrace Stakeholder Theory? *Business and Society Review*, 119.1., 2004, 37-59.

¹⁶⁶ *Shim E.D.*, Sustainability, Stakeholder Perspective and Corporate Success: A Paradigm Shift, *International Journal of Business, Humanities and Technology*, 4.5., 2014, 64-67.

¹⁶⁷ *Sundaram A.K., Inkpen A.C.*, Stakeholder Theory and The Corporate Objective Revisited: A Reply, *Organization Sci-*

to discard it, placing the stakeholder theory as the dominant doctrine¹⁶⁸. They see such changes as admirable in both an economic as well as the moral sense^{169,170}, something that makes them all the more desirable.

Despite the aforesaid, however, the dominant approach to the stakeholder theory is that it is impractical and unrealistic in an economic sense¹⁷¹. The director is more able to do their duty when they have a single purpose to serve (like with the agency and stewardship theories). If this is not the case, all that is left is chaos, as the director is unable to juggle all the demands placed upon them. If the only purpose is to accrue capital, those governing the corporation know what steps they should take¹⁷², but when this is no longer the case, and since there is no real “hierarchy” of these interests, the director will struggle and ultimately be unable to “do the right thing”¹⁷³.

As for what consequences we can see in practice when utilizing the stakeholder theory, there is no reliable hard data on this matter¹⁷⁴. Therefore, it is impossible to state if this doctrine is “correct” or “incorrect” and, therefore, it is likely to be a matter of academic discussion for years to come¹⁷⁵.

3.4.2 Parties Involved in the Stakeholder Theory

A major dilemma related to the stakeholder theory is the issue of defining the “stakeholder” itself¹⁷⁶. It is often stated to mean “any individual, who can influence the actions of the company or any individual, upon whom the actions of the company can have an influence”¹⁷⁷. Alternatively, it has been defined as “any individual, who has a vested interest in the life and work of the company”¹⁷⁸. Additionally, academic literature does contain proposals regarding how a hierarchy of the stakeholders can be created, but there is no real consensus there¹⁷⁹.

Even if there was no controversy with defining the primary term of the doctrine, the issue of its proponents’ failure to provide an adequate agreement regarding the hierarchy of stakeholders would still be a major issue. There is no agreement even on whether one stake can be considered to be superior to the other. Additionally, it is all but impossible to state whether one or another entity can be considered a “stakeholder”, which is directly tied to the nature of the theory at hand. For instance, a shareholder, a director or an employee are always considered to be stakeholders, but there is no agreement whether, say, the consumer or the state itself can be considered to be stakeholders. There is no settled practice on this matter¹⁸⁰. Therefore, the utilization of the stakeholder theory is fraught with a number of practical dilemmas.

ence, 15.3., 2004, 370-371.

¹⁶⁸ *Mitchell R.K., Agle B.R., Wood D.J.*, Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts, *The Academy of Management Review*, 22.4., 1997, 853-886.

¹⁶⁹ *Smith S.S.*, Integrated Reporting, Corporate Governance, and the Future of the Accounting Function, *International Journal of Business and Social Science*, 5.10., 2014, 58-63.

¹⁷⁰ *Carroll A.B., Shabana K.M.*, The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice, *International Journal of Management Reviews*, 12.4., 2010, 85-105.

¹⁷¹ *Freeman R.E., Wicks A.C., Parmar B.*, Stakeholder Theory and The Corporate Objective Revisited, *Organization Science*, 15.3., 2004, 364-369.

¹⁷² *Hitt M., Freeman E., Harrison J.*, *Handbook of Strategic Management*, Oxford, Blackwell Publishing, 2001.

¹⁷³ *Jensen M.C.*, Value Maximization, Stakeholder Theory, and the Corporate Objective Function, *Business Ethics Quarterly*, 12.2., 2002, 235-256.

¹⁷⁴ *Чернышев М.А., Тяглое С.Г.*, Теория Организации, Ростов-на-Дону, Издательство Феникс, 2008.

¹⁷⁵ *Hitt M., Freeman E., Harrison J.*, *Handbook of Strategic Management*, Oxford, Blackwell Publishing, 2001.

¹⁷⁶ *Lau J.W.C.*, Enriching Stakeholder Theory: Student Identity of Higher Education, *American Journal of Industrial and Business Management*, 4, 2014, 762-766.

¹⁷⁷ *Kaeb C.*, Putting the “Corporate” Back into Corporate Personhood, *Northwestern Journal of International Law & Business*, 35.3., 2015, 591-653.

¹⁷⁸ *Kakabadze N.K., Rozuel C., Lee-Davies L.*, Corporate Social Responsibility and Stakeholder Approach: A Conceptual Review, *International Journal of Business Governance and Ethics*, 1.4., 2005, 277-302.

¹⁷⁹ *Alves E.R., Gomes E.R., Corsini L.F.*, The Characteristics of Power, Legitimacy and Urgency of Stakeholders and the actions of Corporate Social Responsibility of Companies, *Asian Journal of Business and Management Sciences*, 3.7., 2014, 34-46.

¹⁸⁰ *Hitt M., Freeman E., Harrison J.*, *Handbook of Strategic Management*, Oxford, Blackwell Publishing, 2001.

3.4.3 Summary of the Stakeholder Theory

In light of the aforesaid, it becomes clear that there are no settled approaches regarding the stakeholder theory. Even the central definition thereof is not agreed upon. This means that since there is no stability, its usage would be a truly great risk. As for its primary characteristics, in accordance with the discussions above, they can be summarized as follows:

1. The stakeholder theory postulates that the purpose of the director and the company at large is not to maximize their value, but, instead, to care for the well-being of all those who have a stake in the company.
2. Corporate governance has not only economic, but also moral and social dimensions and it should be conducted in accordance with all these values.
3. The definition of the term “stakeholder” is quite wide and it should be applied to different individuals based on their specific circumstances, without having a pre-made recipe.

4. Secondary Theories of Corporate Governance

4.1. The General Characteristics of the Secondary Theories

The secondary theories of corporate governance differ from their primary counterparts in that they have a much narrower view of the matters related to the governing of the company¹⁸¹. They are focused on specific matters and, therefore, do not offer a wide analysis like, for instance, the agency theory¹⁸². This results in the secondary theories being vastly less used in academic literature as well as in practice¹⁸³.

Additionally, it should also be noted that while the primary theories are opposed to each other and using more than one of them is all but impossible, the situation is quite different with the secondary theories. In reality, using two or more secondary theories without losing hold of their essence is quite possible, which stems from the narrow scope of these doctrines. They rarely oppose each other and one could easily utilize several of them at once¹⁸⁴.

Due to the narrow scope and purpose of the secondary theories, their names directly stem from the functions that they are supposed to fulfill. Therefore, their names should be directly translated as well, something that is seen in foreign academic literature¹⁸⁵¹⁸⁶. The research at hand utilizes such an approach, translating the titles of the secondary theories verbatim, without losing sight of their core ideas.

4.2 The Resource Dependency Theory

The subject matter of the resource dependency theory is the role and function of the director in the everyday life of the company¹⁸⁷. This doctrine states that the company depends on having relevant resources for any actions it

¹⁸¹ *Zerk J.A.*, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, New York, Cambridge University Press, 2006.

¹⁸² *Либман В.А.*, Теоретические Аспекты Агентской Проблемы в Корпораций, Вестник, СПбГУ, 8.1., 2005, 123-140.

¹⁸³ *Бакунова Н.В., Мухаровский Н.В.*, Трансформация Корпоративного Управления в Условиях Рыночных Отношений, Вестник Омского университета, 2, 2011, 80-84.

¹⁸⁴ *Hitt M., Freeman E., Harrison J.*, *Handbook of Strategic Management*, Oxford, Blackwell Publishing, 2001.

¹⁸⁵ *Basle M., Delorme R., Lemoigne J.L., Paulre B.*, *Approches Évolutionnistes De La Firme Et De L'industrie*, Paris, Harmattan, 1999.

¹⁸⁶ *Weibel A.*, *Kooperation in Strategischen Wissensnetzwerken, Vertrauen und Kontrolle zur Losung des Sozialen Dilemmas*, Wiesbaden, Mohr Siebeck, 2004.

¹⁸⁷ *Htay S.N.N., Salman S.A.*, Transaction Cost Theory, Political Theory and Resource Dependency Theory in The Light of Unconventional Aspect, IOSR Journal of Humanities and Social Science, 12.5., 2013, 89-96.

wants to undertake. Therefore, the function of the director is to ensure that all these resources are made available to the company¹⁸⁸.

The Resource dependency theory stipulates, that the company requires a huge number of such resources, the existence of which is essential to its success. This includes capital, human resources and, additionally, other individuals, the contact with whom may facilitate the company to obtain what it needs¹⁸⁹.

The resource dependency theory states that it is the directors' primary function, to obtain these badly needed resources and, at the same time, it emphasizes that no one else is capable of doing so¹⁹⁰. The doctrine at hand emphasize the need for the directors to form personal relations with "important" individuals, as, in this manner, the director may achieve a leg-up on the competitors for the company, which would go a long way in supporting the success of the business entity¹⁹¹.

It should not be forgotten, that while the theory at hand postulates the obtaining of the needed resources to be the primary function of the director, but this does not mean that the director no longer has other duties to the company¹⁹². They have the obligation to support their corporation in every way possible and that is not limited to simply getting the resources

4.3 The Transaction Cost Theory

The transaction cost theory has become established as a part of corporate governance as a result of the influence of economic theories¹⁹³. It sees any and all companies as a web of contracts and transactions. The higher this cost becomes, the less effective the management of the company should be considered to be. Therefore, it is the primary function of the director to make certain that the cost of these transactions is as low as possible, thereby enhancing the efficiency of the company's governance¹⁹⁴.

The theory at hand discusses a number of relationships, the cost of which is needed to be lowered by the director. It contains, for example, the matters related to the oversight of the directors as well. The transaction cost theory considers such control mechanisms to be unnecessary and, therefore, postulates that the company's resources should not be wasted in order to check the reliability and trustworthiness of those who are supposed to be leading it. It more so rules out the creation of a permanent entity, the sole function of which would be to oversee the directors¹⁹⁵. Instead, the transaction cost theory demands that only the directors, who can be trusted, be appointed, so that there is no need to control them¹⁹⁶. The theory at hand recognizes the risks associated with such an approach, but considers them to be worth taking, as reducing the costs is considered to be of greater importance. As for the risks, they are placed squarely on the shareholders. Therefore, if a director is appointed and they proceed to act against the best interests of the company, this is considered to be the "fault" of the

¹⁸⁸ *Hung H.*, A Typology of the Theories of the Roles of Governing Boards, *Scholarly Research and Theory Papers*, 6.2., 1998, 101-111.

¹⁸⁹ *Yussoff W., Alhaji I.*, Insight of Corporate Governance Theories, *Journal of Business & Management*, 1.1., 2012, 52-63.

¹⁹⁰ *Van Ness R., Miessing P., Kang J.*, Understanding Governance and Corporate Boards: Is Theory a Problem, *European Journal of Management*, 7.9., 2009, 186-199.

¹⁹¹ *Pfeffer J.*, Merger as a Response to Organizational Interdependence, *Administrative Science Quarterly*, 17, 1972, 218-228.

¹⁹² *Htay S.N.N., Salman S.A.*, Transaction Cost Theory, Political Theory and Resource Dependency Theory in The Light of Unconventional Aspect, *IOSR Journal of Humanities and Social Science*, 12.5., 2013, 89-96.

¹⁹³ *Geyskens I., Steenkamp J.E.M., Kumar N.*, Make, Buy, or Ally: A Transaction Cost Theory Meta-Analysis, *Academy of Management Journal*, 49.3., 2006, 519-543.

¹⁹⁴ *Zajac E.J., Olsen C.P.*, From Transaction Cost to Transactional Value Analysis: Implications for the Study of Interorganizational Strategies, *Journal of Management Studies*, 30.1., 1993, 131-145.

¹⁹⁵ *Coase R.H.*, The Nature of the Firm, *Economica*, 4.16., 1937, 386-405.

¹⁹⁶ *Hardt L.*, The History of Transaction Cost Economics and Its Recent Developments, *Erasmus Journal for Philosophy and Economics*, 2.1., 2009, 29-51.

shareholders, as they failed to appoint someone worth trusting and, therefore, it is the shareholders who should be found accountable¹⁹⁷.

One other thing that should be emphasized, is that unnecessary risks should not be undertaken, as this can easily lead to the suffering of the company. In the end, the transaction cost theory can be summarized as a doctrine, which states that value maximization for the shareholders is the primary purpose of corporate governance and in this pursuit, undue risks should not be taken, but the costs should be reduced considerably, something that, as per the theory at hand, would lead to the occurrence of the favorable results for the company¹⁹⁸.

4.4 The Political Theory

The political theory of corporate governance states, that a major role in the day-to-day life of the company is played by the internal politics of the corporation¹⁹⁹. It considers all other theories to be naïve, as they deliberate on the optimal decisions that must be made by the parties that be, without analyzing the political situations that may lead to certain actions, such as the internal structure of the company and the people in it²⁰⁰. This theory, just like the agency theory, postulates that the egotistical interests of the directors are much more important to them than those of the company or its shareholders. Therefore, the political position of the director becomes of paramount importance²⁰¹.

The political theory can be summarized as follows: The director, usually, is appointed by the shareholders and is responsible to them as well. The power that the director possesses stems from the shareholders. Therefore, the most important thing the director must do, at least in their own mind, is to sustain the good grace of the shareholders in order to rule out their own power being diminished or lost completely²⁰².

The political theory emphasizes the need for the directors to be seen as politicians. They are prepared to utilize the company's resources in order to protect their own position within the internal hierarchy and will take any steps that would strengthen this position, even if they may be detrimental to the company itself or the shareholders thereof²⁰³. This may include providing incorrect information, as well as intentionally acting otherwise in a manner that would harm the company or its stakeholders²⁰⁴.

Of course, in some cases, the director will attempt to sway the graces of the shareholders by acting in a way that is beneficial to the company²⁰⁵. On such occasions, there are no issues, but, unfortunately, there are often different situations in practice. One example would be the often seen practice of the director requiring to have the shareholders on their side and, therefore, issuing dividends at a point in the life of a company when such an action would severely harm the interests of the corporation²⁰⁶.

¹⁹⁷ *Williamson O.E.*, *The Mechanisms of Governance*, New York, Macmillan Free Press, 1998.

¹⁹⁸ *Htay S.N.N., Salman S.A.*, *Transaction Cost Theory, Political Theory and Resource Dependency Theory in The Light of Unconventional Aspect*, IOSR Journal of Humanities and Social Science, 12.5., 2013, 89-96.

¹⁹⁹ *Abdullah H., Valentine B.*, *Fundamental and Ethics Theories of Corporate Governance*, Middle Eastern Finance and Economics, 4, 2009, 88-96.

²⁰⁰ *Muller H.M., Warneryd K.*, *Inside Versus Outside Ownership: A Political Theory of the Firm*, RAND Journal of Economics, 32.3., 2001, 527-541.

²⁰¹ *Gourevitch P.A.*, *The Politics of Corporate Governance Regulation*, The Yale Law Journal, 112, 2003, 1829-1880.

²⁰² *Roe M.J.*, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance*, Princeton, Princeton University Press, 1994.

²⁰³ *Fadun O.S.*, *Corporate Governance and Insurance Company Growth: Challenges and Opportunities*, International Journal of Academic Research in Economics and Management Sciences, 2.1., 2013, 286-305.

²⁰⁴ *Muller H.M., Warneryd K.*, *Inside Versus Outside Ownership: A Political Theory of the Firm*, RAND Journal of Economics, 32.3., 2001, 527-541.

²⁰⁵ *Roe M.J.*, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance*, Princeton, Princeton University Press, 1994.

²⁰⁶ *Nasieku T., Olubunmi E.M., Togun O.R.*, *Corporate Governance And firm's Earnings Quality*, Economics and Finance Review, 3.12., 2014, 1-10.

It should be emphasized that, in accordance with the political theory, the discussed problems arise in both large and small companies. Therefore, the need to mitigate this threat is especially important. Unfortunately, the theory at hand offers no specific, concrete proposals which would help solve the presented issues. One idea is to create a supervisory entity that would be wholly independent of the shareholders and the directors. This stems from the opinion that the shareholders are unlikely to see any issues with the actions that benefit them, while this entity would in no way be able to benefit from the actions of the director, something that would guarantee its members' impartiality. This would help ensure that the directors serve the company, instead of protecting their own interests or, alternatively, telling the shareholders only the things they want to hear²⁰⁷.

4.5 The Legitimacy Theory

The central idea of the legitimacy theory is that in order for the company to continue its existence, the steps taken by it should be seen as "legitimate". This means that it must only take steps which would be considered acceptable by the society at large²⁰⁸. At the same time, the legitimacy theory states that the corporation is not obliged to do more than the bare minimum which would be enough for it to not cause an antagonistic attitude. It should not be hated, but should also do nothing more²⁰⁹.

The positions of the legitimacy theory stem from the fact that, according to it, the final authority, the most important entity that supervises the company is not the shareholders, but the society at large, the people in general²¹⁰. At the same time, the directors do not have a duty to care for the interests of the society or to think about their livelihood. The legitimacy theory merely demands that the company have a positive reputation in the eyes of people and it does not care whether the corporation actually deserves such good graces, or what actions they undertake to obtain such a reputation²¹¹.

In light of the aforesaid, the legitimacy theory can be summarized as follows: The director has a duty to make certain that the society has a positive view of the company and its reputation, but it must obtain such a result by spending as little resources as possible. What way is used to create this reputation, is of no importance to the theory at hand.

4.6 The Social Contract Theory

The social contract theory, just like the legitimacy theory, is focused on making sure that the actions of the company are perceived as "legitimate", but the difference is that here, the most important result is not the reputation, but the result of such legitimate actions²¹². It considers that all actions related to the economy need to be based on two fundamental aspects – a social contract and the moral imperatives²¹³.

A social contract is the model of the society, which has been widely used since the eighteenth century and according to which, when living and acting in the society at large, people (and legal entities) voluntarily give

²⁰⁷ *Roe M.J.*, Strong Managers, Weak Owners: The Political Roots of American Corporate Finance. Princeton, Princeton University Press, 1994.

²⁰⁸ *Omran M.A.*, Theoretical Perspectives on Corporate Social Responsibility Disclosure: A Critical Review, *International Journal of Accounting and Financial Reporting*, 5.2., 2015, 38-55.

²⁰⁹ *Bather A., Tucker R.*, Legitimacy Theory and a Compliance Analysis of Tesco's 2008 Business Review, *International Review of Business Research Papers*, 7.2., 2011, 137-156.

²¹⁰ *Yussoff W., Alhaji I.*, Insight of Corporate Governance Theories, *Journal of Business & Management*, 1.1., 2012, 52-63.

²¹¹ *Aziz N.A.A., Manab N.A., Othman S.N.*, Exploring the Perspectives of Corporate Governance and Theories on Sustainability Risk Management (SRM), *Asian Economic and Financial Review*, 5.10., 2015, 1148-1158.

²¹² *Yussoff W., Alhaji I.*, Insight of Corporate Governance Theories, *Journal of Business & Management*, 1.1., 2012, 52-63.

²¹³ *Othman Z., Rahman R.A.*, Understanding Corporate Governance from a Social Constructionist Perspective, *International Journal of Humanities and Social Science*, 1.2., 2011, 123-127.

up certain rights and freedoms in exchange for a guarantee that other rights and freedoms are protected²¹⁴. The social contract theory of corporate governance uses this model as well and states, that just like the society is obliged to protect the company (via the rules and regulations formulated and enforced by the state), so the corporation has a duty to care for the society itself²¹⁵.

In the end, it should be noted, that even under this theory, the primary duty of the directors is the protection of the company's interests (in which it differs from the stakeholder theory). At the same time, the director is obliged to act in protection of these values in a manner that is not amoral and the company is able to "repay the debt" to the society. This should occur in a way that the company takes social responsibility upon itself and supports the development of the economic climate²¹⁶.

4.7. The Enlightened Stakeholder Theory

The enlightened stakeholder theory can be, in a way, considered to be a synthesis of the agency theory and the stakeholder theory²¹⁷. Its central idea is that, according to it, the success of the company can be determined by its monetary value²¹⁸. However, it also does not reject the statement of values of the stakeholder theory and considers the primary function of the company to protect the interests of all those affecting it and affected by it²¹⁹.

This theory was created partly as a response to the negative opinions regarding the stakeholder theory, namely the idea that it lacks a central target towards which the director should strive, making them easily confused as to what route of action they should pursue²²⁰. This issue is remedied by the enlightened stakeholder theory, which provides a specific barometer of the company's success. It states, that the "goodness" of the company's actions can be determined by how they will impact the corporation's value in the long term²²¹. Therefore, it is the director's duty to ensure that the value of the company's shares (and, by extension, the company itself) always rises with time.

A positive side of the enlightened stakeholder theory is that it is capable of somewhat satisfying the supporters of all three primary theories of corporate governance. It is acceptable to the proponents of the agency and stewardship theories, as it emphasizes value maximization and the enrichment of the shareholders by means of making the company as valuable as possible, which would be great to the corporation itself as well²²². While it underscores the long-term goals, but this should not be misconstrued to diminish its value²²³. At the same time, it agrees with the stakeholder theory and considers the moral aspects of corporate governance. It stipulates, that the duties of the directors include caring for the interests of all the stakeholders, not just the shareholders or the

²¹⁴ Mouritz T., Comparing the Social Contracts of Hobbes and Locke, *The Western Australian Jurist*, 1, 2010, 123-127.

²¹⁵ Moir L., What Do We Mean by Corporate Social Responsibility? *The Journal of Corporate Governance*, 1.2., 2001, 16-22.

²¹⁶ Sacconi L., Corporate Social Responsibility and Corporate Governance, *EconomEtica*, 38, 2012, 1-42.

²¹⁷ Jensen M.C., Value Maximization, Stakeholder Theory, and the Corporate Objective Function, *Business Ethics Quarterly*, 12.2., 2002, 235-256.

²¹⁸ Tullberg J., Stakeholder Theory: Some Revisionist Suggestions, *The Journal of Socio-Economics*, 42, 2013, 127-135.

²¹⁹ Branco M.C., Rodrigues L.L., Positioning Stakeholder Theory within the Debate on Corporate Social Responsibility, *Electronic Journal of Business Ethics and Organization Studies*, 12.1., 2007, 5-15.

²²⁰ Чернышев М.А., Тяглое С.Г., Теория Организации, Ростов-на-Дону, Издательство Феникс, 2008.

²²¹ Agyemang O.S., Aboagye E., Frimpong J., Where Does the Relevance of Corporate Governance Lie? *Business and Economics Journal*, 5.3., 2014, 1-4.

²²² Babatunde M.A., Olaniran O., The Effects of Internal and External Mechanism on Governance and Performance of Corporate Firms in Nigeria, *Corporate Ownership & Control*, 7.2., 2009, 330-344.

²²³ Jensen M.C., Value Maximization, Stakeholder Theory, and the Corporate Objective Function, *Business Ethics Quarterly*, 12.2., 2002, 235-256.

corporation²²⁴. It states, that the best way for the interests of the stakeholders to be preserved is for the director to make sure that the company is successful in the long run, which would enhance its value for all involved²²⁵. This approach ties the interests of the company, as well as its shareholders and the stakeholders to each other, thereby all but ruling out meaningful conflict among them, which, as per the present theory, is a guarantee that healthy and efficient corporate governance will be ensured.

The enlightened stakeholder theory is one of the newest concepts in corporate governance. Despite this, it has found considerable support already and, as some believe, can be considered to be in serious contention for being considered the fourth primary theory²²⁶. However, it should be noted, that there is quite a large group of opponents of the enlightened stakeholder theory in academic literature, who consider it to be unacceptable in an economic sense and believe that it is nowhere near optimal²²⁷. This, coupled with the novelty of the theory and certain gaps in its approaches, means that until it is effectively tested in practice, it is all but impossible to definitively support or oppose it. Therefore, there is no real consensus regarding it in academic literature.

4.8 The Ethics Theories

Unlike the theories discussed above, the ethics theories of corporate governance cannot be considered a single, specific theory. Essentially, instead of this, there is an amalgamation of several smaller theories, which have only one thing in common – that they are based in ethics – hence the name²²⁸.

These theories take several approaches to corporate governance. One of them, the “business-ethics theory” postulates, that since the role of business within the society is ever expanding, that means that the companies have a duty to enhance the duties they are willing to undertake in the life of the society²²⁹. The “moral values theory” states, that such a duty stems from the fact that all people are obliged to adhere to ethical norms and this includes groups of people as well (which includes companies)²³⁰. Finally, the postmodern moral theory states that the achievement of the aims that are determined by an individual’s ethics is the need that all people have, therefore, acting in such a manner would be preferable to the company as well, something that would enhance its effectiveness²³¹.

One thing that needs to be noted, is that due to the varied nature of the ethics theories, their influence upon corporate law is quite miniscule. This leads to the situation that, when one wants to consider the moral aspects of corporate governance, instead of ethics theories, the stakeholder theory is used instead.

²²⁴ *Pour B.S., Nazari K., Emami M.*, Corporate Social Responsibility: A Literature Review, *African Journal of Business Management*, 8.7., 2014, 228-234.

²²⁵ *Obeten O.I., Ocheni S.*, Empirical Study of the Impact of Corporate Governance on The Performance of Financial Institutions in Nigeria, *Journal of Good Governance and Sustainable Development in Africa*, 2.2., 2014, 57-73.

²²⁶ *Branco M.C., Rodrigues L.L.*, Positioning Stakeholder Theory within the Debate on Corporate Social Responsibility *Electronic Journal of Business Ethics and Organization Studies*, 12.1., 2007, 5-15.

²²⁷ *Babatunde M.A., Olaniran O.*, The Effects of Internal and External Mechanism on Governance and Performance of Corporate Firms in Nigeria, *Corporate Ownership & Control*, 7.2., 2009, 330-344.

²²⁸ *Badiyani B.M.*, Corporate Governance: Ethical Issues and Popular Theories, *International Journal of Research in Economics & Social Sciences*, 3.2., 2013, 15-19.

²²⁹ *Crane A., Matten D.*, *Business Ethics*, 2nd ed., London, Oxford University Press, 2007.

²³⁰ *Annas J.*, *Virtue Ethics and Social Psychology A Priori*, 2, 2003, 20-34.

²³¹ *Badiyani B.M.*, Corporate Governance: Ethical Issues and Popular Theories, *International Journal of Research in Economics & Social Sciences*, 3.2., 2013, 15-19.

5. Corporate Governance Theories and Law

The paragraphs of the research at hand provided above discussed both the primary as well as the secondary theories of corporate governance. This paragraph summarizes the legislative approaches characteristic of the laws that are drafted in accordance with the demands of specific theories. After this has concluded, a critical evaluation shall be made of these approaches when comparing them with the Georgian corporate law. After this, if needed, recommendations will be provided.

5.1 Laws Created in Accordance with the Corporate Governance Theories

The relevant paragraphs and sub-paragraphs of this research have provided the primary characteristics of all the discussed theories of corporate governance. Therefore, at this stage, it is logical to analyze them and summarize the general principles that are usually seen when the laws are based on these specific theories. It is the position taken by this research, that such principles are as follows:

- **Agency theory** – The only purpose of the director is to maximize the value for the shareholders, the shareholders utilize the mechanisms to control and oversee the director, the director's pay is tied to his success and all responsibility for undue risks rests with them as well.
- **Stewardship theory** – The only purpose of the director is to maximize the value for the company itself, the shareholders are not involved in the running of the company and they do not supervise the directors (not even possessing such mechanisms), the responsibility for risks does not rest with the director.
- **Stakeholder theory** – The purpose of the director, as well as the company itself, is to care for the interests of all parties involved with the running of the company, stakeholders can participate in corporate governance, the society has social responsibilities and is not focused solely on value maximization, an emphasis is put on moral values.
- **Resource dependency theory** – The purpose of the director is defined as obtaining a number of resources for the company.
- **Transaction cost theory** – The purpose of the director is to lower the cost of transactions for the company. All inefficient mechanisms are annulled.
- **Political theory** – The director is supervised in a way that is entirely independent of the shareholders, so that it is possible to ensure their effectiveness.
- **Legitimacy theory** – The company is obliged to abide by the societal norms, but only so far that it is needed for its reputation to remain at least somewhat positive.
- **Social contract theory** – The company has the obligation to care for the society, as the society is caring for it in the limits of the social contract entered into.
- **Enlightened stakeholder theory** – The director must care for the shareholders and the company, as well as the stakeholders at large. This needs to occur by ensuring the long-term success of the company. The emphasis is put on the future of the company.
- **Ethics theories** – The purpose of the company is to act in a way that complies with ethical and moral norms.

As it has already been discussed, the secondary theories of corporate governance are quite limited in scope, which leads to them being far less utilized in practice by the legislator. Therefore, it is the primary theories which usually form the basis of national laws.

5.2 Corporate Governance Theories and the Georgian Legislation

As it has already been stated within this research, a big part of Georgian legislation has been created by the means of legal transplantation. This fact means that it is quite likely that the Georgian corporate law framework has been drafted without a deep understanding of the theories underlining the topic at hand. If there is no real, concrete approach visible in the current laws that would be the proof of such a lack of understanding of the theoretical basis.

The paragraph at hand presents the primary source of Georgian corporate law – the Law on Entrepreneurs. This analysis is conducted so that it becomes possible to determine if there is a single, consolidated approach in the legislative framework regarding the theories of corporate governance and which ones, if any, can be seen to influence the stated legislative document.

First of all, it should be noted that the Law on Entrepreneurs is quite short and provides a rather laconic legislative framework. Therefore, there are no regulations provided regarding a number of matters, which are quite important in regards of the corporate governance theories. Despite this, however, there is still a possibility of seeing the style characterizing certain theories within the text of the law.

The Georgian Law on Entrepreneurs never even mentions the duties of the companies towards the third parties. As for the rights to govern the company, they are not granted to anyone except the shareholders and those appointed by them. Additionally, not a single rule is provided dealing with ethics or morals. Therefore, it is quite easy to state that the existing law rejects out of hand five out of ten theories of corporate governance – the stakeholder theory, the legitimacy theory, the social contract theory, the enlightened stakeholder theory and the ethics theories.

As for the three remaining secondary theories, due to their limited scope, in order to be able to say that they are utilized within the national law, their usage should be clearly visible. This is most certainly not the case, as there is not a single reference to obtaining resources or lowering the cost of transactions. Therefore, the transaction cost theory and the resource dependency theory are also definitively rejected.

The final secondary theory of corporate governance – the political theory, can be considered to be possibly influencing the legislation of Georgia. Article 55.21 of the Law on Entrepreneurs stated, that if a company is the “responsible entity”, or a corporation, the shares of which are being traded on a stock exchange, needs to have at least one supervisory board member, who is not a shareholder or an employee of the company, or otherwise being involved in its work. This means that on at least one occasion, the law demands for a person in a supervisory role to be wholly independent²³², which is in line with the demands of the political theory.

The Georgian Law on the Securities Market defines the “responsible entity” to mean a company established in accordance with Georgian laws, which has issued publicly traded securities²³³. As for the supervisory board, it is regulated by the Law on Entrepreneurs and basically can be considered to be an entity which is to control and oversee the directors²³⁴. Therefore the law clearly demands for a person in a supervisory role to be wholly independent, which is in line with the demands of the political theory. Despite this, one should keep in mind that this applies to only one member of the supervisory board, which can be composed of at least three and no more than 21 individuals²³⁵. As it has already been stated, the political theory makes it compulsory for the supervisory bodies to be entirely consisting of independent individuals, while having 1 out of 21 people be not tied to the management of the company cannot be considered to be enough to fulfill this requirement. Additionally, there is no demand for this board to make unanimous decisions on anything. Therefore, this makes the independent member quite impotent. Therefore, it can be said, that while there is a rule that is similar to the one demanded by

²³² Georgian Law on Entrepreneurs, 1994, Article 55, Sub-paragraph 21.

²³³ Georgian Law on the Securities Market, 1998, Article 9.

²³⁴ Georgian Law on Entrepreneurs, 1994, Article 55.

²³⁵ Georgian Law on Entrepreneurs, 1994, Article 55, Sub-paragraph 1.

the political theory, the influence of this doctrine upon Georgian legislation is clearly too limited and it cannot be considered to be an instrument that has a real influence on the existing framework of corporate law.

Due to all the aforesaid, there are only two remaining theories, which can be considered to possibly be the basis of the corporate laws of Georgia. These are the stewardship theory and the agency theory.

On one side, the Georgian law definitely provides a number of rules, which can be assumed to be influenced by the agency theory. One example of this would be the entity known as the supervisory board, which is supposed to oversee the directors and participates in the governance of the company. This is in line with the agency theory and directly opposes the stewardship theory, which considers such instruments to be a pointless waste of resources. Additionally, the Law on Entrepreneurs grants rather wide governance rights to the shareholders²³⁶²³⁷, which is also opposed to the ideals espoused by the stewardship theory, which state that the shareholders should assume a passive role and not interfere with the running of the company. One additional rule put forth by the Law on Entrepreneurs is the idea that if a company has the right to demand something from a third party but fails to do so, any shareholder gains the right to exercise this right themselves, on behalf of the company²³⁸.

Notwithstanding the above, the Law on Entrepreneurs also provides rules, which oppose the ideas of the agency theory. For instance, the law does not refer to the payment of the directors. This matter being ignored goes against the agency theory, but is fully compliant with the stewardship theory. Additionally, unless the corporation is incorporated as a Joint Stock Company and has at least 100 shareholders, it is not obliged to create a supervisory board²³⁹, which is also not in line with the agency theory.

Finally, the best argument in favor of the stewardship theory is that the Law on Entrepreneurs directly states the directors to be accountable before the company and not the accountants. More so, there is a stipulation, that the director must act “in belief, that the actions undertaken by them are favorable to the company” and that “the director cannot claim to not be responsible for their actions on the basis on acting in accordance with the wishes and decisions of the shareholders”²⁴⁰. Therefore, when there is a conflict of interest among the company and the shareholders, the Georgian law favors the company, which complies with the stewardship theory.

As it becomes clear from the aforesaid, there is no accepted approach regarding the corporate governance theories in Georgian law. There is some influence of the agency and stewardship theories visible, the political theory also having a minor role, but there is most definitely a lack of a single accepted consensus and all we have is an amalgam of the three theories. This stems from the fact that the law is clearly created as a result of legal transplantation. Therefore, the law has been drafted without its fundamental theories being understood. This can easily become problematic and it would be desirable for the Law on Entrepreneurs to be reformed in a way that makes it clear, as to which theory is preferred by the legislator.

5.3 Reform of Georgian Corporate Laws and Recommendations

The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part states, that Georgia is obliged to approximate its legislation with that of the European Union. One of the fields where this obligation exists, is that of corporate law, where Georgia needs to transpose the norms set forth in 8 of the EU directives²⁴¹.

²³⁶ Georgian Law on Entrepreneurs, 1994, Article 91.

²³⁷ Georgian Law on Entrepreneurs, 1994, Article 54.

²³⁸ Georgian Law on Entrepreneurs, 1994, Article 53.

²³⁹ Georgian Law on Entrepreneurs, 1994, Article 55, Sub-paragraph 1.

²⁴⁰ Georgian Law on Entrepreneurs, 1994, Article 9, Sub-paragraph 6.

²⁴¹ The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 2014, Annex XXVIII.

In order for these rules to be transposed into Georgian legislation, work has been started on a new Law on Entrepreneurs. For the mistakes of the past not to be repeated, legal transplantation must no longer be the primary source of the new legislative framework. The new law should be created in a manner that understands the theoretical framework, up to and including the primary as well as the secondary theories of corporate governance. As a result of the comprehension of the theoretical basis, specific approaches and methods need to be created, so that the project of the new law is drafted in compliance with this approach, resulting in a law that has a solid theoretical base.

This can be considered somewhat problematic, as Georgia has an obligation to transpose EU laws into the national legislation. This factor, of course, bears keeping in mind, however, what should be emphasized is that the directives of the EU give quite a lot of leeway, allowing the legislator the chance to maneuver and draft a law in compliance with the theoretical basis that would considerably enhance the resultant act²⁴². Therefore, there is a possibility of doing so, meaning that this is a chance that needs to be used.

The approach adopted by the research at hand is, that the new Law on Entrepreneurs must be drafted so that the position of the state in regards of the theories of corporate governance is well established. This research does not identify the “best” theory, but concludes that it is imperative for the state to be staunch in its support of one of the theories. This would give the law a strong backbone, which would undoubtedly be a positive development.

6. Conclusion

The research at hand has stated, that the corporate governance theories are an important instrument for the determination of the primary principles of the corporate law of the nation. They have, essentially, not been used in Georgia and, more so, there is all but no academic literature available on this matter, which is a significant issue. This problem must be remedied, something that can be done only by understanding the theories of corporate governance well, which would be followed by the state defining its approach and amending the laws in accordance with it.

The purpose of the present research was to discuss the theories of corporate governance, to compare the positions supported by the with the national legislative framework and to provide recommendations regarding the outcome of this comparison. This function has been completed and, based on it, at interested party has the chance to understand the corporate governance theories, as well as their functions, demands and importance of a single, unified approach.

In case that the recommendations provided by this research are heeded, this would be a positive development for the corporate laws of Georgia. Alternatively, even if the legislator ignores it, a text deeply analyzing and scrutinizing the corporate governance theories is an addition to Georgian academic literature, something that was not done before. Therefore, hopefully, this research will have played a small role in the development of corporate law in Georgia, as well as the academic literature regarding it.

²⁴² *Volaard H., Martinsen D.S., Bounded Rationality in Transposition Processes: The Case of the European Patients’ Rights Directive, West European Politics, 37.4., 2014, 711-731.*

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Creation of Embassies of Georgia and Other Diplomatic Missions, Appointment and Dismissal (Exemptions) of Their Heads

Nowadays in Georgia, the issues related to the establishment of various foreign representations and embassies of Georgia, also-appointment and dismissal (exemptions) of their heads is not fully defined by the Constitution or other legislative acts. The work deals with the competitive competences of the President of Georgia and the Government of Georgia in the field of foreign representative functions, particularly in the competence of appointment and dismissal of the ambassadors. The paper aims to clarify the differences between the competence of the executive power and of the head of state in the regulations of foreign affairs and to create the list of recommendations regarding the legislative regulations, according to the basic principles of the Constitution. So, at first of all we should clarify the Constitution's basic principles and definition of the special competences.

We believe that the head of state is not part of the executive power, as it is a representative of the Commonwealth (federative power), i.e. represents a sovereign with main representative function. Hence, we can talk about the supremacy of the head of state in foreign affairs, in defense and security issues, as well as the determination of the most important issues in the state's politics. One of the most important directions in the foreign relations is the appointment of diplomatic officials, which is partially regulated by the Constitution, but mostly regulation is realized via as the diplomatic law, as by the international diplomatic law norms. The regulation of the diplomatic official's appointment is within the scope of the study.

Key words: *President of Georgia, Ambassadors, Diplomatic Representatives, Embassies, Consulates, Diplomatic Representations, Foreign Affairs*

1. Introduction

“Diplomatic Law is the eldest field of international law, which is the result of diplomatic activities of the international law subjects, and is realized depending on base of diplomatic law. The diplomatic activities are the way of realization of the state foreign relations and it determines the content-the state's foreign policy's one of the main directions.”¹ Thus the issue must be examined broadly including such elements as diplomatic relations and consulting activities and their main directions, and the bases for the regulation of diplomatic activities and standards need to be analyzed.

In this paper, we'll evaluate the authorization of the foreign affairs' executive bodies by institutionally. “In any state, the foreign affairs' executive bodies are divided into two groups-domestic (central) and foreign. Thus, the domestic foreign affairs' executive authorities, their formation and their powers' characteristics, usually are divided into constitutional and specialized bodies.”² Therefore, it's necessary to evaluate the state authorities' role and function in the decision-making process, which have the real impact as on the determination of foreign policy, as well on the full implementation and realization of the constitutional norms.

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¹ *Legashvili N.*, Diplomatic Privileges and Immunity, Almanac 1999, №9. International Law (II) (in Georgian), <<http://www.nplg.gov.ge/gsdll/cgi-bin/library.exe?e=d-01000-00---off-0period--00-1---0-10-0---0---0prompt-10---4-----0-11-11-ka-50---20-about---00-3-1-00-0-0-11-1-0utfZz-8-00&cl=CL2.6&d=HASHa7563fae1ef8bb17876837.7&x=1>>.

² See note №1.

The State's Head's and Government's participation in the foreign affairs is always an important and problematic issue, and the ambassador's appointment is one of the core elements in this area. The issue became significant since December 15 of 2016, after the Georgian Parliament adopted the resolution "creation the Constitutional Commission and the Constitutional Commission statute's approval"³, which aimed revising of the Constitution and creation of draft for the constitutional law, including regulation the president's and the government's competences, what gives more importance to this problem. The Constitutional Commission completed the work and was submitted a new project of the constitutional law to the Parliament on May 1, 2017, which was accepted by the first and second hearings, respectively on 21 and 23 June 2017, and the next hearing is noted for the 2017 autumn session.⁴ Despite that, within the reform there is no any substantial changes for main presidential competences granted by the constitution, but the issue is still opened, as the way of the presidential election has been rearranged and that has a great deal of practical importance, as it has influence on the realization of the presidential competencies, including realization of the foreign representations, particularly appointment and dismissal of the foreign representatives of the country.

2. The Influence of the Governance model on the President's Foreign Competences

Article 73 of the Constitution of Georgia⁵ defines the constitutional competence of the President of Georgia. By the subparagraph "a" of paragraph 1 of this Article, "the President of Georgia, with the agreement of the Government of Georgia, negotiates with the foreign countries' governments and with the international organizations, concludes international treaties and agreements; with the Georgian governments' presenting, the president appoints and dismisses the ambassadors and other diplomatic representatives of Georgia; with agreement the government, the President of Georgia accepts accreditation of the foreign states' and international organizations' ambassadors and other diplomatic representatives."⁶

The thesis mainly deals with systematic analysis and understanding of this constitutional norm, particularly, authority of the President of Georgia in foreign relations and in the regulation of ambassadors' appointment and recall on the constitutional level.

It is important to define how should be regulated the appointment and dismissal of ambassadors and diplomats, under the Constitution, and as well as the creation and liquidation of diplomatic missions with its nature is a constitutional dimension, consequently which constitutional bodies should regulate and what would be the optimal solution for regulation of these issues.

Furthermore, in the history of Georgian constitutionalism we can list some important constitutional reforms dated as 1) February 6, 2004, 2) October 15, 2010 and 3) the 2016-2017 constitutional reforms that changed the constitutional models of governance. The history of Georgian constitutionalism includes the presidential and both division of the Semi-Presidential governance models: including the so-called "Parliamentary-Presidential" system, also "Primer-Presidential" models, and today's formation gives a classic type of the Parliamentary system. But currently so-called Semi-Presidential is an active governance model.

³ <<https://matsne.gov.ge/ka/document/view/3472813>>.

⁴ See also Note №5.

⁵ On May 1, 2017, the draft of "the new amendment of the Constitution of Georgia" (Constitutional Law project N07-3/52/9) was presented to the Georgian Parliament, in accordance with the above mentioned law, in the new edition Article 52 regulates the Presidential competences, the subparagraph "a" of this article repeats, with technical characteristic changes, subparagraph "a" of Article 73 of the Constitution of Georgia, in which the presidential competencies in foreign relations, at the implementation stage, are set out in the list. The draft law was adopted by the first hearing by the Parliament on 21 June 2017 and the remaining two hearings should be held by the 3-month interval for the revision of the Constitution. In accordance with Article 102 § 3 of the current constitution. The Bill: "On Changes to the Constitution of Georgia" (№07-3 / 52/9 of the Constitutional Law) (in Georgian), <<http://info.parliament.ge/#law-drafting/13831>>.

⁶ The Constitution of Georgia (04/10/2013), (in Georgia), <<https://matsne.gov.ge/ka/document/view/30346>>.

“The second wave of democratization in Europe has led to the types of regimes that do belong neither to the parliamentary, nor to the presidential systems. The term “Semi-Presidentialism” was first used in 1959 by Hubert Beuve-Méry, the French journalist and editor of the newspaper *Le Monde*, and in the academic sphere, the term was used for the first time by Morris Diuverzes in his book “on Political Institutions and Constitutional Laws”, 11th edition.⁷ As we have mentioned, the mixed model of governance originated in the French Constitution by combining some of the European and American constitutional systems and it is a hybrid of these two systems.⁸ Namely, the established model of governance is Semi-Presidential, if it includes these competences: a) the president of the Republic is chosen according to the universal rule by the people of the Republic and b) he acquires enough power; c) the president’s opposition is the government, and the latter holds the executive power, till it has got the parliament’s support.⁹

It should be noted that there are two separated branches of the Semi-Presidential system.¹⁰ “The manifestation of the practical multiple diversity of mixed presidential governance prompted Shugart and Carey to develop the concept by forming the Prime-President and Presidential-Parliamentary Subtypes.”¹¹

We can conclude that the Semi-Presidential system is a complex model that includes two important subtypes: first-the President-Parliamentary subtype, which is more like a so-called Austrian Semi-Presidential model, and a second subtype-referred to as the Premier-Presidency subdivision, is more common in Eastern Europe and is oriented to the classic French Semi-Presidential model. “The words “presidential” and “parliamentary” identify which from the elected institutions has the authority to form a government, and as Primer-Presidentialism expresses the prime minister’s superiority and important assertions of the president’s existence, the term “Presidential-Parliamentary” The regime defines the main properties of the model, in particular the presidential primacy to other branches of the government, in addition the minister’s cabinet dependence on the parliament, in such systems, in addition of other classical characteristics of the system, the president must be elected indirectly.¹²

In the parliamentary systems, the role of the president in implementation of the foreign representative functions is significantly weakened, due to president’s indirect election. Therefore, the president’s participation in the implementation of the foreign office’s functions is essentially important. The president, in the Semi-Presidential model (the model of the Prime-President), had a significant prerogative in the selection, appointment and dismissal of the representatives of the embassies and foreign representations. In the condition of preserving

⁷ *Elgie R.*, <http://www.researchgate.net/publication/265101267_The_Politics_of_Semi-Presidentialism>.

⁸ *Kimberly A., McQuire*, President – Prime Minister Relations, Party System, and Democratic Stability in Semiprezidential Regimes ; Comparing The French and Russian Models, *Texas International Law Jurnal* Vol.47 Issue 2, 2012, 429.

⁹ *Sartori G.*, *Comparative Constitutional Engineering-an Inquiry into Stuctures, Incentives and Outcomes*’- Macmillan, 1994, 137.

¹⁰ In the frames of today’s constitutional reform, the classical parliamentary system was chosen as a model for governance, in which the President is not directly elected and the model of state arrangement is transformed into the regime of the parliamentary republic.

¹¹ *Alasania G.*, *The Scope of the Executive Governmental Power of the President of Georgia as Defined by the Constitution of Georgia*, the seminar work, Scientific Supervisor; *Kurashvili K.*, Tbilisi, 2008, 22, (in Georgian) compared with Matthew Soberg Shugart and John M. Carey, *Presidents and Assambles-constitutionalal design and electoral dynamics*”, Cambridge university press, 1992.

¹² In accordance with the draft of the Constitution, by the Article 50 of the new version of the Constitution, the President of Georgia is elected for 5 years by the Electoral College with open ballot and without a debate. The Electoral College consists of 300 members, including all members of the Parliament of Georgia and Supreme Representative bodies of the Autonomous Republics of Abkhazia and Adjara. Other voters are defined by the Central Election Commission of Georgia to comply with the principle of proportional geographical representation on the basis of organic law and composition of local self-government representative bodies in accordance with the proportional quota according to the results of the local self-governance proportional elections and are named by the relevant political parties. The composition of the Electoral College is approved by the Central Election Commission of Georgia, <<http://info.parliament.ge/file/1/BillReviewContent/152296>>.

the same competencies for the president in the proposed parliamentary system, the presidential institution will be granted with the same discretion as now, what again emphasizes the importance of the President of Georgia's role of in the model of parliamentary governance.

3. Creation and Formation of Embassies and Other Diplomatic Missions

In international relations, there are several active international treaties, regulating between-state relations with regard appointment and recall of the ambassadors and other diplomatic representatives.¹³

The Vienna Convention on Diplomatic Relations, dated April 18, 1961 (ratified by the Parliament of Georgia on May 15, 1993 as "Diplomatic Relationship" joining to Vienna Convention)¹⁴ and the Vienna Convention on Consular Relations of April 24, 1963 (ratified by the Parliament of Georgia with decree of June 8 of 1993, as "Consular Relations" joining to the Vienna Convention).¹⁵

The article 14 in The Vienna Convention on Diplomatic Relations provides the following types of the diplomatic missions: the first class representatives are the ambassadors, nuncios and other officials with equal rank, who manages the diplomatic missions and are accredited by the heads of state, as it is directly referenced in the convention. By the convention the second class diplomats are represented as the emissaries and internuncios, accredited by the heads of government. And third-class representatives are the commissioners, who are entrusted with the competence of the Ministry of Foreign Affairs.¹⁶ Under article 10 of the Vienna Convention on Consular Relations, the heads of consular offices are appointed by the presenter states, according to their own legislation-determining the procedures of their appointment and dismiss.¹⁷ Consequently, above mentioned issues are regulated not only based on the internal law, by also-on base of the international conventions, what underlines the constitutional level of regulation.

3.1 Diplomatic Representation and Consular Office of Georgia

In accordance with the Constitution of Georgia, the foreign representations are carried out by the President of Georgia, by the Government of Georgia and on the basis of the ordinary legislation-by the Ministry of Foreign Affairs and also by diplomatic and consular representatives, whose establishment and function is not directly defined by the Constitution.

Although the Constitution's Article 73, paragraph 1, subparagraph „a" determines the ways of election of ambassadors and diplomatic representatives, but does not regulate directly the matter of the establishment of diplomatic missions, what we believe the importance of this issue presents the constitutional dimension, as are — appointment-dismissal of the ambassadors and the diplomatic officials.

Georgia's diplomatic representations are: a) Embassy of Georgia; b) Permanent Representation of Georgia in the international organization; c) Representation of Georgia associated with the international organization. Here we have to mention that, if Georgia is a member-state of an international organization, it has permanent representations in that organization, in other cases there could be presented only regular representatives of the country. What about the consular offices, usually they are established in the States, where diplomatic representation has not been based.¹⁸

¹³ Convention on the Legal Status of Special Missions in International Community (1969) and Convention of Representatives in International Relations with International Organizations (1975), See Note 1.

¹⁴ <<https://matsne.gov.ge/ka/document/view/116584>>.

¹⁵ <<https://matsne.gov.ge/ka/document/view/116590>>.

¹⁶ <<http://www.supremecourt.ge/files/upload-file/pdf/aqtebi39.pdf>>.

¹⁷ <<http://www.mfa.gov.ge>>.

¹⁸ In addition the law takes into account such cases, when the two countries established diplomatic ties are cut, or are temporarily or permanently broken up, in this case possible to create section of Georgian interests under the third state's

Diplomatic representation of the Georgian, in accordance with the law of Diplomatic Service, subparagraph “c” of article 2, is a subdivision of the Ministry of Foreign Affairs in the abroad state, where it represents Georgia in diplomatic and consular relations with the international organization and the receiving state.¹⁹ And the consular office, in accordance with subparagraph “d” of Article 2 of the same law²⁰ and the sub-point “d” of the Article 3 of the Law on Consular Activities, is a subdivision of the Ministry of Foreign Affairs in abroad, which represents Georgia in the consular and diplomatic relations with the receiving state, where Georgian Diplomatic Corp is not based.²¹

Decisions on the establishment and liquidation of the diplomatic representation are adopted by the Government of Georgia and the decisions on the reorganization of the diplomatic representation and on the establishment, reorganization, and liquidation of the consular offices are taken by the Minister of Foreign Affairs.²² These issues are regulated in accordance with the Georgian Law on Diplomatic Service, but we believe, it would be better, if these legal relations are defined and managed by the Constitution and not by the ordinary law, since the diplomatic activities’ and services’ regulative legislation cannot be an only appropriate normative source, to determine the rule of establishing the institution, because this law regulates the implementation of this service and not the establishment process.

In addition, we think that, as the president is the country’s representative in foreign relations, actions realized in accordance with only the government’s decision will not be treated with the idea of the constitutionalism. If the president decides to appoint ambassadors and diplomatic representations, he/she also should take part in decision making processes regarding the establishment and liquidation of diplomatic missions.

It is noteworthy, to review the constitutional models from several Eastern European countries, particularly the states that are located in one region with Georgia, have more or less narrow historical-legal and political past and still exist in a similar legal environment, for example, the President of Azerbaijan, in accordance with 15 paragraph of article 109 of the Constitution of Azerbaijan, applies to the Milli Məclis (Parliament) on behalf of establishment of the foreign states’ and international organizations’ diplomatic missions in the Republic of Azerbaijan, also he/she appoints and dismiss diplomatic representatives in other states and international organizations.²³ While in Azerbaijan is a model of presidential governance, it is noteworthy, that the legislative body is involved in the creation of diplomatic missions and appointment of the ambassadors.

By the Article 81 of the Constitution of Romania-Presidents are elected by the direct, universal, equal, secret and free elections.²⁴ And in accordance with the Constitution paragraph 2 of Article 91, the president’s foreign policy for accreditation to grant diplomatic representatives, as well as in his capacity to create, abolish and change diplomatic missions, is executed on the government’s proposal.²⁵ Concluding constitutionally should be settled the issues: where and what level of the diplomatic missions should be established.

In Moldova, the president is elected by the Parliament (Article 78 of the Constitution)²⁶ and according to

diplomatic representation, however, the issue is not a interest for our research and therefore we’d not pay attention to these issues.

¹⁹ Georgian Law on Diplomatic Service (22/12/2016), (in Georgian), <<https://matsne.gov.ge/ka/document/view/20158>>.

²⁰ Georgian Law on Diplomatic Service (22/12/2016), (in Georgian), <<https://matsne.gov.ge/ka/document/view/20158>>.

²¹ Georgian Law on Consular Activities (29/05/2014), (in Georgian), <<https://matsne.gov.ge/ka/document/view/1682950>>.

²² § 1 and 2 of Article 8 of the Georgian Law on Diplomatic Service.

²³ Constitutions of Foreign Countries Part. I I 2nd ed., *Gonashvili V.(ed.)*, Tbilisi, 2008, 239-240, (article in Georgian), compared with Constitution of the Republic of Azerbaijan, <http://azerbaijan.az/portal/General/Constitution/doc/constitution_e.pdf>.

²⁴ Constitutions of Foreign Countries Part. 3rd ed., *Gonashvili V.*, Tbilisi, 2006, 573, (in Georgian).

²⁵ Constitutions of Foreign Countries, Part. 3rd ed., *Gonashvili V.*, Tbilisi, 2006, 576, (in Georgian), compared with Constitution of Romania, <<http://www.wipo.int/edocs/lexdocs/laws/en/ro/ro021en.pdf>>.

²⁶ Constitutions of Foreign Countries, Part. 4th, *Gonashvili V.*, Tbilisi, 2007, 626, (in Georgian).

the Article 86 of the Constitution, which defines the president's competences in foreign relations, the President of the Republic of Moldova appoints and revokes the diplomatic representations, also approves, abolishes and changes rank of diplomatic missions, with the agreement of the Government.²⁷

In contrast to Azerbaijan, this particular cooperation between the President and the Government in the Moldovan and Romanian constitutions makes them relate, with its modular characteristics, to the Georgian constitutional model, so called the Semi-Presidential system is a model of the Prime Minister-Presidential Model (Semi-Parliamentary System)²⁸ that is closer to the model of parliamentary governance, but we consider that in both cases, the most important prerogative of the legislative authority is to determine and define by what rank of diplomatic activity should be represented the state in relations with other particular states.

Georgian foreign policy is determined by the highest constitutional body as it is the Parliament,²⁹ and because the definition of the diplomatic relations level in particular countries is one of the significant elements of the foreign policy, this competence in full or in partially should be obligate for the Parliament or at least it has to be involved in the decision-making process. Before October 15, 2010's constitutional reform and the relevant text came in action the appointment and dismissal of the foreign representatives were in the competence of the parliament and were approved by cooperation with the president.³⁰ Thus, the issue of creation of a diplomatic representation must be regulated by the Constitution of Georgia and the decision has to be made based on the participation of the relevant authorities.

3.2 Diplomatic Service Types, their Functions and Status of Officials

As we have already noted, Georgia's diplomatic missions consist of three types of diplomatic missions: the Embassy of Georgia; the Permanent Representation of Georgia in international organizations and the Representation of Georgia in international organizations and the Representation of Georgia with international organizations, which are not represented by the relevant supervisor and other diplomatic officials.

Diplomatic ranks are defined by the law, and three-level diplomatic officials may be destined for positions, namely: a) the highest diplomatic positions are: the First Deputy and the Nominated Deputy of Minister of Foreign Affairs, the Director of the Department of the Ministry, the Ambassador, the Permanent Representative of Georgia in international organization, the Representatives of Georgia in international organizations, the General Consul and the Ambassador of Extraordinary Assignments; b) senior-level diplomatic positions: the Department Deputy Director of the Ministry of Foreign Affairs, the Extraordinary and Plenipotentiary Ambassador, Deputy of the Permanent Representative of Georgia in the international organization, Deputy of the Representative of Georgia in the international organization, the Head of the Minister's Secretariat, the Head of Division of the Department of the Ministry, the Senior Advisor, the Counselor, the Adviser, Defense Attache and the Representative of the Ministry of Defense, the Police/Security Attaché and the Liaison Officer, the Commercial Attache; c) the junior diplomatic rank positions are: the Vice-consul, the First Secretary, the Consular Agent, the Second Secretary, the Third Secretary, an Attaché, Defense Attache's Office and the Office of the Representative of the Ministry of Defense officials, the Police/Security Attaché and the Liaison Officers and employees.

²⁷ Constitutions of Foreign Countries, Part. 4th, *Gonashvili V.*, Tbilisi, 2007, 628, (in Georgian) compared with Constitution of the Republic of Moldova see, <http://www.wipo.int/wipolex/en/text.jsp?file_id=427200>.

²⁸ <http://www.researchgate.net/publication/265101267_The_Politics_of_Semi-Presidentialism>.

²⁹ Under Article 48 of the Constitution, the Parliament of Georgia determines the main directions of domestic and foreign policy of the country.

³⁰ *Tsurtsunia S.*, Constitutional status of the President of Georgia's in the foreign representation (Comparison of Legal Analysis) Models of State Governance: Constitutional Reality and Perspectives of Georgia (II National Conference in Constitutional Law: Collection of Reports) Publishing House of David Batonovishvili Institute of Law, Tbilisi, 2016, 67, (in Georgian).

According to the law on the Diplomatic Service, the President of Georgia appoints and dismisses the head of the Diplomatic Representative by the suggestions of the Government of Georgia. The law defines the certain incompatibilities with diplomatic positions; from the moment of appointment on the diplomatic position the designated person is obliged to terminate any political activity. In the diplomatic service the diplomat is politically neutral and does not have the right to engage in activities/propaganda in favor or against any political party, organization or union.

The main functions of diplomatic representations, in accordance with Article 61 of the Law of Georgia on Diplomatic Service, are: support of the strengthening relationships of political, economic, social, scientific, technical, military, cultural and other fields of cooperation between Georgia and the receiving state/international organization; ensure dissemination of information on Georgian domestic and foreign political, economic, social and cultural life in the receiving state and promoting Georgia as a democratic state; Protection of interests of Georgia in the host state/international organization; organizational provision of visits of Georgian official delegations, in particular, to convene the reception and farewell ceremonies, and if necessary, to participate in official meetings; Other functions provided by the Georgian legislation.

The functions of diplomatic representations are mainly determined by the 1961 Vienna Convention on Diplomatic Relations. "The diplomatic representative's function includes such as the negotiations, informational activities, and diplomatic protection. In many manuals, to these functions have been added the fourth function-a representation, and it has been so frequently demonstrated in international practice and doctrine, later it was reflected in the 1961 Vienna Convention. The representation is considered to be the main function, as this is a whole activity of the embassy-i.e. to speak on behalf of his state in the official relations between the two countries. Essentially this function derives from the rest."³¹ Under the relevant legal framework, the representation is also the consulates' main function.

3.3 Types of Consular Activities, Functions and Officials

Consular activities, under the law of Georgia, are determined as: a) General Consulate of Georgia, whose head is the General Consul b) Consulate of Georgia-Consular c) Vice Consulate of Georgia-Vice Consular d) Consular Agency of Georgia - Consular Agent.

Consular activities are carried out in hierarchical classes, first of all by the General Consulates; they represent the highest branch of the consular offices' hierarchy and are possible to be created in the state, where Georgia is represented through the appropriate diplomatic missions. Although the General Consulate by its importance is equal to the diplomatic representation, this type of consulate can be established in the states with which Georgia does not have diplomatic representation. The General Consulate is authorized to carry out consular activities and it is equipped with all the consular functions envisaged by the Law of Georgia on Consular Activities and the Vienna Convention on Consular Relations dated with April 24, 1963. A consulate, established in the state in which Georgia has no diplomatic representation, functions to be defined in the same way as the diplomatic representation of Georgia. Hence, the General Consulate can, within its functional and legal nature, be the same as the diplomatic representation, and therefore we should consider constitutionally basis for its establishment.³² All types of consular posts are established by the order of the Minister of Foreign Affairs, and require the consent of the receiving state. Reorganization and liquidation of consular offices are based on the Minister's order. This does not comply with some of the constitutional provision, as the General Consul at first

³¹ Ref. Note №1.

³² Decree №158 of the Minister of Foreign Affairs of Georgia of 9 July 2013 on Approval of the Rule of Opening of the Consular Post and the Approval of Typical Regulations (Articles 8-13), (in Georgian), <<https://matsne.gov.ge/ka/document/view/1965749>>.

represents the highest level of diplomatic position and the diplomatic officials have to be appointed by the head of the states, based on the recommendation of the government and the consulate to be established by decision of the highest officials, because consuls' function, which require state officials' authorization.

The consular functions are a set of legal mechanisms available for a consular officer, whose powers 1) are legislated by the law of Georgia, 2) are permissible under the laws of the receiving state and 3) are possible by international treaties and agreements of Georgia.³³ Consular functions are divided into main and delegated functions.

The main consular functions are: consultation; legal protection; mediation; promotion of cooperation in trade, economic, cultural, scientific, transport, tourism and legal spheres within the consulate district; observing of consular districts; general supervision over the implementation of international treaties and agreements in the consular sphere; consular legalization; issuing Georgian visa; issuing a certificate for return to Georgia; consular accounting; legal assistance to Georgian administrative bodies; perform notarial actions; consular services for marine, air, motor and railway transport of Georgia.

The delegated consular functions are: issues related to Georgian citizenship and migration; tasks related to registration of citizens of Georgia and distribution of identity documents; issues related to registration of civil acts; also the other functions defined by the Minister of Foreign Affairs and the Minister of Justice of Georgia.³⁴ The functions mentioned above are essentially the same as are assigned to the different diplomatic missions, like Embassy of Georgia. And the fact that a state has not the diplomatic relations with other countries can't rule out the authority of the different government branches in legal consular relations: in creation of consulate-representations and in appointment the representatives.

While the Vienna Convention on Consular Activities determines as the state legislation prerogative the regulation to set up and dismiss the consular officials, however, the Vienna Convention on diplomatic relations suggests that the head of the diplomatic mission should be appointed by the Head of State, and as the consular office is more or less equal to other diplomatic missions,³⁵ and therefore the consular officers are equal to the heads of diplomatic missions, based on their status.

In regard to this issue, the experience of different countries is interesting, and in particularly, by the Article 94 of the Constitution of Croatia, the president is elected by universal rule, which underlines the position and role of the head of state in the governmental system, and defines, to comply with Article 98 of the Constitution, the President, with the governmental suggestion and counter-signature of the Prime Minister, establishes the diplomatic missions and consulates of the Republic of Croatia in abroad, and under the same article, the President, with the government's and the Committee on the Proposals of the Croatian Sabor's suggestion, also with counter-signature of the Prime Minister approves and fires the diplomatic officials.³⁶ It is possible to say that in this case all relevant institutions are involved in this process, which in one hand is quite positive event, as it creates possibility for refining decision, but on the other hand, the appointment of the ambassadors becomes difficult process and we think that in this case, in decision making process somehow the role of the government has increased and it would be better just to make decisions based on the parliament and the president's agreement about diplomatic representations and consular posts, and in appointment of consuls the role of the president is very important.

³³ The Law of Georgia on Consular Activities (29/05/2014), § 1 of article 11 (in Georgian), <<https://matsne.gov.ge/ka/document/view/1682950>>.

³⁴ The Law of Georgia on Consular Activities (29/05/2014), § 2 of article 11 (in Georgian), <<https://matsne.gov.ge/ka/document/view/1682950>>.

³⁵ The consular offices have relatively administrative functions, but the duties and responsibilities of diplomatic missions can not be limited with only one type of competence, especially when it comes to heads of representations and institutions.

³⁶ Constitutions of Foreign Countries. Part. III, *Gonashvili V.* (ed.), Tbilisi, 2006, 842, (in Georgian).

4. Appointment and Dismissal of Diplomatic Representatives

Judicial relations connected with the appointment of ambassadors and diplomatic representatives are regulated by the Constitution of Georgia and the Law on Diplomatic Service as well as by the Vienna Convention on Diplomatic Relations. The latter is considered as the major and primary legal source in regard to the issues related to the appointment and dismissal of the ambassadors.

As already mentioned, since October 15, 2010 Georgia has adopted constitutional model by which representatives of diplomatic missions are appointed and dismissed with the involvement of the head of the country and the executive branch of the government. During the period of the constitutional reform, an attitude towards the regulation of the noted subject was different. For instance, according to the constitutional law project presented by V. Gonashvili and L. Bodzashvili, ambassadors were appointed by the president with the consent of parliament.³⁷ Moreover, the constitutional project presented by the Chairman of the State Constitutional Commission (A. Demetrashvili) did not envisage new edition of the constitution, which would differ from the old one³⁸ and which, we think, would as well be more acceptable for the current constitutional model – as stated above, participation of the representative body in the decision-making process would be more beneficial and it would adjust to the constitutional system more due to the fact that the constitutional body determining foreign policy would be able to control execution of this very foreign policy. The Public Constitutional Commission has presented an interesting approach regarding appointing and dismissing the ambassadors. According to their proposal, the president, as the head of the state, is responsible for appointing the ambassadors and other highest ranking diplomatic representatives. However, the proposal also says that the decision has to be made with the government and parliament's approval. Even though the stated model also exists in the constitutional law practice³⁹, participation of every branch will complicate the decision-making process and it will be impossible to elaborate optimal procedures regulating this subject. More precisely, in its concluding remarks, the Venice Commission has not suggested recommendations upon this topic. Though, the Commission's recommendations referred to polishing regulations regarding president's involvement in foreign affairs.⁴⁰ Approximately the same opinion was expressed at Berlin Conclusive Conference, referring to the Constitution's subparagraph "a", first paragraph of 73 article, which belonged to the professors Oetter and Nusberger.⁴¹ In its conclusion, the Venice Commission also paid attention to the subparagraph "a", first paragraph of 73 article as well as to matters connected with ambassadors and other diplomatic representatives. To be more precise, according to the Venice Conclusive Commission's final remarks: "Holding talks with foreign countries, including reformulation of international treaties, is a problematic topic. Based on changes drawn from the second hearing, president will be obliged to get government's approval on letters of credence received from ambassadors and other diplomatic representatives, which will not eliminate disturbing instances. In the sphere of foreign affairs, differences in duties and responsibilities between president and government are not well-defined. If according to the explanation given by the Constitutional Commission it is implied that president's general role is representative and that he/she can make a decision only in the most important cases, then it is unclear why president has the authority of "negotiating with foreign countries" and "executing international conventions and contracts" (every type, on every level) even if

³⁷ Demetrashvili A., 2009,2010 Constitutional Reform in Georgia (Georgia's Constitutional Chronicles), Batumi, 2012, 230, (in Georgian).

³⁸ Ibid, 188.

³⁹ More or less same regulation in accordance with Croatia's Constitution, as Croatia's Sabor (to the extent of the respective Committee), president and government take part in the decision-making process connected with the appointment of ambassadors – ref. note 30.

⁴⁰ CDL (2010)062 Conclusion of the Venice Commission (№543/2009) related to the corrections and changes in Georgian constitution about constitutional bill, Strasbourg, 31 July, 2010, 11, <<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL%282010%29062-geo>>.

⁴¹ Demetrashvili A., 2009,2010, Constitutional Reform in Georgia (Georgia's Constitutional Chronicles), Batumi, 2012, 396, (in Georgian).

they are implemented “with government’s approval”. If this means that government does not have the power to hold talks regarding international agreements, then aforementioned opposes paragraph of article 78, according to which the government executes foreign policy. The necessity of government’s consent will not eliminate and, instead, will even more increase chances of disagreement between government and president in case the latter participates in discussions of the mentioned topic. In contrast to the bases of president’s new role that, first of all, can be considered as a guarantor of the state’s fundamental features, it should also be taken into account that he/she is responsible for general traits of foreign policy, while government takes care of everyday foreign relations. However, it is very difficult to differentiate these two spheres from each other.”⁴²

In accordance with the Georgian Constitution’s subparagraph “a”, first paragraph of 73 article, the President of Georgia appoints and dismisses Georgian ambassadors and other diplomatic representatives after they are presented to him/her by the government. Therefore, an ambassador or another diplomatic representative is firstly identified and presented by the government, and afterwards is appointed or dismissed by the president’s legal act.

According to the Georgian Constitution’s subparagraph “a”, first paragraph of 73 article, in order to execute the power entitled by the Constitution, the President of Georgia issues an edict, a decree, an order, also, as the Supreme Commander-in-Chief of Georgian military forces – a command. Thus, the president has the power to promulgate 4 types of legal acts: an edict, a decree, a command and an order.⁴³

Regarding appointment and dismissal of ambassadors, the government, in accordance with Georgian Law on “Georgian Government’s Structure, Authority and Types of Activity”, article 5, sub-point “gh”, presents a candidate to the president, received in a form of an order.⁴⁴ After president appoints or dismisses an ambassador, president’s legal act (order)⁴⁵ does not require counter-signature as according to Georgian Constitution’s paragraph 3 article 73, the “counter-signature is not required on those legal acts of the president, which are issued in accordance with the constitution and are presented by the government or which are pre-approved by the government.” In this case, the president’s legal act is issued on the basis of the government’s presentation.

Based on the Georgian Law on Diplomatic Service, article 6, paragraph 5 and 6, the President of Georgia appoints and dismisses heads of diplomatic representatives once they are presented by the government. Appointment of diplomatic representatives’ supervisors is directly connected with the appointment of the highest ranking officials of the state’s any representation, including appointment of consulate’s senior officials. The above-mentioned law also extends to ambassadors as well as to permanent and temporary representatives (in accordance with paragraph 5 of article 17 and paragraphs “d”, “e” and “e1” of article 12, as well as aforementioned article 6, there are blanket instructions in the law).

⁴² CDL (2010)028 Conclusion of the Venice Commission related to the corrections and changes in Georgian constitution about constitutional bill, approved by the Venice Commission during its 84th plenary session (Venice, 15-16 October, 2010), Strasbourg, October 15, 2010, 11, <<http://constcommission.parliament.ge/1-5http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282010%29028-e>>, based on conclusions made by the Venice Commission on July 31, 2010.

⁴³ In accordance with the constitutional practice, president issues an order regarding matters of appointment and dismissal of ambassadors. However, in this case, president is also eligible to issue an order as based on Georgian Law on Statutory Acts, article 11, point 3, Georgian president’s decree is a statutory act, except cases when orders are issued regarding staff and personal matters. For instance, Georgian president’s orders issued on November 24, 2016, №24/11/01, <<https://www.president.gov.ge/ka-GE/sajaro-informacia/samartlebrivi-aqtebi/%E2%80%8Bsaqartvelos-prezidentis-gankarguleba-N-24-11-01.aspx>>, and on March 25, 2016 № 25/03/01, <<https://www.president.gov.ge/ka-GE/sajaro-informacia/samartlebrivi-aqtebi/%E2%80%8Bsaqartvelos-prezidentis-gankarguleba-N-25-03-01.aspx>>, (in Georgian).

⁴⁴ Georgian government’s order №2434, issued on November 17, 2016, (in Georgian), <<https://matsne.gov.ge/ka/document/view/3440196>>.

⁴⁵ See note 33.

Regarding issuing Georgian president's order, it must be noted that based on practice, he/she is guided by the administrative law. However, according to General Administrative Code of Georgia, article 3, part 4, subparagraph "e", general administrative code's authority does not extend to the basic constitutional competencies that the president of Georgia has—more precisely, "to appointment and dismissal of officials by the president in accordance with Georgia's constitution as well as to exercising authority entitled by Georgia's Constitution's paragraph 2, 4 of article 73 and also subparagraph "a", "i" and "p" of paragraph 1 of the same article 73."⁴⁶ Therefore, it can be said that the appointment of ambassadors and diplomatic representatives is a constitutional legal act rather than administrative-legal act. Though, it should be noted that in constitutional practice, the president supervises promulgation of such type of order in accordance with General Administrative Code. More precisely, in regard to changes in a specific order, the president makes a decision in accordance with General Administrative Code, article 63. The noted article takes into account changes to already issued individual administrative legal act according to the rule by which it was issued.⁴⁷ Even though the above-mentioned topic is a procedural nuance, we think that in this case the president should only be guided by and should appoint ambassadors and diplomatic representatives only in accordance with the constitution and not in accordance with the Law of Georgia on Diplomatic Service.⁴⁸

After analyzing practice, it can be said that, as a rule, special and plenipotentiary ambassadors in specific states are assigned as permanent representatives and representatives in international organizations, located on the territory of their respective states. For example, a representative in the European Union is, at the same time, an ambassador of Georgia in Belgium⁴⁹, also an ambassador of Georgia in Austria is a permanent representative of Georgia in Organization for Security and Co-Operation in Europe (OSCE).⁵⁰ Moreover, Georgian ambassador in Canada is a permanent representative of the country in International Civil Aviation Organization (ICAO).⁵¹ However, there are some exceptions to this general approach. For instance, Georgia's representation in the Council of Europe does not represent the state in international relations with other countries.⁵² Thus, it can be implied that diplomatic representations in international organizations and in foreign countries are compatible positions and, as a rule, positions of ambassadors and diplomatic representatives are combined by the territorial principle. Though, some exceptions also exist.

In the Georgian Constitution, in subparagraph "a" of paragraph 1 in article 73, an appointment of ambassadors and other diplomatic representatives is discussed. However, the constitution does not directly define which officials are meant under other diplomatic representatives. Though, based on the analysis of the legislation, it can be inferred that under other diplomatic representatives are meant those officials who are supervisors in diplomatic missions. However, the legislation is also vague as it is unclear whether only supervisors of diplomatic representations or senior officials from consulates are implied.⁵³ The latter, we believe, has to be defined by the

⁴⁶ General Administrative Code of Georgia (based on 21/12/2016 issue), (in Georgian), <<https://matsne.gov.ge/ka/document/view/16270>>.

⁴⁷ From October 15, 2010 to December 28, 2016, the president issued several legal acts, which presented changes in already issued legal acts, based on the norm corresponding to General Administrative Code (Georgia's president's order issued on November 15, 2011, №15/11/05, Georgia's president's order issued on November 15, 2011, №15/11/05, Georgia's president's order issued on March 21, 2013, №21/03/01, Georgia's president's order issued on April 17, 2013, №17/04/01), (in Georgian).

⁴⁸ As a rule, the president of Georgia issues orders regarding appointment of diplomatic representatives in accordance with the Law on Diplomatic Service, article 6, point 5. However, the major legal basis is the Constitution's 73rd article, 1st point, "a" sub-point.

⁴⁹ An order issued by the president of Georgia on March 18, 2013, №18/03/07; an order issued by the president of Georgia on March 21, 2013, №21/03/01 (in Georgian).

⁵⁰ An order issued by the president of Georgia on March 18, 2013, №18/03/12; an order issued by the president of Georgia on April 17, 2013, №17/04/01 (in Georgian).

⁵¹ An order issued by the president of Georgia on July 9, 2012, №09/07/01, (in Georgian).

⁵² An order issued by the president of Georgia on May 10, 2013, №10/05/11, (in Georgian).

⁵³ In accordance with the Law on Consulate Activity, article 8, point 4, "once appointed, the supervisor of the consulate receives accreditation in a written form – a consular patent" (in Georgian).

constitution or the text of the constitution and the part which says that every diplomatic representation's supervisor has to be appointed by the president, as these officials should be considered as diplomatic representatives, have to be explained more broadly.

It is important to discuss foreign countries' constitutional regulations regarding matters of appointment of ambassadors and other diplomatic representatives.

Poland's Constitution differently regulates matters connected with the appointment and dismissal of ambassadors. In particular, the president of Poland is not tied by executive or legislative authorities when he/she appoints ambassadors and other diplomatic representatives. In Lithuania and Portugal, similar to Georgia, the president is tied by the executive authority when he/she appoints the ambassadors and other diplomatic representatives. In these cases, like in Georgia, the president appoints country's representatives by cooperating with the government—the government presents a candidate, who afterwards is appointed by the head of the country.⁵⁴ According to the Constitution of Poland, subparagraph 2 of paragraph 1 from Article 133, the president personally appoints and dismisses ambassadors, and has same competence regarding the representatives in the international organizations.⁵⁵

As a rule, in the presidential governance models, aforementioned competence belongs to the head of the country as the supreme constitutional body of the executive authority. However, during decision-making, he/she is tied by the authority of the supreme representative body. For instance, according to Argentina's Constitution's article 99, paragraph 7, the president, with the approval of the senate, appoints and invites ambassadors and plenipotentiary representatives of the country.⁵⁶ The Constitution of the United States has the similar regulation as based on the 3rd sentence from the 2nd part of the article 2, the US president assigns the ambassadors, other official representatives and consuls by suggestion and consent of the senate.⁵⁷ In this case, it is noteworthy that it is president's competence to appoint consuls. Though, this regulation is not peculiarity of the presidential governance as it is typical to other mixed or parliamentary systems. As for the Constitution of Georgia, even though it is not clear who is meant by other diplomatic representatives appointed by the president, analyzing the legislation makes evident that Georgia's consuls are not appointed by the president, which, we believe, is a legislative gap for both constitutional and ordinary laws. In a theory, it can be said that representative authority and electing international delegates are functions of the executive authority. Though, in reality, cooperation between executive and legislative authorities in regard to choosing diplomatic officials is necessary (In the US, based on bicameral parliamentary systems, the senate takes part in selecting international treaties and diplomats, while the Congress participates in matters connected with the declaration of war. Therefore, regarding international relations, president's authority is shared with the parliamentary authority).⁵⁸

Regarding the Russian Federation, which is essentially one of the Presidential Republics, in accordance with paragraph "L" of Article 83 of the Constitution, the President of the Russian Federation, on the basis of

⁵⁴ *Tsurtsunia S.*, Constitutional Status of Georgia's President in Executing Foreign Affairs (comparative legal analysis). Models of State Governance: Georgia's Constitutional Reality and Perspective (II National Conference in the Constitutional Law: Collection of Reports). Davit Batonishvili Law Institute Publishing House, Tbilisi, 2016, 67, (in Georgian).

⁵⁵ Constitutions of Foreign Countries, part II (the second modified edition), *Gonashvili V.*, (ed.), Tbilisi, 2008, 656, (in Georgian), compared with Constitution of the Republic Of Poland, <http://www.wipo.int/wipolex/en/text.jsp?file_id=194980>.

⁵⁶ Constitutions of Foreign Countries, part I (the second modified edition), *Gonashvili V.* (ed.), Tbilisi, 2008, 121, (in Georgian), compared with Constitution of Argentina, <<http://www.biblioteca.jus.gov.ar/argentina-constitution.pdf>>.

⁵⁷ Constitutions of Foreign Countries, part I (the 2nd ed.) *Gonashvili V.*, (ed.), Tbilisi, 2008, 51, (in Georgian), compared with *Francis N. Thorpe*, „Is the President of the United States Vested with Authority under the Constitution to Appoint a Special Diplomatic Agent with Paramount Power without the Advice and Consent of the Senate?“*The American Law Register and Review* Vol. 42, №4, (First Series) Vol. 33 (New Series, Vol. 1), (Apr., 1894), 257.

⁵⁸ *Francis N.*, Thorpe, „Is the President of the United States Vested with Authority under the Constitution to Appoint a Special Diplomatic Agent with Paramount Power without the Advice and Consent of the Senate?“*The American Law Register and Review* Vol. 42, №. 4, (First Series) Vol. 33, (New Series, Vol. 1), (Apr., 1894), 263.

consultations with relevant committees and commissions of the Federal Assembly, is entitled to appoint and dismiss Diplomatic Representatives in foreign states and international organizations.⁵⁹

Based on this and the Constitution of USA, it could be argued that appointment and resignation of the ambassadors by the head of state in presidential system depends on negotiations with parliament. Despite various regulations, effectively the decision is taken based on relations between president and parliament. On the one hand, the legislature should give consent (USA), on the other; the Constitution of the Russian Federation prescribes mandatory consultations. Despite the difference the constitutional construct is the similar.

It is important to study experience of the countries, where is established the mixed model of governance. The head of state has primary responsibility in foreign representation and the domain of foreign affairs is under president's authority. Under Article 106 paragraph 5 of the Ukrainian Constitution the presidents appoints and accepts resignations of the ambassadors and other heads of diplomatic missions.⁶⁰ The Article 84 paragraph 10 of the Belarusian Constitution allows the President to unilaterally appoint and resign ambassadors, as well with other diplomatic missions.⁶¹ The President of Kazakhstan appoints heads of foreign diplomatic missions under Article 44, paragraph 6 of the Constitution.⁶² The Constitution of the Republic of Armenia the President appoints ambassadors and representatives to international organizations.⁶³

It is interesting to study the experience of mixed government countries. The president's right to appoint ambassadors is limited usually with countersignature of the government, as in Georgia. For example, Article 14 of the Constitution of France the President grants accreditation of ambassador sot foreign countries. In this case the president uses its prerogative to choose a diplomat for job.⁶⁴ However, Article 19 of the Constitution all acts of president requires countersignature - unless stated otherwise. The Article 14 is not exempt. Hence, president is limited by executive branch.⁶⁵ In a Semi-Presidential rule the president authority is limited with countersignature.

The Latvian constitutional model deserves attention, because the President that is elected by majority of Saeima,⁶⁶ appoints and resigns ambassadors according to Article 41 Constitution of Latvia.⁶⁷ In this case, the act of the president requires countersignature by prime minister or relevant minister under Article 53. This case is interesting because Latvia is more parliamentary oriented republic than Georgia. That issue, according to Latvian example is President's prerogative to appoint ambassadors and represent the country in foreign affairs.

According to Article 54 paragraph 2 of the Constitution of the Czech Republic the President is elected by joint session of parliament and under Article 54 paragraph 3 during his term of presidency he/she is not account-

⁵⁹ Constitutions of Foreign Countries. Part. I (2nd ed.), *Gonashvili V.*, (ed.), Tbilisi, 2008, p. 408, (in Georgian) compared to Конституция Российской Федерации, <<http://constitution.kremlin.ru>>.

⁶⁰ *Constitutions of Foreign Countries, Part. III*, *Gonashvili V.*, (ed.), Tbilisi, 2006, 655, (in Georgian).

⁶¹ Constitutions of Foreign Countries, Part. II (2nd ed.), *Gonashvili V.*, (ed.), Tbilisi, 2008, 300, (in Georgian), compared with Конституция Республики Беларусь, <<http://pravo.by/pravovaya-informatsiya/normativnye-dokumenty/konstitutsiya-respubliki-belarus/>>.

⁶² Constitutions of Foreign Countries, Part. III, *Gonashvili V.*, (ed.), Tbilisi, 2006 , 770, (in Georgian).

⁶³ Constitutions of Foreign Countries, Part. I (2nd ed.), ed. *Gonashvili V.*, Tbilisi, 2008, 466, (in Georgian), compared with Constitution of the Republic of Kazakhstan, <http://www.constitutionnet.org/sites/default/files/2303_constitution_kazakhstan1.pdf>.

⁶⁴ Constitutions of Foreign Countries, Part. II (2nd ed.), *Gonashvili V.*, (ed.), Tbilisi, 2008, 580, (in Georgian), compared to Constitution of France, <http://www.constitutionnet.org/sites/default/files/constitution_of_france_1958.pdf>.

⁶⁵ *Pacte P., Melen-Sukramanian P.*, Constitutional Law, *Kalatozishvili C.* (ed.), *Demetrashvili A.*, First Georgian Edition (28th ed., as of 2009) Tbilisi, 2012, 644-645, (in Georgian).

⁶⁶ According to Article 36 of the Constitution of the Republic of Latvia, the President is elected by 51 votes, and according to Article 5 of the same constitution, the Saeima consists of 100 deputies. Constitutions of Foreign Countries, Part. I (2nd ed.), *Gonashvili V.*, (ed.), Tbilisi, 2008, 305, 301, (in Georgian).

⁶⁷ Constitution of the Republic of Latvia (Satversme), <<http://www.humanrights.lv/doc/latlik/satver~1.htm>>, compared with Constitutions of Foreign Countries Part. I (2nd ed.), *Gonashvili V.*, (ed.), Tbilisi, 2008, 306, (in Georgian).

able for his/her actions.⁶⁸ The Article 63 paragraph 1 subparagraph "e" the President of Czech Republic has authority to appoint and fire the heads of diplomatic missions.⁶⁹ The Czech Republic like Latvia are parliamentary republics, and president's power are limited wither requirement of mandatory countersignature by head of the government or relevant minister.⁷⁰ Under the Article 60 of the Austrian Constitution the President of Austria is elected in direct elections⁷¹ and under Article 65 paragraph 1, the elected president appoints consular representatives and concludes international agreements;⁷² however in this case the nomination from the government or by the relevant minister is necessary (Article 67 paragraph 1).⁷³ Under Article 84.3 the President of Latvia appoints and takes resignation of ambassadors with consent of the government.⁷⁴

By the Article 59 paragraph 1 of the German Basic Law the President of Germany grants accreditation to the ambassadors, and under Article 58 of the same law for activation of the presidential order the act should be signed by the Federal Chancellor or by the relevant minister.⁷⁵

The paragraph 3 of the German Federal Law on Foreign Service (Gesetz über den Auswärtigen Dienst), regulates the status of the ambassadors, general consuls, consuls, permanent missions in the intergovernmental and supranational organizations.⁷⁶ All these activities represent diplomatic work, and respectively equal social and legislative protective standards for the diplomatic representatives; though the statuses of ambassadors are different because they represent the President of the FRG and are responsible to him. In Germany also acts The Law on Consular Activities, Responsibilities, and Authorities (Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse),⁷⁷ but it does not regulate the appointment of the consul and hence it is domain of common rule.⁷⁸

Between European constitutional models, there are specific states, in which the issues are regulated depending on their peculiarities. Such state is Bosnia and Herzegovina, according to the Constitution of the country, in particular, article 5, the presidium of the country consists with three members; they are chosen from territories of the federation, each one Bosnian, one Croatian and also one Serbian chosen from territories of the Republic of Serbia.⁷⁹ They have authority to appoint ambassadors and other diplomatic representatives, the norm determining the same competence has its own special requirement (reservation) according to which two-thirds of ambassadors and diplomatic representatives must be from the territory of the Federation.⁸⁰

We believe it's important to examine constitutional system of appointing ambassadors and envoys of those states in which the head of state is chosen indirectly, by the legislative instance or by the special board and not elected directly by the people. We can compare several systems. For example, according paragraph 2 of article 79 of the Estonian Constitution, the diplomatic representatives of Estonia are appointed and dismissed by the

⁶⁸ Constitutions of Foreign Countries Part. I (2nd ed.), *Gonashvili V.*, (ed.), Tbilisi, 2008, 653, (in Georgian,) compared with The Constitution of the Czech Republic, <<http://www.psp.cz/en/docs/laws/constitution.html>>.

⁶⁹ Constitutions of Foreign Countries Part. I (2nd ed.), *Gonashvili V.*, (ed.), Tbilisi, 2008, 655, (in Georgian).

⁷⁰ Constitutions of Foreign Countries Part. I (2nd ed.), *Gonashvili V.*, (ed.), Tbilisi, 2008, 656, (in Georgian).

⁷¹ Bundesverfassung der Republik Österreich, <<http://www.verfassungen.de/at/verfassungheute.htm>> compared with Constitutions of Foreign Countries, Part. II (2nd ed.), *Gonashvili V.*, (ed.), Tbilisi, 2008, 120, (in Georgian).

⁷² Constitutions of Foreign Countries, Part I I (2nd ed.) *Gonashvili V.*, (ed.), Tbilisi, 2008, 122, (in Georgian).

⁷³ Constitutions of Foreign Countries, Part I I (2nd ed.), *Gonashvili V.*, (ed.), Tbilisi, 2008, p. 124 (in Georgian).

⁷⁴ Constitutions of Foreign Countries, Part I I (2nd ed.), *Gonashvili V.*, (ed.), Tbilisi, 2008, 356, (in Georgian), compared with Constitution of the Republic of Lithuania, <http://www.opbw.org/nat_imp/leg_reg/lithuania/constitution.pdf>.

⁷⁵ *Shavbe J.*, Decisions of Federal Constitutional Court of Germany, Tbilisi, 2011, 414, (in Georgian), <<http://lawlibrary.info/ge/books/giz2011-ge-BVerfGE.pdf>>.

⁷⁶ <<https://www.gesetze-im-internet.de/bundesrecht/gad/gesamt.pdf>>.

⁷⁷ <<https://www.gesetze-im-internet.de/konsg/BJNR023170974.htm>>.

⁷⁸ The German Federal Law on Consular Activities deals only with the appointment of the Honorary Consul, but even in this case, does not define the procedure by which the consuls have to be appointed.

⁷⁹ Bosnia Herzegovina is a state, which is represented by the so-called "Head of the Collective State", what in turn reflects on the country's international relations.

⁸⁰ Constitutions of Foreign Countries, Part. III, *Gonashvili V.*, (ed.), 2006, 34, (in Georgian).

State Assembly, with suggestion of the Government, And the president is elected by the Electoral College, but if has not been elected by the three rounds, the president will be elected by the Chairman of the State Assembly's invited voter's board.⁸¹

The President of Albania approves and dismisses the candidates put forward by the Prime-Minister according to constitution's article 92 paragraph "F". The President of Albania is elected by 3/5 representatives of Kuvendi.⁸² This means that president is elected indirectly and makes decisions under control of the Government.

According to the Hungary's Constitution's article 29/a (1) the president is elected by the parliament. According article 30/a (1) paragraph "c", the parliament also selects ambassadors and envoys with prime-minister's or responsible minister's counter-signature.⁸³

It's impossible to understand the duty of such president and the purpose of existence of the governmental organ which can't do anything within its own competences. It's completely incomprehensible doubling of the competences via mechanism of counter-signature and we believe that, existence of the presidential institute in this form is unacceptable.

A similar system acts in Republic of Italy. According to article 83 of the Constitution of Italy, the president is elected by both chambers of the parliament and by the regional representatives, and in accordance of article 87 of the Constitution of Italy, the president is authorized to appoint and dismiss the envoys. But by the constitution, article 89, and the president's every act needs to be agreed and signed by the relevant minister and the act of law issued by the president requires approving by the head of cabinet council.⁸⁴

There are several European countries in which the presidents are elected directly by the people and have high legitimacy in decision-making process and in politics, but individually can't make decisions about appointment of the ambassadors. For example, the President of Bulgaria, elected directly by the people, in accordance with article 93 of the Constitution of Bulgaria, appoints and removes the candidates, which are put forward by the cabinet of Ministers, as the heads of diplomatic representatives and the permanent representatives in the international organizations.⁸⁵ According the article 121 of the Constitution of Portugal, the Portugal's President in elected also directly by the people⁸⁶ and as it is in most of main European countries, he/she appoints the ambassadors and special representatives (the paragraph "A" of article 135 of the Constitution of Portugal).⁸⁷ Therefore, if we consider foreign countries' constitutional regulations regarding the issue, we conclude that, the president's competence in appointment and resignation of the ambassadors is not directly linked neither to the way of election of the president, nor to the model of governance, but is the subject of regulation in the process of separation of the concrete competences. According to Montesquieu and Blackstone the governmental executive branch's one of the main competences is the subject of selecting ambassadors, and in so far executive branch belongs to government, it's explained that president does not carry out the executive power, is able to carry out the foreign policies. In authors' opinion this subject is a category for evaluation and is approached individually in different countries.⁸⁸ We have reviewed several constitutional models about competences of foreign representations, almost every model which exists

⁸¹ Constitutions of Foreign Countries, Part. III, *Gonashvili V.*, (ed.), Tbilisi, 2006, 259-260, (in Georgian), compared with Constitution of the Republic of Estonia, <<https://www.president.ee/en/republic-of-estonia/the-constitution/>>.

⁸² Constitutions of Foreign Countries, Part. IV, *Gonashvili V.*, (ed.), Tbilisi, 2007, 53-55, (in Georgian).

⁸³ Constitutions of Foreign Countries, Part. III, *Gonashvili V.*, (ed.), Tbilisi, 2006, 712-715, (in Georgian).

⁸⁴ Constitutions of Foreign Countries, Part. V, *Gonashvili V.*, (ed.), Tbilisi, 2007, 343-345, (in Georgian).

⁸⁵ Constitutions of Foreign Countries, Part. I V, *Gonashvili V.*, (ed.), Tbilisi, 2007, 209 – 211, (in Georgian).

⁸⁶ Constitutions of Foreign Countries, Part. V, *Gonashvili V.*, (ed.), Tbilisi, 2007, 671, (in Georgian).

⁸⁷ Constitutions of Foreign Countries, Part. V, *Gonashvili V.*, (ed.), Tbilisi, 2007, 676, (in Georgian), compared with Constitution of the Republic of Portugal, <https://www.constituteproject.org/constitution/Portugal_2005.pdf>.

⁸⁸ *Papashvili T.*, Foreign Affairs of the President and Government In the context of the 2010 Constitutional Reform, Contemporary Constitutional Law (Book I), Collection of Articles, Red: *Kverenchkhiladze G., Gengenava d.*, (David Batonishvili Institute of Law) Tbilisi, 2010, 198, (in Georgian).

in republic countries. We can say that, by the universal principle of constitutionalism, foreign policy is a competence of the head of state that includes subject of appointment of the ambassadors and envoys. In addition, it should be noted that there is no system of mixed governance in which the executive power completely belongs neither to the head by the head of state, nor to the government. Their functions and competences are strictly separated, but in certain cases the shared competencies are carried out.

Based on analysis of the constitutional practice, we can say that, in the case of expiry of the term or early release of the diplomatic representatives from the office, the president issues an order for his/her dismissal and due to that the Minister of Foreign Affairs is instructed to dismiss the diplomatic officials. Therefore, the President gives immediate assignment to the government's executive branch representatives to be performed appropriate legal actions envisaged by the law. This issue once again points to the fact that the president cannot be distant from the executive branch of government and frequently is connected within execution of the power.⁸⁹

5. Conclusion

In the paper, we have discussed the President's competence in the scope of appointment and dismissal of the ambassadors and diplomatic officials, as well as the constitutional regulation of the creation of diplomatic missions and consular posts and appointment of foreign representatives in general, which are regulated by the Constitution of Georgia, by the current legislation of Georgia and also by the international treaties.

It can be said that the constitutions of other countries, compared with the Constitution of Georgia, more specifically refers to the fact that the president not only appoints the ambassadors and other diplomatic representatives, but also, as the Constitution specifies and defines the competence of the president, the heads of diplomatic missions as well as the heads of consulates are appointed by the President. Also the constitutions of foreign countries directly regulate the bases of establishment and liquidation of foreign representations and institutions. Thus, it would be better and justified if the Georgian Constitution was more clearly in regulation of these issues.

In addition, it is possible to adopt a constitutional model that will ensure that decision on the foreign representation will be taken together, by the consultations between the head of state and the government and the representative body, that actually determines the main directions of the foreign policy. Also, the current constitution is unclear regarding to the other diplomatic representations, whether is included or not the consular representation and we believe that regarding this theme is needed more specified regulations.

The paper discusses the constitutional practice concerning the ordinances of the President and the Government, on the basis of which the ambassadors and diplomatic representatives are appointed. Based on the analysis of this practice can be concluded that, there are some inconsistencies between the acts and regulations, and to say that the resolutions on the appointment of ambassadors and diplomatic officials should be considered, not only as a legal administrative acts, but also as constitutional legal acts, as the authority of the President first of all is made on the basis of the Constitution.

And at last, the control and supervision of the diplomatic relations and diplomatic service must exercised by the higher authorities of the state and not only by the Ministry of Foreign Affairs, as the Constitution Article 3 paragraph "e",⁹⁰ respectively, defines the state's representation in the political-legal provision is only the government's supreme authority on relative issues, while the Ministry of Foreign Affairs is only the subject of the such body and can not unilaterally be the highest authority of the state.

⁸⁹ Decree N07/12/08 of the President of Georgia of 7 December 2015, ordinance № 15/03/03 of the President of Georgia of 15 March 2012, (in Georgian).

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The Importance of Free Legal Aid Service Quality Control and the Basic Difficulties Associated with it

Providing an effective system of free legal aid and constant care on improving the quality of the services provided by such a system is one of the most important challenges of government. How far, in terms of the documented results, has the Republic of Georgia progressed in this direction, compared to a number of western and central European countries which have well-organized systems of free legal services at the national level, but does not have mechanisms focused on concrete and practical challenges to the state-funded service control.

This article is dedicated to the importance of quality control to free legal aid systems. It explores several actual issues related to providing such quality control, about which there are significant differences of opinion both in practice and theory. In particular, it is still difficult to protect the confidentiality of communications between the legal aid lawyer and the client, while at the same time insuring the quality of the legal services, especially in cases where the problems with the quality of the services being provided requires removal of a particular attorney from the case, vis-à-vis the right of self-organization of the lawyer etc.

Key Words: Quality control, efficiency, compulsory protection, secured at the expense of the state, mechanisms, free, public attorney, rule and criteria.

1. Introduction

Unlike the Legal Protection Institute, which has very early formation and development stages¹ as a fundamental part of human rights protection, legal aid systems funded by state resources has existed for a relative short period of time. It is known that it was developed in the United States of America in the 19th century,² and slightly later under the international law, legal aid system developed in the form of the right to a fair trial.³ In the 20th century, the right of free legal aid (in some cases obligations) for the persons accused of a crime has become an integral part of the Constitution in all democratic states.⁴

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¹ Compare: The elements of legal protection, and the importance of the lawyer to protecting legal rights, were established in antiquity period, see e.g. Anton -Hermann Chroust, *Legal Profession in Ancient Republican Rome*, 30 Notre Dame L. Rev. 97 (1954). In Georgia development of what is now known as the Legal Protection Institute, began in the XIII century. At that time, the person serving as the trustee, guardianship and carefulness were referred to by the common name – “the Solicitor.” See in detailed, *Akubardia I.*, *Art of Protection*, Tbilisi, 2011, 12.

² See in detailed: Inter alia *Batlain F.*, *Women and Justice for the Poor: A History of Legal Aid, 1863-1945* (Studies in Legal History), Cambridge University Press, 2015; *Essenburg T. J.*, *New Faces of American Poverty, A Reference Guide to the Great Recession*, ABC-CLIO, 2014, 464-466.

³ When we talk about the basis of state funded legal aid system in Georgia, one historical fact of particular interest noted by Davit Batonishvili, is that the solicitor was appointed for noble orphans from the circle of the nobility, that was responsible for the care of the orphans and their property, while, at the same time, taking into consideration of their interests. But because of, that the “Substitute Man”, or the “Advocacy Insitute” is not confirmed with other sources, Iv. Sulguladze concludes that D. Batonishvili took the Institute which existed in other countries and provide their information to the Russian Society, In fact, even in that period in Georgia it was not known as the “Advocacy Institute”. See *Akubardia I.*, *Art of Protection*, Tbilisi, 2011, 14-15.

⁴ *Kublashvili K.*, *Basic Rights*, Tbilisi, 2003, 26.

While second half of the last century mainly focused on the establishment of free legal aid systems and their organizational-legal arrangements, in this century, governments have put the importance of the quality of these legal aid services on the agenda. Indeed, modern challenges to human rights protection treat merely providing free legal services by democratic states only at the formal level as absolutely insufficient. This first simulates them to focus on the quality of these services and developing effective mechanisms to control that quality. The opinion of the scientific community on this issue, as well as the case law from the Supreme Court in the United States of America¹ (hereafter referred to as the “U.S. Supreme Court”) and the European Court of Justice (hereinafter “European Court”), is both solid and consistent. Secondly, mere agreement on the fact that legal aid provided at the expense of the State should be effective and must meet international standards, is not, in and of itself, sufficient to meet the challenges that must be overcome, because one of the main difficulties which must be addressed are found in the implementation process of the national legal framework and practices. Namely, it is still arguably a question of what criteria should be taken into account when evaluating the quality of legal aid and what kinds of legal “units of measurement” should constitute the best model of quality control function. This is problematic because the fairly high standard imposed on the confidentiality and privacy of the relationship between the lawyer and his client privacy, and on the need for the lawyer to have professional independence, provide impediments to “third parties” (i.e., other state actors) having sufficient and legitimate access to relevant information and processes which is needed in order to implement effective quality controls.

Due to the fact that at this time, research for this dissertation has reach only a preliminary stage of what is needed to fully explore this subject, the issues raised in it, including the discussion alluded to in the preceding paragraph, will be presented in greater detail and scope in the final dissertation work. For example, according to the Research Limiting Character, it presently includes only a British Model review of Quality Control of Legal Aid, which will be presented more contently with greater legal analysis and compared to the models of some other countries in the context of legal analysis in the context of the Dissertation dissertation Survey.

In conclusion, the specific concepts and recommendations which are presented in this work, regarding the specific issue which will be reviewed will significantly improve the quality of free legal services in Georgia and increase public confidence towards the efficiency of this system.

2. Necessity of Quality Control of Legal Aid and General Issues Related to it

The necessity to control the quality of work being is an integral part of the activities of high-level management in any organization, the necessity and importance of which no longer are in doubt. What only remains controversial is the essence of control and planning the process of conducting it.² In the case of legal aid, the need for Quality Control of Legal Aid should be started naturally by discussing the importance of its effectiveness. In any jurisdiction, the basic precondition for effective criminal legal defence is the legislative and constitutional structure itself, which, as a minimum, should correspond to the attributive standards established by the case-law of European Court and the European Convention on Human Rights, as well as the standards of the European Union on the procedural rights of the defendant in criminal proceedings.³ Naturally, we can not speak about the necessity of quality control with the same enthusiasm and meaning with regard to possible deficiencies which may exist with criminal defence counsel which has been retained by the defendant mutual private agreement (i.e., paid out of the defendant’s own financial resources), because the standards of advocacy provided on the private origin

¹ It is important to note that one of the first states in which Legislation was enacted to regulate of free legal aid was the United States of America. Compare. *Suknidze N.*, How to make justice available for everyone, Part I, Tbilisi, 2003, 12.

² *Shubladze G., Mgebrishvili B., Tsotskolauri P.*, Basis of Management, Tbilisi, 2008, 111.

³ *Cape E., Namoradze Z.*, Effective Criminal Defence in Eastern Europe (Bulgaria, Georgia, Lithuania, Ukraine), Legal Aid Reformers’ Network, Soros Foundation, 2012, 33.

are regulated by a labor market which is based on a competitive environment. Thus, any shortcomings in the quality of representation (even when they are of a substantial character), cannot become the basis of international responsibility for Georgia (as a Contracting Party of the European Convention).

For the purposes of this research, the measures needed to be taken to improve the quality of free legal services, are of particular interest relative to Georgian legal reality. In the field of legal aid, the main priority of the reform of the criminal justice system in Georgia, is the need to insure the quality of the work.⁴ Besides the “Plans described in the documents”, in the practice of the common courts of Georgia we have already found a sad but notable precedent, namely when the Court (in other words - the State) on its own initiative removed the attorney who had been appointed for the defendant through the legal aid program because the attorney failed to observe the minimum standards for effective legal assistance during the trial.⁵

According to case-law of European Court of Human Rights, the right to free legal aid stipulated by point 3(c) of the 6th article of European Convention should be effective and the State is obliged to provide the Public Attorneys with the necessary legal leverages for implementing the quality protection.⁶ At the same time, if a specific Public Attorney’s actions are not effective, the State is obliged to provide the accused with an other attorney.⁷ It should be emphasized that in this case, we are talking about the existence of a strong system and not about the individual defects revealed about the public attorney, because the European Court of Human Rights doesn’t impose any responsibility on signatory States to remedy mistakes made by individual public lawyers. The public attorney, as the representatives of the independent and liberal profession, must have certain rules of regulation. The European Court of Human Rights declared that “the State can not be responsible on any mistake made by a public attorney appointed under free legal aid ... The States are obliged only to interfere in the issue if the failure of implimentation of effective representation by the lawyer is obvious and the authorities are aware of this”.⁸ In the 20th Century, the Supreme Court of the United States adopted an almost a similar approach, based on the 6th Amendment⁹ to the United States Constitution.¹⁰

Thus, the homogenous regulation of the issues related to the effectiveness of free legal assistance and the quality control should be sought in the perspective of developing a well-systemized mechanism (which, in parallel with the efforts of state institutions, is also the presented scientific research). It should also be noted that in science and practice there is no common position on that we can use as a guide to frame the principles and methods to determine the issue of effectiveness of legal assistance and the role of each legal subject in ththis process. “In practice it has also been proven that in the case of legal assistance for a lawyer it is difficult the defendant’s effective representation on the background of the absence of instructions from the client and also when to the client’s opinion is not clear for him/her - what does he think that is true or how he perceives the events”.¹¹ Furthermore, there is no doubt that the primary criterion determining the quality of protection cannot

⁴ Criminal Justice System Reform Strategy, approved by Criminal Justice Reform Interagency Coordinating Council at the 24th Meeting, 12th of April, 2017, 80-90. The document is available on the official web page of Ministry of Justice of Georgia, <<http://www.justice.gov.ge/AboutUs/Council/240>>, [24.05.2017].

⁵ Order of Tbilisi City Court №1/168-13 of the 21st of June of 2013. Court order is accessible in the Court Archive.

⁶ Goddi v. Italy, [1984] ECHR (Ser. A.), 35, *Kamil Öcalan v. Turkey*, [2006] ECHR (Ser. A.), 41.

⁷ Artico v. Italy, [1980] ECHR (Ser. A.), 33-34, 36.

⁸ *Imbrioscia v. Switzerland*, [1993] ECHR (Ser. A.), 275, *Kamasinski v. Austria*, [1989] ECHR (Ser. A.), 168; *Czekalla v. Portugal*, [2002] ECHR (Ser. A.), 65; *Daud v. Portugal*, [1998] ECHR (Ser. A.), 38; *Lagerblom v. Sweden*, [2003] ECHR (Ser. A.), 56; *Ebanks v. the United Kingdom*, [2010] ECHR (Ser. A.), 73; *Orlov v. Russia*, [2011] ECHR (Ser. A.), 108.

⁹ The 6th Amendment to the United States Constitution states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.”

¹⁰ See also, *Weaver R.L., Abramson L.W., Burkoff J. M., Hancock C.*, Principle of Criminal Procedure, 4th ed., 2012, 41-63.

¹¹ *Cape E., Namoradze Z.*, Effective Criminal Defence in Eastern Europe (Bulgaria, Georgia, Lithuania, Ukraine), Legal Aid Reformers’ Network, Soros Foundation, 2012, 47.

be the efficiency of the investigative or other procedural actions conducted by the public attorney, if during the initial stages there is no analysis of the protection strategy employed by the public attorney during that particular criminal case. This circumstance complicates the fact that each criminal case is very individual and the defense strategy should be assessed based on the specifics of that case. On the other hand, it is important that the quality of legal assistance should not be measured based on the “legal tastes” of a particular person which would become a source of arbitrariness, based on individualism.

In order to address the above stated problem, first of all it should be realized that the correct professional approach is that of a “Golden Interval,” which on the one hand, will balance the obligation of the legal states, to remedy identified faults in the legal assistance provided with their resources, into the subject of its own responsibility, and on the other hand, to be dismissed from such duties of which imposition to the state institutions will gain in themselves the formal character.

One of the main postulates of the raised issue is the principle that the mechanisms of the quality control within the Free legal Services system should necessarily be conducted, as far as possible, based on detailed predetermined criteria. As the professional responsible for implementing quality control in particular cases, the Public Lawyer must exactly know which kind standards and assessment methods for monitoring and controlling will be used. Therefore, there should be an effective system of information retrieval and collection. All above mentioned conditions highlight the difficulty of the process.¹² Also, when the issue concerns the independent professional judgment of the lawyer in a case, it’s very sensitive and almost imposibe for the relevant State Institutions (for example: Legal Aid Service) to have full access to the details of the case and the confidential communication between the Public Lawyer and the client, on which the former founded the defense strategy. However, to our view, international experience gives the proper means, taking into consideration the confidentiality of the attorneys and client relationships. Thus, it is necessary to develop a more efficient and transparent model, which, on the one hand, excludes the risks of increasing the international liability of Georgia as a signatory State of the Convention and, while at the same time, sharply increasing the level of society trust towards the institute of functional public attorney in the country.

Finally, the need for quality control is not limited by narrow legal meanings and adequate provision of free legal aid and to provide free legal assistance. Rather it has been given a decisive role along side the modernization of the organizational arrangement of the system, as well as raising the qualification of public lawyers and reaction upon other important challenges.

3. Perspectives of Establishing Effective Quality Control Mechanisms in Georgian Legal Space Based on International Experience

3.1 The Formal-Legal Side of the Settlement of the Issue

We should begin the discussion on the issue by determining, whose function includes establishment of the criteria and methods of quality control of legal aid and what kind of legal forms should be implemented by legislation in Georgia. This entails determining, as of today, what are the parameters of free legal services provided by the state budget of Georgia.

According to the Law of Georgia on Legal Aid,¹³ the LEPT Legal Aid Service¹⁴ is obliged to provide free legal assistance as guaranteed by point 3(c) of the Article 6 of the European Convention throughout the country. It carries out this service through the local branches composed by the regional principle.¹⁵ In addition to local

¹² Compare *Shubladze G., Mghebrishvili B., Tsotskolauri P.*, *Baiscs of Management*, Tbilisi, 2008, 111.

¹³ Law of Georgia on Legal Aid, Legislative Herald of Georgia №4955-Is, [19.06.2007].

¹⁴ The service is not subordinates to any other state agency and is accountable only to the Parliament of Georgia.

¹⁵ The detailed information on the structure and current activities of the LELP Legal Aid Service <www.legalaid.ge>, [24.05.2017].

organizational units, the central office functions within the service, in which one of the main units is the monitoring and analysis unit. The functions of the monitoring and analysis unit¹⁶ are stipulated by the 10th article of the Regulations of Legal Aid Service and it mainly means monitoring the quality of service provided by the public lawyers and consultants working in the Service. In terms of legal techniques, regulations related to quality control will be approved by the decisions of the Legal Aid Council, which will be presented by the director of service according to the subparagraph “d” of paragraph 1 of the article 11 of the Law of Georgia on Legal Aid.

Even though, free legal aid is available in Georgia from the 17th of February of the year 2005 until today, due to lack of quality control mechanisms, monitoring of the effectiveness of this service was not physically carried out until recently, which at least did not make it possible to say that Georgia was fulfilling the legal values guaranteed by Article 6 of the European Convention.

Thus, about eleven years after the formation of the Legal Aid System in Georgia,¹⁷ on the 2nd of March of the year 2016, the Legal Aid Council (hereinafter - the Council) approved the procedure and criteria for assessing the quality of free legal services provided by the LEPL Legal Aid Service by adopting decision №39 “About Approval of the Rules and Criteria for Quality Assessment of Legal Aid provided by LEPL Legal Aid Service”.¹⁸ However, the present, disputes on its lawfulness are still ongoing in the courts. In particular, on the 21st of April of the year 2016, public lawyers employed at the Legal Aid Service filed a lawsuit in the Administrative Cases Panel of Tbilisi City Court against the Legal Aid Council challenging the Council’s actions on the 2nd of March of the year 2016 approving decision №39, and requesting that the Court annul the Council’s decision. At the same time, the applicants requested that the Court suspend decision №39 before making the final decision on the case.¹⁹ As for the main side of the above mentioned administrative dispute, i.e., that the decision of the Council be annulled, the Court has not yet made a final decision on it as of the writing of this paper today, but that part of the claim asking for suspension of Decision was not satisfied by the First Instance Court,²⁰ although by the Verdict №3B/1045-16 of the 26th of January of the year 2017 of the Chamber of Administrative Cases of the Tbilisi Appeal Court, the first instance decision was cancelled and the Claimants’ request was fully satisfied by suspension of validity of the Decision №39.²¹

In parallel with the above-mentioned litigation by part of public lawyers employed in the Legal Aid Service, on February 13, 2017 in the Constitutional Court of Georgia was presented a constitutional claim, No. 870, on the basis of which applicants disputed whether subparagraph “d” of paragraph 1 of the article 11 of the Law of Georgia on Legal Aid conformed with the paragraph I of Article 20 and paragraphs 3 and 8 of the Article 42 of the Constitution of Georgia. In particular the applicants contend, that the former, which authorizes the Legal Aid Council, when approving the rule and criteria for evaluating the quality of legal counseling and Legal Assistance provided by the Service, to determine the rules and criteria for assessing the quality of service provided by the lawyers of the Legal Aid Service, necessarily relates to the confidentiality of the relationship between the lawyer and the client. This, in turn, applicants contend will not only allow, but will obligate the lawyer to disclose the following information: (1) “Whether the client was informed regarding the strategy selected by the lawyer”; (2) “Taking into consideration the objective circumstances how timely and sufficient was the communication with the client during the detention / Before using the detention”; and (3) “How adequately the client was informed about the prospects of the case or their absence at all stages of the proceedings / development of the case (includ-

¹⁶ Approved by the decision №20 of the 3rd April of 2015 of Legal Aid Council, <www.legalaid.ge>, [24.05.2017].

¹⁷ Reform of the free legal aid system in Georgia started in 2004 in cooperation with state, non-governmental and international organizations. Initially, the concept of reform was prepared. Since 2005, the commission has started implementation. See in detailed, <http://legalaid.ge/?action=page&p_id=448&>, [24.05.2017].

¹⁸ See Decision №39 of the 2nd of March, 2016 of the Legal Aid Council “About Approval of the Rules and Criteria for Quality Assessment of Legal Aid provided by LEPL Legal Aid Service”, <http://www.legalaid.ge/index.php?action=page&p_id=673&lang=geo>, [24.05.2017].

¹⁹ Order №3/3094-16 of the 5th of May of 2016 of Tbilisi Appeal Court, is available in the Archive of the Court.

²⁰ Ibid.

²¹ Order №3B/1045-16 of the 26th of January, 2017 of Tbilisi Appeal Court, is available in the Archive of the Court.

ing the expected final result)²².²² The above mentioned claim will not be taken for a merits hearing by the Order №1/4/870 of the 7th of April of the year 2017 of the Constitutional Court.²³

Given the fact that in-depth discussion of the Rules and Criteria of Quality Assessment of Legal Aid approved by the Legal Council goes beyond the scope of the subject of this article, its detailed consideration will be discussed at the next stage of the dissertation research.

3.2 Minimal Standards of the Quality Control

When it comes to the fulfilment of the obligations undertaken by the European Conventions of the signatory States, in this case, of Georgia, it is important to pay attention to the so-called principles of minimum standards. Namely, International Law imposes obligations on the Member States on the minimum requirements of quality of rights that is required by the principle of the rule of law in a democratic society and requires them to protect them strictly.²⁴ This approach is particularly relevant with regard to the right to the Effective Legal Aid guaranteed under the paragraph 3(c) of the article 6 of European Convention, in view of the fact that the Public Attorney is the representative of the independent legal profession in Georgia, as well as in all countries of the world, and he or she does not acquire the status of a public official.²⁵ Considering this, the International law can not impose an unreasonably high standard to the Member States, even if deficiencies arise within the implementation of the legal protections provided at the expense of the State.

The quality of the Free Legal Aid, and the importance of its control in theory and practice, are discussed in two independent directions:

- The obligation of the Contracting State of the European Convention on Human Rights to provide at national level such institutional basis of legal assistance, which (at the very least) must defend the set minimum standards;
- The internal policy of a much higher standard than the minimum established by the International Law, which is strictly oriented on the high quality of the Free Legal Aid provided by the State and it constantly carries out monitoring by the rule established under the Law.

In order to identify the main differences between these two models at practical level, it is interesting to make the analysis of the key aspects of case-law of the European Court of Human Rights and the U.S. Supreme Court.

As it was noted above, the right to legal representation guaranteed in the 6th Amendment of the Constitution of the United States of America, which implies the obligatory minimum standards of effectiveness in itself,²⁶ has repeatedly become the subject of discussion by the U.S. Supreme Court and, in terms of the development of law, quite interesting approaches have been established. In particular, the American experience is especially important in relation to the first component mentioned above, since it is clear how basic is the quality control of legal protections provided by public lawyers and, when defects are found, the standards which are imposed on the the responsible state.

Studying the cases decided by that Court, the precedent value has of those decisions been distinguished from the general type of appeals in which the applicants were appealing for protection of their rights while at the same time, the State was justifying the inefficiency of appointed public lawyers. Perhaps, at first glance,

²² Constitutional complaint №870 of the 13th of February of 2017, <<http://constcourt.ge/ge/court/sarchelebi>>, [24.05.2017].

²³ Court order №1/4/870 of the 7th of April of 2017, <<http://constcourt.ge/ge/legal-acts/rulings>>, [24.05.2017].

²⁴ Compare Open Society Justice Initiative, *Legal Aid in Europe: Minimum requirements under international law*, 2015, 13, <<https://www.opensocietyfoundations.org/briefing-papers/legal-aid-europe-minimum-requirements-under-international-law>>, [24.05.2017].

²⁵ Within this research there was not able to find an example of different legal representations.

²⁶ *Weaver R.L., Abramson L.W., Burkoff J.M., Hancock C., Principle of Criminal Procedure*, 4th ed., 2012, 40.

such factors may really inspire expectations, that in a similar situation, persons with similar characteristics will not be able to realize (or has realized) the effectiveness of the legal services provided in a criminal case, because applicants' complaints were not explicitly shared with the Court, which was applied to any one of the following circumstances:

- Lawyer's age (Which means a very young age, as well as older remoteness);
- Inexperience (It is meant as a directly professional as well as its public understanding);
- Some kind of professional incompetence;
- Personal and/or emotional problems of the lawyer;
- Problems related to illegal use of alcoholism and/or narcotic substances;
- Problems related to being in conflict with the law (or when the lawyer appears to have a substantive legal conflict);
- Problems related to suspension or abolition of the lawyer's status by the entity that regulates the practice of law in the jurisdiction.²⁷

The above-mentioned factors in American legal literature are referred to as extrinsic factors of possible ineffectiveness of legal representation, which was inculcated in the judgement delivered by the U.S. Supreme Court in the case of *United States v. Cronin*.²⁸ In the *Cronin* case among the circumstances that were proven were that the public attorney appointed by the state was quite young and inexperienced and that he had never participated in jury trial prior to Mr. Cronin's case. The applicant claimed that his lawyer's inexperience was the reason that why his lawyer requested only about twenty five days to get acquainted with materials of the criminal case and to prepare a defense. The Supreme Court of the United States of America has made it clear that any one of the above listed extrinsic factor cannot be considered to establish as an ineffectiveness of counsel argument if there is no indication of the particular incompatibility of the criminal case. Addressing professional inexperience in particular, the Court observed that any criminal lawyer can initiate the first steps in the preliminary stage of the first criminal proceedings, thus, this can not be considered as the defect of its any form.²⁹ This approach was strengthened relatively later in the cases of *Bell v. Cone*³⁰ and *Florida v. Nixon*³¹ Cases. By comparison, it is especially interesting that in the case of Romania, where, in terms of staff policy, the authorities responsible for ensuring the Free Legal Aid, make special emphasis on the young public lawyers, which obviously does not mean that the management wants to employ unqualified and inexperienced public lawyers.³²

In the opinion of the Supreme Court of the United States of America, the State at the systematic level must provide competence and equality of protection in the proceedings process and it should only be responsible for the inefficiency of free legal assistance when the institution at the national level is so imperfect that the system itself fails to provide a high standard of professionalism by the public lawyers. This attitude of the Court was more clearly demonstrated on the case of *Strickland v. Washington*, where the Court held that for the purpose of the 6th Amendment of Constitution of the United States, in order to consider criminal defense ineffective, the public lawyer must have made the professional mistakes of such degree and quality, that the totality his activities on the particular criminal case, should not be perceived as the lawyer's and the Human rights defender's actions.³³ In the same case, the Court emphasized the importance of evaluation in conjunction with existing circumstances

²⁷ Compare, *ibid*, 41.

²⁸ *United States v. Cronin*, 466 U.S., 648, (1984), 666-667.

²⁹ Bazelon D.L., *The Defective Assistance of Counsel*, Vol. 42, 1973, 1, 18-19.

³⁰ *Bell v. Cone*, 535 U.S. 685, (2002).

³¹ *Florida v. Nixon*, 543 U.S. 175, 190, (2004).

³² *Bard K., Terzieva V.*, *Legal Services for Indigent Criminal Defendants in Central and Eastern Europe*, *Parker School Journal of East European Law* Vol. 5, 1998, 17.

³³ *Strickland v. Washington*, 466 U.S. 668, (1984).

and stated that one specific ineffective action, taken by the defence council could not be taken as a basis for considering the lawyer to be totally ineffective in the particular criminal case.³⁴

It is noteworthy that American and European approaches to the inefficiency of protection are quite similar to each other. The classical example of the principles set out in *Strickland v. Washington*, can be summarized by the landmark case of the European Court of Human Rights - *Artico v. Italy*,³⁵ where the legal activities of the public attorney were not clearly perceived as suitable acts for the criminal defense attorney and most importantly, there were no quality control mechanisms within the state institutions.

Ettore Artico, who was convicted for simple fraud in the above-mentioned case, initially was represented by a lawyer he had privately retained (contracted). Later he requested that the Court of Cassation to provide him with free legal assistance, which was satisfied, but only after action on his motion was suspended for five months. One month later, the convict informed the Cassation Court that he had not been able to communicate the appointed public attorney so far and requested that the state to provide him with effective legal assistance. Arguing that the appointed public attorney had failed to provide him with effective representation due to the attorney's deteriorating health condition, the applicant categorically requested that the Court remove an ineffective defender and appoint another lawyer. His request was not granted and, moreover, he was advised to withdraw his own application to have the state appointed lawyer removed. Since the convict was not even allowed to drop the ineffective defender during the merits of the case, he considered that his right to effective representation had been violated.

When the case reached the European Court of Human Rights, it agreed with position of E. Artico and recalled that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.³⁶

The Court pointed out that Article 6, paragraph 3 (c) of the Convention refers to the word "aid" and not "appointment", which in context suggests, that the fact of appointment of a lawyer in the case does not create the presumption of effective legal protection, even because "after the lawyer is appointed on the case, he may die, be seriously ill, to avoid the fulfillment of the rights and obligations for a long period of time"³⁷ etc. In this particular case, the Court found that the applicant had not received any benefit from the lawyer appointed by the State during the conduct of the criminal proceedings.

In conclusion, it should be noted that *Artico v. Italy*, the Court found a violation of Article 6 § 3 (c) of the European Convention on Human Rights, as the State did not respond to the full legal imputation of the public attorney, especially considering that the client had repeatedly called the problem to the attention of the trial court, such that the State was fully informed about the situation.

This decision was made in the 1980s, although case law has not yet tested the standards set in the period, these approaches have been fully shared in the cases discussed in 1993-1994, such as "*Imbrioscia v. Switzerland*",³⁸ "*Stanford v. the United Kingdom*"³⁹ and others.

There is also the special case of *Kamasinski v. Austria*, which stands in contrast to case of *Artico v. Italy*. Namely, in this case the Austrian state has shown institutional readiness to respond to the ineffectiveness of free legal aid. The applicant expressed dissatisfaction with the public attorney appointed for the first time by the state because he could not properly speak the English language, which made it impossible for the applicant to communicate with him. This circumstance was taken under consideration by the relevant state institutions and

³⁴ It is noteworthy that the trend of evaluation in combination with the factual and legal circumstances also includes the case-law of the European Court of Human Rights, particularly when the issue concerns a possible violation of the right to a fair trial under Article 6 of the European Convention by national institutions of any Contracting State. For example: *inter alia* *Bendenoun v. France*, [1994] ECHR (Ser. A.) 61; *Efisio Pisano v. Italy*, [2001] ECHR (Ser. A.), 23-24.

³⁵ *Artico v. Italy*, [1980] ECHR (Ser. A.).

³⁶ *Ibid*, 33.

³⁷ *Ibid*.

³⁸ *Imbrioscia v. Switzerland*, [1993] ECHR (Ser. A.), 41.

³⁹ *Stanford v. the United Kingdom*, [1994] ECHR (Ser. A.), 28.

the lawyer was immediately removed the case review. Kamasinski complained about the subsequently appointed public attorney, in particular, claiming that the lawyer did not personally visit him to provide him with legal advice and that the lawyer dealt with issues via telephone.

The applicant claimed that the public attorney did not find the evidence that would support his acquittal of the charges being brought by the prosecution and that he did not present the defense witnesses in a court hearing.⁴⁰ In this case the applicant's legitimate dissatisfaction was taken into account and the attorney was removed from the case based on the grounds of inefficiency. Finally, as a result of the Austrian state's fair reaction, the applicant was appointed a public attorney who visited the prisoner in prison and filed a complaint to the court on a request for the lawlessness and reduction of the sentence imposed on his client. He also provided Kamasinski with a translation of the judgment in his own language.

As we see, the basic similarity and the distinction between the above two legal proceedings is that in both cases the actions (or rather inactivity) of the appointed public lawyers proved to be ineffective in the protecting their clients. In the case of *Kamasinski v. Austria*, Austria as a signatory State to the Convention, has had a fast and adequate response mechanism, which, in this case, resulted in the dismissal of the ineffective public attorney from the criminal case. When the case reached the European Court of Human Rights, it considered the quality control mechanism in terms of minimum international standards.

The Court explained that "the issues related to the implementation of the defense are essentially the sphere of relations between the accused and the lawyer, regardless of whether the lawyer is appointed, based on personal funding or in the legal aid scheme".⁴¹ Consequently, the request for interference in the implementation of free legal aid guaranteed by Article 6 (3) (c) is only to occur when the fact of ineffectiveness of a legal aid attorney is obvious and prominent.⁴²

Thus, the experience of European and American analysis shows that the international standard related to the quality of public attorneys of the State and the control mechanisms which are utilized is very cautious and focused on the fact that the states should simply "sponsor" the adversarial process and ensure fair trial. On the other hand, when we talk about protection of minimum standards of free legal aid, the international practice does not consider the specially organized, separate normative act, as mechanism of quality control, the practical use of which may serve as an independent organizational unit equipped with special functions. In this case, it is sufficient that States could ensure the appropriate persons with accessibility of early legal services and timely removal of an ineffective public attorney from criminal case.

3.3 Means of Quality Control in Respect of Completed Criminal Cases (Maximum Standard)

In contrast to the above cited cases, where the public advocate's ineffectiveness was reacted by the state within current legal proceedings (e.g., *Kamasinski v. Austria*), the monitoring of completed cases is far less reasonable and is less problematic in legal terms. In the framework of this research, on the one hand, we will generally review the type of existed international experience on completed criminal cases, in terms of quality monitoring and on the other hand, we will discuss the related Georgian perspectives.

In the previous subsection, we discussed the bases that are established by international standards and experience that are protected by civilized legal states as a positive obligation. However, it is evident, that the minimum standards regarding the modern challenges of human rights protection in democratic society are very superficial and insufficient. In recent years, the developed countries have strongly advocated the tendency to establish free legal aid quality control mechanisms that are not limited to taking care of minimal standards. In

⁴⁰ *Kamasinski v. Austria*, [1989] ECHR (Ser. A.), 66.

⁴¹ *Ibid.*

⁴² *Ibid.*

those countries, the state should not stand before international responsibility. The essence of international law for the member states of the Democratic World is that it establishes basic standards, but international organizations express active support to member states in order not to satisfy the established minimum standards and provide high quality justice to the public at national level.

Nowadays, there are successful models in different countries, which help the states to carry out free legal services control, with regard to completed criminal cases. However, it should also be noted, that monitoring of the completed cases is not the only way to achieve the goal and there are also other ways to monitor the ongoing cases. For example, based on legislative regulations specifically set out in Israel, the Public Defender's Office regularly checks the efficiency of public lawyers' service by attending trials. It also has a legislative leverage to remove a public lawyer from a case.⁴³ In Slovakia, the court has the right to remove an inadequate public lawyer from the ongoing case, while the Bar Association is responsible for the early accessibility of free legal aid in Poland. Furthermore, the Prosecutor's Office and the Court are obligated to detect the ineffectiveness of the public attorney and to inform the Polish Bar Association.⁴⁴ According to the Polish Disciplinary Court, a public attorney appointed on a criminal case, should be obligated to diligently carry out his or her duties, as is the lawyer who is hired by the client.⁴⁵ These methods of quality control are undoubtedly effective, but they are more sensitive in respect with defending the principle of professional independence of lawyers, which issue will be discussed in the next chapter.

As for the monitoring of the completed criminal cases, which Georgia actively strives to implement, is mainly carried out through the computer program (Case Management) and the full responsibility is imposed on a specially created organizational unit - the Monitoring and Analysis Division. As a developed country, the United Kingdom has a very interesting and successful experience in the field of monitoring on the completed cases.⁴⁶ The existing system implies full access to the cases by the monitoring entities after the proceedings are completed and their assessment according to the following stages:

- Early accessibility of legal assistance to a protected person;
- Frequency and results of the communication with the client;
- Criminal proceeding at the investigation and court trial stages;
- Proceedings at the first instance, appeals and cassation stage;
- Human rights protection activists at the penalty execution stage (possible removal of sentences).

As it relates to individual criminal case, the object of assessment is the stage that has been undertaken within the specific legal proceedings. The selection of cases, subject to monitoring, shall be conducted with respect to each public attorney, based on the random sampling principle and the key criteria will be presented by the following legal issues:

- How perfectly did the public lawyer own the information contained in the case materials;
- How effective legal advice was given by a public attorney to a defendant at the relevant stage of the proceedings;
- How adequately was an organized defense strategy related to a particular charge;
- Whether a public lawyer has joined all essential legal opportunities prescribed by law to provide effective

⁴³ *Hacohen M.*, District Public Defender for Jerusalem, Israel's Office of Public Defender: Lessons from the Past, Plans for the Future, 2002, 4.

⁴⁴ *Hermelinski W.*, Country Report: Poland, Access to Legal Aid for Indigent Criminal Defendants in Central and Eastern Europe, Parker School Journal of Est European Law Vol. 5, 1998, 1-2, 7.

⁴⁵ *Suknidze N.*, How to Make Justice Available to Everyone, part I., 2003, 98-99.

⁴⁶ *McCormack N.*, Peer Review and Legal Publishing: What Law Librarians Need to Know about Open, Single-Blind, and Double-Blind Reviewing (February 7, 2009), Law Library Journal, Vol. 101, №59, 2009, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1339227>, [24.05.2017].

protection (to obtain evidence, to abolish the arguments of the prosecution side and so on);

- How qualified is a public attorney to draw up legal documents;
- How rational and adequate was expenses of state resources in respect of a specific case;
- And etc.

In the case of sharing of British experience, the above criteria must comply with each country's own legislation and practice on the internal level of individual specificity.

As a result of the amendments made on 13 December 2013 in the Law of Georgia on Legal Aid, it was determined, that the Legal Aid Council should approve the Rule of Quality Assessment and Criteria, by submitting the service director (Subparagraph "d" of paragraph 1 of Article 11 of the law). For the overall outcomes of the criminal system reform of Georgia, it is of highly important, that Georgia should not be limited by providing only legal assistance consistent with the minimum international guarantees and to make a choice on a quality monitoring mechanism. Namely, to implement the monitoring system through the electronic program for completed criminal cases. Also, there are exceptions to legislative leverage on timely response to the court's observations and revealed results on current criminal cases.

The logical question arises - what is the state's reaction toward the fact of ineffectiveness legal assistance, and so, what are the legislative leverages to prevent the state from preventing such a situation? For the visualization, let us consider the case, when in the format of absent legal proceedings, based on Article 45 of the Criminal Procedure Code of Georgia, the wanted person has been appointed a public lawyer by the state under format of obligatory defence, who provides unqualified legal service. Article 60 of the Criminal Procedure Code of Georgia (hereinafter referred to as "CCG Criminal Code of Georgia"), which unites the excluding circumstances of the lawyer's participation in the criminal proceedings, does not envisage the possibility of removing public attorney from the case on the grounds of inefficiency. This mechanism is not included in the Law on Legal Aid or any other normative act. Accordingly, the situation in the legislative standpoint is quite deadly. In particular, if the quality control of the free legal assistance is carried out with the best method, there is no legal leverage to remove the public attorney from the case based on national legislation. This can only be justified by formulated grounding, on the basis of the ECHR's case-law.

Based on the foregoing, it is expedient to add subparagraph "m" to the Article 45 of the Criminal Procedure Code of Georgia, which will grant the Court and/or investigative body with the authority, to remove a publicly appointed attorney from the criminal proceedings in cases of obviously inefficient legal service, based on the solicitation of the parties or on the client's own initiative.

4. The Basic Difficulties Associated with the Professional Independence of the Public Attorney and the Quality Control of Legal Assistance

In order to accurately identify the issue in this chapter, we should note at the outset, that when we speak about the professional independence of the lawyer, it is not only a possible that there will be disproportionate interference in the control process of quality of legal assistance. The issue is also problematic in the following areas: Under the current Criminal Procedure Code, how the lawyer is "free" from the defendant in the sense, to be independently liable for the quality of performed free legal services. How much is the lawyer provided with a sufficient way to self-organize by the current law?

Thus, the issue should be discussed in two independent directions:

- If there is a risk that the public attorney should blame the client in his/her professional ineffectiveness in case of dishonesty and declare that he/she has been restricted in a range of actions, the implementation of which would give protection much higher quality;
- To what extent and means is the subject of the authorized legal aid quality control entity able to find

the information which is protected by the confidentiality of the relationship between the lawyer and the client.

It would not be an exaggeration to say that these two issues are some of the most difficult tasks in the field of modern administration of free legal aid. Numerous international and local conferences have been dedicated to these issues over the past few years.⁴⁷ It is practically impossible to introduce mechanism adapted to the fundamental values of effective legal aid quality control system and law of human rights without a practical understanding of these issues.

The difficulty of the above mentioned issue (which can be called the problem of overriding the poor quality protection to the client) is that in contrast to the regulations set out in the Criminal Procedure Code of February 20, 1998, the Criminal Procedure Code of 9 October 2009 unreasonably strictly limits the extent of attorney's professional independence in respect with criminal cases. In particular, in accordance with Article 44 § 1 of the Criminal Procedure Code of Georgia, "the lawyer shall not be entitled to act against the defendant's *instructions* and interests." This legislative novelty, which, at first glance, may only be regarded as the subject of legislative techniques, has practical consequences. It creates conditions where a defendant with high intellectual capacity often not only corrects the basic procedural documents drawn up by the attorney, he or she also asks for substantial changes to its content, and / or makes other remarks in respect to the activities of the lawyer which are related to advocacy activities.⁴⁸ Accordingly, no matter how strange it sounds, the performance of the lawyer's activities, and/or the quality of procedural documents produced by him/her is not always a product of the professional independence of the lawyer. As a result, it is difficult to obtain an objective picture of the the quality of the legal protection provided to the client, including the quality of procedural documents, the professional skills of the particular attorney, and the degree to which the attorney was acting in good faith. In addition, such an embarrassing reservation in the legislation, which is related to the possibility of issuing a "instructions" by the defendant toward his or her own lawyer, does not adhere to the general jurisprudence of the legal practice and justice system. Obviously, if there is a dispute between the lawyer and the client about the representation, the fact that the starting point of the attorney's activity is a good legal goal for the person to be protected, should not be the basis for the dispute. The attorney should be focused on protecting the defendant's best interests, but the use such terminology as is found in Article 44 § 1 of the Criminal Procedure Code, is more appropriate for regulatory supervision of prosecutorial activities. This legislative shortcoming is especially problematic in relation to the activity of public lawyers, because due to the specific nature of mandatory defence, they do not have the right to terminate the relationship even with the most disturbed defendants and have to carry out a quality service that may not meet demanding standards in the monitoring conditions.

For example, if we look at the example of EU countries, we'll see that the procedural legislation requires from the lawyer to represent the legal interests of a person under the protection, but does not make the conclusion that the defendant is entitled to interfere with the direct guidance of the defense strategy in the planning of specific investigative and other procedural actions. For example, in accordance with Article 274 of the Criminal Procedure Code of France, the defendant has the right to choose an attorney to help him/her protect his/her

⁴⁷ For example, on October 30, 2009, International Conference in Sophia (Bulgaria) - Workshop of Legal Aid Network On the topic – "Promoting the reform of the free legal aid system in European countries, sharing experiences and discussing the possibilities of further cooperation", by the organizational and financial support of Open Society Justice Initiative (OSJI). On September 29, 2010, a Conference following the same format was held in Tbilisi - The next annual meeting of the Working Group on the topic – "Free Legal Aid Quality Assurance Mechanisms". On April 15, 2011, International Conference on Scotland (Great Britain) – "Organizational Arrangement of Free Legal Aid System", organized and financial support of the European Union project "Supporting the Rule of Law in Georgia".

⁴⁸ *Laliashvili T.*, Fulfilment of the Professional Functions of Defence Counsel, Criminal Defence Strategy and Personal Instructions of the Defendant, Anniversary Collection, Dedicated to Guram Nachkebia, ed. Todua N., Tbilisi, 2016, 104-109.

rights.⁴⁹ In accordance with Article 99 of the Criminal Procedure Code of Bulgaria, which is a special norm and unifies the range of an attorney's obligations, establishes that the lawyer is obliged to provide the accused with legal assistance and explain all the factual and legal circumstances in the relevant stages of the proceedings that are applicable for the defendant's sense of protection. It also requires the lawyer coordinate with the client in determining the main directions of protection.⁵⁰ In accordance with Section II of Chapter II of the Criminal Procedure Code of Finland, the defence counsel and the victim's lawyer must protect the legitimate interests of his/her client on the basis the good faith and best advocacy practice and for this purpose, must facilitate the outcome of the case.⁵¹

As we can see, in accordance with international practice, the first paragraph of the Article 44 of the Criminal Procedure Code of Georgia is more rigid and disproportionate, which in turn creates risks in two directions. First, when a public attorney may not be able to provide effective protection to a client, or when an unscrupulous lawyer is trying to impose a low-quality legal service on the defendant, they can avoid liability by declaring, that he/she was acting under the instructions of the defendant. The second risk raised specifically relates to the extent and means of entitlement of quality control entity of legal assistance is able to seek the information protected by the confidentiality of the relationship between the lawyer and the client.

The principle of confidentiality of the legal relationship of the lawyer and the client, in the form of imperative regulation, is strengthened in the following Acts:

- Code of Conduct for Lawyers in the European Union (Article 2.3);⁵²
- GBA Code of Professional Ethics for Lawyers (Article 4)
- Law of Georgia on Advocates (Subparagraph "g" of Article 3, subparagraph "d" of paragraph 5, article 7 and paragraph 6 of the article 38);
- Criminal Procedure Code of Georgia (Article 38, Part 5 and Article 43).

The problem is a third party's access to this information, which is directly proportional to our identified problem. In some cases the legal community has an incorrect interpretation of the information subject to the professional secrets which the lawyer is required to protect (both the term and its legal substance). In the opinion of some lawyers, it means only the information, that the lawyer had learned during a private meeting (eg, during a visit to the penitentiary facility). There is also a different perspective held by other lawyers, which asserts, that in addition to the above, the details of identification and personal characteristics of the client is subject of confidentiality. It should be noted that both of these positions represent (not wrong but) an incomplete definition, as a special legislative act regulating the legal profession in Georgia - the Law on Advocates (Article 7) and the Code of Professional Ethics for Lawyers (Article 4) subordinates to the confidentiality obligation, all the information which was made known to the lawyer during his professional duties, or it would not have been known if he/she did not carry out the authorized activity to work on a particular case. The above acts provide only two possibilities for disseminating confidential information: 1. With the client's consent; and 2. When the defence counsel is inviting a third person (eg expert, interpreter) to assist him or her in order to effectively carry out professional duties. In this case, the lawyer is obliged to provide guarantees for non-proliferation of information disclosed to invited persons.

Thus, when there is a suspicion that the attorney blames the client for ineffective assistance, the only way for Legal Aid Controlling Entity to examine the claim is to apply to the defendant in a written or oral manner, to explain the purpose of the inquiry and the need to discuss his or her relationship with the lawyer. In this way it will be possible to find out from the defendant authenticated information about the lawyer's claim which are

⁴⁹ Criminal Code of France, <<http://www.legislationline.org>>, [24.05.2017].

⁵⁰ Criminal Code of Bulgaria, <<http://www.legislationline.org>>, [24.05.2017].

⁵¹ Criminal Code of Finland, <<http://www.legislationline.org>>, [24.05.2017].

⁵² <<http://www.ccbe.eu/documents/professional-regulations>>, [24.05.2017].

blaming the client. However, this method is not effective, since, if the defendant denies the information provided by the lawyer for the Monitoring and Analysis Unit, being faced with two opposing but contradictory pieces of evidence, there will be no liability for the public attorney. Moreover, in accordance with the general principles of law, because of the lack of proof, the presumption of innocence will act in favor of the attorney's interests.

In addition to the above, we may consider the second method, namely how effective can a public attorney be imposed with a legal obligation to draw up a special record and to make defendant certify the authenticity of such cases, when the lawyer disagrees with the instruction of defendant in respect with the defence strategy and quality. In this regard, the issue is quite problematic, even if it is technically convenient. In practice, individuals who are often charged with criminal offense have refused to sign any kind of document, especially those with respect to the attorney, who the defendant perceives as being "state-appointed." In addition, such actions are totally unnatural and paradoxical in terms of trust building and confidence among the client and attorney.

Based on all the foregoing, the only correct and easiest way we find to solve this issue is to make relevant legislative amendments in accordance with Article 44 of the Code of Criminal Procedure and the lawyer should be dismissed from the direct instructions of the defendant.

5. Conclusion

Thus, in this work we tried to focus on all the theoretical and practical aspects which are relevant and actual in terms of efficient functioning of free legal aid quality control system. We also have discussed the measures to be implemented within the framework of the Criminal Justice System of Georgia, which should become the guarantee not only to protect the basic requirements prescribed by international standards, but also offer to beneficiaries objectively high standards of free legal services, tailored to the latest challenges.

Naturally, all of this can not be done without overcoming the complexity of systemic reforms and the fundamental analysis of a number of issues, therefore, we have tried to meet several key issues, which are especially problematic, on the one hand respecting the professional independence of lawyers, and on the other hand, in terms of interaction with the quality control of the free legal services.

On the basis of this, we can draw some key provisions about modern approaches to the issues raised in the survey and the different views for the solution of the problems which have been identified:

1. There are two types of issues concerning the scope of the control of quality of legal aid: (1) The State shall maintain the protection of minimum standard of international experience and / or (2) Not to be limited by provision of the basic needs and introduce the best possible effective legal system based on modern concepts of quality control;
2. It is recommended the combination model of the control of quality of legal assistance, which will monitor both ongoing criminal cases (in relatively small doses), as well as on the completed cases through a special electronic program;
3. It is recommended that Article 45 of the Code of Criminal Procedure be amended to add a sub-paragraph "m", which grants the Court the authority, to remove the attorney from a criminal case in cases of obvious ineffective legal services, based on the motion of the parties or at the Court's own initiative.
4. It is also recommended that the legislature enact amendments in the Criminal Procedure Code of Georgia, which will free the lawyer from the [absolute] obligation of obedience to the person the lawyer represents, and which, on the one hand, precludes the public attorney being held liable in cases where he can not be held responsible for the above objective circumstances and, on the other hand, it will erase the harmful practice of blaming the client in inefficient protection by the lawyer.

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Ioseb Gabaraevi*

Liability for Commission of Rape with Omission

Criminal law distinguishes between causality of action and causality of omission, whose scope is determined under Article 8(3) of the Criminal Code of Georgia and provides for liability for commission of crime with omission in the case of presence of specific circumstances.

The article represents the peculiarities of the rape committed with omission and theoretical possibility of criminal liability of the person who committed the mentioned offence. This legal analysis which is collated and is based on the opinion of Georgian and foreign scientists, demonstrates that the applicable version of the Criminal Code of Georgia makes possible to bring criminal prosecution against a person for both, perpetration and complicity in rape committed with omission (for mediate perpetration).

The following issues are discussed in the paper: Complicity and co-perpetration in a rape committed with omission, their objective and subjective components, possible subjects and expected legal consequences;

Keywords: *Causation, omission, guarantor, perpetration (joint principal), complicity in a crime, sexual assault, rape.*

1. Introduction

According to the opinion established in dogmatics of criminal law, rape, as a general tort (and not a special one) of an act may be committed only with action, using one or several ways described in disposition. However, in public relations regulated by law, except for consequences caused by active actions, harmful consequences may be caused by omission as well, when a subject abstains to act actively due to his/her social role, which leads to the consequence that could be prevented by the action of the subject.¹

Regardless the fact, that there has been no judicial practice regarding decisions adopted on rape committed with omission, it does not hinder, and on the contrary, analysis of applicable legislation demonstrates possibility of theoretical reasoning of sexual assault committed with omission.

Generally, omission of a person is a broader concept. That is why any omission may not be causally related to the result provided for in criminal law. Law, unlike the causality of action, provides for liability for omission only in the case of presence of certain circumstances, thus, scope of causality of omission shall be determined by relevant regulations of criminal law.

The grounds for liability during omission is causality of omission, which generally implies wrongful nature of omission. Causality of omission has the normative nature and its legal regulation is provided in Article 8(3) of the Criminal Code of Georgia, which is significantly different from causality of action and constitutes a evaluative (normative) category.² Although normative causality forms a factual character and causes changes in a real life.³

In the theory of criminal law the omission is divided into two parts, such as pure and mixed omissions. If obligation to act during omission is derived from the relevant article of the Special Part of the Criminal Code

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¹ *Nachkebia G.*, Criminal Law, General Part, Tbilisi, 2011, 257.

² *Turava M.*, Criminal Law, Overview of the General Part, Tbilisi, 2008, 175.

³ *Gamkrelidze O.*, Definition of the Criminal Law, Tbilisi, 2008, 96.

(e.g.: Article 129 of the Criminal Code of Georgia), it is a tort of pure omission (*delicta ommissiva*), when a person infringes the obligatory regulation and he/she shall be imposed liability only for omission; whilst, if the obligation to act is derived from special regulation provided for in special section of the Criminal Code, in particular from Article 8(3), it is a tort of a mixed omission (*delicta com missiva per ommissionem*), whose commission is possible with both, act or omission, and a person shall be liable for being passive, what means not only non-performance of the action but also failure to perform the action that might prevent the consequences of the offence.⁴

Thus, Article 8(3) of the Criminal Code of Georgia shall be applied only to crimes of mixed omission, which is ‘the exact reflection of torts to be committed by the active actions’.⁵

A certain tort with omission shall be deemed to be committed if there is a special obligation to act with other two conditions of omission, such as ability to act and prevent the consequences; absence of one of them during omission excludes presence of causation but it does not exclude the guilt. A person shall be denounce only if he/she physically and actually was capable to perform action.⁶

Article 8(3) of the Criminal Code of Georgia does not determine the group of persons who shall be imposed special legal obligation to act, neither determines the elements to establish obligations for a guarantor. The law-makers rely on dogmatics of criminal law and the judicial practice in resolving these issues.⁷

The above mentioned makes available theoretical reasoning of a rape committed with omission (mixed omission). The applicable version of the Criminal Code of Georgia relates the punishability of a person (guarantor) to the failure to fulfil obligations of a guarantor (Article 8 of the Criminal Code of Georgia), when a guarantor was obliged to make a certain decision or provide otherwise responses on the basis of a relevant regulation/rule. When dealing with omission in criminal law, it is referred not to the absolute inaction of a special subject but abstinence from a certain action that was expected from this subject.⁸ ‘Omission by a person in the presence of certain persons is not “nullity” or emptiness, but constitutes definite behaviour’⁹. Omission may be a motive, which has determined behaviour of other persons; it may force those persons to perform some active actions.¹⁰

A person shall be liable for mixed omission if (1) one guarantor encourages another guarantor in omission (a guarantor to a guarantor) and does not hinder occurrence of a result (co-perpetration); (2) or the guarantor, with deliberate failure to interfere, persuades a person to be under his/her protection (incapable due to mental illness) to commit a sexual assault (mediate perpetration); (3) or an incapable person commits a sexual assault against an incapable person, who is under supervision of a guarantor (assistance).

In all three cases omission of a guarantor has a certain definition. He/she creates a motive for a certain type of conduct of other persons by his/her omission. A subject (guarantor) does not fulfil obligation of active lawful action, does not interfere in the course of events and does not prevent the unlawful result; failure to fulfil obligations does not mean passive ‘omission’ but implies failure to perform certain legally stipulated measures. The type of obligation, imposed on an addressee of the regulation shall be established objectively in each case.

However, only establishing the fact that a guarantor has been obliged to act due to the conditions or imposed obligations in a certain way, is not sufficient to establish causality of omission. It is necessary that a person, who has not fulfilled imposed obligations, shall have factual ability to fulfil these obligations.¹¹ A guarantor is required to perform such active lawful act if he/she was objectively able to prevent wrongful consequence as a result of such act and consequences would be prevented by performing obligatory and possible act.

⁴ *Mchedlishvili-Hedrich K.*, Criminal Law, General Part, Certain Forms of Identifying Crimes, Tbilisi, 2011, 328.

⁵ *Wessels I., Boilke V.*, General Part of Criminal Law, Crime and its Structure, Tbilisi, 2010, 421.

⁶ *Ibid*, 427.

⁷ Authors’ Collection, Criminal Law, Overview of the General Part, Textbooks, Tbilisi, 2016, 137.

⁸ *Tsereteli T.*, Problems of Criminal Law, Vol. II, Tbilisi 2007, 379.

⁹ *Piontkovsky A.A.*, The Doctrine of Crime, 227, cited *Tsereteli T.*, Problems of Criminal Law, Vol. I, Tbilisi, 2007, 278.

¹⁰ *Tsereteli T.*, Problems of Criminal Law, Vol. I, Tbilisi 2007, 279.

¹¹ *Ibid*, 290.

2. Co-Perpetration (Joint Principal) in a Rape with Omission

Article 22 of the Criminal Code of Georgia distinguishes three types of perpetrators: immediate perpetrator, co-perpetrator (joint principal) and mediate perpetration. In order to consider an inactive person as a co-perpetrator with omission, he/she has to be imposed an obligation of a guarantor.

Co-perpetration of guarantors implies the cases, where a guarantor (a person with special obligation to act) encourage omission of another guarantor or does not prevent occurrence of the result with his/her omission. In such cases co-perpetration with omission takes place.

Both guarantors shall be liable for co-perpetration committed with omission, if another guarantor, who does not prevent occurrence of the result with his/her omission, is imposed obligation of protection and care, similar to the first guarantor. In this case, the co-perpetrators shall be liable for failure to fulfil their own obligations and not for each other's omission.¹²

Co-perpetration is rape committed with omission, implies liability of guarantors for mediate perpetration. It is obvious, that number of guarantors, as a reason of a joint consequence of an unlawful result, will affect the qualification of rape in respect of aggravation of their criminal liability. Both guarantors shall be liable for rape committed jointly if the result was caused by their joint omission (co-perpetration in rape - Article 137(2)(c) of the Criminal Code of Georgia).

In other words, if each mediate perpetrator is able to cause the same result with their omission or failure to fulfil their special obligations that cause in the course of joint omission (with mediate co-perpetration), in such a case they are parallel perpetrators. Although, differentiation of a co-perpetration from a parallel perpetration does not bear practical importance¹³ and they shall be liable for a rape committed jointly with omission.

For more obviousness, it is appropriate to analyse briefly the following example. Where a guarantor, with intentional failure to hinder, persuades a person incapable due to his/her mental illness, who is under his/her protection, to commit a rape against the other person and the second guarantor encourages the omission of the first guarantor or together with him/her does not hinder the occurrence of the result with his/her omission, both guarantors shall be considered as mediate perpetrators.

At the same time, omission of guarantors constitutes a supportive reason for occurrence of the wrongful result¹⁴ (infringement of a sexual freedom that is specific legally protected interests). It is absolutely sufficient to consider a person as a co-perpetrator in rape committed with omission. Nevertheless, the both guarantors affect the further development of the causation without physical interference and do not perform the components of an act themselves. They participate in commission of one of the crimes as mediate perpetrators. Both of them dominate on act committed by the 'live weapon' and use another person who is blindly obedient, not only as a blind weapon to perform his/her will, but as a person who physically commits a crime and shall not be liable for committed offence.

In such case, these co-perpetration by these persons take place,¹⁵ which is referred as a 'mediate co-perpetration' by O. Gamkrelidze.¹⁶ Taking into consideration that the mediate perpetration is similar to perpetration,

¹² *Mchedlishvili-Hedrich K.*, Criminal Law, General Part II, Tbilisi, 2011, 353.

¹³ Authors' Collection, Criminal Law, General Part, Textbooks, Tbilisi, 2016, 371.

¹⁴ There is a dominated opinion in legal literature (see *Gotua Z.*, Liability for a Rape, Tbilisi, 1994, 7; *Tsulaia Z.*, Criminal Law, Special Section, Vol. 1, Tbilisi 2000, 179; *Zhuravlev M.P.*, *Nikulin S.I.*, (Red.), Criminal Law, General and Special Part, 2nd edition, 2008, 382.), that rape constitutes a formal crime, a tort of an abstract threat. However, this opinion has opponents as well (see *Lekveishvili M.*, *Todua N.*, *Mamulashvili G.*, Special Section of Criminal Law, Vol. I, 6th ed., Tbilisi 2016, 216; *Jishkariani B.*, Special Section of Criminal Law, Crimes against Humans, Tbilisi 2016, 246), according to whose appropriate opinion, a rape shall be deemed as substantive component if a victim had not incurred serious harm of his/her health and the initiated sexual intercourse was not fully completed. Even in such case sexual freedom, honest and dignity of a victim have been abused, that is already quite a grave consequence of the rape.

¹⁵ *Tsereteli T.*, Complicity in Crimes, Tbilisi, 1965, 131.

¹⁶ *Gamkrelidze O.*, Definition of the Criminal Law, Tbilisi, 2008, 186.

and co-perpetration implies two or more perpetrators, they (both guarantors) will be considered as co-perpetrators (mediate co-perpetrators).

It is impossible to impose liability on the second guarantor as an abettor in rape, as the first guarantor, as a mediate perpetrator of a rape committed through a 'live weapon', has not made decision on participation in a rape with omission as a result of the second guarantor's influence. Abetting at mixed omission shall take place if the second guarantor persuades the first one and forces him/her to make a decision not to fulfil special obligation imposed on him/her. A guarantor encouraged by an abetting guarantor acts with intention and he/she manages the omission.

Taking into consideration the fact that the mediate perpetrator is a type of a perpetrator, in order to qualify the act of a mediate perpetration, it is not necessary to refer to Article 22 of the Criminal Code of Georgia. This rule shall be applied to qualification of co-perpetration of an act and mediate co-perpetration.

The issue of guarantors' liability shall be otherwise decided during complicity in rape (see Chapter IV). When a capable person commits a rape against an incapable person who is under supervision of a guarantor, like the second guarantor, in the case of his/her engagement in the causation chain, like the first guarantor, shall be liable for assisting with omission in sexual assault committed with act, with reference to Article 24(3) of the Criminal Code of Georgia.

2.1 Subjective Part of the Co-Perpetration (Joint Principal) in Rape Committed with Omission

Subjective attitude of co-perpetrators is manifested in the intent of their behaviour. Irrespective the fact, that sometimes co-perpetrators act in prior agreement (on the basis of a general plan), their prior agreement is not necessary. In order to impose liability on a co-perpetrator for sexual assault committed with omission, apart from the presence of the causation between guarantor(s)' omission and the occurred result, both guarantors shall have a common purpose¹⁷ and their intentional act be guilty. Both of them must bear certain obligations, and be able to influence the forces which threaten legally protected individual (particular) interest, such as sexual freedom of a person.

When participating in a rape committing with omission in a form of a mediate perpetrator, it is necessary that another guarantor be aware that he/she commits an omission together with the first guarantor, where like the first guarantor, he fails to fulfil imposed liability intentionally and at the same time, enables another guarantor not to hinder the 'live weapon' to commit a rape with act. In such case, another guarantor, like the first one, shall be liable for both, mediate perpetration and failure to fulfil special legal obligations imposed on him/her.

3. Mediate Perpetration in Rape Committed with Omission

Similar to the co-perpetration, the concept of mediate perpetration shall be distinguished from the concept of a perpetrator. Mediate perpetration is not a type of complicity, and when dealing with the mediate perpetration, complicity shall be excluded. This is the case when the act of another person is involved in the chain of causation through which the mediate perpetration fulfils his/her intention. The offender influences the further development of causality without his/her own physical interference and uses blindly obedient person as the blind weapon for fulfilling his/her own intent, as well as the physical perpetrator of the crime who either is not completely liable or is liable for another crime. The offender shall be a real, liable person as a mediate perpetrator and not an aider or abettor.¹⁸

¹⁷ *Authors' Collection*, Criminal Law, General Part, Textbooks, Tbilisi, 2016, 154.

¹⁸ *Sauer W.*, General Criminal Law, Berlin, 1955, 213-216. According to *Sauer W.*, creating mediate perpetrator's character artificially is a great methodological mistake and a mediate perpetrator with his concept and nature, as well as with the

In terms of criminal law, persons who rendered assistance with advice and weapon to a person of legal age or a capable person in committing a crime and a person who provided a mentally unhealthy person with such advice may not be judged similarly and deserve similar punishment. Mediate perpetration is not limited only with 'abetting' or 'rendering assistance' to 'a live weapon'. According to the appropriate opinion of M. Kovalov, 'mediate guiltiness is not only a surrogate of abetting but it is quite independent event which may be manifested in such an act that is like abetting or in the act, which resembles an assistance.'¹⁹

'Use of "a live weapon" for criminal purposes is substantially different from the use of mediate perpetrator for the same purposes, who is capable and acts with intent.'²⁰ Use of the 'live weapon' with its nature equals to the mediate perpetration by a person, who abuses this 'live weapon'. Such person, as a blind weapon, shall not be liable for his/her act that caused an unlawful consequence, is not his/her wilful act, he/she is incapable and is not aware of his/her act. It is obvious that encouraging or support of a capable person or a person of full legal age to commit a crime, shall not be considered as a mediate perpetration.

In dogmatics there is the opinion expressed regarding impossibility of mediate perpetration in torts of omission. According to the opinion of one part of the scientists, the mediate perpetration is impossible in the torts of mixed omission.²¹ This opinion in the referred sources is mentioned by the authors when discussing torts of pure omission, in which, in my opinion, exclusion of a mediate perpetrator in torts of pure omission is implied, that is related to fulfilment of special obligations which are personal and defines the nature of the tort. This is definitely true as the latter are torts of obligation and their commission is possible only with omission.

The issue is otherwise raised when it is dealt with possibility of mediate perpetration in torts of mixed omission whose commission is possible with both, act and omission.

To illustrate the above mentioned, it is appropriate to briefly analyse the following example: An incapable person is placed in a psychiatric facility due to his/her mental state.²² A supervisor/doctor (guarantor) of a psychiatric facility shall be obliged to prevent incurring harm by the patient against the other persons. His, as the guarantors certain obligations regarding particular legally protected interests of his/her patient (sexual freedom) shall be emerged from the obligation to supervise the third persons,²³ although he/she may be imposed the obligation of both, a supervisor and a protector. To supervise the process of psychiatric support is his/her official duty.²⁴ He/she shall also have an official obligation for protecting life and health (including sexual freedom) of the patient placed in the psychiatric facility as well as for ensuring protection of the employees of the psychiatric facility from a person suffering from mental illness.

extent of his/her punishment, is much closer to an abettor and even to a mental aider, than to a mediate perpetrator who him/herself perform an executive act. That is why he requires to expel this concept of a mediate perpetrator completely from the field of criminal law and blend it with the concept of complicity in crime. Cited. *Tsereteli T.*, Problems of Criminal Law, Vol. II, 2007, 120.

¹⁹ *Kovalev M.I.*, Complicity in Crime, Part II, Sverdlovsk, 1962, 19.

²⁰ *Solnarzh V.*, Accompliceship on Criminal Law of Czechoslovakia Socialist Republic, 1962, 94, Cited. *Tsereteli T.*, Problems of Criminal Law, Vol. II, 2007, 121.

²¹ Gamkrelidze denies the possibility of mediate perpetration in torts of mixed omission, see *Gamkrelidze O.*, Problems of Criminal Law, vol. I, Tbilisi, 2011, 195-196; *Gamkrelidze O.*, Problems of Criminal Law, Vol. III, Tbilisi, 2013, 268; Mchedlishvili-Hedrich K. also excludes the mediate perpetration of torts of mixed omission (tort of obligations). See also *Mchedlishvili-Hedrich K.*, Criminal Law, General Part II, Tbilisi, 2011, 360-361.

²² medical and preventive treatment facility holding an appropriate licence, whose primary function is providing medical and other types of specialised psychiatric support to the persons suffering from mental illness. See the Law of Georgia on Psychiatric Care.

²³ *Wessels I., Boilke V.*, General Part of Criminal Law, Crime and its Structure, Tbilisi, 2010, 439.

²⁴ Supervising the process of psychiatric support implies supervision of workers employed in the psychiatric facility, relations between administration and patients, which is regulated by the relevant Order of the Minister of Labour, Health and Social Affairs of Georgia.

In practice, a mentally ill patient (incapable) who is placed in the psychiatric facility may attack a woman employed in the psychiatric facility (or another patient) for the purpose of establishing sexual intercourse, while a supervisor observes the fact who is imposed function to supervise the source of threat and/or third persons and shall be obliged to avoid any threat to legally protected interest. Nevertheless, he/she does not prevent the fact and does not prevent fulfilment of intention of a person who is incapable due to his/her mental illness and who cannot be aware of the nature of his/her act and cannot manage his/her behaviour; if a supervisor/doctor who is under supervision of a guarantor, commits corpus delicti of the rape with act in such circumstances, a supervisor guarantor sees it and does not prevent his/her action, a guarantor shall be punished as a mediate perpetrator.

In the presented example, an incapable person who is under supervision of a supervisor who performs the corpus delicti of the act, shall not be imposed criminal liability as a 'live weapon', as he/she acts in the circumstances excluding capability (mental state), as he/she acts non culpably without intent, which exclude his/her and supervisor's (guarantor's) general liability on the basis of general guilt. Each accomplice shall be charged or jointly charged.²⁵ Absence of this condition exclude liability of a guarantor for co-perpetration in sexual assault (rape) committed with omission.

Acts of a 'live weapon' is directed by the intentional acts of the other person (guarantor). A supervisor shall dominate the act which is performed not directly by him/her, but he/she use a 'live instrument' for performing the act acting without guilt, in order to impose liability on him/her; within the scope of dominating over it becomes possible to reason presence or absence of mediate perpetration. If it is impossible to establish the fact of mediate perpetration, it has to be established whether abetting took place in part of a guarantor.

A mediate perpetrator, as a rule abets, does not hinder or eases committing a crime with his/her omission to 'a live instrument' for committing unlawfulness and aids him/her in committing unlawfulness. Although such an act cannot be considered as a complicity in a crime as in accordance with Article 23 of the Criminal Code of Georgia, complicity in a crime shall mean joint participation of two or more persons in the commission of an intentional crime. Thus, in order an act to be considered as complicity in a crime, unity of both, objective and subjective parts is necessary. According to A. Trainini, when an immediate perpetrator of a crime acts without intent ... it is so called mediate perpetration of a crime. In such cases, a perpetrator in a crime is not an instrument ..., but a person who had used this instrument, who at the same time is the author of this intentional crime.²⁶ "A live weapon' commits a criminal unlawfulness and not a crime; as he/she in the most of the cases is characterised by some 'defect'²⁷ and this very 'defect' is used by a mediate perpetrator through 'a live instrument' to commit a crime and commit a corpus delicti through another person.²⁸ On one hand, this makes possible that a supervisor of a psychiatric facility finally will be considered as a mediate perpetrator in a rape as a general tort committed with omission.

Taking into consideration criteria established for subjectivity, mediate perpetration is excluded in torts to be committed under special obligations and on the own of a person, mediate perpetration shall be excluded. Accordingly, someone who cannot commit corpus delicti him/herself, he/she cannot commit this corpus delicti through 'a live weapon' either.²⁹ Mediate perpetration is the same as perpetration, since a mediate perpetration is one of the types of perpetration.

On the other hand, it should be noted that a supervisor (doctor) of a psychiatric facility, as a guarantor (who has undertaken a function of a legal guarantor) of incapable persons, who is either mentally ill or is a minor, is

²⁵ Tagantsev N.S., Russian Criminal Law, General Part, Vol. 1, Tula, 2001, 573.

²⁶ Traynin A.N., Teaching About Complicity, Chapter Eight, Moscow, Jurid. Publishing House of the NKJ USSR, 1941, 112, <<http://law.edu.ru/book/book.asp?bookID=6451>>, [28.11.2016].

²⁷ Kindhauser U., General Part of Criminal Law, 3rd ed., Berlin, 2008, 11, 27, 39.

²⁸ Gamkrelidze O., Problems of Criminal Law, Vol. I, 2011, 190.

²⁹ Gamkrelidze O., Definition of the Criminal Law, Tbilisi, 2008, 187.

imposed an obligation of supervision and protection and regardless the grounds of emerging his/her obligations, he/she shall be obliged to protect legally protected interests.³⁰

In order to establish causation between omission and occurred harmful consequence, first of all, it shall be established whether or not a particular person had been engaged in the common factors of relations determined by his/her prior action and at what extent this engagement stimulated development of these relations. Specific conditions of an individual imposes him/her functions due to which they are expected to act relevant to this expectation in the specific situation and if this reasoned expectation is not justified, when a person turns away from specific situation and enables forces causing unlawful consequences, omission turns into the condition of a harmful consequences.³¹

In general, this opinion complies with disposition content of Article 137(1) of the Criminal Code of Georgia, which, although does not specify type of act, or the rape shall be committed with act or omission, penetration of sexual nature, if judging by literary definition of this word, its commission is impossible without an active act; content of Article 8(3) of the Criminal Code of Georgia theoretically does not exclude rape committed with omission. In the torts of mixed omission a guarantor abstinent to act, bears prevention of consequences and his abstinence, in terms of assessment, equals to implementation of *corpus delicti* with action,³² as it leads to the same consequence, as the act.

Article 8 of the Criminal Code of Georgia, as the general regulation, interprets preconditions of causality with a result in one of the elements of the classical concept of the crimes, such as types of acts during the act or omission. Due to its general nature, it applies to the *corpus delicti* provided for in Article 137 of the Criminal Code of Georgia and according to the relevant opinion of O. Gamkrelidze, referring only to a result does not always imply fulfilment of this result with omission in the course of a rape,³³ if a person at the same time is not imposed a special obligation and a real ability to act in parallel to this obligation, and if with an obligatory and possible acts a consequence could be avoided.

Since a mediate perpetrator is the same as the offender who acts individually, he/she shall be punished as a perpetrator. Referring to Article 19 of the Criminal Code of Georgia in the case of mediate perpetration shall be inadmissible.

The fact that reasoning of theoretical possibility of a rape committed with omission, does not raise the problem and enables to qualify the act in the case of sexual assault (rape) committed with omission, if such an act occurs and the person imposed a legal guarantee meets all conditions with his/her omission necessary for establishing causality; and only the fact that currently there are no cases of rape committed with omission in judicial practice and it shall not be a weighty argument rejecting possibility of consideration of a rape committed with omission.

3. 1. Subjective part of a mediate perpetration in a rape committed with omission

Subjective part of a mediate perpetration does not differ from a subjective part of a complicity. A mediate perpetrator also acts with a direct intent.

A guarantor, together with obligation to protect (protection of beneficiaries/patients from any threat) shall be imposed obligation to supervise (he/she shall be obliged to prevent commission of a crime by an incapable person), which cannot be fulfilled due to their incapacity and a guarantor shall be imposed obligation within the entire term of his/her authority.

³⁰ *Shonk A., Schroeder H.*, Criminal Code, Munich, 2006, 16.

³¹ *Tsereteli T., Tkesheliadze G.*, Doctrine of a Crime, Tbilisi, 1969, 303.

³² BGHSt GrS 16,155, citation *Wessels I., Bolike V.*, General Part of Criminal Law, Crime and its Structure, Tbilisi, 2010, 421.

³³ *Gamkrelidze O.*, Problems of Criminal Law, Vol. III, 2013, 181.

In order to impose liability on a supervisor (guarantor) as on the mediate perpetrator for rape committed with omission, guarantor shall necessarily know the consequences of criminal unlawfulness committed by a 'live weapon', who is under his/her supervision, and the guarantor has to be willing to do so and attend rape committed by or against such an incapable person. It is inadmissible to bring formal charges against a person for omission if he/she is not on site physically.³⁴

A guarantor, together with the non-performance of obligatory and objectively possible intention, in respect with the function of a legal guarantor, shall have awareness that an incapable person, who is under his/her supervision, within the limits of his/her ability, independently, with failure to fulfil his/her obligations 'cannot commit an unlawful act and violate legally protected rights of other persons, or he/she can do it within the limits of his/her ability'.³⁵ This very extent of unlawful act committed by an incapable person, together with the extent of the unlawfulness shall determine the extent of the guilt of a guarantor. A person shall be denounced only if he/she had possibility of performance an action. Accordingly, inability of a special legal obligation to act excludes causation, as well as the guilt, since Article 8(3) of the Criminal Code of Georgia establishes the liability for omission only if a guarantor has a real ability to act preventing harmful consequence.

Guilt of a 'live weapon', who is under supervision of a guarantor, for a criminal unlawfulness committed by him/her shall be excluded on general grounds due to his/her incapacity.

4. Complicity in a Rape Committed with Omission

The current applicable Criminal Code of Georgia, unlike its previous version, provides for co-perpetration in a narrow sense and an accomplice is no longer considered as a type of co-perpetrator. Although the aider, similar to the organiser and abettor, do not perform corpus delicti provided for in the Special section of the Criminal Code of Georgia, although they jointly perform common unlawfulness, - joint wilful act, and they are called as accomplices by lawmakers.

Mixed omission, in general, may be committed with participation of accomplices,³⁶ perpetrator of which has to be a capable person. Due to the accessory nature of complicity in crime, an aider shall be liable for support with omission of the perpetrator.

In practice, it is problematic to differentiate between the issues of a perpetrator and accomplice during the mixed omission, when it shall be legally assessed the participation of a guarantor with omission in active acts performed by the non-guarantor. This problem may be demonstrated with more intensively when the matter deals with such offences committed with mixed omission of specific corpus delicti of sexual offences as a rape.

In order to illustrate the issue, we the following example may be provided: The caretaker guarantor sees that a legally capable person (non-guarantor) is committing a rape against the person under his/her protection who is incapable due to his/her age or mental state (and a guarantor is imposed an obligation of both, protection and supervision) and the guarantor does not hinder it. It is interesting how to decide the issue of liability of a guarantor and if a guarantor shall be liable for assistance with omission in rape.

In the given example, when a capable person, who is an immediate perpetrator with an act, is committing a rape against an incapable person who is under supervision of a guarantor and who shall be protected (due to the age or mental state) and a caretaker guarantor does not intentionally hinder rape committed by the other capable person against a person to be under his/her protection (incapable), a supervisor, who acted with intentional

³⁴ *Mchedlishvili-Hedrich K.*, Criminal Law, General Part, Tbilisi, 2011, 306.

³⁵ *Kutalia L.-G.*, Guilt in Criminal Law, Tbilisi, 2000, 501; the same, see *Nachkebia G.*, Criminal Law, General Part, Textbook, Tbilisi, 2011, 311.

³⁶ *Baumann / Weber / Mitsch*, AT §15 / Rn.35; *Shonk / Schreder-Kremer-Hain*, §25 / Rn.99, Cited, *Mchedlishvili-Hadrich K.*, Criminal Law, General Part, Certain Forms of Identifying Crimes, Tbilisi, 2011, 351.

omission, shall be liable as an aider. He/she (a supervisor/guarantor), as a co-perpetrator, does not hinder (supports, assists) with his/her omission the accomplice in occurrence of wrongful consequence, on the contrary, he/she creates conditions supporting occurrence of tortious results and in thus he/she makes easier commission of rape that finally increase the possibility of occurrence of the result. Assistance may be expressed in providing a guarantor with an advice necessary for committing a crime or in rendered mental assistance.³⁷

A guarantor (with omission) and a perpetrator (with an act) commit a common unlawfulness. Both of them abuse and harm the same legally protected interests of sexual freedom, that is why both, the accomplice (as a guarantor aider) and perpetrator, due to accessory nature of complicity in crime, they are prosecuted for incurring harm to the same legally protected interests. Due to such common factors, a perpetrator is the main character whose act, in terms of the objective unlawfulness, determines the scope of liability for assistance.³⁸

At the same time, omission of a guarantor is not mandatory to be a necessary condition, i.e. *Conditio sine qua non* for committing a crime.³⁹ He/she shall be liable as an aider even if it is established that the perpetrator was committing a rape without his/her assistance. To qualify the assistance of the guarantor as an aid, it is primarily necessary to establish whether or not his/her, as the aider's omission was involved in certain consequential causality and if it preceded in time his/her, as the accomplice's (aider's) omission, to the act of the perpetrator and the occurred consequence in general.

However, currently, there is a difference of opinions in dogmatics of Georgian criminal law on aiding with omission. O. Gamkrelidze bases his opinion regarding the assistance with omission,⁴⁰ on the lack of the appropriate cases in judicial practice and agrees with the opinion expressed in German literature, according to which a protecting guarantor who does not fulfil their imposed obligations, is always a perpetrator;⁴¹ whilst M. Turava Considers assistance with omission to be possible.⁴² Possibility of an accomplice in rape committed with omission (assistance in rape - Articles 25 and 137) is also recognised by N. Todua,⁴³ however, he excludes perpetration with omission in rape.⁴⁴

If following the opinion of O. Gamkrelidze, in this particular case, a caretaker guarantor, who is imposed the function of a protector guarantor and does not perform specific imposed function, shall be liable for his omission as a perpetrator (co-perpetration) in sexual assault committed with omission. Although the above mentioned is in compliance with and does not contradict dominating opinion in dogmatics of criminal law expressed by T. Tsereteli regarding possibility of co-perpetration with both, act and omission,⁴⁵ but this opinion does not comply with the theory on domination over the act, based on which it is possible to affirm that only an immediate (capable) perpetrator with act dominates over the act. Omission of a guarantor is not domination over the act. In the present case, the described crime has a (capable) person committing crime with an active act who dominates over the act, and this very element, - domination over the act, - makes the inactive guarantor (supervisor) a secondary character, such as an aider; the inactive person attending the crime shall be liable for aiding in crime

³⁷ *Mchedlishvili-Hedrich K.*, Criminal Law, General Part, Certain Forms of Identifying Crimes, Tbilisi, 2011, 352.

³⁸ *Makharadze A.*, Criminal Liability for Assistance in Crime, Tbilisi, 2006, 199.

³⁹ *Turava M.*, Criminal Law, Overview of the General Part, 9th ed., Tbilisi, 2013, 89.

⁴⁰ Generally, assistance with omission is recognised in Georgian criminal law as well. The author, likely does not consider assistance with omission to be impossible, but he, in all his presented examples, has such consideration, where both, perpetrator committing an act and a person committing an omission perform functions of a guarantor. see example, *Gamkrelidze O.*, Interpretation of the Criminal Code, 2nd ed., Tbilisi, 2008, 200; *Turava M.*, Criminal Law, Overview of the General Part, 8th ed., Tbilisi, 2010, 273.

⁴¹ *Ebert U.*, Criminal Law, General Part, 3rd ed., Heidelberg, 2001, 192.

⁴² *Turava M.*, Criminal Law, Overview of the General Part, 8th ed., Tbilisi, 2010, 274.

⁴³ *Lekveishvili M., Todua N., Mamulashvili G.*, Special Part of Criminal law, Vol. I, 6th ed., Tbilisi, 2016, 212;

⁴⁴ The author considers it impossible to commit rape with violence or threat of violence. Due to the above mentioned judgement, if taking into consideration that law stipulates liability for omission only in specific circumstances, perpetration in rape with omission is quite possible.

⁴⁵ *Tsereteli T.*, Complicity in Crimes, Tbilisi, 1965, 141.

only if he is obliged to prevent the unlawful consequence, or imposed the function of a guarantor.⁴⁶ Failure to fulfil these very obligations is in causation with infringement of legally protected interests, causing his/her, as an aider's liability. Regardless the fact that in this case a guarantor does not dominate over the act during his/her omission, he/she shall be obliged to prevent unlawful consequences, although he/she acts as a inactive attending person and shall be liable for both, infringement of imposed obligations and for failure to prevent the occurred result.

When qualifying a supervisor/guarantor's, as an aiders act in sexual assault committed with omission, the act will also be qualified as co-perpetration with acting assistance and Article 24 of the Criminal Code of Georgia shall be referred. On the other hand, the issue to collate a perpetrator from an aider is a matter of an independent judgement and indeed, it is not subject to in-depth consideration at the present stage. We would like to make a general notice with respect of the issue in question.

4. 1. Subjective Composition of Complicity in Rape Committed with Omission

In subjective part, a guarantor, as an aider must act with intent. He/she has to be aware that he/she contributes, aids an accomplice in committing a crime with his /her omission, and perform a common unlawfulness, which implies connection of their acts with common intent.⁴⁷ A guarantor is aware of basic elements of unlawful act of an accomplice and acts with a direct intent. By expressing the act of an accomplice, plan and nature of act of an accomplice is obvious for a guarantor, without knowing of which it is impossible to be a co-perpetrator.⁴⁸ At the same time, it is not necessary that an accomplice to know about omission of the co-perpetrator, i.e. co-perpetration is not always characterised by 'inter-knowledge'.⁴⁹

At the same time, the guarantor, with his/her omission is becoming an accomplice of perpetrators purpose and abides his/her purpose to it, which is implemented through the perpetrator's act.⁵⁰ The result is desired to the extent of the wish of the perpetrator, thus to achieve his/her goal, a guarantor, who shall be liable for assistance, which complies with the opinion expressed in the doctrine of criminal law that in order to be a co-perpetrator in a crime, it is necessary a perpetrator and an accomplice have one common goal,⁵¹ as an accomplice and a perpetrator commit unlawfulness together with common objective and subjective elements, otherwise it is impossible to commit a common unlawfulness; F. Burchak has similar opinion: '... Co-perpetrators are related to each other with common purpose, general aim, and such unity is possible only in such crimes which are committed with the direct intent'.⁵² That is why the supervisor of a psychiatric facility shall be liable as an assistance in committing general unlawfulness.

In the case if a person shall not be imposed a special obligation to act, obliging him/her to perform such an act intended for avoiding the result, and he/she will merely attend commission of crime and will not assist in crime, in such a case, taking into consideration the fact that a sexual assault is the crime of a grave category, such a non-guarantor person shall be liable for failure to inform about the above mentioned.⁵³

⁴⁶ *Baumann J., Weber U., Mitsch W.*, Criminal Law, General Part, 11th ed., Bielefeld, 2003, 214.

⁴⁷ *Gamkrelidze O.*, Interpretation of the Criminal Law, 2nd ed., Tbilisi, 2008, 200.

⁴⁸ *Traynin A.N.*, Teaching About Complicity, Chapter Eight, Moscow, Jurid. Publishing House of the NKJ USSR, 1941, 112 <<http://law.edu.ru/book/book.asp?bookID=6451> > [28.11.2016].

⁴⁹ See *Tsereteli T.*, Problems of Criminal Law, Vol. I, Tbilisi, 2007, 63-64; *Turava M.*, Overview of the General Part, 8th ed., Tbilisi, 2010, 270.

⁵⁰ *Makharadze A.*, Criminal Liability for Assistance in Crime, Tbilisi, 2006, 199.

⁵¹ *Dvalidze I.*, Impact of the Motive and Purpose on Qualification of an Act and Criminal Liability, Tbilisi, 2008, 110.

⁵² *Burchak. F.G.*, The Doctrine of Complicity in Soviet Criminal Law, Kiev, Kiev Book Factory No. 1, 1969, 120, <http://www.economics.com.ua/writer/4095/textbook/11742/burchak_fg/uchenie_o_souchastii_po_sovetskomu_ugolovnomu_pravu >, [06.10.2017].

⁵³ *Ebert U.*, Criminal Law, General Part, 3rd ed., Heidelberg, 2001, 215. See the same *Tsereteli T.*, Complicity in Crimes, Tbilisi, 1965, 176.

5. Conclusions

The above mentioned theoretical discussion presented in the paper is based on proper, logical judgement, which is the sufficient basis for further discussion of the issue in the context that the present issue has not been subject to discussion yet.

Regardless the fact that result, - abuse of sexual inviolability, - provided for in Article 137(1) of the Criminal Code of Georgia, typically occurs with act, the above mentioned theoretical discussion presented in the article and legislative stipulation of corpus delicti of a sexual assault and legislative record provides sufficient basis to conclude possibility of the same result committed with omission.

It is significant, that in the legislative record of Article 137(1) of the Criminal Code of Georgia there is no reference to sexual assault as the type of act prohibited by law - whether the abuse of sexual inviolability be committed with act or omission. That is why, both act and omission are implied in this case, which creates solid foundation to the above mentioned opinion on committing sexual assault with act or omission.

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Guram Nachkebia*

The Objects and Subjects of Criminal Defense as the Categories of criminal Law Philosophy **

The article refers to the issues of criminal law philosophy and from this point of view the traditional dogmatic of criminal law which does not recognize the idea of legal relations due to reasonable action is criticized. From the same point of view the traditional conception of the Russian criminal dogmatic, according to which criminal law as though regulates the relation originated due to committing a crime, is criticized. The traditional concepts of “the object of a crime” and “the subject of a crime” are elaborated from this position as well. Really, in contrary, by committing a crime the person who commits a crime is fallen outside the framework of criminal law due to which “a crime” is not the subject of regulation of criminal law anymore. The article emphasizes that in the result of practical enactment of criminal law, legal relations are originated due to reasonable action. From this aspect, instead of the fake concept of “the subject of a crime”, the concept of “the subject of criminal law” is shaped as the last one, by its reasonable action, transfers the requirement of a norm of law to law and order. Consequently, the subject of law by its reasonable action, defends the object from criminal encroachment, which is defended from the criminal encroachment under the law of criminal law. Hence, “the object of a crime” does not exist, but “the object of criminal defense” which outmarchs committing a crime. “The objects of criminal defense (for example, life of a human, health, property, etc) and subjects (for example a citizen, worker, medical worker, etc) are on the one hand the elements of criminal relations due to reasonable action and on the other hand, create the system of the private part of criminal law.

Key words: *The subjects and objects of criminal law defense, System of the private part of criminal law*

1. Introduction

Subject of regulation of criminal law as a field of law remains to be an unsettled issue. Dominant theory in Soviet and post-soviet criminal law is focused on the idea of criminal law relationship triggered by the commission of the crime. According to this theory, a crime is a legal fact, which triggers a criminal legal relationship between the State and the offender. However, in some cases, the crime may be accompanied by a fact of justification. However, a question arises why can't a criminal law regulate the relationship directed towards the prevention of the crime. In other words, the relationship directed towards the lawful conduct, which translates the requirement of the norm into the state of the rule of law. **Doesn't that create a form of union as a category of ought (sollen) and the state of rule of law, as partially accomplished law as a category of being (sein). Isn't the content of this form, the positive responsibility of the subject before the State, the object of which is the lawful conduct?** Without the positive responsibility of the subject of the criminal law before the State, his negative responsibility wouldn't be possible. **All this appears to the subject of criminal legal philosophy, because researching the category of responsibility and its forms of manifestation in criminal law is not a task of criminal legal science and it belongs to the area of criminal legal philosophy.**

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** The present work is the last scientific work of Emeritus-Professor Guram Nachkebia.

Unfortunately, German criminal legal doctrine is not familiar with the concept of criminal legal relationship, neither triggered by the commission, nor directed towards the prevention of the crime. Hence, then dominating doctrine is the protection of the legal goods through the threat of punishment stipulated in the criminal law¹. Threat of future punishment may indeed influence the morally unstable elements of the society, **but this threat has no impact on the educated parts of the community, which abstains from the commission of the crime not because of the threat of punishment, but because of the personal dignity and high sense of responsibility before the community and the State. Consequently, we believe that it would be an insult to the dignity to this law abiding part of the community to say that they are acting under the threat of punishment.** Besides, it turns out that according to the German doctrine, only the State is fighting against the crime, while individuals do not take any part, because the German doctrine is not familiar with the concept of the subject of criminal law protecting legal goods from criminal harm through their lawful conduct. Unfortunately, neither the Russian criminal legal doctrine is familiar with the concept of the subject of the criminal law: Based on the doctrine of criminal legal relationship triggered by the commission of the crime, this doctrine is focused on the concept of object of the crime and subject of the crime. **Moreover, it looks as if the object of the crime and the subject of the crime are part of the legal definition of the crime.** It is true that in German doctrine, the concept of the crime and *corpus delicti* are clearly delineated from each other due to the fact that German legal doctrine is not familiar with the idea of criminal law relationship directed towards the prevention of the crime, the German scholars are compelled to describe the crime according to four elements: the object and the subject, the objective side and the subjective side, as it is also accepted in Russian criminal doctrine.

2. Falsity of the Concept of the Criminal Legal Relationship Triggered by the Commission of the Crime.

One of the textbooks of the criminal code of Russian federation is citing old Russian law, according to which the crime is a transgression of some rule („Пересугление сии правила,,)². Briefly stated, the commission of the crime means the stepping out of some rule or some law, which places the offender beyond the boundaries of the criminal law as the field of law. The history of Georgian criminal law also reveals the same concept. It appears that in old Georgian law, the crime implied a transgression of some rule, some law and therefore as a trespassing conduct. According to the opinion of academician Iv. Javakishvili “the goal of the legislator was to regulate the relationship between the individuals. Setting boundaries for the human conduct. Crossing these boundaries implied an assault upon the State, religion and rights and interests of others. The books of law mandated the implementation of the rule of law and therefore, correct behavior of humans was defined as “lawfulness”³. From here the author concluded that the conduct breaching the rules of faith of law and of procedures was called a trespass⁴.

Hence, in accordance with Georgian as well as with Russian law, a crime is the transgression of some rule, faith, religion or law (“Переступение”). If we consider the reality, according to which the criminal law, after its entry into force is directed towards all mentally capable individuals in order to induce the sense of responsibility towards lawful conduct, **here we have a relationship between the State and the subject of law directed towards the lawful conduct.** From here we can easily conclude that the commission of the crime takes the person away from criminal legal relationship with the State and therefore the crime does not trigger criminal legal relationship. **Therefore, the concept of criminal legal responsibility due to the commission of the crime is false, especially if we consider the crime as being legally committed when it is proven by the judgment of**

¹ Baumann O., Weber M., Mitsch W.J., Strafrecht, Allgemeiner Teil, Lehrbuch, 10 Auflage, 1996, 11.

² Уголовное право, Общая часть, Учебник для вузов, М., 2004, 78.

³ Javakishvili Iv., History of Georgian Nation, Vol., 12, T, 7, 188.

⁴ Ibid, 109.

conviction. Before that moment a crime is not legally committed and it cannot trigger any criminal legal relationship. Legal relationships based on the law of execution of punishment is a separate issue, which is not by itself a criminal legal relationship.

2.1. Anti Philosophical Consequences of the Confusion of Negative Responsibility with the Relationship Triggered by the Commission of the Crime.

The concept of criminal legal relationship arising out of the commission of the crime is significantly founded on the confusion between “**responsibility**” and “**relationship**”. Namely, the negative criminal responsibility triggered by the commission of the crime doesn’t raise any question, while criminal legal relationship due to the commission of the crime is impossible. The abovementioned textbook contains a logical contradiction: on the one hand it asserts, that according to old Russian law, the crime is the transgression of some rule or law (prestuplenie⁵), while the same **textbook asserts that “the criminal legal norms are directed towards a person who committed the crime”⁶. There is only one way of solving this contradiction: we should differentiate between criminal legal relationship and criminal responsibility. Unfortunately, due to the fact the philosophical nature of “responsibility” and “relationship” could not properly be analyzed in the past, an academic confusion of these two categories still creates a substantial misunderstanding.** The commission of the crime takes the offender outside the boundaries of the legal relationship with the State, due to which he is now negatively responsible for the State. However, the problem is that the criminal responsibility due to the commission of the crime is practically impossible without criminal procedural relationship. **According to art. 169 of criminal procedure code, the defendant in the stage of investigation is only a presumable perpetrator of the crime.** This is why a defendant in accordance with his procedural status is still considered to be non culpable until his guilt is established by legally valid court judgment of conviction.

Therefore, the responsibility due to the commission of the crime is the negative aspect of the responsibility. This is an aspect which is practically implemented through criminal procedural relationship. In this respect, the criminal legal responsibility is either not visible or assimilated to the punishment and in this case the philosophical category of “responsibility” is not manifested in the criminal law. This is impossible and runs against the category of “responsibility”.

3. The Idea of Positive Responsibility and Criminal Legal Relationship Directed Towards the Lawful Conduct.

Responsibility as a philosophical category has two aspects. The first aspect of the responsibility is positive, prospective aspect, which is called a responsibility for the future. According to this view, the subject responsibly deals with his obligation in present time and therefore his conduct is morally justified and legally lawful. The lawful conduct of the subject translates the requirements of the norm into the rule of law. The rule of law is a form of union between the norm of the law as a category of ought and the state of Rule of law as a partially implemented law. The content of this form is the positive responsibility of the subject of law due to the lawful conduct. In this framework, an individual is obliged to act lawfully and on the other hand a person is called upon to deal responsibly with his obligation towards lawful conduct. I.e. with internal readiness and full awareness of the personal dignity⁷. On the one hand, due to the false idea of criminal relationship triggered by the commission of the crime and on the other hand, due to the disregard of the concept of the criminal legal relationship for lawful

⁵ Ibid, 178.

⁶ Ibid, 61.

⁷ *Nachkebia G.*, Textbook of Criminal Law, General Part, Tbilisi, 2015, 46.

conduct, in criminal law there is no place left for positive responsibility and therefore the responsibility is only negative. A necessary outcome of this position is the assimilation of negative responsibility with punishment, which brings the criminal legal theory into the dead end. From this point of view, the criminal legal philosophy becomes impossible. The latter requires an independent research and cannot be founded in the framework of this article. However, it is still important to raise the issues of criminal legal philosophy in order to briefly clarify the concepts such as “the object of criminal legal protection” and the “subject of criminal law” as elements of criminal legal relationship directed towards the prevention of the crime. As we have already noted, based on the concept of criminal legal relationship due to the commission of the crime, **the Russian legal thinking has identified four elements into the *corpus delicti*: object of the crime, subject of the crime, objective side, subjective side.** The private part of the criminal law has also been structured based on these four elements.

4. Contradictions Related to the Traditional Concept of the Object of the Crime

Up to now, the Russian criminal legal doctrine is dominated by the concept of the object of the crime which is considered to be the first and the foremost elements of the legislative definition of the conduct. It appears that this is also manifested in the structure of the criminal code, in the private part of which we have for example “crime against the persons”, “crime against life”, “crime against property”, etc. From this viewpoint the notions of “object of the crime” and “subject of the crime” appear to be quite logical. But as soon as we examine the traditional definition of the object of the crime, we shall encounter a circle of the “logical contradiction”. Namely, “the object of the crime” cannot be defined without first referring to the **“object of the criminal legal protection”**. For example, P. Nikiforov was asserting that the “object of the crime and the object of criminal legal protection are the same. The object of the crime is the very same societal relationship, which is attacked by the crime and which is protected by the criminal law”⁸.

Thus, it appears that the object of the crime is the same social relationship protected by the criminal law. Thus, the object of the crime and the object of the criminal legal protection are the same. **“The definition of the object of the crime is logically preceded by the object of the criminal legal protection.** Before specific societal relationships are covered by criminal legal protection, an object of the crime cannot logically exist. Therefore we disagree with the assertion of professor Nikiforov, according to which the object of the crime and the object of the criminal legal protection are identical because we may not assimilate the criminal legal protection of specific social relationship and criminal infringement upon this relationship. For example, N. Kurjanski was defining the notion of object of the crime as “the societal relationship, which is protected by the criminal law from criminal assault”⁹.

Therefore, the traditional concept of the object of the crime is logically and factually preceded by the concept of the criminal law protection, **because the latter one is related to the legislative activity of the State criminalizing certain human conduct and thus creating the notion of object of criminal legal protection.** However, the case is not so simple. In the criminal legal literature of the Russian federation, the notion of the criminal legal protection as a product of legislative activity is not rejected. On the other hand, it is asserted that object of the crime, which is part of *corpus delicti*, is something completely different¹⁰.

It appears that the object of the crime has an independent meaning from the object of the criminal legal protection because the object of the crime is an element of *corpus delicti*. **However, an interesting question is, how can a societal relationship, which is damaged by the crime considered to be an element of *corpus delicti*. On the other hand, how can the subject of the crime be part of the *corpus delicti* committed by the**

⁸ *Никифоров Б.С.*, Объект преступления по советскому уголовному праву, М., 1960, 8-9.

⁹ *Коржанский Н.И.*, Объект и предмет уголовно-правовой охраны, М., 1980, 28.

¹⁰ *Гаухман Л.Д.*, Квалификация преступлений: закон, теория, практика, М., 2001, 64.

same subject. In order to avoid this type of absurd situation, we should say that there is only the “object of the criminal legal protection”, which is later harmed by the criminal conduct, which is composed by subjective side and objective side, while the object and the subject are outside the corpus delicti and they are elements of the societal relationship directed towards the prevention of the crime. The lawful conduct of the criminal law subject protects the object from criminal harm.

Thus, it is apparent that the concept of the “object of criminal legal protection” expresses the substance of the legislative activity. **By this, we want to say that the author of the criminalization is the legislator, while the investigative and judicial bodies classify the already committed conduct as a crime, in accordance with their procedural rules.**

So the object of the crime does not exist. What exists is the object of criminal legal protection – life, health, freedom, property, State power, etc. **Consequently, the crime is directed towards these objects, which are protected by the criminal law.** From the moment of entry of the criminal law in force, the criminal legal relationship is created which translates the lawful conduct of the subject into the rule of law and therefore it protects the object of the criminal legal protection from the crime.

5. Sociologism of the Traditional Concept of the Subject of the Crime

The crime is committed by a specific subject upon a specific object. Therefore, on the one hand the notions of the object and of the subject of the crime appear to be quite natural. However, in reality, they are the product of an erroneous thinking. It is enough to replace the traditional concept of the subject of the crime by the concept of the subject of criminal law. The subject of law is a physical or legal person, which is bound to act lawfully and thus create the rule of law. Here we already have defined legal relationship but not arising out of the commission of the crime, but on the contrary directed towards the lawful conduct and this is the case, when the subject of law translates the requirements of the norm of law into the rule of law by his lawful conduct.

Therefore, the concept of the “subject of law” is the product of the legal thinking **because the subject of law is obliged to act lawfully and called upon to deal with this obligation responsibly.** Traditional concept of the “subject of crime” cannot exist because the criminal legal relationship may not be created by the commission of the crime. Therefore, the traditional concepts of the object of crime and subject of crime are not a manifestation of legal thinking. However, they are sold as such, which is a rough sociologism in criminal law. **Based on this, the legislative definition of the crime is composed only of subjective and objective aspects. The “object of crime” and “subject of crime” do not exist. What exists, however, is the “object of criminal law protection” and “subject of criminal law protection”, which are indivisible elements of the special part of the criminal law.**

6. The Objects of Criminal Legal Protection in the System of Special Part of the Criminal Law

Criminal legislation is composed of general and special parts. While the most fundamental issues of the criminal law are covered in the general part (including the issue of criminal legal relationship), special part provides for the legislative definition of the criminal conduct. From this viewpoint, it is clear that the system of the special part of the criminal law is structured in accordance with the hierarchy of values expressed in the object of the criminal legal protection. From this viewpoint, in Georgia the primary object of the criminal legal protection is the human being, his life, health, freedom, while the remaining values are the community and the State (to a certain extent, the worldwide peace and security).

Thus, the system of the special part of the criminal law is based on the system of objects of the criminal legal protection. Now the question is whether the textbooks of the criminal law recognize the notion of the object

of criminal legal protection or still retain the notion of the object of the crime. Unfortunately, while the textbook of the criminal law of the Russian federation mentions the object of the criminal legal protection, it still refers to a concept of the “general object of the crime”¹¹. We have a similar situation in 2011 textbook of the special part of the Georgian criminal law, which on the one hand talks about the general object of the crime¹² and on the other hand it states that the legislator “is protecting the life of the person before his death”¹³.

While analyzing the crime against property, the given textbook formulates the traditional concept of the “object of the crime” and on the other hand, clarifies the concept of “object of criminal legal protection on the page 518”. The textbook issued in 2016 talks about two partite division of the object of the crime¹⁴. However, it talks more often about the object of criminal legal protection¹⁵, which is legally correct. However, we believe that **it would be more appropriate to clarify what are the advantages of the notion of object of criminal legal protection vis-à-vis to the traditional concept of the object of the crime.**

Thus it is apparent that the textbooks of the special part of the criminal law do not have a uniform approach towards this issue. Thus, once and for all, we should say good bye to the traditional concept of the object of the crime and replace it with the object of the criminal legal protection, which is the product of the legislative classification of the conduct as the crime when the legislator has classified the objects of criminal legal protection in special part of the criminal law in accordance with their value. **Criminal law protection objects may be classified into general, group or typical objects and while analyzing the corpus delicti of a crime, we may also have additional objects.**

7. Subjects of Criminal Legal Protection and the System of the Special Part of the Criminal Law.

The concept of subject of the criminal legal protection is even more ambiguous than the concept object of the criminal legal protection. Indeed, if the legislator has created the concept of object of criminal legal protection, as a product of legislative classification of the conduct of the crime, than **the subject of criminal legal protection is the legislator itself.** However, the point is that State is not the sole responsible entity for the fight against crime. **This fight requires the participation of every conscientious member of the community.** Therefore, we have a legal relationship directed towards the prevention of the crime or towards the lawful conduct as we have already underlined the lawful conduct translates the requirement of the norm of law into the norm of law. We have also mentioned that not every conscientious member of the community abstains from the commission of the crime for the fear of punishment. They are not committing crimes because of the high sense of the personal dignity and positive responsibility before the public. **These are exactly the persons, who are the subject of the criminal legal protection together with the State.** Besides, we should not forget so called encouraging norms, which call upon the citizens towards lawful conduct (such as the norm encouraging the abandonment of the crime). In addition, we also have grounds of justification, which require the active participation of the citizens (self-defense, arrest of the potential criminal, state of necessity, lawful risk);

Unfortunately, the system of the special part of the criminal law still retains the concept of the subject of the crime¹⁶. In this respect, we can frequently encounter the concept of the “subject of the crime” in the textbooks of the special part¹⁷, however, sometimes a more reasonable solution is found when they talk about the author

¹¹ Уголовное право, Особенная часть, Учебник М., 2011, 13.

¹² *Lekveishvili M.*, Private Part of the Criminal Law, Tbilisi, 2011, 24.

¹³ *Ibid*, 24.

¹⁴ Mamulashvili G. (ed.), Private Part of the Criminal Law, Part 1, Tbilisi, 2016, 20.

¹⁵ For example, 32.

¹⁶ For example, the above mentioned textbook of the criminal law of Russian Federation, 76.

¹⁷ For example the textbook of Georgian criminal law issued in 2016, Part 2, 159.

of the crime, including the special author (principle). As opposed to the view of the some of the criminal legal scholars, we believe that the crime is not committed generally, but through the execution of the legislated *corpus delicti*¹⁸, clearly, in absence of grounds of justification. Because the legislative formula of the *corpus delicti* is practically executed by the author (also the “co principle), the author of the crime is bound to deliberate before embarking upon the commission of the crime. Think whether it is better to act lawfully and therefore with the sense of responsibility before the State. Because he has a choice, naturally, he is the subject of positive responsibility and from this viewpoint, **he is the citizen, a non citizen with legal status, a public officer, a medical worker, a driver, a ship captain, etc. Clearly, the subjects enumerated here make up the special part of the criminal law in accordance with their status.**

We may definitely say that the subjects of criminal legal protection are the product of the same line of thinking as objects of the criminal law protection. Even in 1999 I wrote that here we have criminal legal relationship directed towards the prevention of the crime and one of the elements of this relationship is the object of criminal legal protection. Therefore, it is evident that we also need the concept of the subject of criminal legal protection because the lawful conduct of the subject, which is the object of the criminal legal relationship creates the object of the criminal legal protection. **Therefore, the subject of the criminal legal protection and the object of the criminal legal protection are the elements of the criminal legal relationship**¹⁹.

8. Conclusion

In the light of all that was mentioned above, there is nothing that can prevent us from asserting that special part of the criminal law is nothing more than **the unity of the objects and subjects of the criminal legal protection**. Therefore, we should start analyzing special part of the criminal law not by traditional concept of the object of the crime, but by the object of criminal legal protection. **The legislative classification of the conduct as a crime is expressed exactly in this viewpoint together with the fact that the legislator is protecting the societal goods by legislative definitions of the crime**. On the other hand, from the viewpoint of the criminal legal relationship directed towards the prevention of the crime, **It is clear who is obliged to act lawfully and thus protect the object of the criminal legal protection**. This is the mode of legal thinking which should be observed not only in the general part of the criminal law but also in the special part. **Therefore, the correct legal thinking requires even in special part of the criminal law to focus on the legal relationship directed towards the lawful conduct. The object and subject of the criminal legal protection are the categories of criminal legal philosophy and are indivisible from each other in the system of the special part of the criminal law.**

From this viewpoint, its even more logical to analyze the given problem **from the perspective of criminal legal philosophy**, because the legislative classification of the conduct as a crime requires the implementation of the principles of the criminal law and the identification of the objects of criminalization, in the course of which the legislator is not only **objectively justified** but also politically correct, especially taking into account the fact **that criminal law is the form of union between the criminal legal doctrine and criminal politics and as such category, its subject of philosophical research.**

¹⁸ See *Nachkebia G.*, Introduction to the general theory of the qualification of the conduct as a crime (from the aspect of the system of criminal science), Part 1, Tbilisi, 2000, 81.

¹⁹ See *Nachkebia G.*, Concept of the Object of Criminal Legal Protection “Samartali” 1999, № 6-7.

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Kakha Tsikarishvili*

Particularities of Subjective Element of the Crime in French Criminal Law

French criminal law is characterized by many particular features, which make it different not only from the common law systems but also other countries of continental Europe. The Mens Rea of the crime is also quite peculiar. In difference with Georgian criminal law, in French law, the motive and purpose of the crime are not deemed to be part of subjective element of corpus delicti, while dolus eventualis is not considered to be a form of intention; in crimes accompanied by secondary consequences, as well as in cases, where the principle offender acts beyond common intent, as well as in so called contraventions, elements of objective imputation may be present.

Keywords: mens rea of the crime, fault, intention, negligence, dolus eventualis, premeditation, liability without fault, norms of foresight.

1. Introduction

Study of the composition of the mens rea in French criminal law discloses several interesting features, namely, the mens rea of the crime and its place in the structure of the crime are not clearly identified; like in Anglo-American criminal law and in difference with Georgian criminal law, dolus eventualis is not a form of criminal intent; like in Anglo-American criminal law, premeditation is a more serious form of intent, which in a number of cases constitutes an aggravating circumstance; An accomplice may be charged with aggravating circumstances of the conduct of the principle, even though he may be unaware of them; Like in Italian criminal law, in crimes with secondary consequences there is no need to establish mens rea towards secondary consequences of the crime, which points to objective imputation; likewise, objective imputation can be found in so called “faute contreventionnelle”, which is close to the Anglo-American strict liability.

Lets briefly overview each of these particularities.

2. Place of the Subjective Element in the Structure of the Crime

The structure of the crime and the relationship between its elements still raises controversies in modern French criminal legal doctrine¹. Traditional school distinguished between legal element (which implies criminal law), material (which implies mainly actus reus) and moral element (which implies mainly the guilt).

Contemporary French authors frequently criticize traditional doctrine. For example, Pradel believes that the legal element, e.g. criminal law should not be included in the definition of the crime. He also believes that the structure of the crime should also not include so called “moral element”, because we should clearly distinguish between the offence and the offender. According to Pradel, the psychological elements should be attached not to the crime but to the offender². Consequently his definition of the crime includes only three elements: conduct, result and the causation³.

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¹ See e.i. Козочкин И.Д. (ред.), Уголовное право зарубежных стран, Омега, 2003, 275, Also, Ambos K., Observaciones a la doctrina francesa del hecho punible desde la perspectiva alemana, revista para el analisis del derecho, <<http://www.raco.cat/index.php/InDret/article/viewFile/124287/172260>>, [10.09.2017].

² Ibid.

³ Ibid, 362-402.

Desportes believes that the crime is composed only of material and mental elements. As to grounds of justification and excuse (he deals with them under the title of objective and subjective circumstances excluding liability), they are placed not under the concept of the crime but beyond.

Michelle Laure Rassat identifies three elements in the crime: material, moral and illegality element. She deals with grounds of justification while dealing with legal element of the crime and considers grounds for excuse to be part of the mens rea of the crime⁴.

In order to denote subjective element of the crime, French criminal law uses the terms such as “moral element”, “intellectual element”, “psychological element”. Some authors assimilate subjective element with the fault, while some believe that its’ only a part of it⁵.

In the French criminal law, there is no uniform definition of guilt, though it is more apparent that the prevailing theory is more inclined towards psychological, rather than normative definition⁶.

Dana is opposed to pure psychological understanding of the guilt and believes that the guilt should be defined as indifferent or hostile attitude of the person towards social values, which are ground of its negative evaluation⁷.

Due to the ambiguities related to the definition of the fault element, many contemporary French authors skip its definition altogether⁸.

French authors-Lavasseur and Bulloc differentiate between fault and imputability and believe that the imputability is a necessary precondition for the imputation of the conduct, which implies the awareness and the will⁹

As it can be seen, the place of the subjective element in the structure of the crime is subject to debate: it is either deemed to be part of the crime, or outside the crime.

According to the prevailing view, the purpose and motive are not independent elements of corpus delicti. The purpose is deemed to be a part of a specific form of fault – special intent, while the motive is not considered to be a part of corpus delicti¹⁰.

⁴ *Rassat M.L.*, Droit Pénal Général, Elypses, 2004, 304-397.

⁵ *Pollin C.*, Droit Pénal Général, Litec, 2000, 62.

⁶ Xavier Pin defines guilt as decision of the person to act “in spite of prohibition by criminal law”. See, *Pin X.*, Droit Pénal Général, Dalloz, 2007, 141, *Christopher Pollin* explains guilt as a link between the will of the person and the criminal conduct⁶, see *Pollin C.*, Droit Pénal Général, Litec, 2000, 59, *Rassat* defines guilt as psychological element of the crime, See. *Козочкин И.Д.* (ред.), Уголовное право зарубежных стран, Омега, 2003, 290. Cited in: *Ambos K.*, Observaciones a la doctrina francesa del hecho punible desde la perspectiva alemana, revista para el analisis del derecho, <<http://www.raco.cat/index.php/InDret/article/viewFile/124287/172260>>, [10.09.2017].

⁷ On this question, Saint Gerard writes following: “criminal law does not give due account to the guilt as independent legal concept. The understanding of guilt is oriented more towards abstraction and philosophy, than towards legal science, due to which the guilt is understood as secondary concept, which is disseminated among other fundamental concepts”. Cited in *Ambos K.*, Observaciones a la doctrina francesa del hecho punible desde la perspectiva alemana, revista para el analisis del derecho, <<http://www.raco.cat/index.php/InDret/article/viewFile/124287/172260>>, [10.09.2017].

⁸ Jean Larguier also agrees with them. He states “the conduct shall turn into crime, if it is committed by a responsible person, who is using his mental capacities (imputability) and commits it culpably (culpability). See *Larguier J.*, Droit Pénal Général, Dalloz, 2001, 77, Some French authors also propose to replace criminal imputability by the term “penal capacity” (capacite penal), See, *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas, 2008, 432.

⁹ *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas, 2008, 434, Pradel agrees with them and believes that the imputability is the precondition for the guilt. At the same time, Pradel believes that the grounds such as age, insanity, constraint, mistake exclude the penal capacity, *Ibid*, 433, 459.

¹⁰ The given principle in French legal literature is called the principle of irrelevance of motives (principe d’indifference du mobile). *Renout* describes this principle in following terms: “motives are the personal causes for the conduct. They are different and change according to persons and circumstances. The law does not take into account the motive in building up a crime of murder. The only important factor is intention, which is a necessary and sufficient element. Motive has no role in the construction of the crime. Therefore, they say that the motive is irrelevant for the criminal repression”. See

3. Intentional and Non Intentional Fault

French criminal law traditionally distinguishes between intentional and non intentional fault: *faute intentionnelle*, *faute non intentionnelles*.

The gravest offences called “crimes” can be committed only intentionally (art. 121-3 of the French criminal code). Offences with intermediate gravity (*delit*) may be committed also by negligence (art. 121-3), while the “contreventions” can be committed by any form of guilt (even without fault).

Some authors identify deliberate endangerment as a separate form of *mens rea* (see below¹¹)

4. Mens Rea and its Forms

In difference with Georgian criminal code, French criminal code does not define intent. In order to denote intentional conduct, French criminal code uses different terms, such as “voluntarily” (*volontairement*¹²), “knowingly” (*sciemment*)¹³”, “purposely” (*dans le dessein*¹⁴), etc.

Jean Larguier believes that together with the will, the intent also implies the knowledge of the unlawful nature of the conduct (*caractere illegal de ses actes*¹⁵)

French criminal legal doctrine differentiates between different forms of intent, among which should be mentioned: general intent and special intent; direct and indirect intent, preterintentional intent. Lets briefly discuss each of them:

4.1 General and Special Intent

French doctrine, like Anglo-American criminal law differentiates between general and special intent. General intent implies the knowledge of illegal nature of the act and the will to perform the act¹⁶. It accompanies every intentional offence.

Pradel describes general intent in following terms: “the intention is in the first place the understanding of the factual and legal nature of the offence by the offender, which means that he is aware of the material element of the conduct and of the fact that it is prohibited by law (...), next the intention is the decision of the person to act notwithstanding the prohibition¹⁷”.

In difference with the general intent, the special intent implies the “aspiration towards a certain result prohibited by law¹⁸”. For example, the special intent of murder implies the intention to take away the life of another

Renout H., *Droit Pénal Général, Paradigme*, 2009, 41. Despite that, he recognizes that in exceptional cases, the motive may present a mandatory element of the crime, and in some cases an aggravating circumstance. *Ibid*, 142-143. In French legal literature, motive and purpose are not clearly delineated. The purpose of “hindering the finding of the truth”, “facilitation of the preparation or commission of the crime”, “undermining public order” are cited as examples of motive. See *Ibid*, *Desportes F.*, *Droit Pénal Général, Economica*, 2008, 438.

¹¹ *Pin X.*, *Droit Pénal Général, Dalloz*, 2007, 141.

¹² Art. 223-5.

¹³ Art. 224-8.

¹⁴ Art. 434-7-2.

¹⁵ *Larguier J.*, *Droit Pénal Général, Dalloz*, 43. The same approach is adopted by *Renout*. See, *Henout H.*, *Droit Pénal Général, Paradigme*, 140.

¹⁶ *Desportes F.*, *Droit Pénal Général, Economica*, 430, On the similar classification in American criminal law see *Pollock J.M.*, *Criminal Law, Routledge* 2013, 56-57.

¹⁷ *Pradel J.*, *Manuel De Droit Pénal Général, Editions Cujas*, 2008, 469, Such definition of guilt leads to logical conclusion that factual mistake and excusable legal mistake exclude guilt. See, *Desportes F.*, *Droit Pénal Général, Economica*, 2008, 431.

¹⁸ *Desportes F.*, *Droit Pénal Général, Economica*, 2008, 433, Some authors find special intent in cases, where the intention

person. Special intent also means intent in so called crimes of danger containing criminal purpose¹⁹.

Desportes states that in many cases, the need of special intent is derived directly from the law (for example, art. 411-4 criminalizes “the collection of data for the purpose of handing over to another State in order to contribute to the hostilities or aggression against France”). But there are cases in which the special intent cannot clearly be visible from legal provision and it is identified by court²⁰.

4.2 Direct and Indirect Intent

Some French authors differentiate between direct and indirect intent. Pradel states, that in direct intent, the person is aiming to achieve special result²¹, while in case of indirect intent, he has no such purpose, but is certain (or practically certain) that this result shall be brought about. For the purpose of the liability, court case-law equates direct intent with indirect intent²².

It should also be noted that such classification of the forms of intent in French criminal law coincides with the classification of intent into first degree and second degree direct intent in Georgian criminal law²³.

4.3 Dol Preterintentionel.

Expression preterintentionel comes from latin words “preater” and “intentionem”, which means something beyond intention.

Dol preterintentionelle reflects the situation, in which the intention was directed towards bringing about specific results, though it finally caused a different type of harm²⁴.

In dol preterintentionel, French authors identify three types of situations:

First, if the different or secondary result is not specifically envisaged by criminal law, then the person shall not bear liability for its occasioning.

Second, if the different or secondary consequence is envisaged by statutory definition of the offence, then this crime can be punished with the same degree of severity, as in case of intentional causing of the harm. For example, if hijacking a plane, or boat or other means of transport caused the death of one or more persons, it shall be punishable by lifetime imprisonment (art. 224-7). If the destruction of property by explosion, arson or other risk creating means has resulted in death of a person, it shall also be punishable by lifetime imprisonment (art. 322-10).

Thirdly, if the secondary consequence is not envisaged by corpus delicti of the crime, it may be punishable less severely than its intentional causing. Art. 222-7 of the criminal code states that violence which unintentionally caused death shall be punished by up to 15 years of deprivation of liberty. Therefore, this crime is punishable less severely than intentional murder (art. 221-1 of the criminal code envisages up to 30 years of imprisonment), though less severely than violence which has not triggered such result (art. 222-22 of the criminal code envisages deprivation of liberty up to 3 years).

is directed towards the realization of the harm beyond corpus delicti. See e.g. *Pin X.*, Droit Pénal Général, Dalloz, 2007, 145.

¹⁹ *Desportes F.*, Droit Pénal Général, Economica, 2008, 433.

²⁰ Art. 221-5 of the French criminal code describes poisoning, as administration of mortal substance. Whether this article requires the purpose to bring about death caused long debates between practitioners and legal scholars. Only in 2003, French Court of Cassation decided that this crime is present if the defendant is acting “with the purpose of causing death”. See *Desportes F.*, Droit Pénal Général, Economica, 2008, 434.

²¹ *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas, 2008, 469.

²² *Desportes F.*, Droit Pénal Général, Economica, 2008, 434.

²³ See e.g. *Turava M.*, Criminal Law, Overview of General Part, Tbilisi, 2013, 132.

²⁴ Similar form of Mens Rea is also known in Italian Criminal Code, see art. 43.

It is important to note that in the last two cases, the French criminal law does not require the guilty attitude of the person towards the secondary consequences (even in the form of negligence)²⁵, which points to objective imputation²⁶. According to French authors, such approach of the legislator is justified by the fact that these crimes are characterized by an increased risk of death. Therefore it is difficult to foresee the consequence. In addition, it is always difficult to prove intent in such situations. Consequently, the legislator has dispensed the prosecuting party from proving mental attitude of the defendant towards the consequence²⁷.

Georgian criminal law has traditionally maintained the approach, according to which “aggravation of liability for secondary consequences is permissible only when the defendant is at least negligent towards that consequence”²⁸. This position was initially formulated in the criminal code of Soviet Republic of Georgia and later reproduced in art. 11 of 1999 criminal code, which states: “If the criminal law envisages the aggravation of the sentence for the occurrence of secondary consequence, which is not covered by defendant’s intent, such aggravation is only possible if defendant caused the result negligently”.

On the other hand, it is evident that if the intentional act of the defendant (such as attempted murder) negligently caused substantially different result (such as the destruction of the property), defendant shall be charged with two crimes: attempted murder and destruction of property by negligence.

4.4 Premeditation

Premeditation is defined in art. 132-72 of the French criminal code, according to which “decision to commit the offence is taken prior to the commission of the specific crime or delict”. Pradel defines premeditation as the intent extended through time²⁹. Renout believes that premeditation implies “purposeful calculation, preparation and organization of the crime”. In order to illustrate the difference between sudden and premeditated intent, he examines two examples: in the first example, a person in a quarrel suddenly grabs a gun hanging on the wall and shoots the opponent, while in the second example, the defendant goes home after the conflict, seizes the arm and commits murder³⁰.

In addition to theoretical importance, the difference between sudden and premeditated intent also has practical implications in French criminal law: like in Anglo-American criminal law, the premeditation shall turn a homicide into aggravated murder. It is also an aggravating factor in other violent crimes³¹.

²⁵ *Desportes F.*, *Droit Pénal Général*, Economica, 2008, 441.

²⁶ Italian author – Giuseppe Salvatore Cetere, while discussing the given aspect of the French law concludes that we are facing with objective imputation. “Unintended harm is imputed objectively, so that no faulty attitude is necessary”. See *Cetere G.S.*, *La Praeterintention*, <http://www.penale.it/public/docs/La_praeterintention.pdf>, [10.09.2017]. A different view is expressed by Jean Pradel, who believes that the consequence should be foreseeable. See *Pradel J.*, *Manuel De Droit Pénal Général*, Editions Cujas, 2008, 432. This opinion is also shared by Françoise Durieux, See *Durieux F.*, *Droit Pénal Général* <www.hugo.nadin.free.fr>, [10.09.2017]. It is worth to note that in Italian law, which is familiar with this form of mens rea, part of the authors think that it expresses objective imputation, while others think that this is a combined form of guilt, where the defendant has intention towards one consequence and negligence towards another. See Astolfo Di Amato, *criminal law in Italy*, Kluwer Law International, 2011, 86. Similarly, the caselaw is also controversial. See Studio Cataldi, *Omicidio Preterintenzionale* <<http://www.studiocataldi.it/guide-diritto-penale/omicidio-preterintenzionale.asp>>[10.09.2017]. Preterintentional intent is also known in Belgian criminal law, though secondary consequence can be imputed only if foreseeable. See, *Kuty F.*, *Principes Généraux de Droit Pénal Belge*, T. II, *Infraction Pénale*, 261.

²⁷ *Mayaud Y.*, *Droit Pénal Général*, Presses Universitaires de France, 2013, 254-255.

²⁸ See *Tsereteli T.* (Edit.), *Authors Collective*, *Commentaries of Criminal Code of Georgia Socialist Republic*, Publishing House – Sabchota Sakartvelo, Tbilisi, 1976, 74.

²⁹ *Pradel J.*, *Manuel De Droit Pénal Général*, Editions Cujas, 2008, 472.

³⁰ *Renout H.*, *Droit Pénal Général*, Paradigme, 2009, 144.

³¹ See e.g. art. 222-3 (torture), art. 222-8 (violence that resulted into death).

5. Non Intentional Fault

According to prevailing view, in the course of non-intentional conduct, the defendant does not strive toward the realization of a criminal harm, but reveals an indifferent attitude towards socially protected values³².

French criminal law differentiates between three forms of intentional fault: deliberate endangerment (*mise en danger délibérée*), negligence (*imprudence ou négligence*) and contraventional guilt (*faute contraventionnelle*).

5.1 Deliberate Endangerment

One of the particular features of the French criminal law is that it unites two forms of guilt, which in Georgian criminal law are known as eventual intent and conscious negligence under specific forms of *mens rea* – deliberate endangerment. By this approach, it approximates with Anglo-american recklessness³³.

Following examples of deliberate endangerment are cited in the French Law: Supervisor, which lets the workers on an unstable scaffolding; driver who passes another car in limited visibility area, defendant throwing a heavy furniture from the window without being interested in the fate of by-standers. Renout states that according to old criminal code, the given cases, if ended up in a criminal harm would constitute criminal negligence. Though, in case of absence of criminal harm, would be left unpunished, or liable as a formal violation (such as violation of traffic rules or road safety norms)³⁴.

Criminal Code of France of 1994 envisaged this form of guilt only in the general part of the criminal code in the form of “deliberate endangerment”, however, in the special part of the code, it is only envisaged in the form of several crimes.

Art. 121-3 envisages deliberate endangerment as a specific form of guilt. It states: “whenever the law so provides, a delict can be committed though deliberate endangerment of another person”. At the same time, according to the law, the deliberate endangerment should be preceded by “a manifestly deliberate violation of a specific duty of care or foresight”.

1. Deliberate endangerment as a form of guilt is characterized by following conditions:
2. First, there must be a violation of a specific duty of care or vigilance (this can be e.g. construction norms, road safety regulations, etc.³⁵)
3. The norm in question should lay down a specific duty of safety or precaution. which means that the judge cannot rely on rules of general nature³⁶.
4. Violation of the duty should be manifestly deliberate³⁷

Deliberate endangerment as a form of guilt has its peculiar features in result and conduct crimes.

In result crimes it may be an aggravating circumstance (if it is envisaged specifically by law)³⁸

As to the conduct crimes, criminal code envisages only one such crime containing deliberate endangerment. Namely, art. 223-1 of stipulates the “immediate placement of another person into the risk of death or injury, or permanent work disability through a manifestly deliberate violation of duty of care or safety set down by the law or regulation³⁹”

³² Renout H., *Droit Pénal Général, Paradigme*, 2009, 146.

³³ See *Tsiskarishvili K.*, Question of Commission of Attempt with *Dolus Eventualis* in Italian, French and Anglo-American Criminal Law, “*Martlmsajuleba and Kanoni*”, 2009, №1, 10.

³⁴ Renout H., *Droit Pénal Général, Paradigme*, 2009, 154.

³⁵ Renout H., *Droit Pénal Général, Paradigme*, 2009, 155.

³⁶ *Ibid*, 155.

³⁷ *Ibid*, 155.

³⁸ According to art. 221-6 of the criminal code, negligent homicide is punishable by deprivation of liberty up to 3 years and fine up to 45 000 Euro. According to the par. 2 of the same article, if the conduct is committed in deliberate violation of norms of security or foresight, it will be punishable by 5 years of deprivation of liberty and fine of 75 000 Euro.

³⁹ Similar crime in American law is reckless endangerment, which like French *mise-en-danger*, does not require the

In order to charge a person under this article, following conditions must be present:

1. Creation of immediate risk of life or health of another person.
2. This risk must be caused by a specific duty of safety or care envisaged by the law or regulation⁴⁰
3. The violation should be manifestly deliberate. However it is not necessary that the defendant is aware of the risk⁴¹.

The expression “manifestly deliberate means that the violation of the norm should be the choice of the person and not be caused by inadvertence⁴².

Xavier Pin criticizes the legislative formulation of deliberate endangerment. The author differentiates between *dolus eventualis* and conscious negligence. While in *dolus eventualis*, the person shows indifferent towards the harm, in conscious negligence, the person hopes that the it will not occur. The author does not agree with the placement of both forms of guilt under one and the same category. He believes that deliberate endangerment should cover only *dolus eventualis*, while the conscious negligence should belong to negligence⁴³.

5.2 Negligence

French criminal code defines neither intention nor negligence. The negligence is expressed in terms such as “imprudence”, “negligence”, “inattention”, “maladresse”.

French authors Conte and Maistre De Chambon define intention and negligence in following terms: “while intention is the directed will, the negligence is the failure to direct the will. If the intention is the will which is directed towards unlawful result, the negligence is the failure to foresee the result, while the defendant does not envisage the risk of occurrence of the harm⁴⁴”.

Different authors define negligence differently. Renout states that the negligence implies the failure to foresee the harm. Consequently, the negligence means lack of foresight⁴⁵. The given definition is quite narrow, because it does not embrace conscious negligence.

causation of specific harm, <<http://definitions.uslegal.com/r/reckless-endangerment>>, [10.09.2017].

⁴⁰ In difference with negligence, the given norm does not imply the violation of unwritten norms of foresight. As it is often referred, while incriminating this conduct, the legislator primarily had in mind traffic and workplace safety violations. See, *Desportes F.*, *Droit Pénal Général, Economica*, 2008, 460.

⁴¹ *Renout H.*, *Droit Pénal Général, Paradigme*, 2009, 156. Despite the fact that this was established by February 16 Decision of 1999 of the Court of Cassation, some authors contest this statement (See *Desportes F.*, *Droit Pénal Général, Economica*, 2008, 459). The given statement questions the assimilation of this crime with *dolus eventualis* or with conscious negligence, because in both cases the defendant is familiar with the risk of occurrence of the harm. In Georgian criminal law, similar provision is contained in art. 127, in the form of “deliberate placement into danger”. However, the comparison of these two incriminations also reveals a significant difference: According to Georgian criminal code “the victim should have no possibility to take measures for self-protection”, while according to French code, this danger should be caused by “violation of specific obligation of security or foresight established by the law or reglement.

⁴² *Desportes F.*, *Droit Pénal Général, Economica*, 459.

⁴³ *Pin X.*, *Droit Pénal Général, Dalloz*, 2007, 157. Pradel also agrees with such differentiation, though he uses a different formula. According to Pradel, in deliberate endangerment, the defendant holds the occurrence of the harm possible, while during conscious negligence, he rules out such possibility. See *Pradel J.*, *Manuel De Droit Pénal Général, Editions Cujas*, 2008, 486. *Renout* qualifies as reckless endangerment only those cases, when the defendant hopes that the result will not occur, however he never states, what will be the qualification when the defendant tolerates the occurrence of the harm. See *Renout H.*, *Droit Pénal Général, Paradigme*, 2009, 38.

⁴⁴ *Conte P., Maistre Du Chambon P.*, *Droit Penal General*, 203, cited from *Козочкин И.Д.* (ред.), *Уголовное право зарубежных стран, Омега*, 2003, 293.

⁴⁵ *Renout H.*, *Droit Pénal Général, Paradigme*, 2009, 146. These clarifications inadequately reflect the essence of negligence, because they do not cover the cases of conscious negligence.

The duty of foresight may be derived from different sources. French criminal law doctrine differentiates between two types of negligence: first, when the duty of foresight is envisaged by the law or regulation, and another type, when it is not⁴⁶.

This difference has practical meaning: in some cases the law foresees only the first type of negligence (e.g. art. 332-5 of the criminal code: destruction of property through explosion or arson, through violation of duty of safety or foresight stipulated by the law or regulation).

An interesting issue is the interpretation of violation of the duty of foresight.

Traditionally, the courts evaluated the violation of the duty of foresight *in abstracto*, from the viewpoint of an average person, without taking into account specific skills and experience of the defendant⁴⁷. Some French authors believe that this approach was modified by 1996 law, which stipulated that the negligence is present when “the person failed to take reasonable measures of precaution taking into account his mission, functions, competences as well as powers and means at his disposal”. Since enactment of this legislative novelty, the judge has a duty to evaluate the violation of duty of foresight in the light of specific experiences and powers of the person”⁴⁸.

5.3 Faute Contrevenionnelle

French criminal law is also familiar with so called “contraventional” guilt, which is beyond traditional concepts of intention and negligence and is close to the Anglo-American strict liability⁴⁹.

Contraventional fault is expressed only in violation of the prohibition established by the legal norm (regulation or the law). The prosecution does not have to prove the existence of intent or negligence. Sometimes these violations are called “material violations”. The violator is exempted from liability only due to a constraint⁵⁰, insanity⁵¹, lack of age or *force majeure*⁵².

Desportes justifies the existence of contraventional fault by the fact that the relevant prohibitions do not reflect fundamental values of contemporary society, but some social discipline and their infringement does not entail any social blame⁵³.

Rassat justifies the existence of such norms by the fact that the legislator requires utmost vigilance from the citizens in order to prevent violation of norms established by the law or regulation⁵⁴.

Old criminal code envisaged contraventional fault not only for petty offences but also for delicts. However, the new code limited this type of mens rea only to contraventions. This does not mean that all contraventions can be committed with such form of mens rea. Sometimes, the legislator clearly states that this particular offence can

⁴⁶ In some cases, the legislative formulation of a specific crime envisages only the first type of negligence (such as art. 332-5 – destruction of property by explosion or arson, which is caused by violation of norm of safety or foresight established by the law or regulation).

⁴⁷ Renout H., *Droit Pénal Général, Paradigme*, 2009, 147.

⁴⁸ Ibid, 148.

⁴⁹ See *Tsiskarishvili K.*, *Strict Liability in Anglo-American Criminal Law, Legal Anomaly or Effective Regulatory Tool*, *Journ.*, “Samartali”, 2000, № 2.

⁵⁰ See *Crim. 28 Juillet, 1881, Dp, 1882, 1., 95.* see. *Desportes F.*, *Droit Pénal Général, Economica*, 2008, 476

⁵¹ *Rassat M.L.*, *Droit Pénal Général, Elyses*, 2004, 342.

⁵² The court case-law interprets the force majeure broadly and also includes in it the cases where the person was not and could not be aware of the prohibition. For example, the driver which goes in opposite direction through one-way traffic may be excused by force majeure, if the prohibiting sign was removed. *Rassat M.L.*, *Droit Pénal Général, Elyses*, 2004, 341.

⁵³ *Desportes F.*, *Droit Pénal Général, Economica*, 2008, 475.

⁵⁴ *Rassat M.L.*, *Droit Pénal Général, Elyses*, 2004, 342, 344. Similar arguments are brought by English and American authors in support of strict liability in common law countries (see, *Tsiskarishvili K.*, *Strict Liability in Anglo-American Criminal Law, Legal Anomaly or Effective Regulatory Tool*, *Journ.*, “Samartali”, 2000, № 2.

be committed only through intention or negligence⁵⁵.

Some authors conclude that the contraventional fault implies a liability without fault, for which the fact of material violation of the norm suffices⁵⁶.

Rassat disagrees with such approach. She believes that if this were the case, than the defenses such as lack of age, insanity or constraint would not exclude liability. Rassat believes that the contraventional fault is more a procedural institution, which exempts prosecuting party from the proof of mens rea and bars defense party from proving the contrary. Therefore, this must be regulated rather by procedural, than substantive law⁵⁷.

Subsequently, many authors denominate this type of mens rea under “presumed guilt”⁵⁸

6. Forms of Mens Rea and Complicity

The French criminal law requires that the accomplice should be aware of the intent of the perpetrator⁵⁹. According to Gaston Stephani, the intention of the accomplice is different from the intention of the perpetrator: “it consists of the intent of the accomplice, his willingness to join to the conduct of the perpetrator⁶⁰”. Is it possible for the accomplice to act by negligence? Michele Laure Rassat writes on this subject:

“A negligent conduct, in whatever form it is expressed, even if it is causally linked with the result and this is sufficient to ground civil liability may not serve as basis for the accomplice liability. The concierge of the house or a baby-sitter, which tells to an outsider about the habits of the residents of the house, may not be held liable as accomplice to theft or kidnapping, even if his conduct has a crucial causal effect to the occurrence of the result⁶¹”

We should separately treat the issue of so called “perpetrators excess”. French criminal law distinguishes between three types of “excess”:

1. If the perpetrator commits the different type of crime⁶² other than envisaged by the accomplice, the latter shall not be criminally liable⁶³.
2. If the perpetrator commits the same crime, which was covered by the intent of the accomplice but in aggravating circumstances, the accomplice shall be charged with these circumstances even if he/she was not aware of them⁶⁴.

A famous case illustrating the the court caselaw is the “Oriol Murder”. In this case, deputy police chief Maria intended to kidnap and kill his boss Massy for political and personal reasons. He assigned this task to four of his accomplices, who assaulted the house of Massy and while they were waiting for him, they tied 5 family members, including a 7 year old child. Because one of the members of the family recognized the assailant, they killed them all. Later, they also killed Massy. The instigator of the crime – Maria has been found guilty for the

⁵⁵ See e.g. articles R. 625 and 626

⁵⁶ *Schmidt J.C.*, L’element intentionnel en matiere de contravention, *Rev. Penit.* 1932. In its judgment “Salabiaku v. France, ECtHR stated that the presumed guilt did not violate art. 6 of the European Convention with the precondition that it is confined “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence” See *Salabiaku v. France*, judgment of 7 October 1988, Series A, No 141-A.

⁵⁷ *Rassat M.L.*, *Droit Pénal Général*, Elypses, 2004, 342.

⁵⁸ *Rassat M.L.*, *Droit Pénal Général*, Elypses, 2004, 341. Desportes does not agree with the approach according to which the contraventional fault implies presumed guilt. The presumption may be overridden by proof that the person acted neither by intent nor negligence”>, *Esportes F.*, *Droit Pénal Général*, Economica, 2008, 476.

⁵⁹ *Elliott C.*, *French Criminal Law*, Willan, Routledge, 2001, 90.

⁶⁰ *Stefani G., Lavasueur G., et Bouloc B.*, *Droit Pénal Général*, *Precis Dalloz*, 1981, 269

⁶¹ *Rassat M.L.*, *Droit Pénal Général*, Elypses, 2004, 411.

⁶² *Pradel* differentiates between different types of crimes according to legally protected values, infringed by those crimes, *Pradel J.*, *Manuel De Droit Pénal Général*, Editions Cujas,2008, 423.

⁶³ *Ibid.*

⁶⁴ See *Pradel J.*, *Manuel De Droit Pénal Général*, Editions Cujas,2008, 426. *Pradel* justifies this approach by stating that “every participation in the crime contains hazard, risk that no accomplice can rule out. *Ibid.*”

instigation of murder of 6 persons, even though he intended to kill only one of them⁶⁵.

3. Like in Georgian criminal law, if the perpetrator commits the same type but less grave crime as envisaged by the accomplice, (for example uses the weapon that handed over for murder for the commission of body injury) he shall be liable for the crime factually committed⁶⁶.

7. Intention in Attempted Crime

French criminal law, like the criminal law of many European nations does not generally envisage liability for the preparation of the crime. An attempted crime can only be committed with intent⁶⁷. However, because in French criminal law, *dolus eventualis* does not belong to the intent, this excludes the possibility of attempt committed with *dolus eventualis*. Subsequently, in French criminal law, the attempt is only possible with intent.

8. Conclusion

The present overview highlights that in European criminal law, there are many differences with regard to the *mens rea* and many issues are still under elaboration. From this viewpoint, thanks to the legal school, Georgian criminal law stands on solid grounds. However, the theoretical foundations of Georgian criminal law should be strengthened, even by way of comparative research, which shall enable Georgian legal system to find its place in common European family.

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⁶⁵ See e.g. <http://www.lemonde.fr/ete-2007/article/2006/07/31/la-tuerie-d-auriol-massacre-chez-les-barbou-zards_799844_781732.html>, [10.09.2017], In present case, Georgian criminal law differs from French, namely according to art. 26, par. 2 of criminal code of Georgia, the co-principle or accomplice shall bear no liability for the principle's deviation from criminal purpose. According to par. 4 of the art. 25 of Criminal code, if the conduct of the principle or accomplice is accompanied by a circumstance, which characterizes the unlawful conduct, this circumstance shall be imputed to the accomplice or other co-principle, who was aware of it.

⁶⁶ See Larguier J., *Droit Pénal Général*, Dalloz, 2001, 104. On the other hand, if the principle commits the same crime, of which the accomplice was aware, though through different method, this shall not have any effect on the qualification (Ibid.). Georgian legal literature traditionally differentiated between quantitative and qualitative access of the principle. Quantitative excess is considered to be the case, when the principle committed the crime of the same nature, which was within the accomplice's intent, though more grave. Qualitative excess shall be the case, when the principle committed the crime of different nature. According to the prevailing view, the accomplice should be liable for the conduct which was covered by his/her intent (see Ibid.). This approach was reflected in art. 26 of the criminal code, which states that the other accomplice or co-principle shall bear no liability for the perpetrator's excess.

⁶⁷ Tsikarishvili K., Question of Commission of Attempt with *Dolus Eventualis* in Italian, French and Anglo-American Criminal Law, "Martlmsajuleba and Kanoni", 2009, №1, 10, Georgian criminal law traditionally rejected the possibility of attempt with *dolus eventualis*. (See Tsereteli T., *Problems of Criminal Law*, Vol. 2, Tbilisi, 488). However, the latest literature and case law, has seen more and more supporters in favor of this position. See Turava M. Criminal Law, Overview of General Part, Tbilisi 2013, 136.. See also Feb. 20, 2016 Decision n. 41 AP of the Criminal Chamber of the Supreme Court of Georgia.

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Davit Makaridze*

Specificities of the Entry into Force and Suspension of an Individual Administrative-legal Act

The paper focuses on the following topics: the specificities of the entry into force and suspension of individual administrative-legal acts; the rule of official presentation thereof; the practices of specific administrative authorities with respect to the entry of individual administrative-legal act into force; legal nature of unpromulgated individual administrative-legal acts; judicial practice in relation to the entry of individual administrative-legal act into force. The paper reviews the entry of individual administrative-legal act into force with additional stipulations as well as the cases of its suspension in case of filing administrative complaint, and in case of appealing in court.

Key words: *General Administrative Code of Georgia, individual administrative-legal act, additional stipulations, judicial practice; suspensive effect.*

1. Introduction

The goal of the paper is to demonstrate the specificities of the entry into force and suspension of individual administrative-legal acts, the rule of official presentation and promulgation thereof, legislative gaps of these institutions and issues related to their smooth functioning. Administrative bodies often introduce practice that connects the entry of an individual administrative-legal act into force with an instance of its signing. The paper reviews the above-mentioned practice and provides legal assessment of this fact. Other preconditions for the entry of individual administrative-legal acts into force, in addition to those prescribed by legislation, are presented, based on the Supreme Court practice. The paper also reviews the entry into force of individual administrative-legal acts with additional conditions, legal definition of which is not envisaged by the legislation of Georgia. This institution contributes to more effective and flexible operation of administrative authorities. The paper offers an insight into the essence and the advisability of introducing the above concept in the legislation.

The paper provides an overview of the matter of suspending individual administrative-legal acts, when, according to the law, different approaches are stipulated for suspending an act appealed through the administrative channel, versus taking a case to court. The challenging issues associated with each of these two mechanisms are presented, as well as recommendation for the improvement of the mentioned institution is proposed.

The paper examines the mechanism of functioning of similar institutions in foreign states (primarily, the Federal Republic of Germany, since, Georgian administrative law institutions are largely regulated similar to the German legal system) and proposes solutions.

2. The Entry of an Individual Administrative-legal Act into Force

The entry of individual administrative-legal acts into force is one of the most important aspects of administrative procedure. An individual administrative-legal act becomes binding for an addressee after the entry into force, prescribing a party to take certain action or refrain from such action. Remedies come into action at this stage as well, in case a addressee deems that its rights have been breached.

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The process of drafting, adoption and validity of an administrative act is a special legal procedure that is regulated extensively in the legislation of foreign states. In Western states, these matters are usually governed by special legislation, specifically, USA 1964 Law on Administrative Procedures and relevant laws of states, Switzerland 1968 Law on Administrative Procedures and Switzerland analogous laws, 1976 Law of Germany, legal regime of public administration of Spain and 1992 General Administrative Procedures Law, the Netherlands Law on General Administrative Law, France 2000 Law on the Rights of Citizens towards the Public Administration.¹

2.1 Official Presentation of an Individual Administrative-legal Act

According to the example of the practice of foreign states, the entry of an individual administrative-legal act into force is connected with its official presentation.² The legislation of Georgia contains a similar regulation, specifically, pursuant to Article 54 of the General Administrative Code of Georgia (GACG), unless otherwise prescribed by legislation, an individual administrative-legal act enters into force immediately after it is served to the a party per the law prescribed rule or on the day of promulgation. Furthermore, presentation according to the rule, per Article 58(2) of the same Code, involves the handing over of such act or sending through mail, while promulgation, according to Article 56(1), involves publishing it in an official publishing body of its administrative body.

2.2 The Practices of Specific Administrative Bodies with Respect to the Entry of Individual Administrative-legal Act into Force

It is important to overview the specific practice of administrative bodies with respect to the entry of individual administrative-legal acts into force. Some administrative bodies connect the entry of individual administrative-legal acts into force with their signing. The following cases can be brought as an example of the above: pursuant to Article 3 of the Minister of Education of Sciences of Georgia March 31, 2014 Order N 388 on Approving the Schedule for Organized Professional Testing in Spring, 2014, by the National Assessment and Examination Center, a Legal Entity of Public Law, this Order enters into force upon signing³; According to Paragraph 4 of the Staffing Schedule Structure and Wages of the State Audit Service, approved under March 11, 2015 Order N42/37 of the General Auditor of the State Audit Service, this Order shall become effective upon signing⁴.

It is evident from the presented examples that in some cases administrative bodies connect the entry of individual administrative-legal acts into force with their signature. It is self-evident here that the regulation prescribed under Article 54(1) of the General Administrative Code of Georgia, which connects the entry of an act into force with its presentation to an addressee, cannot be fulfilled, and respectively, despite such provision, an act cannot enter into legal force. Official presentation of an individual administrative-legal act is not only a criterion for its legality, but also a precondition for its existence. Similar to a law taking force through its official promulgation, an individual administrative-legal act acquires force by means of its official presentation to a addressee. In the process of presentation an individual administrative-legal act, attention should be paid to Articles 55-58 of the General Administrative Code of Georgia and specificities stipulated in special laws. The failure to comply with the law-prescribed format for presenting an individual administrative-legal act to a party does not necessarily prevent its entry into force; rather, it renders an act illegal. In such case, an individual administrative-legal act does not take force, i.e., an act is not binding for a party.⁵ The Supreme Court of Georgia

¹ *Kozirin A., Shmamina M., Zelentsov A., Bogdanovskaya I., Danilov S., Sazhina V., Reitelmeier K., Shaikh K., Nikerov G., translators: Kharshiladze I., Ovsanykova N., Administrative Law of Foreign States, Tbilisi, 2014, 202 (in Georgian).*

² *Ibid*, 213.

³ <<http://mes.gov.ge/old/upload/editor/file/Brdzanebebi/2014/marti/388.pdf>>, [29.07.2017].

⁴ <<http://sao.ge/files/proaqtuli/safinanso/sahtato-nusxa.pdf>>, [29.07.2017].

⁵ *Turava P., Tskepladze N., Handbook of General Administrative Law, 2nd ed., Tbilisi, 2013, 84-85 (in Georgian).*

develops a similar opinion in one of its decisions.⁶ The entry of an act into force is almost similarly regulated in the German law as well. A decision taken by a state authority should enter into force. An administrative act enters into force at the instance when an addressee of such act is notified about this. Presentation is an important part for an administrative act. The importance of presentation is twofold: following notifying, it can be said about an administrative act that it has acquired the legal presence function and secondly, presentation concludes an administrative procedure.⁷

It is especially important to serve a prohibiting (binding) individual administrative-legal act to an addressee. In such case, the entry into force is related to the activation of the administrative enforcement mechanism. The Cassation Court explains that the institution of the entry of individual administrative-legal acts into force is related to the institution of enforcement of an act, since enforcing individual administrative-legal act is an important stage of administrative procedure. Results of a decision taken based on administrative procedure are manifested in its enforcement. Enforcement implies the possibility of enforced execution of public legal obligations of citizens or other entities of law. Save the exceptions strictly defined by the law, enforcement of an administrative-legal act may not be commenced unless it is served to an addressee per the law prescribed rule.⁸

2.3 The Legal Nature of an Unpromulgated Administrative-legal Act

It is interesting what happens to an already promulgated and signed act when it has not been served to a addressee, or has not been promulgated according to the legislation prescribed rule. Can an administrative body amend an act that has not been served to an addressee, or abolish it altogether; how should a party interested in issuing an act defend itself in such case. A team of authors notes in relation to this issue that official presentation of an individual administrative-legal act is not only a criterion for the legality of an act, but also a precondition for its existence. Similar to a law that takes force through its official promulgation, an individual administrative-legal act acquires binding power through its official presentation to an addressee.⁹ The precondition for the entry of administrative acts into force is the departure of the internal state system and moving into the public domain. An act has to take force in order for it to exist. An act becomes existant only after it is presented officially; prior to this exists something that will become an administrative act. A document passed prior to its official presentation is a decision within an administrative body. A document that may later become an act and the entry into force should be differentiated, the former is the precondition for the latter.¹⁰ Respectively, if an administrative authority would like to amend or cancel an administrative legal act that has already been promulgated but has not taken force, it will not have legal basis for doing so.

2.4 The Practice of the Supreme Court with Regard to the Entry of Individual Administrative-Legal Acts into Force

The Supreme Court of Georgia makes a very significant commentary in relation to the entry of an individual administrative-legal act into legal force, in one of its decisions: the cassation court explains that the judiciary, when examining the legitimacy of an administrative-legal act conferring the power of appeal cannot assess the right of an addressee to legitimate expectation; respectively, they will neither be able to defend themselves, since an addressee of an act derives legitimate expectation only after an act takes legal force, i.e., as has been mentioned above: 1. Once the term for appealing an act expires; or 2. In case of appealing an act, once it is left unaltered.

⁶ The Supreme Court of Georgia Administrative Chamber July 9, 2013 Decision №36-220-212(2j-13) (in Georgian).

⁷ *Peine F.J.*, Allgemeines Verwaltungsrecht 7. neu bearbeitete Auflage, schwerpunkte C.F. Muller, Heidelberg 2004, 125.

⁸ The Supreme Court of Georgia Administrative Chamber July 9, 2013 Decision №br-220-212(2j-13).

⁹ *Turava, P., Tskepladze N.*, Handbook of General Administrative Law, (2nd ed.), Tbilisi, 2013, 87 (in Georgian).

¹⁰ *Peine F.J.*, Allgemeines Verwaltungsrecht 7. neu bearbeitete Auflage, schwerpunkte C.F. Muller, Heidelberg 2004, 125.

It is the very entry of an act into legal force that gives rise to the emergence of the entitlement to legitimate expectation of an addressee of such act, and respecting this right becomes priority in relation to the principle of legality. Thus, in the course of legal procedure, it is inadmissible to assess legitimate expectation of an addressee of an appealed administrative-legal with a conferring power; this is a nonlegal approach, since in such conditions it will be impossible to defend legitimate interests of an appellant.¹¹

It can be concluded based on such judicial decision that the entry of an individual administrative-legal act into force depends not only on the serving of such act to an addressee according to a law prescribed rule, or its promulgation, but two other criteria are added to it: the expiration of the term of appealing an act and, in case of appealing an act, leaving it unaltered. It is exactly after the expiration of every term for appealing an act, or, if appealed, leaving it unaltered (based on the final decision), that an interested party derives legitimate expectation towards such act and it can receive benefit or right set forth under this act.

2.5 The Entry of an Individual Administrative-legal Act into Force with Additional Conditions

The following is worthy of a separate mention: the entry into force of an individual administrative-legal act which entry into force, or retaining an already valid act in force, is connected with the fulfillment of a certain condition by a addressee. In the governance practice, additional stipulations of an individual administrative-legal act are of essential importance, especially, if a conferring act is issued. Its goal is to overcome those legal and effective barriers that impede the issuance of a specific permit and hence, the issuance of a conferring individual administrative-legal act. If an applicant fails to fully meet the preconditions for issuing an individual administrative-legal act stipulated by the law, an administrative body may, instead of a refusal to issue an act, issue such individual administrative-legal act through appending additional stipulations.¹² The mentioned institution is also envisaged in the German legislation. Regulation is crucial for an administrative act. It establishes main opinion as to how a state authority has to issue a desirable act. The act may be limited through any method. Such limitation may be exercised through additional stipulation.

This legal definition of the concept of the additional stipulations concept is provided in Paragraph 36 of the Administrative Procedure Act of the Federal Republic of Germany. Sub-paragraph 2 of this paragraph lists 5 additional stipulations of an administrative act: term (time limit), condition, a reservation regarding annulment, an obligation or a reservation to the effect that an obligation may subsequently be introduced, amended or supplemented (condition).¹³

For administrative authorities to enjoy this highly flexible mechanism, it is better to reflect it in legislation, specifically, in the relevant articles of the General Administrative Code of Georgia, since thus it will be clear and explicit for administrative bodies that they can apply the mentioned mechanism, which will streamline administrative legal procedure and render it more effective, especially when such practice exists at the example of the German legislation.

3. Suspending an Individual Administrative-legal Act

It is important to establish in which case a valid act can be suspended. This may be effected by means of appealing such act, within the administration or outside – in court. The filing of an administrative complaint gives rise

¹¹ The Supreme Court of Georgia Administrative Chamber July 16, 2013 Decision №br-192-184(3j-13) (in Georgian).

¹² *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.*, Handbook of General Administrative Law, Tbilisi, 2005, 158-159 (in Georgian).

¹³ *Peine F.J.*, Allgemeines Verwaltungsrecht 7. neu bearbeitete Auflage, schwerpunkte C.F. Muller, Heidelberg 2004, 118.

to the suspension of an appealed act. Suspensive effect is the suspension of an individual administrative legal act, following remedies, administrative complaint and counterclaim. It is a suspensive effect and not the suspended state.¹⁴

3.1 Suspensive Effect Theories

In German literature, there are three main theories of the suspensive effect. Two of these are the branches of the “validity theory”.¹⁵

The first, the so-called “strict validity theory” delays the¹⁶ entry of an administrative act into force until the instance when a valid judicial decision or a decision of an administrative body reviewing a complaint is rendered in relation to it. The goal of suspensive effect is not to assign priority to someone; rather, it is to provide legal safeguard against the expected irreparable damage.¹⁷

With the so-called “limited validity theory”, the validity of an administrative act is analogous to the validity of variably invalid deals. Its validity is suspended only temporarily, i.e., until the entry into force, an administrative act is in a “floating” state. If it takes legal force following a complaint or an appeal, the counting of the term of validity will commence from the day of presentation.¹⁸ According to this theory, an act will be deemed valid from the instance of final refusal to a remedy – valid from the beginning (it has retroactive force).¹⁹

According to the enforcement theory, suspensive effect suspends just the applicability of an act and from the instance of final refusal to a remedy – the enforcement becomes retroactive. The enforcement theory is the most common. They distinguish also the so-called interim theory, according to which a suspensive effect is temporary suspension of the validity of an act.²⁰

3.2 Suspending an Individual Administrative-legal Act in Case of Filing an Administrative Complaint

Pursuant to Article 80(1) of the Federal Republic of Germany Code of Administrative Court Procedure: “An objection and a rescissory action shall have suspensive effect. This shall also apply to constitutive and declaratory administrative acts, as well as to administrative acts with a double effect (an administrative act is conferring for one party, while limiting for the other). Unlike the Georgian model, in German legislation a temporary action in case of an administrative complaint and an administrative appeal is regulated together.²¹ Article 184 of the General Administrative Code of Georgia sets forth the rule for suspending an appealed act, and, according to its Paragraph 1, “Unless prescribed otherwise under the law or a sub-legal act passed based on the law, the validity of an appealed act is suspended from the instance an administrative complaint is registered. An administrative body passes an individual administrative-legal act about this.” Usually, appealing an act shall automatically cause the suspension of its applicability. This very content is included in the first sentence of the referenced provision. Although, according to the second sentence, an administrative body issues an individual administrative-legal act about this. If the legislator declares a principle that it recognizes the suspension of an act in case

¹⁴ *Sioridze G.*, Suspensive Effect in General and Procedure Administrative Law of Georgia; drawbacks and prospects of double regulation, current issues of Georgian Administrative Law, David Batonishvili Institute of Law, Tbilisi, 2016, 43 (in Georgian).

¹⁵ *Ibid*, 44-45.

¹⁶ The term „administrative act“ is a term used by an author (G. Sioridze, Suspensive Effect in General and Administrative Procedure Law of Georgia). For the purposes of this paper it is used with the meaning of an individual administrative-legal act.

¹⁷ *Ibid*, 45.

¹⁸ *Ibid*, 45.

¹⁹ *Tsiklauri B.*, Preliminary Remedies in Administrative Law, “Students Law Journal“, 2011, 16 (in Georgian).

²⁰ *Ibid*, 16.

²¹ *Ibid*, 10.

it is appealed automatically, then the meaning of this sentence is unclear. What will happen if a body does not issue an act with such content, will such an action result in the failure of an act to take force? A team of authors notes on the above-mentioned issue that article 184 of the General Administrative Code of Georgia sets forth a suspensive effect of a complaint; this implies automatic suspension of an appealed act and this is not dependent on an administrative authority decision.²² Suspensive effect emerges from the instance of the registration of a complaint. The passing of an individual administrative-legal act about this is declaratory and an administrative body does not have a discretionary authority to pass it.²³ The above-mentioned dubious sentence may cause just misunderstanding, it leaves to an authority certain room for arbitrariness, especially that it is not a regular individual administrative-legal act, which would have to be presented to a party in order to take force.

3.3 Suspending an Individual Administrative-Legal Act in Case of Appealing in Court

Legal remedy envisaged under Article 29 of the Georgia Administrative Procedure Code is aimed at ensuring effective execution of justice. Suspensive effect of an appeal stipulated in Article 29 serves the very temporary safeguarding of this right, which is aimed at protecting a party against the effects of activities of authorities until the decision is taken on the subject of dispute in the course of administrative proceedings.²⁴ Pursuant to Paragraph 1 of this Article, accepting an appeal in court suspends an appealed individual administrative-legal act. Unlike Article 184(1) of the General Administrative Code of Georgia, here no additional decision is taken about suspending an individual administrative-legal act. The applicability of an appealed act²⁵ is suspended by accepting an appeal by court, automatically, and this is not dependent on a court or party will. The presence of such a provision indicates to high degree of securing an administrative complaint. The suspension of an administrative act based on law commences from the instance a judicial ruling about the acceptance of an appeal into proceedings is taken. This should not be interpreted as if the suspension of an administrative act is effected based on court decision. The applicability of an administrative act is suspended based on the law, automatically, and not based on a judicial decision.²⁶

Similar to Article 184(2) of the General Administrative Code of Georgia, Article 29 of the Administrative Procedure Code also contains the cases when the applicability of an appealed act is not suspended. The applicability of an act shall not be suspended if: a) this is related to the payment of state or local taxes, fees or other charges; b) delaying enforcement will result in considerable material damage, or will pose considerable threat to public order or security; c) it has been issued during emergency or martial law declared based on a relevant law; d) an administrative body has taken justified decision about immediate enforcement, in the presence of the necessity of immediate enforcement; e) an individual administrative-legal act has been enforced or it is a conferring act and its suspension will inflict considerable harm to the legitimate right or interests of another party; f) it is envisaged by law. It appears that there are certain differences in suspending individual administrative-legal acts in cases of filing a complaint and an appeal. For example, Article 184(2) of the General Administrative Code does not envisage extending the validity of an act in cases stipulated under Article 29(2)(a) and (d) of the Administrative Procedure Code, considerable difference is found in other paragraphs as well. The above-mentioned

²² Turava P., Tskepladze N., Handbook of General Administrative Law 2nd ed., Tbilisi, 2013, 202 (in Georgian).

²³ Sioridze G., Suspensive Effect in General and Procedure Administrative Law of Georgia; Gaps and Prospects of Dual Regulation, Current Issues of the Administrative Law of Georgia, David Batonishvili Institute of Law, Tbilisi, 2016, 49 (in Georgian).

²⁴ Kopaleishvili M., Skhirtladze N., Kardava E., Turava P., Administrative Procedure Law Handbook, Tbilisi, 2008, 386 (in Georgian).

²⁵ The term „an administrative act“ is used by the authors (Vachadze M., Todria I., Turava P., Tskepladze N., Commentary to the Administrative Procedure Code of Georgia, Tbilisi, 2005); for the purposes of this Paper, it has the meaning of an individual administrative-legal act.

²⁶ Vachadze M., Todria I., Turava P., Tskepladze N., Commentary to the Administrative Procedure Code of Georgia, Tbilisi, 2005, 160 (in Georgian).

approach is not expedient, it is better to establish a unified standard, a listing of cases when the applicability of an act appealed at a higher administrative body or in court, is not suspended. For example, it is unclear why, in one case, an act is extended if an appeal is filed – in relation to individual administrative-legal acts concerning the payment of state or local taxes, fees or other charges; while, if an administrative complaint on the same issue is filed with a higher administrative body – it does not result in extending its validity. The above-mentioned problem is more vivid in cases when an interested party has the choice of where to appeal an individual administrative-legal act. Let us continue with the same example: according to Article 305(1) of the Georgia Tax Code, “in case the Revenue Service takes a decision that is not desirable for a complainant, such complainant is authorized to appeal a decision within 20 days from its serving at the Dispute Resolution Board or in court.” As can be seen, in one case, if an interested party decides to take to court and file an appeal – in relation to an individual administrative-legal act related to the payment of state or local taxes, fees or other charges, then the applicability of such act will not be suspended, while if the party decides to file an administrative complaint to a higher administrative body, Dispute Resolution Board – this will give rise to the suspension of an appealed act. The mentioned example once again showcases the currency of this problem and the need to resolve it.

Pursuant to Article 29(3) of the Administrative Procedure Code of Georgia, based on a request from a party, court may suspend an individual administrative-legal act or its part in case envisaged under Paragraph 2 of this Article, in case there is justified doubt about the legitimacy of an individual administrative-legal act or its immediate enforcement inflicts substantial damage to a party or renders it impossible to protect his/her legitimate right or interest. In such case, a legislator, based on the interest of an interested party, leaves such party certain “opportunity” to manage to suspend the applicability of such act, which has to be assessed as positive. The discretionary role of court increases here and it is allowed to, on a case by case basis, resolve the issue of suspending an act or refusal to suspend it. In each specific case of suspending an administrative act, the necessity for applying such measure should be clear. A request from a party to suspend an appealed administrative act shall contain reference to factual circumstances due to which its immediate enforcement inflicts substantial damage thereof or renders it impossible to protect its legitimate right or interest, as well as to justify the suspicion concerning the legality of an administrative act.²⁷

Pursuant to Article 29(4) of the Administrative Procedure Code, based on the demand from a party, court may, in cases envisaged under Paragraph 1 of this Article, revoke the suspension an individual administrative-legal act or its part, provided there is the necessity of urgent enforcement of an individual administrative-legal act or its part that is associated with significant (substantial) harm or limits a legitimate right or interest of a party. At the opinion of a group of authors, such legislative amendment effectively cancels a legal, suspensive effect of an administrative-legal act that has been appealed in court. Based on this provision, court is authorized to revoke the suspension of an administrative-legal act prescribed by law through its decision.²⁸ This provision truly diminishes the suspensive effect. Even the more, the mentioned stipulation renders redundant not only first part, but also the second part, pursuant to which an act is not suspended only in exceptional cases. While, Paragraph 4 overlooks such cases and an act may be extended in any case.

4. Conclusion

The specificities of the entry into force and suspension of individual administrative-legal act have been reviewed in the Paper.

The following circumstances have been identified during the study of the issue: some administrative authorities connect the entry of administrative-legal acts into force with signing thereof. In such case, legislative stipulation which connects the entry into force of an act with its presentation to an addressee, cannot be fulfilled and respectively, despite such a provision, it cannot take legal force; official presentation of an individual ad-

²⁷ Ibid, 167.

²⁸ Ibid.

ministrative-legal act is not only a criterion for the legitimacy of an individual administrative-legal act, but also a precondition for its existence.

It has been identified that when an individual administrative-legal act has been issued but has not been served to an addressee pursuant to a law prescribed rule, it simply does not exist; it comes into existence only following official presentation, while, prior to then exists something that will become an administrative act later. Based on the judicial practice, two additional criteria for final entry into force of an individual administrative-legal act have been identified – expiration of the term for appealing an act and in case of appealing an act – leaving it unaltered. During the study of the issue of the entry into force of individual administrative-legal acts with additional stipulation, the advisability of its introduction in the legislation has been identified.

It has been identified over the course of the analysis of suspending an individual administrative-legal act that in case of an administrative complaint and appeal, there are various preconditions set for suspending an individual administrative-legal act, which is not expedient, since it may cause misunderstanding; hence, it is advisable to establish a unified standard, a listing of the same cases when the applicability of an act appealed either at a higher administrative body or in court, does not cease.

The paper showcases certain gaps in the area of the entry into force of an individual administrative-legal act and its suspension, provides comments and specific recommendations for the improvement of these legal institutions and their better perception.

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Koba Kalichava*

Europeanization of Georgian Administrative Law from the European Integration Point of View - Experience of the Past and Future Perspectives

The process of Europeanization of Georgian administrative law is a phenomenon, emerged in the period of independence of the country. It comprises main phases before and after the Association Agreement. In spite of the fact that the Association Agreement imposes certain obligations of reforms of the legal system on Georgia, Europeanization processes of law considered within its limits must be distinguished from the Europeanization phenomenon of the law systems within the formal borders of the European Union. This difference on its own requires working out a really functional strategy of the reform of the Georgian administrative law (Europeanization), within the limits of which it will be clarified the possibility of the successful reception or transplantation of European law experience in the Georgian legal system, which is a purpose of the present article.

Europeanization of administrative law, phases of Europeanization of Georgian administrative law, Association Agreement.

1. "Europeanization" as a Missionary Goal of the Reform of Georgian Administrative Law and Reception/Transplantation of Foreign Law as a Means of Achievement of this Goal

1.1. Why "Europeanization"?

In connection with sharing of foreign experience in the Law field in Georgian legal literature there is often discussed the reception of the European law (mostly in relation to Private Law¹), harmonization of the Georgian legislation with the European Law (generally in relation to Law²) or Europeanization of Georgian Law (from the point of view of sectorial Administrative Law,³ as well as of Private Law⁴). Though in relation to Administrative Law an argued discussion about which phenomenon must be accentuated has not been done yet. Observing the dynamics of the development of the modern Administrative Law in Georgia, which will be discussed later, we will conclude that at a missionary level it will be right to talk only about "Europeanization". The point is that

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¹ Zoidze B., The Reception of European Private Law in Georgia, Tbilisi, 2005, 5 (In Georgian); Burduli I., (ed.), The Development of Modern Georgian Entrepreneurial Law (Main Aspects of the Reform), Tbilisi, 20116, 14 and etc. (In Georgian).

² Samkharadze I., Harmonization of Legal Systems: The European Union and Georgia, Ivane Javakhishvili Tbilisi State University Press, "Law Journal", # 1, 2015, 314 (In Georgian); Surmava L., Conformity of the Georgian Legislation with the Legislation of the European Union in State Aid, Tbilisi, 2012, 17-60 (In Georgian).

³ Kalichava K., Strategic Aspects of the Legislation Reform of the Georgian Environment Protection, Ivane Javakhishvili Tbilisi State University Press, "Law Journal", # 1, 2012, 118 (In Georgian).

⁴ Chanturia L., Die Europäisierung des georgischen Rechts – bloßer Wunsch oder große Herausforderung?, in: RabelsZ, Bd. 74, 2010, 154 ff.

the reform of the modern Georgian administrative law from the very start was going in parallel with the European integration processes. According to the facts the first codification of the administrative legislation (1999) was directly connected with the integration of Georgia into European structures. Then the categorical condition of the Council of Europe for the membership of Georgia in the European Union - to adopt administrative legislation appropriate with the principles of the democratic legal state – was in full compliance with the national interests of Georgia and the political will of the country. So the reform was successfully carried out. Since 2014 within the Association Agreement a missionary effect of European integration on the development of the Georgian administrative law has become deeper and more systematic.

1.2. Definition of the Role of the Reception/transplantation of European Law

The reception/transplantation of European Law in Georgia (in the sense of supranational as well as of national) is a means of Europeanization. From the point of view of the development of Georgian Administrative Law we must differentiate from each other, on the one hand, Europeanization as an invariable missionary goal of the reform or those values, which Georgia is striving to and, on the other hand, the reception/transplantation of European Public Law as a means of achieving this goal (or Europeanization).⁵ As it will be discussed below, the first phase of Europeanization was characterized with both as reception, as well as transplantation features. It is true that these two forms of transfer of the foreign law differ from each other;⁶ however I think that a very strict line must not be put between them. Anyway events in the society's legal life in any country might be developed in such a way that a norm created as a result of the reception (which is being established together with the national identity) later might become unacceptable for a concrete political and socio-economic situation, but a norm created as a result of the transplantation (which is being established in detachment from the national identity) later might be turned into an inseparable part of the legal system of the country.

2. Europeanization as a Capability of Performing Internal (National) Constitutional Obligations and Admissible Scopes of Europeanization

2.1. Europeanization not as a Goal in Itself

Europeanization of the Georgian administrative law is not a goal in itself. In the first place it serves to the performance of the obligations stated by the Constitution of Georgia. If we believe *Fritz Werner's* thesis, that "Administrative Law is the concretized constitutional law",⁷ then this link becomes clear in itself. It was already mentioned above, that in a democratic and social-legal state administrative public administration (and its regulating administrative legislation) has functions of providing, regulating, protecting, serving main rights and democratic guarantees. In everyday life realization of these functions (common and private) is done by means of administrative legislation. Sharing of the European legal experience in this field, in the focus of which man is meant as a main value, has only a positive effect on the increase of the protection, control and stability standard. It is obvious that in the conditions of the constitutional identity protection it only favors the realization of those thoughts of a legislator, which are meant in the most common constitutional norms.

⁵ It should be noted that a conformist definition of the norm, reception, approaching, within the scope of the European Union, can be explained as a means of getting a goal of Europeanization of legal regulations of the member-states, see *Zuleeg M.*, *Deutsches und Europäisches Verwaltungsrecht – wechselseitige Einwirkungen*, VVDStRL, 53, 1994, 165 ff.

⁶ About the difference between the reception and transplantation in detail see *Bregvadze L.*, *The Theory of the Autopoietic Legal Culture: Law Transfers and Legal Self regulation in a Global Society*, Tbilisi, 2016, 155-163 (In Georgian).

⁷ *Werner F.*, *Verwaltungsrecht als konkretisiertes Verfassungsrecht*, DVBl, 1959, 527-533.

2.2. Constitutional Framework of Europeanization

The Europeanization processes of the Georgian legal regulation must not jeopardize the state sovereignty of the country and constitutional identity. In connection with it a constitutional court of Germany has interesting decisions, the standard of which must be used more strictly in relation to Georgia, as to a non-member state of the European Union. The constitutional court of Germany states the acceptable scope of influence of European Law on National Law. The court clarifies that the European Union is a unity of sovereign states and the national legislative authority must be responsible when transferring European legislation into the national legislative space, so that the sovereignty principle will not be humiliated.⁸ According to the court “the issue of formation of the country belongs to the management of member-states and people”, namely “The European Union, which is a contractual link of the sovereign states, is inadmissible to be carried out in such a way, that member-states will not have enough space for defining their economical, cultural and social politics”⁹. So the constitutional court puts an absolute and untouchable limit to the obligation of maintaining the “constitutional identity”.¹⁰ These approaches are shared by the constitutional court decision of 2010, in which the court clarifies that if the “interference” in the EU competence is not seen obviously enough and if the act “interfering” in the competence brings on its own important positive structural changes for the member-state, then the competence disturbance can’t be stated.¹¹

3. Main Motivators of Development of the Modern Georgian Administrative Law

3.1. Georgian Administrative Law in the Period of the Soviet Totalitarianism and Legal Nihilism

As it is known the Soviet system was characterized with legal nihilism and primacy of politics¹² that was having a negative influence on the sphere of public management and its regulating administrative legislation. The activities of the socialist “state governing apparatus” were defined not by laws, but by politics stated by the dominant class (communist party).¹³ As Law was identified with “the will of the dominant class”, administrative decisions were also taken by the transmissive rule, namely, the will of the communist party was transferred to the state governing apparatus as a directive to be executed, which was fulfilled by the “staff” promoted by the party nomenclature.¹⁴ According to the communist doctrine the state and law were discussed as an instrument of realization of the “historical mission”, socialist ideology.¹⁵ Considering also that capital (as well as social) building, industrial activity, socialist trade and service “were totally discussed as the spheres of public administration”,¹⁶ which were completely monopolized by the state, we can logically conclude that in that period in a classical sense there was not left any reasonable space for the development of Administrative Law (accordingly either for its Europeanization). So the Soviet administrative law had only one purpose – it was not “law, regulating legal

⁸ BVerfGE 123, 267 ff. (Ultra-Vires-Lehre).

⁹ BVerfGE 123, 267 ff. (Ultra-Vires-Lehre).

¹⁰ BVerfGE 123, 267 ff. (Ultra-Vires-Lehre).

¹¹ BVerfGE 126, 286 ff. (Ultra-vires-Kontrolle).

¹² About the legal nihilism in the Soviet period, see *Gamkrelidze O.*, Fighting for a legal state, Tbilisi, 1998, 3-28 (In Georgian); About Primacy of politics, see *козлов ю.м.*, Советское административное право, Москва, 1984, 16-17; Старосьцяк Е., правовые формы административной деятельности, М., 1959, 68.

¹³ *Eremov Gr.*, The Soviet Administrative Law, Tbilisi, 1967, 6 (In Georgian).

¹⁴ *König K.*, Moderne öffentliche Verwaltung, Berlin, 2008, 151.

¹⁵ *Eremov Gr.*, The Soviet Administrative Law, Tbilisi, 1967, 6 (In Georgian).

¹⁶ *Kalichava K.*, Control of Environment Protection Activities basing on the example of immissions protection law (comparing Georgian, German and European laws), Tbilisi, , 2016, 37 (In Georgian).

relations between the state, as a legal entity and individuals and economic units, but was an organizational law¹⁷.

3.2. Real Opportunity of Development of Administrative law in the Post-Soviet Period

In a classical sense the real opportunity of development of the Georgian administrative law arose only in 1991 after breaking up of the Soviet Union and gaining independence by Georgia. According to Professor G. Winter's estimation "After the great political changes of that time the political will turned out to be stronger, the structures must be established by a completely innovative conception – in kind of a democratic legal state with social market economics."¹⁸ The Constitution of the 24th of August of 1995 from the very start created a strong normative base for this obliging Georgia to establish such administrative legislation, which in the conditions of the system of the authorities distribution and the market economics would adequately define functions of providing main rights, order, protection, service and democratic guarantees, which results from the constitution of any democratic country.¹⁹ By the European Convention for Protection of Human Rights, ratified by the Parliament in 1999, the above mentioned constitutional obligations were raised to the international obligation rank and this way its importance was made much stronger. Just in "this open normative space" the outer factors of the reform began acting, which were creating (and are still creating) a voluntary base of the reform (Europeanization) of the Georgian administrative law, but within the scope of the Association Agreement - its normative base.

4. The First Phase of Europeanization of the Modern Georgian Administrative Law

4.1. The Context of the First Phase (about "self-limitation")

The first phase Europeanization of Georgian administrative law starts from the period of gaining independence by Georgia, when Georgia took active steps for the purpose of integration into the European structures. Events in this direction developed fast. In 1993 the country asked the Council of Europe for a "special guest" status. In 1996 the Partnership and Cooperation Agreement (PCA) was drawn up between the parties, by Article 43 of which was defined a general obligation²⁰ of legal approximation. In 1997 the Parliament adopted a regulation "About Harmonization of the Legislation of Georgia with the Legislation of the European Union",²¹ according to which all the laws and normative acts subjected to the law must have been in compliance with the standards and norms stated by the European Union. The purpose of this "self-limitation" made by Georgia was raising the political and international prestige but really it was not performed; of course it was impossible for "all the normative acts" to be in compliance with the European standards. Neither Member-States of the EU have a similar obligation. However in that period because of such a political will there were adopted normative acts, which were answering the goals of the above mentioned self-limitation and so they will be remained as good examples in the history of the administrative law reform.

¹⁷ Winter G., Development of Administrative Law and Legal Consultation on the example of Georgia, as a transitional country, Journal "Administrative Law", #1, 2013, 68.

¹⁸ Ibid.

¹⁹ Functions of Public Management in Democratic Legal State, see Sommermann K. P., Public Management in Social and Democratic Legal State, see Khubua G., Sommermann K.P. (ed.), Legal Foundations of Public Management, Tbilisi, 2016, 18-40.

²⁰ By that time it implied satisfaction of those minimal criteria, which were inevitable for Georgia to become a member-state of the EU. Just after satisfaction of these criteria on the 27th of April, 1999 Georgia became the 41st member of the European Union.

²¹ <<https://matsne.gov.ge/ka/document/view/38704>>.

4.2. Reform of General Administrative and Administrative Procedural Legislation (“Rudimentary” Europeanization)

The start of Europeanization of the Georgian administrative Law is connected with the idea of creating general administrative and administrative procedural codes. For its part this idea was coming from the Council of Europe, which in 1997 as a pre-condition for membership of Georgia defined the legislative regulation of public management in accordance with the principles of a democratic legal state.²² On the performance of this international obligation there was also the internal political will, anyway it seemed so from “outside”.²³ The guarantee of carrying out the reform successfully was also preparing the project of administrative and administrative procedural codes, which were based on the experience of different western administrative law order (Germany, Holland, partly the USA), on the basis of which Georgian legal norms were formed (about administrative proceeding, forms of activities of an administrative authority, legal confidence, state responsibility, administrative complaint, protection of the right by the rule of court and etc.).²⁴ Though, despite lots of changes the necessity of the reform of these codes even after 16 years is of high priority,²⁵ the main European line, which was defined correctly from the very start, now a talk will be of its perfection. Thus what was begun as transplantation and in that reality seemed strange, today has turned into reception and become an organic part of the Georgian legal system.

4.3. Reform of the Sectoral Administrative Legislation (mostly “random” Europeanization)

The process of approximating the sectoral administrative legislation with the western experience was mostly spontaneous. At the beginning of the 90s because of market economics, privatization, entrepreneurship freedom and a new politics of the managing sector Georgia had to create a new legislation regulating different fields.²⁶ As in that period our country was carrying out reforms almost in all directions,²⁷ many norms from the western experience were “involuntarily” introduced in haste. The point was that because of the lack of market economic experience our country began to “adopt blindly” most part of foreign legislative acts, which was followed by some part of the western experience brought over recklessly. The example of this was “Best Available Technology-BAT”, which appeared in some laws of environment protection, however, since it was a norm carried over by chance, and there were not implemented necessary mechanisms for starting it up, of course in real life it did not work.²⁸ The second example is a two-stage system of town planning and accordingly the European conception of banning of building on so called “external territories”, which though was avowed in the worked up legislation, by economic and political motivations there were introduced exceptional mechanisms, because of which the

²² In detail see *Winter G.*, The Development of Administrative Law and Legal Consultation on the Example of Georgia, as a Transitional country, Journal “Administrative Law”, #1, 2013, 69.

²³ Ibid.

²⁴ Ibid 70 and further.

²⁵ In 2016 the Ministry of Justice of Georgia and GIZ within the scope of the EU grant started a reform of general administrative and administrative procedural legislation. There was created a workgroup, consisting of Georgian and foreign experts as from an academic, as well as from a practice sphere.

²⁶ *Winter G.*, Administrative Law Development and Legal Consultation on the Example of Georgia, as a Transitional country, Journal “Administrative Law”, #1, 2013, 73 (In Georgian).

²⁷ Transition from the Soviet system to the post-Soviet system affected almost all the spheres of public life – democratization, development of market structures, development of state structures and others, high quality achievement of which at the same time was impossible, see *Khubua G.*, Modernization of State Management, see Publications of the Institute of Administrative Sciences of TSU, Transformation of Public Management in South Caucasus: experience and perspectives, Tbilisi, 2015, 20

²⁸ *Kalichava K.*, Control of Permissibility of Environment Protection Activities on the example of the immissions protection law (Comparison of Georgian, German and European Law), Tbilisi, 2016, 136-137 (In Georgian).

existence of a planning conception lost its sense.²⁹ There were lots of analogous examples in the legislation of that period. Therefore from the very start it needed drastic reform.³⁰ For this reason the above mentioned process can't be called a really approximating process of the Georgian administrative Law with the western-European experience, it was rather a mechanical process.³¹ Though despite this its importance must not be lessened, because these accidentally appeared conceptions and institutes within the scopes of the Association Agreement will give more organicity to the process going on the day of the administrative legislation reform and will simplify the reception process of the European legal experience.

5. The Second Phase of Europeanization of the Modern Georgian Administrative Law

5.1. Context of the Second Phase (Limitation within the Scope of the Association)

The second phase of Europeanization of the modern Georgian administrative law began on the 27th of June, 2014, when in Brussels between the European Union and Georgia was signed an Association Agreement (AA), which started coming into operation from the 1st of July, 2016.³² The Association Agreement substituted "The Agreement about Partnership and Cooperation" (PCA) signed in 1996 and created a new legal frame of cooperation between Georgia and the European Union. The Association Agreement belongs to the so called "new generation" agreement and comprises a component of the Deep and Comprehensive Free Trade Area (DCFTA) too, which foresees concrete mechanisms for approaching the European Union. In the preamble of the Association Agreement there is said that parties "are taking obligations to strengthen the respect to the parties' common values, based on the democratic principles of fundamental freedoms, human rightsthe supremacy of law and good management". These principles are also articulated in other articles of the Agreement. There are also given step-by-step and dynamic approaching mechanism. Concrete regulations and directives, the step-by-step implementation of which must be carried out in the Georgian legal system,³³ are represented in special attachments to the Association Agreement. As for the obligation of dynamic approximation it implies already implemented regulations and to represent current changes in the directives made by the European Parliament, also in the current regime, into the Georgian legislation.³⁴

²⁹ It should be noted that such a reform is needed even today, see *Kalichava K.*, "Influence of Georgian Building Law on business freedom", see Materials of the forum of the Administrative Sciences Institute of TSU, Perspectives of Administrative Sciences, #2, Tbilisi, 2016, 37 (In Georgian).

³⁰ *Winter G., Turava P., Kalichava K.*, Analysis and Appraisal of General Norms of Environment Protection (Permissions System, Environment Impact Assessment, damage prevention and compensation, environment planning and eco-audit), Tbilisi, 2009, 11-132 (In Georgian).

³¹ Such examples of "... transplantation are in great numbers in countries, which are liberated from the totalitarian regime or are in crisis from the point of view of economical growth, where in the euphoria of democratic changes there are introduced the models of legal acts or institutions from the countries of "the developed, democratic, western" world thoughtlessly, mechanically and chaotically" (see *Bregvadze L.*, The Theory of Autopoietic Legal Culture: Law Transfers and Legal Self-regulation in the Global Society, Tbilisi, 2016, 156)

³² Though from 2014 several obligations were already in force, within the frame of which there were worked up different laws and normative acts.

³³ Article 417 of the Associated Agreement.

³⁴ Article 418 of the Associated Agreement

5.2. Legal Nature of the Associated Agreement and Comparison it to Europeanization in in European concept

The Associated Agreement is an international legal basis of the association (union) based on bilateral rights and obligations, joint tasks and special procedures. Though, it must be noted here that despite the correlativity and reciprocity of rights-obligations, the obligation of approximation of legislation is unilateral in relation to Georgia, implying that only Georgia is obliged to approximate the national legislation to the European standards.³⁵ In common tasks there are meant taking joint measures for achieving free trade goals, just because of which the Association Agreement has a legally obligatory character.³⁶ For implementing of these obligations there is an institutional frame, namely in the country there is functioning as vertical (departments subordinated to Prime Minister and the Parliament), as well as horizontal institutional infrastructures (in kind of corresponding Ministries), but on the international level there is acting the Association Council, Association Committee and ssciation subcommittees.³⁷

In the European area the term “Europeanization of Law” is used as generally in law science,³⁸ as well as especially in administrative law science.³⁹ The Europeanization phenomenon in the field of administrative law became a subject of scientific interest even from the 80s of the XX century and it is natural, that it was being established in parallel with the formation of European administrative law. It’s true that the first signs of creation of science of transnational (European) administrative law appeared in the middle of the XIX century,⁴⁰ that was connected with the establishment of the association of the international telegraphic and Universal Postal Union,⁴¹ though in its development a crucial role was played by “the greatest legal creation in the world history”⁴² – the modern European administrative law,⁴³ consolidation of which was simultaneously based on mutual influence factors of European and national legal orders.

In the foreword to the first German book⁴⁴ in the European administrative law the author admitted that “apart from demonstrating the existed achievements (of that time) in the development of European Law” the most important issue was to ascertain the influence of main principles of the national administrative Law on the EU’s Law and on the contrary, the counter-influence of the newborn European Law on the national administrative legal order”.⁴⁵ Even today in German, French, Italian or English⁴⁶ publications the Europeam administrative Law is analyzed from the both above mentioned perspectives or considering as the influence of European legal

³⁵ See *Samkharadze I.*, Harmonization of Legal Systems: the European Union and Georgia, Ivane Javakhishvili Tbilisi State University Press, “Law Journal,” #1, 2015, 327 (In Georgian).

³⁶ *Ibid.*, 325.

³⁷ Articles 404, 407 and 409 of the Associated Agreement.

³⁸ *Coing H.*, Europäisierung der Rechtswissenschaft, NJW, 1990, 937 ff.

³⁹ *Sommermann K.-P.*, Europäisches Verwaltungsrecht oder Europäisierung des Verwaltungsrechts?, DVBI, 1996, 889 ff.

⁴⁰ *Sommermann K.-P.*, Ziele und Methoden einer transnationalen Verwaltungsrechtswissenschaft, in: *Sommermann (Hrsg.)*, Öffentliche Angelegenheiten – interdisziplinär betrachtet, Berlin, 2016, 73 ff.

⁴¹ *Ibid.*, 81.

⁴² *Sommermann K.-P.*, Europäisches Verwaltungsrecht als „die großartigste Rechtsbildung der Weltgeschichte“?, DÖV, 2007, 859.

⁴³ *Sommermann K.-P.*, Ziele und Methoden einer transnationalen Verwaltungsrechtswissenschaft, in: *Sommermann (Hrsg.)*, Öffentliche Angelegenheiten – interdisziplinär betrachtet, Berlin, 2016, 73 ff.

⁴⁴ *Schwartz J.*, Europäisches Verwaltungsrecht, Bd. I und II, Baden-Baden, 1988. In this two-volume set legal materials, which were chaotically scattered before, are gathered and systemized for the first time (see *Danwitz v. Th.*, Europäisches Verwaltungsrecht, Berlin, Heidelberg, 2008, 1).

⁴⁵ *Schwartz J.*, Europäisches Verwaltungsrecht, Bd. I, Baden-Baden, 1988, I.

⁴⁶ *Auby J.-B., Rochère J. D. (dir.)*, Droit administratif européen, 2. ed., Brussel, 2014; *Chitti M. P., Greco G. (dir.)*, trattato di diritto amministrativo europeo, 2. ed., Milano, 2007; *Craig P.*, Eu Administrative Paw, Oxford, 2006 (cited *Sommermann K.-P.*, Ziele und Methoden einer transnationalen Verwaltungsrechtswissenschaft, in: *Sommermann (Hrsg.)*, Öffentliche Angelegenheiten – interdisziplinär betrachtet, Berlin, 2016, 76 f.).

norms on the national legislation, as well as from the perspective of the counter-influence of different legal cultures of the Member-States on supranational law.

Thus in the European interpretation Europeanization of Law in the point of view of Eurointegration is a dynamic process of approximation of national and supranational legal systems, which is not a voluntary (political) act, but is more of compulsory (legal) character. Therein, there are distinguished from each other vertical and horizontal influences/interrelations. Vertical Europeanization implies “transformation of national administrative legal order on the basis of the European concept and approaches having a compulsory force and formation process in a new manner”,⁴⁷ or inevitably conditioned by legal order of the European Union”...process of newly interpretation, substantial changes and replacement of the national administrative Law⁴⁸.

Horizontal Europeanization emphasizes that the influence of the EU Law on Member-States Law is not unilateral, but is basing on bilateral connections.⁴⁹ European administrative law was mostly established as a result of dogmatic conceptions and institutions originated in the bosom of the national legal order, which in a unified form are returning to Member-States.⁵⁰ At the same time for efficiency of European law a proper support must be appeared in national law that in dynamics is based on such systematic elements of overcoming conflicts between legal orders, as: direct action of European law, reception, approximation, a conformist explanation of a norm by a judge and etc.⁵¹

6. Reform (Europeanization) Strategy of Georgian Administrative Law

6.1. Practical Purpose of Comparative law in the Process of Reform and Europeanization of Law Science

Within the frame of the Association Agreement Georgia has taken obligations for implementing such norms, in connection with which it did not have proper experience. In the European integration process the national law reform implicates either origination of new conceptions and institutes or thorough perfection of the existed ones. Therefore unknown norms cannot be implemented successfully without strengthening of the role of comparative law. This method, sprung in the bosom of private law,⁵² because of its multifunctional purpose (communication and dialogue between legal cultures, deep comprehension of own legal values, transferring of national law in foreign legal order, harmonization of law⁵³), besides its scientific perception from the point of view of the legislative system reform, has a great practical purpose.⁵⁴ It is a source of deep changes and creating new legal orders as on national, as well as on supranational level: 1) On the national level a legislator or a judge, which is interpreting a law for the purpose of implementing the right legal practice, foresees the foreign law experience,⁵⁵ that is done basing on the own will, with which it differs from the processes of legal transfers caused by the

⁴⁷ *Schmidt-Aßmann E.*, Die allgemeine Verwaltungsrecht als Ordnungsidee, 2. Aufl., Heidelberg, 2004, 31.

⁴⁸ *Sommermann K.-P.*, Europäisches Verwaltungsrecht oder Europäisierung des Verwaltungsrechts?, DVBI, 1996, 191.

⁴⁹ *Danwitz v. Th.*, Europäisches Verwaltungsrecht, Berlin, Heidelberg 2008, 4-7; *Siegel Th.*, Europäisierung des Öffentlichen Rechts (Rahmenbedingungen und Schnittstellen zwischen dem Europarecht und dem nationalem (Verwaltungs-) Recht, Tübingen, 2012, Rn. 69.

⁵⁰ *Rengeling H.-W.*, Deutsches und Europäisches Verwaltungsrecht – wechselseitige Einwirkungen, VVDStRL, 53, 1994, 217 ff.

⁵¹ *Zuleeg M.*, Deutsches und Europäisches Verwaltungsrecht– wechselseitige Einwirkungen, VVDStRL, 53, 1994, 165 ff.

⁵² In private law the meaning of the comparative method in the early period was conditioned by transnationalization of personal and commercial relations, which only later became relevant in the field of public management, (see *Schwartz J.*, Europäisches Verwaltungsrecht, 2. Aufl., Baden-Baden, 2005, 74).

⁵³ *Kischel U.*, Rechtsvergleichung, München, 2015, 49 ff.; 56 ff.; 63 ff.; 68 ff.

⁵⁴ *Sommermann S.-K.*, Die Bedeutung der Rechtsvergleichung für dieFortentwicklung des Staats- und Verwaltungsrechts in Eurioa, DÖV, 1999, 1019 ff.

⁵⁵ *Schwartz J.*, Europäisches Verwaltungsrecht, 2. Aufl., Baden-Baden, 2005, 76.

influence of the colonial regime.⁵⁶ As opposed to it the process of voluntary transfer of the foreign law is due to the development of the country, the growth of its international reputation or the will of execution of international obligations;⁵⁷ 2) In case of supranational law an inevitable precondition of juristic act is also comparative law, which is conditioned by two circumstances. The first circumstance - by means of comparative law to define what kind of values and principles will be positive within the concrete inter-ethnic unity.⁵⁸ The second circumstance – lots of legal institutes of supranational legislation are based on such fundamental principles, which are common for Member-States.⁵⁹

The success of comparative law is connected with internationalization of law science. As modern administrative law “...is mostly a result of breaking of a legal system locked in national-state borders”,⁶⁰ for reflecting international perspectives it requires Europeanization/internationalization of proper (law) science.⁶¹ In this way proper intellectual resources must be mobilized. For its part it requires creation of a proper infrastructure and a united research area,⁶² in which the main role must be played by foreign connections of universities and close international networks of law scientists. It is certain that Europeanization of Georgian administrative law needs “an intellectual law specialist thinking in European manner”,⁶³ which will not be confined in the shell of the national legal culture and provincial legal order and in the process of searching for united transnational legal values is leaving particular legal thinking limits.

6.2. Universalistical and Culturalistical Contexts of the Reform (Especially Considering Membership Criteria for OECD (Organization for Economic Cooperation and Development))

Europeanization Georgian administrative Law, as a missionary goal, demands reception or transplantation of European legal experience (in which are meant as supranational, as well as national legal systems). Achievement of this goal, or more correctly, capability of achieving the goal for its part is connected with culturalistical and universalistical contexts. According to *the culturalistical context* law is discussed as a part of historical, economical and cultural unity of a concrete state, in the conditions of which successful transfer of the unknown legal order is possible only in the conditions of fundamental reforms of the proper state, which means as political, as well as administrative and legal culture.⁶⁴ Authors, who are sharing these approaches of the sociological school of jurisprudence, doubt about a success of law transfer, unless there is the suitable cultural readiness for it. According to Lawrence Friedman, “It is impossible for a legal system to play the same role and cause the same results in the life of any other country, as it happened in the original country”.⁶⁵ Radically skeptical is the following declaration: “The existence of law is possible without a state, but impossible without culture”.⁶⁶ This last assessment is exaggerated. The point is that there are cases when law has a function of transformation, including creation of new cultural values. If it had not been so, lots of paragraphs of the Association Agreement

⁵⁶ Kischel J., *Rechtsvergleichung*, München, 2015, 49, 67.

⁵⁷ Ibid.

⁵⁸ Schwartz J., *Europäisches Verwaltungsrecht*, 2. Aufl., Baden-Baden, 2005, 77.

⁵⁹ Kischel K., *Rechtsvergleichung*, München, 2015, 89 ff.

⁶⁰ *Wissenschaftsrat (WR)*, *Perspektiven der Rechtswissenschaft in Deutschland (Situation, Analysen, Empfehlungen)*, Hamburg, 2012, 29.

⁶¹ Ibid.

⁶² *Duve Th.*, *Internationalisierung und Transnationalisierung der Rechtswissenschaft – aus deutscher Perspektive*, Frankfurt a.M., 2013, 7 ff.

⁶³ About conception see *Coing K.*, *Europäisierung der Rechtswissenschaft*, NJW, 1990, 937 ff.

⁶⁴ *Sommermann K.-P.*, *Erkenntnisinteressen der Rechtsvergleichung*, in: *Gamper/Verschraegen (Hrsg.)*, *Rechtsvergleichung als juristische Auslegungsmethode*, Wien, 2013, 205.

⁶⁵ *Friedman L.M.*, *The Legal System*, New York, 1975, 195.

⁶⁶ *Bregvadze L.*, *Autopoietic Law Culture Theory: Law Transfers and Legal Self-regulation in the Global Society*, Tbilisi, 2016, 246.

would have been fictional. If there is a political will about reform (transformation), then it is quite possible to accomplish it. The continuance of this judgment is a *universalistic context* of the reform, which is based on argumentation, that any political unity has legal and organizational issues, which enables legal transfer to be carried out without any problem, especially from the point of view of generally acknowledged legal principles (for examples fundamental rights).⁶⁷ In practice we have examples of both of them and therefore the truth is somewhere in the middle.⁶⁸ Of course transfer of foreign law is successful, when there is readiness, in an individual legal tradition,⁶⁹ in such a case the transplanted law goes through refining, perfecting and is transformed into a receptive law, “though there are certain universal values, which are inevitable, if there a political will in any society to create and establish market economics and legal state”.⁷⁰ A private property guarantee, limitation of public administration based on law and etc. are those universal values, without which the above mentioned goals cannot be reached and once again I will say the same: the key point is a political will.⁷¹ At the same time there are such extreme cases, when there is absolute non-acceptance of a new norm, though it does not mean, that the norm would not work, but it means that in a democratic state public non-acceptance of the norm will be turned into a source of formation/correction of the political will.⁷² Even a state of the totalitarian political regime avoids accepting a norm, implementation of which will be connected with great efforts, violence and etc. The more particularistic (not universalistic) the issue is, the harder the obstacles are. So a legislator drawing a right line between these two values gets success.

Thus we must talk about individualistic approaches of law reception, as an exchange process of legal institutions and procedures means not an acculturation process, but a reform of legal institutes in parallel with a transcultural process.⁷³ Especially must be foreseen persistent (developing) public administrations, which in most cases fall short of expectations, articulated in active legislations. For awarding legal state qualification to the public administration system the acceptance of legislative regulations is not enough, such as for example, modern general administrative code..., It is necessary to add good public administration culture oriented on principles and values”.⁷⁴ Just in connection with this, within the limits of so called Copenhagen criteria, in OECD report of 2012 („Rethinking Europe’s, Rule of Law and Enlargement Agenda: The Fundamental Dilemma“) there was emphasized unambiguously by the experts that within the frame of the joining procedure on assessing of a candidate state more importance must be given to the analysis of the socio-economic reality of the state

⁶⁷ *Sommermann K.-P.*, Erkenntnisinteressen der Rechtsvergleichung, in: Gamper/Verschraegen (Hrsg.), *Rechtsverglei- chung als juristische Auslegungsmethode*, Wien, 2013, 206.

⁶⁸ *Winter G.*, Administrative Law Development and Legal Consultation on the Example of Georgia, as a Transitional coun- try, *Journal “Administrative Law”*, #1, 2013, 83 (In Georgian).

⁶⁹ *Sommermann K.-P.*, Erkenntnisinteressen der Rechtsvergleichung, in: Gamper/Verschraegen (Hrsg.), *Rechtsverglei- chung als juristische Auslegungsmethode*, Wien, 2013, 207.

⁷⁰ *Winter G.*, Administrative Law Development and Legal Consultation on the Example of Georgia, as a Transitional coun- try, *Journal “Administrative Law”*, #1, 2013, 83-84 (In Georgian).

⁷¹ Professor *Khubua G.* fairly mentions that “... A politically neutral law does not exist, no matter how distant from the politics sphere are the relations it is regulating, the fact of acceptance (or non-acceptance) of this law is already a certain politics, as cases represented in a legislative agency, as a result of consensus or confrontation of certain political forces” (see *Tsnobiladze P., Khubua G., Khmaladze V., Metreveli N., Kapanadze O.*, *How is law created*, Tbilisi, 2000, 43 (In Georgian). About General Interrelations of a Law and Politics, see *ibid*, 39-46.

⁷² An example of it is a draft law about hunting of the latest period, on public discussions of which the society society ex- pressed a complete non-acceptance of banning lead-containing bullets (as the weapons acquired by them were not fitted to iron-containing bullets) and banning hunting beyond the hunting territory (because hunters did not want to spend time organizing hunting). The reaction was so cute that the authority had to retreat temporarily and the prepared draft law was put on the shelf.

⁷³ *Sommermann K.-P.*, Erkenntnisinteressen der Rechtsvergleichung, in: Gamper/Verschraegen (Hrsg.), *Rechtsverglei- chung als juristische Auslegungsmethode*, Wien, 2013, 208.

⁷⁴ *Sommermann K.-P.*, *Public Administration in a Social and Democratic Legal State*, see *Khubua G., Sommermann K.-P. (ed.)*, *Legal Grounds of Public Administration*, Tbilisi, 2016, 23 (In Georgian).

compared with the legal one,⁷⁵ which is a basis of defining legitimacy of public administration. Therefore within the association in the frame of Europeanization of Georgian administrative law there must be created such norms, which will work really and meet the above mentioned criteria.

6.3. Reform in the Point of View of the International Legal Cooperation

In connection with the issue of legal transfer is very important international legal cooperation formats. From this point of view G. Winter in structures and processes distinguishes missionary, bureaucratic and Socratic aspects.⁷⁶ In connection with missionary issues we can simply say that obligations taken within the scope of the Association Agreement is the frame, beyond which must not be acting donor organizations and foreign experts, involved in the limits of the international legal cooperation. As for the course of cooperation, the process must be inevitably going on the basis of Socrates method, when lawmaking is carried out by intensive cooperation of foreign and local experts. Just by this way we can reach that ideal format when universalist and culturalist contexts are successfully merging, the importance of which was already mentioned above. Historically so was done in Georgian Law. Any case of transferring of foreign law into the national space legislation was connected with real activities. It implied that on the basis of foreign experience there was created a norm suitable for Georgian national identity and national security of the country.⁷⁷ It's true that in this process many dead norms were emerging⁷⁸ that is inevitable but in the course of time is corrected, though in main issues there was compatibility and clearness.

7. Conclusion

The Europeanization process of Georgian administrative law is a phenomenon appeared in the period of independence. In the post-Soviet period Georgia reached a great success in this direction, this was completed with the Association Agreement. Within the association the post-Soviet period for Georgian administrative law was over and began a period of completely new perspectives of the reform, touching especially private parts of administrative law. In the first place by signing the Association Agreement there was defined a missionary issue or the choice, what Georgia has done from the point of view of approximation of national law with the European standards. Practically how must the reform of Georgian administration law (Europeanization) be done? In the present article there is an attempt to clarify principal and formal aspects of the reform. As to the principal aspect, Georgia will be able to reach success in this process, if it manages to merge universalist and culturalist contexts of the reform. For transformations and reforms a crucial point is a political will, which will enable universal legal values (which will be in compliance with the national constitutional identity) to become an organic (cultural) part of the country's legal system. Such a political will has been already revealed in Georgia and there are lots of successful historical examples of such a reform. As for formal aspects, for the purpose of the reform to be more based on the national cultural soil, it is inevitable to have more local experts involved in the international legal cooperation. At the same time Georgian legal science and generally juristical education must be internationalized/Europeanized more effectively.

⁷⁵ Ibid, 24.

⁷⁶ *Winter G.*, Administrative Law Development and Legal Consultation on the Example of Georgia, as a Transitional country, *Journal "Administrative Law"*, #1, 2013, 82-83 (In Georgian).

⁷⁷ *Zoidze B.*, Reception of European Private Law in Georgia, Tbilisi, 2005, 5-9 (In Georgian).

⁷⁸ Ibid, 19-20.

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Davit Churghulia*

Problematic Issues of Protection of the Rights of Owners of Neighboring Property in Issuing Construction Permits and Construction Planning

The article deals with the issues related to the protection of the property rights of neighboring property while construction planning and issuing construction permits. The mentioned issue is one of the cornerstones of the construction law. The importance of the issue is due to a significant increase in construction activity in recent years and issues of protection of the rights of persons participating in this process as well as the issues of protection of the rights of those who are directly or indirectly related to civil work. In addition, it should be emphasized that the growth of architectural-building activities is directly related to the improvement and development of the legislation in this sphere; therefore an important challenge is the analysis of the applicable legislation and the study of the probabilistic issues identified during its practical use. The article focuses on the basic concepts of the construction law and its constitutional-legal basis, the rules and stages for issuing building permits, peculiarities of administrative proceedings, participation of persons interested in production and protection of their interests. It also reviews the legal status of the owners of the neighboring property while building the construction, which is necessary for the effective protection of their rights. In addition, the shortcomings existing in practice, specific positions related to the matter are reviewed and the specific ways of elimination of deficiencies are discussed, which hopefully will make its modest contribution to the development of the relevant field.

Key Words: *Construction Law, Construction, Construction permit, Development Regulation Plan, Urban Planning document, neighboring building.*

1. Introduction

One of the most advanced places in the fields developed in recent years in Georgia takes the construction activities, and therefore a significant challenge is the correct and consistent legal regulation of the sector. Construction law is one of the disciplines regulated by the special part of administrative law. Despite its actuality, construction law is less studied in legal science.

As it is known, for the legislative regulation of the construction activities it was necessary to make relevant amendments to the number of laws or regulations, the new regulatory acts have been adopted and important procedures have been issued, However, existing legislation requires a number of important issues to be developed and clarified to ensure that all directions of the field to be encompassed within the right legal frame. The legislative innovations adopted have demonstrated in practice many shortcomings and issue, which requires not only the amendments and perfection but also the new approaches and harmonization with the international norms.

One of the most important issues is the specification of issuing construction planning and construction permits and implementation of measures to protect the rights of owners of neighboring property. In internal organs of state control agencies, as well as in the higher administrative authorities and court the number of applications, lawsuits and appeals has increased dramatically; the plaintiffs or the interested persons are asking to

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study the facts of violation of their rights by the nearby building owners and protection of their infringed rights. In practice, the number of neighboring disputes has been raised mainly due to the consequences resulted in the enforcement of the acts issued by the administrative organs.

That is why the focus is made on the analysis and study the correctness of the measures carried out for using the land plots for construction, the shortcomings relating to the construction planning, specific legal forms of the activities of the administrative bodies in the field of construction permitting process, participation by the acts issuing agencies, the guaranteed rights of the owners of the properties in the vicinity of the planned construction, protection of their interests, practice gaps and searching for the ways to solve the mentioned.

2. Basic Concepts of Construction Law and its Constitutional Legal Basis

“Construction law includes both public and private construction law. The subject of private construction law is the private legal relationship arisen in the construction process and balancing the private interests of neighbors. Public construction law, as a special part of the administrative law, is the combination of the norms that - taking into account the public interests - regulate the issues of using the land plots for construction, namely: the admissibility of the construction of a building, the construction process, the necessary characteristics of a building, the legal regime for its use, change and dismantling; also it establishes the norms for protection of law order in the construction field and the scopes for the use of land for construction purposes.

Construction Law is a complex area that has been constantly growing in recent decades. This is due to the growth of the construction process as well as the lack of land plots for construction purposes. As far as the overuse of the territories for the construction may lead to the violation of the rights of third parties, as well as public interests, it is clear that there is the need to subordinate the use of the land plots for construction and other purposes to the certain rules and restrictions, which provides regulated usage of the land.¹

According to legal nature, there is also an opinion that the construction law is a hybrid field of law, since it includes both public and private elements.² As noted above, the construction law is divided into two parts - public and private construction law; the public construction law - the subject of this research – in turn is divided into the construction planning and construction order law. “Construction planning law is related to the territory. It belongs to the territory planning law and includes the issues related to the use and arrangement of the territory within the territorial units (town development). The town development law, in turn, is divided into general and private parts. The general part incorporates the issues such as a general plan of city planning (for example, “General Plan for Prospective Development of Capital City”), use of the territory for construction and other purpose, land plots utilization and the environmental protection measures. The general part establishes the legal and contextual preconditions for development of the utility urban planning. The norms of the special part regulate the problematic issues such as urban construction rehabilitations works and renovation, as well as promotion, protection and maintenance of city building.

Construction order law is linked to the construction object and sets the legal requirements applicable to the buildings that are to be constructed.³ “Given the scope of the regulation, construction order law includes the norms establishing the administrative proceedings and restrictions in the construction field for ensuring public order and safety, maintenance of the sustainability of the buildings, also setting the obligation for elimination of any illegal and dangerous conditions.”⁴

¹ Turava P., Basic Concepts and Institutions of Construction Law, Legal Journal №2, 2009, 121 (in Georgian).

² See Details for the Legal Nature of the Construction Law: *Gegenava D.*, Construction Law and its Legal Nature, Legal Journal “Sarchevi”, 1(2), Tbilisi, 2011, 24-32, (in Georgian).

³ Turava P., Basic Concepts and Institutions of Construction Law, Legal Journal, №2, 2009, 122 (in Georgian).

⁴ Ibid, 122.

It is impossible to talk about the construction law, its legal nature, basic principles, other problematic issues and not to pay attention to the right to property. The Constitutional legal basis of the constitutional law is the right to property. The constitutional grounds of the construction law are also derived from Article 1012 of the Constitution of Georgia that ensures guarantees of local self-government, guarantee of local authority within the exclusive authority.

“When studying the constitutional-legal basis of the construction law, special attention must be paid to the constitutional right of property. Property rights recognized by the Article 21 of the Constitution of Georgia (hereinafter referred to as “CG”) is, on the one hand, a guarantee of ownership as an institution and, on the other hand, the right of a person to the property. The essence of the institute for property rights is the protection of private property as an objective value and the real ensure of its existence, which is primarily aimed at legislation; the legislator cannot publish such norms that would challenge the private property as an institution. The Constitution of Georgia recognizes the basic rights as the directly applicable law, which limits all three branches of government. The guarantee of the property as a right of a person serves to protect the legal status of the owner, in particular his/her personal right to a certain property. All of these grant individuals the freedom in the property field and, thus, the ability to independently determine his/her own life.

The social embrace of property rights takes into account the reality that the land is not multiplied, at the same time, in many ways, is indispensable. In this regard, it is limited to its free use. Socially legal and public order stipulates that the public interest in property ownership should be exposed clearer than the other property rights. In other words, land in legal relations cannot be considered as a case of movable item. In determining the contents and scope of property rights on the land, the legislator is strongly committed to the need for socially fair use than in other objects of ownership. The social function of the property on land (social bound) stipulates the exclusive limitation of owner to the property other than the property. Ownership right, on the one hand, is the guarantee of the ownership as an institution and, on the other hand, the guarantee of the right to ownership of a person, which means the freedom of construction.

Along with other opportunities of land use, the content of the property determines the possibility of using it for construction. This follows from the fact that the constitutionally protected property is characterized by the possibility of private use, especially the property to land, which, without the possibility of its use and harvesting, would not have been any value. The use of land and its cost increase subjects to the constitutional right of property. In this case the conversation will not affect the possibility of a simple profit, hopes and predictions of the future, which are not subject to constitutional right to property protection. The possibility of use of land for the construction is the essential component of ownership rights. The constitutional right of property in general and the possibility of use of land for construction purposes may be restricted by law. The norms of the construction law establish the limitation of this right under Article 21 of the Constitution and within it.⁵

As noted above, in this case the property right cannot be understood solely as the right to property, the institution, on the one hand, as on the other hand it implies property rights as a person’s right to freedom of construction. Although the owner of the land plot has the freedom to implement the construction under the applicable legislation of Georgia, this freedom is fulfilled where the legal rights and interests of others begin. Therefore legal acts regulating architectural-building activities determine the limitation of this right, naturally based on the Constitution and within its scopes. As it is known, the right to ownership is not an absolute right; the Article 21 of the CG provides for the restriction of property rights. Naturally, in this case, it does not mean the forms of restriction of property rights in general; the goal of this research is to discuss the problem of restricting the right to property rights in legal-building terms. As it was noted, the protection of the rights of the owner of the building is completed where the threat of violation of the rights of others is threatened. In this case, it is noteworthy to

⁵ *Turava P.*, Basic Concepts and Institutions of Construction Law, Legal Journal №2, 2009, 123, (in Georgian).

protect the rights of other property owners around them in the vicinity of the construction companies.

While reviewing the constitutional legal principles of construction, it should be taken into consideration that the measures of protection of the right to property guaranteed by the Constitution and its principles are applicable until the owner of the property acts on the basis of the principle of legitimate, proportionate use of its property. “Along with the objective-legal provision of property, the first sentence of Article 21 of the Constitution protects the property of each individual.”⁶ The constitution’s record, which clearly states that the property is recognized and inviolable, should be considered in the context of the issue in respect of property rights for each person, in terms of its purposeful use, the protection of ensuring this usage. In accordance with the construction law, taking into account the diversity of subjects directly or indirectly involved in the construction process, protection of property rights is a cornerstone of construction law.

3. Construction Planning

3.1 Concept, Significance and Place of Construction Planning in Construction Law

Construction planning is a crucial step in the process of construction, further development of areas dependent specifically on its accuracy. The basis for construction planning is envisaged by the law of Georgia on “Spatial Arrangement and Basis for Urban Construction”. This law is a significant achievement in terms of state planning activities and private activities to be implemented by private individuals. If look at the scopes of regulation of the law, one can have a clear vision that for the country’s sustainable development and population’s healthy and safe and creative environment this law regulates the spatial arrangement and urban construction process, including settlement, infrastructure development – taking into account the environmental and cultural heritage and sets the rights and obligations of the national authorities, natural persons and legal entities. This law establishes the subject of spatial arrangement and urban planning, principles, priorities, goals and tasks, forms and role of spatial-territorial planning and planning documents in the development of Georgian territory. Consequently, it is clear that its importance is not expressed only in the proper way of landing, but it also provides the conditions of life in a safe and healthy environment⁷.

“Successful solutions of the problems faced by modern major cities depend largely on the perfection of city spatial organization, which, above all, means rational use of the territory. In modern complex using of the land resources it is necessary to remember that its waste and loss cannot be compensated, so it is necessary to study its quantitative and qualitative sides in detail.”⁸ Therefore, it is necessary to develop the general plan of the city land use plan properly, tailored with the real situation. The main plan of land use is the main component of urban planning. Urban planning is, according to the “Local Self-Government Code”, the discretionary authority of the local self-government, more precisely, the municipalities have the power to determine the need for planning urban settlement. Construction planning is related to the architectural plans to be implemented by the local municipalities, in particular the urban planning policy and the planning of the construction of certain territories by private individuals. A brief overview of both of the issues and the need to discuss the problem is related to the issues of third parties’ rights protection in planning. The discretionary authority of local self-government does not imply that urban planning is being carried out in general in the space empty of legal requirements. “There are following criteria for the legality of the plan:

⁶ *Izoria L., Korkelia K., Kublashvili K., Khubua G.*, Comments to the Constitution of Georgia, Human Fundamental Rights and Freedom, Tbilisi, 2005, 146 (in Georgian).

⁷ See the law of Georgia on “Spatial Arrangement and Basis for Urban Construction”, article 1, [24.06.2005] (in Georgian).

⁸ *Tsiklauri B.*, Urban Construction (Construction Planning) in Construction Law, Journal “Sarchevi”, Tbilisi, 2011, 39 (in Georgian).

- • Criteria of material legality that imply the compliance of the construction of urban plans with basic human rights, planning guidelines, field requirements, compatibility principles, etc.
- • Formal lawful criteria that involve the obligation of the type of administrative proceeding, the participation of the public and the stakeholders and other preconditions.
- These criteria of legitimizing urban planning are fully compatible with the requirements of the legal and democratic state.⁹

3.2 Rights of Owners of Neighboring Property at Construction Planning and Review of the Existing Problematic Issues

Urban planning in Georgia is carried out in accordance with the Law of Georgia on “Spatial Arrangement and Basis for Urban Construction”. According to the law, planning is carried out through the Land Use Plan and Development Regulation Plan. This is referred to as a two-stage system.¹⁰

Legal definition of urban land use master plan is a document that defines the use of urban areas (land use) and the development of the basic parameters of environment and cultural heritage of spatial conditions, transport, engineering and social infrastructure, economic development and the spatial aspects of accommodation territorial issues. The urban development regulation plan is a document that sets out the land use zones for urban areas (sub-zones) and/or specifies the characteristics of individual units, development planning and architectural features of the spatial volume, placement of buildings, including the planning parameters, also specifies heritage protection and urban development characteristics, the relief organization, accomplishment and green areas, engineering and transportation infrastructure¹¹.

Realization of the right to construction guaranteed by the Constitution is significantly depended on the General Plan of Land Use and the development plan, since the plan is one of the key reasons for approving a construction permit. Nevertheless, it is necessary to note that in both cases the lawful interests of third parties, together with the realization of the right of construction, are legitimate interests. In order to better understand both of them, it is necessary to briefly describe the threats that may be arisen during preparation of the general land use plan and its implementation (local authorities) to the legitimate interests of individuals as well as the dangers and risk to the lawful interests of private regulation plan development and its approval process. It should be noted that although the regulation plan is elaborated by an interested persons, but it is approved by the local government, accordingly, in case of the development activities to be carried out by the government or an individual, the values to be protected is the individual’s guaranteed right.

“The general plan of land use has a preparatory function: it establishes general area zones and / or construction subzones within the framework of which the regulating plan for the lower level determines the prerequisites for the issue of a construction permit (the type of use, the specific parameters of the planting and other). In this case, the general plan of land use is not the basis for decision making. At the same time, the general plan of land use, except for general data, includes the coefficients of development, its intensity and planting, so in such case it is the basis for decision on construction permit and therefore it is obligatory to individuals. Unlike the general plan of land use, the development regulation plan establishes legal obligatory provisions that accurately determine the type and volume of the construction of a specific land plot, which is the basis for making a decision on issuing a construction permit.”¹²

⁹ *Kalichava K.*, Construction Law, *Khubua G.*, *Sommermann K.P.*, Legal Grounds for Public Governance, TSU Administrative Sciences Publication, Tbilisi, 2016, Vol. 3, 270 (in Georgian).

¹⁰ Two-stage planning details are available in *Kalichava K.*, Construction Law, *Khubua G.*, *Sommermann K.P.*, Legal Grounds for Public Governance, TSU, Administrative Sciences Publication, Tbilisi, 2016, Vol. 3, 270-272 (in Georgian).

¹¹ See the law of Georgia on “Spatial Arrangement and Basis for Urban Construction”, article 1 [24.06.2005].

¹² *Kalichava K.*, Construction Law, *Khubua G.*, *Sommermann K-P.*, Legal Grounds for Public Governance, TSU Admin-

Development of a land use plan is naturally important but it should be noted that it is still a document setting the general regulations. The most important document for the subject of the research is the development regulation plan, its order and its contents. “The content of the development regulation plan determines the legal nature, which it has - it is the basis for making a decision on issuance of a permit. In conclusion, it includes:

- • Type of use of land for building
- • Parameters of use of land for building
- • Placement of buildings on the land plot
- • Other information. ¹³

The main thing in this case is the information on the development regulation plan. As the plan determines the type of use of land for the construction, this implies that the development of a plan for regulating the development of the property of the existing construction site should not be limited to the use of the property.

Therefore, when developing the development regulatory plan, it is necessary to follow the principles of Law of Georgia on “Spatial Arrangement and Basis for Urban Construction”. If issues are explained in the above-mentioned order, it should be noted that building of the premises on the land plot and its parameters (dimensions) shall gain great importance. It shall be naturally meaningless unreasonable development planning in the unified environment, therefore, if a building regulation plan determines the land area of the building for the installation conditions and the dimensions of the property in such manner that the owners of adjusting properties subject to harmful influence on their stability and strength, naturally the third persons interests shall not be protected. That is why it is important to note that in the realization of the city’s architectural-development development and construction rights, the primacy is the protection of the rights and interests of the persons whose living environment is reflected in the design. It is necessary to protect the guidelines defined by the Law of Georgia on “Spatial Arrangement and Basis for Urban Construction“. Article 5 of the Law strictly sets out the principles that directly lay the basis for human rights and the protection of private property protected by the Constitution of Georgia, the right to secure a safe and healthy environment in relation to the protection of the environment and the recreational areas and the protection of cultural heritage.

According to the above, in the form of a resume, it can be said that the construction planning (urban construction) place in the construction law system is of utmost importance and can be reflected in both private construction and public law. Consequently, the role of construction planning in public construction law is large, since taking into consideration the public interest in placing the land plot is a necessary precondition; these requirements are set out in the regulatory legislative acts. Building planning measures should be taken so that the risk of violation of fundamental human rights violations does not lead to harmful consequences of their interests, since human rights protection is one of the most important institutions of the construction law.

4. Construction Permit

4.1 Rule and Stages of Issuing Construction Permits

The rule and terms of issuing a construction permit in accordance with the applicable legislation of Georgia are regulated by the Law of Georgia on “Licenses and Permits“, as well as the Resolution №57 of March 24, 2009 of the Government of Georgia on the Rules of Issue of Construction Permit and Construction Conditions (hereinafter referred to as “Resolution”). The first article of the Resolution states that this Resolution includes

Administrative Sciences Publication, Tbilisi, 2016, Vol. 3, 272-273(in Georgian).

¹³ Ibid, 272-273.

the sphere of regulation of legal public relations relating to the construction permit on the territory of Georgia. Namely, it regulates the process of issuance of construction permit on the territory of Georgia, implementation of permit conditions and the process of putting the buildings into operation.¹⁴

The significant achievements of the Resolution are the principles on the basis of which the construction permit is issued and the construction conditions are determined. These principles are:

- Life and health security;
- Ensuring safe environment;
- Protection and maintenance of cultural heritage;
- Protection of property rights and realization;
- Publicity;
- Etc.

In accordance with the requirements of the Georgian legislation, the construction permit is issued in three stages:

I stage – establishment of urban construction conditions (approval of the terms of use the land plot for the construction)

II stage – agreement of the architectural-construction project

III stage – issue of construction permit

Individual administrative proceedings are underway at each stage. Of course the administrative-legal acts related to the stages must be in compliance with the requirements set forth in the Chapter IV of the General Administrative Code of Georgia (hereinafter referred to as “GACG”). Positive completion of administrative proceedings envisaged in the previous stage is a guarantee that the permit seeker will be given the opportunity to start the procedures provided by the next stage. The construction permit shall be issued by the simple administrative proceedings established by the Chapter VI of the General Administrative Code of Georgia and in accordance with the Law of Georgia on Licenses and Permits.

While reviewing the construction permit and its issuing rule, we have to focus on the important issues such as classes of buildings. Buildings are divided into 5 classes:

- I class – buildings, which do not require construction permits;
- II class – buildings with low risk factor;
- III Class – buildings with a medium risk factor;
- IV class – buildings with high risk factor;
- V Class – building with excessive risk factor (buildings of special significance)¹⁵.

It is necessary to interpret the construction permit before reviewing the peculiarities of the stages, its participant subjects, the rights of the third parties and their guarantees, and the gaps in practice; also it is necessary to determine the conditions for using the land plot for the construction and agreement of the architectural design.

Conditions for the use of the land plot according to the Resolution are the conditions which are necessary to be fulfilled for the construction activities on a particular construction land plot. Based on these conditions, the construction documents are drawn up. The conditions determined for the use of the land plot should reflect the mandatory requirements set forth by the legislation, including this Resolution, which are necessary for drafting

¹⁴ Resolution №57 of March 24, 2009 of the Government of Georgia on the Rules of Issue of Construction Permit and Construction Conditions, article 1.

¹⁵ Resolution №57 of March 24, 2009 of the Government of Georgia on the Rules of Issue of Construction Permit and Construction Conditions.

the documents.

As for the next stage, the agreement of the architectural and construction design, it should be noted that the legislation gives the opportunity to unite the second and third stage with the request of the permit seeker. This option is related to the great interest of construction and the willingness to start construction in the timeframe by the investors. The possibility of the agreement of the architectural-building design may have the permit seeker only after determining the terms of the use of the land plot.

The issuance of a construction permit is the last, third stage of the administrative proceeding and after its completion there shall be issued an individual-legal act, which is the legal basis for the construction.

Each of the above described stages is characterized by certain peculiarities. The number of subjects participating in them makes them interesting and diverse.

4.2 Peculiarities of Administrative Proceedings for Issuing Construction Permits and Participation of Interested Persons

A brief overview of the procedure for issuing the construction permits should be discussed in order to better understand the legal relations arising in the issuance of construction permits, it is also necessary to review the acts used in the issuance of a permit, as well as to analyze the entities and their rights and obligations.

The administrative proceedings for issuing a construction permit shall be in compliance with the rules and conditions of administrative procedure set forth in Chapter VI of the GACG. Construction permits are issued through simple administrative proceedings. The exception is the first stage – establishment of the urban construction conditions (approval of the terms of use of the land plot for the construction). It is somewhat characterized by the peculiarities, in particular the legislator has determined that the decision on approval of the terms of the use of the land plot is made by the administrative body issuing the construction permit in the form of public administrative procedure established under Chapter IX of the GACG. This is a very important reservation in the legislation and it is firstly related to the publication of information on implementation of the planned construction in the territory to any interested person.

The condition that the first stage is managed through the public administrative proceedings was not envisaged by the initial edition of the Resolution №57, so the neighboring landowner received information about the construction of the building only when a construction permit had been issued and on that basis of that permit certain types of works had been commenced, so the review of the first stage through the public administrative proceedings should be considered as an important achievement in terms of the rights of the person concerned.

While discussing the construction relations in terms of the administrative context, the concept of the stakeholders was also noted. According to the GACG, the interested party is any natural or legal person, an administrative body, for which the administrative legal act is issued and the legal interests of which is directly subjected to the actions carried out by the administrative body or an administrative legal act.¹⁶ “It is possible that a particular interested party does not participate in the activities related to the issuance of construction permits. In what way do we put such a person’s interest in this case? If the permit seeker is involved in the event, even in silence, the third person whose legitimate interest may be limited by any form of activity may be in more serious conditions.”¹⁷

Here we face a major problem relating to the realization of those owners’ rights and neglect of their interests, who are the owners of the property located in the vicinity of the construction; their living conditions, the right to live in healthy environment, is strengthened by the Constitution and other legislative acts. “What pro-

¹⁶ General Administrative Code of Georgia, article 2.

¹⁷ *Tsiklauri I.*, Issues of Administrative Proceedings for Issuing Construction Permit, Davit Batonishvili Institute of Law, *Giorgadze L.(ed.)*, Tbilisi, 2013, 122-123 (in Georgian).

fects a person under the law, who does not participate in administrative proceedings related to the issuance of a construction permit, but is an interested party? In fact, he/she may only get information through the news board. Fortunately the resolution defines the obligation of placing the information on the board.¹⁸ In such cases, the legislation is quite weak and it is fairly indicated about the public-legal protection of the neighbor's interests in the legal literature.¹⁹ The neighbor, whose legitimate right and interest are damaged due to the ongoing and / or implemented construction on the plots nearby, unfortunately does not have real leverage. In such a case, the interested party or the neighbor may only request the study of lawfulness of the issuance of a permit or challenge the lawfulness of the issued act. The construction legislation does not include a clear and uniform reservation on the guarantee of the protection of the neighbor's interests.

4.3. Problems Related to the Protection of the Rights of Owners of Neighboring Property as a Result of Issuing Construction Permits - General Review of Legislation and Existing Practice

The Resolution №57 of March 29, 2009 of the Government of Georgia on the on the Rules of Issue of Construction Permit and Construction Conditions can only be related as a thesis to the interests of owners of neighboring property at issuing the construction permit. The article 35 of the Resolution states that in the course of the new construction and the reconstruction existing building facilities, the impact assessment on the existing building should be carried out. In the event that planned constructions may influence their sustainability, the construction of this building-structure should be investigated. Though the resolution determines that it is necessary to assess the impact of the building on the adjacent plot, it will not be enough to ensure the security mechanisms. The problem here is that the rule of issuing a construction permit is regulated by the abovementioned Resolution, but the regulation of the construction prior to issuing construction permits is set forth by the Law of Georgia on "Spatial Arrangement and the Basis for Urban Construction" and the relevant act(s) of the local municipal representative body.

In case of Tbilisi city - the №14-39 Resolution of May 24, 2016 of the Tbilisi City Council on Approval of the Rules of Regulation of the Use and Development of Tbilisi Municipality Territories²⁰. It is possible to provide one example that clearly shows that between the rule of issuing a construction permit and the regulation of the development is an important obstacle that will be significant obstacle when practicing in real life. The Resolution №14-39 indicates that the door, window, cellar and other open parts in the walls arranged in the neighboring border cannot be used to block the construction of the new building in the adjoining land. In accordance with this Resolution, the building or part thereof located within the zone of the land plot shall be the one, which is less than 3.0 meters away from the neighborhood²¹.

Naturally, after these regulations it is difficult to talk about any kind of expert assessment and protection mechanisms. Although the 35.5th clause of the Resolution №57 indicates that during the civil works in the conditions limited to the established development the customer, designer and builder must ensure all the necessary measures to eliminate the deformation and damage to the building constructions by their reasons, the customer shall be obliged during confirmation of this fact: at his own expense to repair the damage and deformation to the building and construction in the land adjacent only in the event when such deformation and damage cannot

¹⁸ Ibid.

¹⁹ See in Details: *Kalichava K.*, Control of Admissibility of Construction Activities in Georgia (Reforms Need and Prospectives), Administrative Law, Scientific Journal. *Kopaleishvili M.* (ed.), Vol. 2, Tbilisi, 2016, 93-104 (in Georgian).

²⁰ The mentioned regulation concerns the capital and the example is provided within the regulations set forth for Tbilisi.

²¹ See №14-39 Resolution of May 24, 2016 of the Tbilisi City Council on Approval of the Rules of Regulation of the Use and Development of Tbilisi Municipality Territories, article 30.

be corrected and make compensation on the basis of the agreement with the owner of the adjusted damaged building.

Despite these records the practice shows that as a result of the approved urban development plans and the permits the referral to the court by the neighboring property owners has been sharply increased with the claim of building damage, violation of their rights and living conditions or the sharp deterioration of their conditions.

The various works and articles of construction law researchers also focus on this issue and express their opinion that the protection of rights is difficult for construction permits and existing legislation requires significant reform. “The right to protection against building permits includes both the permit seeker’s and the neighbor’s rights, which implies the protection of two opposing interests in practice.”²² The legal leverage in respect of the issue of the rights of owners of the neighboring plot is not so effective. “The neighbor, whose legitimate rights and interests are damaged due to the construction in the neighboring land, can apply for the protection of the rights to the court on the basis of the article 22 or 24 of the GACG. At the same time, it is important in the neighbor’s notion not only the plot configuration but also the real threat arising from that plot and threatening the owner of a neighboring plot.”²³

The practice of the Supreme Court of Georgia has been established in this type of cases in the manner that the issue of deteriorating of the existing property and protection of owners’ rights gains the great importance. The Court explicitly indicates that the construction activities are so versatile and difficult that only on the basis of the expert’s report can be determine the impact on the adjacent property²⁴. The number of disputes and court practice shows that the legislation has to be improved in this regard and more attention be should given to the expertise to ensure human rights protection in construction. Although the quality of expertise, licensing of expert activities and other related legislative acts does not exist at all, or those which are applicable are not functioning effectively, it is necessary to maintain the existing minimum regulations in order to avoid deplorable results.

5. Conclusion

It is clear that as a result of detailed review of the issues the number of important legislative or practical shortcomings have been identified that require improvement and regulation. Implementation of the above is very important in order to avoid chaotic architectural-building development after the urban planning and construction permit issue on the one hand and prevent any violation of universally recognized human rights guaranteed by the constitution of the country on the other hand.

It is necessary to eliminate the major deficiencies demonstrated on the basis of the issues reviewed above for the effective and comprehensive fulfillment of the functions assigned to them by the local self-government bodies.

While discussing a number of issues, the general picture of the current legislation was also demonstrated and the systemic shortcomings and gaps of the field were identified.

Among the existing deficiencies it should be emphasized the issue of absence of a uniform and regulated system of development and the powers confined to various commissions or working groups functioning under the self-government bodies. At the same time, there are significant contradictions in the regulating legislative basis. On the one hand, it is as if the rules for placement and separation of premises on the land plots are defined, but the in-depth study of existing practices and legislative acts demonstrate that the legislative provisions

²² *Kalichava K., Construction Law, Khubua G., Sommermann K-P., Legal Grounds for Public Governance, TSU Administrative Sciences Publication, Tbilisi, Vol. 3, 2016, 299 (in Georgian).*

²³ *Ibid.*

²⁴ *Decision of July 18, 2012, №bs-1015-1007-(k11), of the Supreme Court of Georgia (in Georgian).*

themselves contradict the fundamental principles. The existing stipulation according to which this or that permit/consent should be obtained in compliance with the special rule contradicts the general principles; the mentioned situation fails to provide the comprehensive mechanisms securing the interests of citizens, which ultimately leads to the need for expertise, judicial disputes and other processes dragged on for too long.

In conclusion, it is necessary to make the number of amendments at the level of legislation in order to provide the resolution of the problematic and contentious issues indicated in this article, which may be managed on the basis of the fundamental reform, but at the same time it is necessary the relevant authorities to ensure the fulfillment of their assignments on the basis of the principle of legality before the implementation of the reform

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Khashayar Biria*

Der Völkerrechtliche Status der „Republik Südossetien“ – souveräner Staat oder besetztes Gebiet?***

Im Gefolge der Auflösung der Sowjetunion 1990 hat sich das bis dahin (als Teil der Georgischen SSR) „autonome“ Gebiet Südossetien zum unabhängigen Staat erklärt. Geschützt durch russische Truppen, die als „Friedenstruppen“ firmieren, konnten alle Versuche einer Rückeroberung durch Georgien abgewehrt werden, zuletzt im russisch-georgischen Krieg von 2008. Russland hat Südossetien mittlerweile als souveränen Staat anerkannt, während Georgien die faktische russische Kontrolle über das Gebiet, gestützt auf eine starke Präsenz russischer Truppen, als Fall einer militärischen Besetzung (durch Russland) qualifiziert. In vorliegender Arbeit wird untersucht, welcher völkerrechtliche Status der „Republik Südossetien“ im Lichte des Völkerrechts zukommt, einschließlich der Frage eines Sezessionsrechts der Osseten. Zudem beschäftigt sich die Arbeit mit der Frage, ob die Zugehörigkeit Südossetiens zum georgischen Staatsverband beendet ist, oder die faktische Kontrolle Russlands über das Gebiet die Annahme einer militärischen Besetzung zulässt.

Keywords: Südossetien, Kaukasuskrieg 2008, Selbstbestimmungsrecht der Völker, Sezession, Sezessionsrecht, de facto-Regime, militärische Besetzung, Menschenrechte, IPBPR, Friendly relations declaration, saving clause, Kosovo-Konflikt, abhelfende Sezession, Drei-Elemente-Lehre, Anerkennung, Nichtanerkennung.

The status of the „republic of south Ossetia” under international law; sovereign state or occupied territory?

In the wake of the dissolution of the Soviet Union in 1990, the until then (as part of the Georgian SSR) “autonomous” region of South Ossetia declared itself an independent state. Protected by Russian troops operating as “peacekeepers”, all attempts to recapture through Georgia could have been averted, most recently in the 2008 Russian-Georgian war. Russia has now recognized South Ossetia as a sovereign state, while Georgia qualifies the de facto Russian control over the area, based on a strong presence of Russian troops, as a case of military occupation (by Russia). This paper examines the status of the “Republic of South Ossetia” in the light of international law, including the issue of a right of secession for the Ossetians. Furthermore, it deals with the question, whether South Ossetia’s membership to the Georgian state has ended, or if the Russian factual control over the area supports the assumption of a military occupation?

Keywords: South Ossetia, Russo-Georgian War, the right to Self-determination, secession, the right to secede, de facto regimes, military occupation, human rights, ICCPR, Friendly relations declaration, saving clause, Kosovo-conflict, remedial secession, three-element doctrine, recognition, non-recognition.

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Bearbeitung

A. Einleitung

Quebec, Katalonien und Schottland, Sezessionen werden auch in Europa und Nordamerika intensiv diskutiert. Ähnliche Bestrebungen entwickelten sich während und nach dem Zerfall der Sowjetunion in Abchasien, Südossetien und Bergkarabach, die in der kaukasischen Region weiterhin teilweise bewaffnet ausgeartet werden. Diese Konflikte haben bisher zahlreiche Todesopfer gefordert, die jeweiligen Gebiete bleiben international isoliert¹ und Korruption und wirtschaftliche Probleme² gehören weiterhin zur Tagesordnung. Die Völkerrechtslage bleibt, unabhängig von ihrer Durchsetzbarkeitshindernissen, nebulös. Dies ist vor allem den unterschiedlichen politischen Zielen der Großmächte sowie des teilweise gegensätzlichen Umgangs der nationalen Verfassungen mit der Problematik geschuldet.³

Die vorliegende Arbeit setzt sich in vier Teilen mit dem Sezessionskonflikt in Südossetien auseinander. Zugrunde gelegt werden bei der Würdigung des Sachverhalts die relevanten Grundsätze und Bestimmungen des Völkerrechts. Regionale Rechtssetzungen sowie nationale Vorschriften müssen wegen des begrenzten Umfangs dieser Arbeit außer Betracht bleiben. Nach einer kurzen Einführung in die Hintergründe des Konflikts wird im ersten Teil die Rechtmäßigkeit der Unabhängigkeitserklärung Südossetiens einschließlich der Frage eines Sezessionsrechts der Südosseten untersucht. Hierbei wird auf die Bedeutung und die Ähnlichkeiten des Kosovo-Falles eingegangen und dessen Folgen auf geltendes Völkerrecht untersucht. Im Fokus des zweiten Teils steht die Ermittlung des völkerrechtlichen Status der sog. „Republik Südossetien“. Nach der Darstellung der klassischen Theorie der Staatwerdung wird die völkerrechtliche Anerkennung beurteilt. Anhand der erarbeiteten Ergebnisse wird im Rahmen der Rechtsfolgen versucht, eine Antwort auf die Frage zu liefern, ob die Zugehörigkeit Südossetiens zum georgischen Staatsverband beendet ist oder die faktische Kontrolle Russlands die Annahme einer militärischen Besetzung rechtfertigt. Zuletzt beschließt ein Ausblick die Arbeit.

B. Die Hintergründe

Der Konflikt zwischen Tiflis und den Südosseten hat seinen Ursprung in den Jahren zwischen 1918-21. Die Unzufriedenheit der in Südossetien beheimateten Osseten⁴ war vorwiegend der wirtschaftlichen Politik der Zentralregierung Georgiens geschuldet, welche aus Sicht der Südosseten ungerechterweise Großgrundbesitzer – meist ethnische Georgier – bevorzugte.⁵ Es dauerte nicht lange, bis die Konflikte in bewaffnete Aufstände anhand ethnischer Linien mündeten. Dabei konnten die Südosseten sich stets auf den Beistand Moskaus verlassen. Während der großen Aufstände in 1919 und 1920⁶ wurde ihnen zum Beispiel geheime materielle Unterstützung von der Roten Armee gewährt.⁷ Die Distanzierung Russlands von einer militärischen Auseinandersetzung mit Georgien, als Ausfluss seiner sezessionseindämmenden Einfrierungspolitik⁸, kommt zunächst durch den Friedensvertrag vom 07.05.1920 zum Ausdruck, in dem Moskau bedingungslos u.a. Südossetien als ein Teil des

¹ Vgl. Dowding, in: Lehning 1998, 71 ff.

² Vgl. Beran, in: Lehning 1998, 38.

³ Nickel, in: VerfBlog.

⁴ Zusätzlich zu Südossetien wird auch die Republik Nordossetien-Alanien (Teil der Russischen Föderation) überwiegend von den Osseten bewohnt. Vorliegend wird jedoch zwecks Unterscheidung den Ausdruck Südosseten benutzt.

⁵ Souleimanov 2013, 112.

⁶ Langa 1962, 228.

⁷ Souleimanov 2013, 113.

⁸ Vgl. Manutscharjan, in: PM 2008, 42 f.

georgischen Staatsverbands anerkannte.⁹ Im Zuge der innenpolitischen Reformen in der Sowjetunion sowie des Wiederauflebens der südossetischen nationalistischen Bewegung (Ademon Nykhas)¹⁰ Ende der 1980er Jahre stellte sich für Südossetien das Bestreben nach mehr Rechten erneut.

C. Die Unabhängigkeitserklärung Südossetiens

Am 30.12.1991, dem Tag der Unterzeichnung der Alma-Ata-Erklärung durch die Staatsoberhäupter Russlands sowie der Nachfolgerepubliken der Sowjetunion, welche den Untergang der Sowjetunion festlegte¹¹, verkündete Südossetien seine Unabhängigkeit von Georgien.¹² Am 19.01.1992 fand dann ein Referendum in Südossetien statt, in dem die Mehrheit sich für die Unabhängigkeit von Georgien und die Eingliederung in die russische Staatsordnung aussprach.¹³ In der vom Obersten Sowjet erlassene Unabhängigkeitsdeklaration vom 29.05.1992 wurde hingegen die Gründung des Staates „Republik Südossetien“ verkündet.¹⁴ Abgesehen von der Inkonsistenz dieser Verkündigungen ist zu prüfen, ob den Südosseten für die völkerrechtsmäßige Erlangung der Unabhängigkeit und die Errichtung eines eigenen Staates ein Sezessionsrecht zustand. Dieses könnte sich trotz des Grundsatzes der Mediatisierung der Individuen im Völkerrecht, wonach Individuen grundsätzlich keine direkten völkerrechtlichen Rechte geltend machen können¹⁵, aus dem Selbstbestimmungsrecht der Völker ergeben.

I. Das Selbstbestimmungsrecht

Das Selbstbestimmungsrecht der Völker ist als politisches Konzept historisch gesehen mit den *Rousseau'schen* Gedanken vom Gesellschaftsvertrag und der Französischen Revolution verbunden.¹⁶ Nach dem ersten Weltkrieg gewann dieses Prinzip durch die Erklärung des amerikanischen Präsidenten *Wilson* vom 08.01.1918¹⁷, nach der die Bestimmung der Staatsordnung mit dem Nationalstaatsprinzip verknüpft sei, völkerrechtliche Relevanz.¹⁸ Zudem war das durch *Lenin* im Jahre 1917 verkündete „Dekret über den Frieden“ für die Herausbildung des Prinzips von Bedeutung.¹⁹ *Lenins* Dekret zielte dagegen auf die Befreiung der Völker durch sozialistische Revolutionen ab.²⁰ Während des zweiten Weltkriegs kommt die Selbstbestimmungsidee durch die Atlantik-Charta vom 14.08.1941 zum Vorschein.²¹ Anerkannt als Recht wurde sie allerdings erst nach dem zweiten Weltkrieg durch die UN-Charta, wo das Selbstbestimmungsrecht zu einem der Ziele der Vereinten Nationen wurde. Bezugnahmen darauf finden sich in den Art. 1 Abs. 2, 55, 73 lit. b, 76 lit. b der UN-Charta.²²

⁹ Mammadov 2012, 33.

¹⁰ Potier 2001, 13.

¹¹ UN Doc. A/46/60.

¹² Mammadov 2012, 40 f.

¹³ Nußberger, South Ossetia, MPEPIL-Online.

¹⁴ Ebd.

¹⁵ Vgl. Brownlie 2003, 65.

¹⁶ Ipsen 2014, 316.

¹⁷ Vgl. Ermacora 1974, 215 f.

¹⁸ Stein/Buttlar/Kotzur 2017, 320.

¹⁹ Cassese 1995, 19.

²⁰ Bültermann 2017, 31.

²¹ Bennouna, Atlantic Charter (1941), MPEPIL-Online.

²² Herdegen 2015, 227.

Das subjektive Recht auf Selbstbestimmung wurde später im Gewand eines Menschenrechts in den gleichlautenden Art. 1 der beiden UN-Menschenrechtspakte (IPBPR²³ und IPWSKR²⁴ v. 19.12.1966) kodifiziert.²⁵

II. Träger des Selbstbestimmungsrechts

Träger des Selbstbestimmungsrechts sind gem. Art. 1 der beiden UN-Menschenrechtspakte die Völker. Fraglich ist, ob die Südosseten ein solches Volk darstellen. Dafür ist zunächst der Volksbegriff zu ermitteln. Die sich auf den Wortlaut der Präambel der UN-Charta stützende Ansicht, wonach nur die Staatsvölker der UN-Mitgliedstaaten („wir, die Völker der Vereinten Nationen...“) sich auf das Selbstbestimmungsrecht berufen können, ist mittlerweile überholt.²⁶ Ebenso überholt sind spätestens mit der Anerkennung des Selbstbestimmungsrechts der Palästinenser²⁷ einige Auffassungen, insbesondere aus einigen postkolonialen Staaten²⁸, wonach das Selbstbestimmungsrecht auf die Kolonialvölker beschränkt sei.²⁹ Heute werden in der Völkerrechtslehre und -praxis folgende zwei Ansätze für die Ermittlung des Volksbegriffs herangezogen.

1. Objektive Theorie

Die objektive Theorie knüpft an Merkmale, wie eine gemeinsame Sprache, Kultur, Religion oder Geschichte³⁰ sowie an das Leben auf einem bestimmten Territorium seit längerer Zeit mit eigenen Institutionen³¹, an. Angewandt auf den Fall Südossetiens ist das betreffende Gebiet klar abgegrenzt und wird seit Jahrhunderten überwiegend von ethnischen Osseten bewohnt.³² Die Behauptungen Georgiens, wonach die Südosseten in jenem Gebiet erst seit dem 17. Jh. siedeln würden und lediglich „Gäste Georgiens“ gewesen seien, haben international keine Bedeutung gewonnen.³³ Die Südosseten sprechen die gemeinsame Sprache Ossetisch, sind überwiegend christlich-orthodoxen Glaubens und haben einheitliche Bräuche. Seit der Zuerkennung des Status eines Autonomiegebiets im Jahre 1922 besitzen sie auch eigene Verwaltungsstrukturen.³⁴

2. Subjektive Theorie

Durch die subjektive Theorie wird ferner ein Zusammengehörigkeitsgefühl, also das Bewusstsein und der politische Wille, ein Volk zu sein, vorausgesetzt.³⁵ Das einheitliche Bestreben der Osseten, eine von Georgien unabhängige politische Gemeinschaft innerhalb einer eigenen „Staatsordnung“ zu bilden, wurde wie oben dargestellt mehrfach zum Ausdruck gebracht.³⁶

²³ UNTS, Vol. 999, 171.

²⁴ UNTS, Vol. 993, 3.

²⁵ Kiss, in: HRLJ 1986, 173 f.

²⁶ Ipsen 2014, 336.

²⁷ GA Res. 3236 v. 22.11.1974; Vgl. „bridge case“ in: Brownlie, in: FS Elias 1992, 5.

²⁸ Vgl. Saini, in: IJIL 1998, 173; z. B. der Vorbehalt Indiens zum Art. 1 IPBPR siehe: BGBl. 1980 II, 1482.

²⁹ Vgl. Kaczorowska 2010, 576, 601.

³⁰ Vgl. Kokott, in: Tomuschat 2002, 6.

³¹ McCorquodale, in: BYIL 1995, 288.

³² Bremmer/Taras 1993, 289.

³³ IFFMCG, Vol. II, 69 ff.

³⁴ Vgl. Mammadov 2012, 34.

³⁵ Hobe/Kimminich 2014, 164.

³⁶ Vgl. Peters 1995, 209 f.; Vgl. Salenko, in: ZaöRV 2015, 150 f.

3. Zwischenergebnis

Die Südosseten sind als ein Volk i.S.d. Selbstbestimmungsrechts und somit als dessen Träger anzusehen. Eine Abgrenzung zu dem Begriff der ethnischen Minderheiten erübrigt sich damit.³⁷

III. Inhalt des Selbstbestimmungsrechts

Die oben aufgeführten politischen Aussagen, welche die Grundlage des heutigen Selbstbestimmungsrechts konstituierten, implizierten ein „Recht“ der Völker, die Souveränität zu wählen, unter der sie leben möchten.³⁸ Jedoch wurde im Zuge der Dekolonisierungsphase, die als Sieg des Selbstbestimmungsrechts bezeichnet wird,³⁹ das Recht auf Selbstbestimmung durch die Dekolonisierungsresolution der UN-Generalversammlung⁴⁰ als ein Recht zur kulturellen, ökonomischen und sozialen Entwicklung der Völker definiert. So wird dem Selbstbestimmungsrecht im Kontext der Kolonialisierung geradezu ein *ius cogens*-Charakter zugewiesen.⁴¹ Von einem *erga omnes*-Charakter des Selbstbestimmungsrechts sprach ferner der IGH in der Osttimor-Entscheidung⁴² sowie dem Gutachten zum israelischen Mauerbau⁴³. Außerhalb des Dekolonisierungsprozesses wird in der Völkerrechtslehre zwischen dem inneren (defensiven) und äußeren (offensiven) Selbstbestimmungsrecht differenziert.⁴⁴

1. Inneres Selbstbestimmungsrecht

Das innere Selbstbestimmungsrecht zielt auf die Optimierung der identitätswahrenden Umstände innerhalb der vorhandenen staatlichen Ordnung ab.⁴⁵ Es kann beispielsweise durch das Errichten eines Autonomiegebiets verwirklicht werden.⁴⁶ Eine Autonomie wird im Völkerrecht als die innere Selbstverwaltung einer Region und damit als eine teilweise Unabhängigkeit vom Einfluss der Zentralregierung definiert.⁴⁷ Seit 1922 hat Südossetien den Status eines Autonomiegebiets innerhalb der Georgischen SSR.⁴⁸

2. Äußeres Selbstbestimmungsrecht

Die Frage nach dem Bestehen eines Rechts der Völker, vorliegend der Südosseten, sich von dem Mutterstaat einseitig loszulösen und einen souveränen Staat zu errichten (Sezession)⁴⁹ wird im Rahmen des äußeren Selbstbestimmungsrechts diskutiert. Für die Ermittlung der Existenz eines solchen Rechts sind die sich aus Art. 38 I IGH-Statut ergebenden Völkerrechtsquellen heranzuziehen.

a) Völkervertragsrecht

aa) UN-Charta

Zu prüfen ist, ob ein Sezessionsrecht sich aus der UN-Charta herleiten lässt. Strikt nach dem Wortlaut gesehen, deuten Art. 1 Abs. 2 und Art. 55 der UN-Charta nicht auf ein Sezessionsrecht hin. Daher wird eine Auslegung notwendig. Hierfür kommen die Art. 31-33 der Wiener Vertragsrechtskonvention von 1980 (WVK) zur Anwend-

³⁷ Vgl. IFFMCG, Vol. II, 146.

³⁸ Vgl. Ermacora 1974, 215 f.

³⁹ Oeter, in: ZaöRV 1992, 747.

⁴⁰ GA Res. 1514 v. 14.12.1960.

⁴¹ Vgl. Kadelbach 1992, 264 ff.

⁴² ICJ Rep. 1995, 102.

⁴³ ICJ Rep. 2004, 199.

⁴⁴ Stein/Buttlar/Kotzur 2017, 320.

⁴⁵ Vgl. Cardenas/Caria, in: Danspeckgruber 2002, 335 f.

⁴⁶ Waters, in: Walter/Ungern-Sternberg 2014, 185.

⁴⁷ Ipsen 2014, 369.

⁴⁸ Sterio 2013, 143.

⁴⁹ Vgl. Hobe/Kimminich 2014, 107.

ung.⁵⁰ Gem. Art. 32 WVK können die Materialien bei der Ausarbeitung der Verträge als ergänzende Auslegungsmittel in Anspruch genommen werden.⁵¹ Wie aus den Dokumenten der San-Francisco-Konferenz von 1945 hervorgeht, waren viele der Gründer besorgt, dass die Bestimmungen der Charta eine Grundlage für zukünftige Sezessionsforderungen bilden könnte.⁵² Vielmehr erwähnt Art. 1 Abs. 2 UN-Charta das Selbstbestimmungsrecht neben dem Grundsatz der Entwicklung freundschaftlicher Beziehungen der Nationen, also der souveränen Staaten, zwecks der Festigung des Weltfriedens.⁵³ Somit gäbe es im Völkerrecht kein Sezessionsrecht *prima facie*. Nichtsdestoweniger wird das Bestehen eines Sezessionsrechts im Rahmen einer teleologischen Auslegung als *ultima ratio* debattiert. Eine Grundlage dafür bietet die sog. „*saving clause*“⁵⁴ der unverbindlichen⁵⁵ *Friendly Relations Declaration* (FRD) der UN-Generalversammlung⁵⁶ als eine spätere Übereinkunft i.S.d. Art. 31 Abs. 3 lit. a WVK. Die ausdrücklich in Abs. 14 der Präambel der FRD herausgehobene territoriale Integrität der Staaten ist nach der „*saving clause*“ dann zu gewährleisten, wenn der Staat ohne Differenzierung nach der Rasse, dem Glauben oder der Hautfarbe seine gesamte Bevölkerung vertritt; sich also in Übereinstimmung mit der inneren Selbstbestimmung verhält. Von der automatischen Entstehung eines Sezessionsrechts *a contrario* infolge der Verletzung der inneren Selbstbestimmung ist jedoch nicht die Rede.⁵⁷ Ferner bestätigt ein Blick in die vorbereitenden Arbeiten zur FRD die Besorgnis einiger Staaten über die extreme Erweiterung des Prinzips.⁵⁸ Dennoch geht ein erheblicher Teil der deutschsprachigen und der US-amerikanischen Literatur im Rahmen der sogenannten Theorie der *remedial secession* von einem Sezessionsrecht in Extremfällen aus.⁵⁹ Solche Extremfälle liegen demnach bei vollständiger Blockierung der Ausübung des inneren Selbstbestimmungsrechts, zum Beispiel bei einer Apartheid⁶⁰, oder schwerwiegenden systematischen Verletzungen grundlegender Menschenrechte, etwa bei (diskriminierenden) Verbrechen gegen die Menschlichkeit, Völkermord oder bei weiträumigen ethnischen Säuberungen, vor.⁶¹

bb) UN-Menschenrechtspakte

Durch den Wortlaut der gleichlautenden Art. 1 Abs. 3 der beiden UN-Menschenrechtspakte, wonach die Verwirklichung des Selbstbestimmungsrechts im Rahmen der UN-Charta zu fördern ist, wird eine sezessionsfreundliche Auslegung, wenn überhaupt, vom Vorliegen eines der oben beschriebenen Extremfälle abhängig. Diejenige Auslegungsversuche⁶², die ein Sezessionsrecht direkt aus den Pakten abzuleiten versuchen, wurden in der Literatur heftig kritisiert.⁶³ Aus den Verhandlungsprotokollen zu der Ausarbeitung der beiden Pakte ergibt sich, dass viele Staaten gegen die Ausdehnung des Selbstbestimmungsrechts auf ein Sezessionsrecht waren.⁶⁴

cc) Wiener Abkommen über die Staatennachfolge

Der sachliche Anwendungsbereich der beiden Konventionen ist gem. Art. 6 der Konvention von 1978 sowie Art. 3 der Konvention von 1983 allein auf die Folgen einer völkerrechtskonform erfolgten Sezession beschränkt. Somit scheiden beide als eine Grundlage für ein Sezessionsrecht aus.

⁵⁰ Kadelbach, in: UNCH-K 2012, 75 ff.

⁵¹ Le Bouthiller, in: WVK-K 2011, 852.

⁵² UNCIO VI, 296, Doc. 343, I/1/16; Wolfrum, in: UNCH-K 2012, 114.

⁵³ Saxer 2010, 277.

⁵⁴ Prinzip V Abs. 7 der FRD.

⁵⁵ Art. 10 f., 13 f. UN-Charta; Vgl. Rosenstock, in: AJIL 1971, 714.

⁵⁶ GA. Res. 2625 v. 24.10.1970.

⁵⁷ Vgl. Del Mar, in: French 2013, 94.

⁵⁸ Siehe u.a. die Erklärung des kenianischen Gesandten, siehe: UN Doc. A/AC.125/SR.107, 88 v. 04.09.1969.

⁵⁹ M.w.N Oeter, in: ZaöRV 2015, 62.

⁶⁰ Cassese 1995, 122.

⁶¹ Oeter, in: UNCH-K 2012, 331.

⁶² Turp, in: CYIL 1982, 24 ff.

⁶³ Kohen 2012, 26.

⁶⁴ Bossuyt 1987, 19 ff.; Thüerer 1976, 115.

dd) Weitere internationale Übereinkünfte

Als Auslegungshilfe kommen die Deklaration der Weltmensenrechtskonferenz vom 25.06.1993⁶⁵ sowie die Deklaration anlässlich des 50. Jahrestages der Vereinten Nationen⁶⁶ gem. Art. 31 Abs. 3 lit. a WVK in Betracht. Beide Werke enthalten eine „*saving clause*“ ähnlich wie die der FRD.⁶⁷ Jedoch lässt sich die abhelfende Sezession wiederum nur implizit aus den Klauseln ableiten⁶⁸. Weiterhin wird vorgebracht, dass einer sezessionsfreundlichen Auslegung die Tatsache entgegen steht, dass die Staatengemeinschaft, wohlwissend um die Umstrittenheit des „*saving clause*“ in der FRD, die Existenz eines Sezessionsrechts nicht nachträglich klargestellt habe.⁶⁹ Dazu kommt, dass ein derart unbestimmtes Sezessionsrecht große Missbrauchsgefahr zur Folge haben könnte und nur sehr schwer mit den Zielen der FRD und der UN-Charta, Sicherheit und Frieden zu wahren⁷⁰, vereinbar wäre.⁷¹

ee) Zwischenergebnis

Auch wenn in der Lehre durchaus plausible Gründe für die Annahme eines Sezessionsrechts mit absolutem Ausnahmecharakter vorgebracht werden, erscheint diese teleologische Auslegung mangels geschriebener Rechtsgrundlage nicht ohne Weiteres tragbar. Anderweitige Auslegungsversuche sind im Hinblick auf den Grundsatz von Treu und Glauben (Art. 31 Abs. 1 WVK) fragwürdig.

b) Völkergewohnheitsrecht

Zu prüfen bleibt nach Art. 38 Abs. 1 lit. b IGH-Statut, wie das Bestehen eines Sezessionsrechts völkergewohnheitsrechtlich zu beurteilen ist. Insofern kommen etablierte einheitliche staatliche Übungen (*consuetudo*), die mit einer Rechtsüberzeugung (*opinio iuris*) vorgenommen werden, in Betracht.⁷²

aa) Erste Phase

Zunächst sind die völkergewohnheitsrechtlichen Ansätze bis Ende 2007 zu ermitteln. Was die ehemaligen Kolonien und deren Loslösung von ihrer Kolonialherrschaft anbelangt, so ist die gewohnheitsrechtliche Geltung eines Sezessionsrechts mit der Verpflichtung zur Respektierung bestehender Grenzen (*uti possidetis*)⁷³ weitgehend anerkannt.⁷⁴ Außerhalb des kolonialen Kontexts und seit der Gründung der Vereinten Nationen, welche erstmalig mit der völligen Ächtung der Gewaltanwendung in zwischenstaatlichem Verkehr verbunden war⁷⁵, zeigt sich die Staatengemeinschaft bis Ende 2007 gegenüber unilateralen Sezessionen „*extremely reluctant*“.⁷⁶ Gleichwohl lässt sich eine langsame Etablierung der in der Lehre vertretenen *remedial secession* insbesondere durch das bedeutende Urteil des kanadischen Obersten Gerichtshofes aus dem Jahr 1998 über den Status von Quebec erkennen.⁷⁷ Dort wurde den Quebecern ein Sezessionsrecht wegen der Wahrung ihres inneren Selbstbestimmungsrechts durch den Staat Kanada abgesprochen.

⁶⁵ UN Doc. A/CONF. 157/23; später bestätigt in: GA Res. 48/121 v. 20.12.1993.

⁶⁶ GA Res. 50/6 v. 24.10.1995.

⁶⁷ Abs. 1 Nr. 2 u. Abs. 3 der Deklaration v. 1993 und Nr. 1 Abs. 3 der Deklaration v. 1995.

⁶⁸ Cassese 1995, 118.

⁶⁹ Krüger 2009, 21.

⁷⁰ Abs. 1 der Präambel der FRD; Art. 1 Abs. 1 UN-Charta.

⁷¹ Krüger 2009, 20.

⁷² Herdegen 2015, 143.

⁷³ Vitzthum/Proelß 2016, 185.

⁷⁴ M.w.N. Murswiek, in: AVöR 1993, 311.

⁷⁵ Vgl. Schöbener 2014, 181.

⁷⁶ Crawford, in: BYIL 1998, 92.

⁷⁷ Canadian Supreme Court 1998, 2 SCR 217.

bb) Zweite Phase

Möglicherweise könnte der Kosovo-Fall im Jahr 2008, der gewisse Ähnlichkeiten mit der Situation Südossetiens aufweist, für das Völkergewohnheitsrecht einen Wendepunkt dargestellt haben. Seine Unabhängigkeit erklärte das bis dahin unter internationaler Verwaltung regierte Kosovo am 17.02.2008.⁷⁸ Die Reaktion der Staatengemeinschaft darauf war zutiefst gespalten. Während zahlreiche Staaten, u.a. die USA und viele EU-Mitgliedstaaten Kosovo anerkannten, lehnten viele andere, wie u.a. China, Georgien, Russland und Spanien, eine Anerkennung ab. Die erste Gruppe stützte sich dabei auf die Menschenrechtsverletzungen durch das Milosevic-Regime und die Unvermeidbarkeit der Ausübung des Sezessionsrechts als „Notwehrrecht“⁷⁹ in diesem Extremfall. Dagegen wurde mit dem Hinweis auf die erhebliche zeitliche Distanz der Unabhängigkeitserklärung zu den Gewaltmaßnahmen⁸⁰ sowie auf die zuvor erlassene Resolution 1244 des UN-Sicherheitsrates⁸¹ hingewiesen. Denn trotz gravierender Menschenrechtsverletzungen insb. in den Jahren 1989/90⁸² wurde in der Resolution 1244 unter ausdrücklichem Bekenntnis zur Souveränität sowie territorialen Integrität Jugoslawiens dem Kosovo lediglich einen Autonomiestatus zugesprochen und die Grundlage für eine Übergangsverwaltung geschaffen⁸³, was offensichtlich die Verwirklichung des inneren Selbstbestimmungsrechts bezweckte. Dem Kosovo wurde somit kein Sezessionsrecht zuerkannt. Insofern wird vertreten, dass die Ausübung des äußeren Selbstbestimmungsrechts hinter den Maßnahmen des UN-Sicherheitsrates zurücktritt.⁸⁴ Auch der IGH hat zu der Klärung der Rechtslage nicht viel beigetragen. In dem Gutachten vom 22.07.2010⁸⁵, welches gem. Art. 65 Abs. 1 IGH-Statut i. V.m. Art. 96 Abs. 1 UN-Charta von der UN-Generalversammlung angefragt wurde,⁸⁶ machte der IGH keine Ausführungen dahingehend, ob im postkolonialen Kontext ein Sezessionsrecht existiert. So unterschied der Gerichtshof zwischen dem *Akt* der Unabhängigkeitserklärung und dem *Recht* auf Sezession und kam, ohne sich bewusst mit dem Anwendungsbereich und dem normativen Gehalt des äußeren Selbstbestimmungsrechts auseinandergesetzt zu haben, zu dem Ergebnis, dass das allgemeine Völkerrecht eine einseitige Unabhängigkeitserklärung nicht verbietet.⁸⁷ Die Fortgeltung der Kapitel IV Resolution 1244 stellt das Gutachten nicht in Frage. Insgesamt wird damit deutlich, dass die Staatengemeinschaft im Kosovo-Fall keine einheitliche Praxis entwickeln konnte, welche die Annahme eines Sezessionsrechts zuließe. Vielmehr haben die anerkennenden Staaten selbst den gewohnheitsrechtlichen Charakter des Falles ausgeschlossen, indem sie den Fall als *sui generis* bezeichneten und dessen Präzedenzwirkung auf andere Sezessionskonflikte ausschlossen.⁸⁸

cc) Zwischenergebnis

Auch völkergewohnheitsrechtliche Ansätze für die Annahme eines Sezessionsrechts liegen nicht vor.

c)Zwischenergebnis

Bestätigt durch das Völkervertrags- sowie Völkergewohnheitsrecht stünde ein Sezessionsrecht in einem Spannungsverhältnis mit der sich aus staatlicher Souveränität (Art. 2 Abs. 1 UN-Charta) ergebenden territorialen Integrität der Staaten (Art. 2 Abs. 4 UN-Charta).⁸⁹ Verbindet man die territoriale Unversehrtheit mit der politischen Unabhängigkeit der Staaten, geschützt durch den zwingenden Charakter des Gewaltverbots nach Art. 2 Abs. 4

⁷⁸ Oeter, Yugoslavia, Dissolution of, MPEPIL-Online.

⁷⁹ Vgl. Wirth, in: ZaöRV 2007, 1074.

⁸⁰ Schaller, in: AVöR 2008, 139; Vidmar, in: VJTL 2009, 817 f.

⁸¹ SC Res. 1244 v. 10.06.1999.

⁸² Vgl. UN Doc. A/54/396, S/1999/1000 v. 24.10.1999, 26. Abs. 96.

⁸³ SC Res. 1244 v. 10.06.1999, Abs. 7, 11 und Annex 2.

⁸⁴ Vitzthum/Proelß 2016, 187.

⁸⁵ ICJ Rep. 2010, 403.

⁸⁶ GA Res. 63/3 v. 08.10.2008.

⁸⁷ Siehe: Abs. 84 des Kosovo-Gutachtens.

⁸⁸ Vgl. US-SD v. 18.02.2008; Rat-EU v. 18.02.2008.

⁸⁹ Ipsen 2014, 353.

UN-Charta, so seien die Staatsgrenzen auch gegen interne Bedrohungen zu verwahren.⁹⁰ Dass die Theorie der *remedial secession* jedenfalls zu einem „*established international law standard*“⁹¹ geworden ist, lässt sich nicht feststellen. Somit bleibt das souveränitätsorientierte Völkerrecht nach wie vor grundsätzlich secessionsfeindlich.⁹²

IV. Die Sezession Südossetiens als allerletzter Ausweg?

Nichtsdestotrotz ist zu erörtern, ob der Fall Südossetien einen derartigen Extremfall darstellt, der, wenn man einem erheblichen Teil der Lehre folgt, ein Sezessionsrecht entstehen lässt. Apartheidähnliche Umstände lagen indes zur Zeit der Unabhängigkeitserklärung vom 21.12.1991⁹³ für Südosseten nicht vor. Südossetien war während der sowjetischen Zeit und auch danach als, wenn auch zeitweilig nur *de facto*, Autonomiegebiet an Tätigkeiten des Staatsapparats mitbeteiligt und konnte seine volkseigenen kulturellen und wirtschaftlichen Interessen zu einem erheblichen Grad frei verfolgen.⁹⁴ Die Sicherheit des Gebietes war spätestens durch die als Folge der Waffenstillstandverträge (siehe unten) stationierten Friedenstruppen gewährleistet.⁹⁵ Trotz der Abschaffung des Autonomiestatus am 11.12.1990⁹⁶ bot die georgische Regierung insbesondere nach der sogenannten Rosenrevolution 2003 Südossetien mehrfach diesen Status wieder an.⁹⁷ Dies wurde mitsamt weiteren Verhandlungsvorschlägen von Südossetien zurückgewiesen.⁹⁸ Zu beachten ist, dass schon die Nichterschöpfung aller vorhandenen Streitbeilegungsmittel, wie u.a. Verhandlungen, den *ultima ratio*-Charakter einer Sezession in Frage stellt.⁹⁹ Unbeschadet der Tatsache, dass der Autonomiestatus *per se* weder die notwendige, noch die hinreichende Bedingung zur Verwirklichung des inneren Selbstbestimmungsrechts abbilden muss¹⁰⁰, wurde dies von georgischer Seite nicht ausgeschlossen. Bezüglich der bewaffneten Handlungen in 2008 wurden ferner jegliche Vorwürfe gegen Georgien wegen des Völkermordes sowie der ethnischen Säuberung von der EU-Wahrheitskommission zurückgewiesen.¹⁰¹ Trotz begangener Völkerrechtsverstöße durch die georgischen Truppen wegen der Verletzung vorheriger Waffenstillstandverträge (siehe unten) sowie des Verhältnismäßigkeitsgrundsatzes im humanitären Völkerrecht (Art. 51 Abs. 5 lit. b ZP I)¹⁰², zielten diese wie offiziell verkündet, auf die Wiederherstellung der territorialen Integrität und verfassungsmäßigen Ordnung des Landes.¹⁰³ Die Voraussetzungen, die die Annahme einer Existenzgefährdung der Südosseten als Volk durch das Verbleiben im Staatsverband Georgiens zuließen, liegen mithin nicht vor. Ergo konnte den Südosseten, selbst wenn man der Theorie der *remedial secession* folgt, kein Sezessionsrecht zugestanden haben.

V. Ergebnis

Ohne ein Sezessionsrecht inne zu haben, entfaltet die Unabhängigkeitserklärung Südossetiens vom 21.12.1991, deren Verkündung an sich völkerrechtlich nicht verboten ist, keine völkerrechtliche Wirkung. Ergo ist die Zugehörigkeit Südossetiens zum georgischen Staatsverband nicht beendet.

⁹⁰ Mammadov 2012, 131.

⁹¹ Canadian Supreme Court 1998, 2 SCR 217, Abs. 135.

⁹² Vgl. Hampson, in: Heintze 1997, 63.

⁹³ Waters, in: Walter/Ungern-Sternberg 2014, 187.

⁹⁴ Vgl. Alexidze, in: BYIL 2012, 85 f.

⁹⁵ Oeter, in: Walter/Ungern-Sternberg 2014, 60.

⁹⁶ Potier 2001, 13 f.

⁹⁷ Der Drei-Stufen-Plan von Saakaschwili vorgelegt vor der UN-Generalversammlung am 21.09.2004, UN Doc. A/59/PV.4.

⁹⁸ Bültermann 2017, 163.

⁹⁹ Vgl. McCorquodale/Hausler, in: Green/Waters 2010, 42 f.

¹⁰⁰ Zu den Unterschieden im rechtlichen und tatsächlichen Grad der Autonomie siehe: Ipsen 2014, 369 ff.

¹⁰¹ Vgl. IIFMCG, Vol. I, 17 ff.; Vol. II, 421 ff.

¹⁰² Ebd., Vol. I, 23, 28; Vol. II, 343 ff.

¹⁰³ Kranz, in: AVöR 2008, 486.

D. Völkerrechtlicher Status Südossetiens

Es ist fraglich, welcher völkerrechtliche Status Südossetien nun zukommt. Dies lässt sich u.a. anhand der klassischen Jellinek'schen Drei-Elemente-Lehre, bestimmen.

I. Die Drei-Elemente-Lehre

Nach dieser Theorie handelt es sich bei einem Gebilde um einen Staat, wenn über ein Staatsvolk auf einem Staatsgebiet eine effektive Staatsgewalt ausgeübt wird.¹⁰⁴ Die Durchsetzung der Drei-Elemente-Lehre, in der Völkerrechtspraxis lässt sich anhand des Art. 1 der „Montevideo-Konvention“ vom 26.12.1933¹⁰⁵ über die Rechte und Pflichten der Staaten dokumentieren. In Bezug auf Südossetien wird diskutiert, ob diesem Gebilde nicht der Status eines stabilisierten *de facto*-Regimes einzuräumen wäre. Stabilisierte *de facto*-Regime entstehen insbesondere dann, wenn ein Loslösungsprozess so weit fortgeschritten ist, dass die effektive Herrschaftsgewalt des Mutterstaates über einen Teil seines Staatsgebietes durch eine neue *effektive* und zugleich *unabhängige* Herrschaft ersetzt worden und im Laufe der Zeit eine befriedete Lage eingetreten ist.¹⁰⁶ Das neue Gebilde müsste bis auf die Anerkennung durch die Staatengemeinschaft, welche u.a. die Mitgliedschaft in den Vereinten Nationen gem. Art. 4 UN-Charta ermöglicht, die grundsätzlichen Montevideo-Voraussetzungen erfüllen.¹⁰⁷ Ihm wird dann zwecks Beibehaltung der befriedeten Lage eine partielle Völkerrechtssubjektivität mit der Folge des Schutzes durch Art. 2 Abs. 4 UN-Charta (Gewaltverbot) und der Möglichkeit zum Beitritt zu internationalen Organisationen zuerkannt.¹⁰⁸

1. Staatsgebiet

Zunächst müsste Südossetien über ein Staatsgebiet verfügen. Dabei handelt es sich um ein abgrenzbares Territorium auf dem das Staatsvolk lebt und die Staatsgewalt ihre spezifische Tätigkeit, die des Herrschens entfalten kann.¹⁰⁹ Hierbei ist es nicht notwendig, dass das gesamte beanspruchte Gebiet unangefochten von dem betreffenden Gebilde tatsächlich beherrscht wird.¹¹⁰ Trotz Nichtvorliegens etwaiger Vereinbarungen zwischen Südossetien und Georgien betreffend den Grenzverlauf handelt es sich bei dem Gebiet Südossetiens um kein fluides umkämpftes Gebiet wie zum Beispiel zwischen Bürgerkriegsparteien. Es macht eine über 3.900 km² erstreckende abgrenzbare Fläche im Nordosten Georgiens aus. Ein Staatsgebiet liegt vor.

2. Staatsvolk

Fraglich ist, ob es sich bei den Südosseten um ein Volk i.S.d. Drei-Elemente-Lehre handelt. Das Staatsvolk ist ein auf Dauer angelegter Verbund von Menschen, über die in seiner subjektiveren Qualität der Staat seine Hoheitsgewalt i.S.v. Gebietshoheit bzw. - bei Aufenthalt außerhalb des Hoheitsgebietes - Personalhoheit innehat.¹¹¹ Anders als die Volksdefinition im Rahmen des Selbstbestimmungsrechts stehen hierbei das Zusammengehörigkeitsgefühl und die objektiven Elemente nicht im Vordergrund.¹¹² Maßgeblich ist nur eine Zusammenfassung von Menschen unter einer bestimmten Rechtsordnung. Die Südosseten, die sich vor Jahrhunderten

¹⁰⁴ Jellinek 1920, 394 ff.

¹⁰⁵ LNTS Bd. CLXV, 25.

¹⁰⁶ Frowein 1968, 7.

¹⁰⁷ Ebd.

¹⁰⁸ Frowein, De Facto Regime, MPEPIL-Online.

¹⁰⁹ Jellinek 1920, 294.

¹¹⁰ Kempen/Hilgrunber 2012; Kap. 2, Rn. 5.

¹¹¹ Jellinek 1920, 406; Ipsen 2014, 93.

¹¹² Hobe/Kimminich 2014, 90.

auf jenem Gebiet niedergelassen haben, machten der letzten sowjetischen Volkszählung zufolge mit einer Zahl von ca. 65.000 Einwohnern zwei Drittel der Bevölkerung Südossetiens aus. Somit stellen sie ein auf Dauer angelegten Verband von Menschen dar. Ferner kommt es bei dem Begriff des Staatsvolkes auf das Kriterium der Staatsangehörigkeit an.¹¹³ Für deren Erwerb muss zwecks Vorbeugung eines Interessenkonflikts zwischen den Staaten ein „*genuine link*“¹¹⁴ zwischen dem Einzubürgernden und dem Einbürgerungsstaat bestehen. Als Anknüpfungspunkt kommen die Geburt auf einem Staatsgebiet (*ius soli*) oder die Abstammung von einem Staatsangehörigen (*ius sanguinis*) in Betracht.¹¹⁵ Es lässt sich vorliegend nicht eindeutig entnehmen, auf welches der beiden Prinzipien Südossetien abstellt. Problematisch erscheint jedoch in diesem Sinne die *en masse* Verleihung der russischen Staatsangehörigkeit an die Südosseten seit 2004, was jederzeit zur Geltendmachung der Personalhoheit Russlands über sie führen könnte¹¹⁶ und tatsächlich auch geführt hat¹¹⁷. Nichtsdestoweniger dürfte dies dahingestellt bleiben, da es im Falle einer Sezession vielmehr auf die Effektivität und Unabhängigkeit der „neuen“ Herrschaftsgewalt ankommt.¹¹⁸ Vom Vorliegen der Volkseigenschaft der Südosseten i.S.d. Drei-Elemente-Lehre ist somit auszugehen.

3. Staatsgewalt

Entscheidend ist, ob Südossetien eine effektive Staatsgewalt innehat. Einerseits sind die Gestaltung und die Aufrechterhaltung der öffentlichen Ordnung im Inneren als Ausfluss der inneren Souveränität zu garantieren, andererseits hat die Staatsgewalt ihre unmittelbare völkerrechtliche Handlungsfähigkeit in Gestalt der äußeren Souveränität sichern können.¹¹⁹ Ferner müsste eine gewisse Stabilität und Dauerhaftigkeit vorhanden sein.¹²⁰ Die erwähnten Funktionen der Staatsgewalt haben ein Mindestmaß an Effektivität aufzuweisen.¹²¹ Bei der Beurteilung der Staatsqualität fällt die Legitimität der Staatsgewalt nicht ins Gewicht.¹²²

a) Innere Dimension

Was die innere Dimension der Souveränität anbetrifft, so ist zu prüfen, ob die Herrschaftsgewalt Südossetiens in effektiver und unabhängiger Weise innerhalb jenes Gebietes Recht und Ordnung aufrechterhalten kann.¹²³ Südossetien hatte sich bereits in seinen Verfassungen von 1993 und von 2001 eine Organstruktur mit exekutiven (bestehend aus einem Präsidialamt, Ministerien und örtlichen Behörden), legislativen (Parlament) und judikativen Funktionen gegeben. Die Parlaments- und Präsidentschaftswahlen finden seit 1992 regelmäßig statt.¹²⁴ Wegen der übermäßigen, systematischen und andauernden Einflussnahme Russlands bestehen allerdings große Bedenken gegen die Unabhängigkeit dieser Ordnung. Was die Wirtschaftsverwaltung angeht, so leiden Südosseten, die materiell enorm von der Landwirtschaft sowie dem Gütertransport abhängig sind, als Folge des niedrigen Produktionsniveaus und der hoher Arbeitslosigkeit unter Armut.¹²⁵ Ohne russische Finanzhilfe wäre

¹¹³ Schweifsfurth 2006, 10.

¹¹⁴ Vgl. ICJ Rep. 1995, 23 ff. (Nottebohm-Fall).

¹¹⁵ Ipsen 2014, 97.

¹¹⁶ Vgl. Luchterhandt, in: AVöR 2008, 468; IIFMCG, Vol. II, 159.

¹¹⁷ Tancredi, in: IYIL 2008, 52.

¹¹⁸ Vgl. Krieger 2000, 95.

¹¹⁹ Vgl. Oeter, in: FS Steinberger 2002, 276.

¹²⁰ Besson, Sovereignty, MPEPIL-Online.

¹²¹ Nußberger, South Ossetia, MPEPIL-Online.

¹²² Arnauld 2014, 33.

¹²³ Siehe Fn. 110.

¹²⁴ Vgl. Luchterhandt, in: AVöR 2008, 458.

¹²⁵ Der Pro-Kopf-BIP von Südossetien wurde um ca. US \$ 250 gerechnet, was Südossetien zu einem der ärmsten „Länder“ der Welt macht, dazu: Heritage-Online.

die Versorgung der Bevölkerung, die bis zu 70% im öffentlichen Dienst tätig ist¹²⁶, unmöglich. Ferner intensiviert sich der Einfluss Russlands in dem für die Beurteilung ausschlaggebenden Bereich der inneren Sicherheit zu einer *de facto*-Kontrolle über die entsprechenden Institutionen in Südossetien.¹²⁷ Die höchsten Ämter, wie zum Beispiel im Innen- und Verteidigungsministerium sowie im nationalen Sicherheitskomitee, sind weitgehend durch russische Beamte oder Südosseten mit russischer Staatsangehörigkeit, die vorher in Nordossetien ähnliche Ämter ausgeübt hatten, besetzt.¹²⁸ Dies bestätigt die Annahme, Südossetien sei weder politisch, noch militärisch, noch finanziell „*effective on its own*“.¹²⁹ Vielmehr exerziert Russland die effektive Herrschaftsgewalt. Dies steht neben der Masseneinbürgerung von Südosseten (zu 90%)¹³⁰ durch Russland im klaren Widerspruch zu Art. 1 der südossetischen Verfassung von 2001, wonach Südossetien ein unabhängiger Staat sei.¹³¹ Ob Südossetien je eine von Russland unabhängige Politik betreiben kann, erscheint mehr als fragwürdig.

b) Äußere Dimension

Hinsichtlich der äußeren Souveränität ist zu erwähnen, dass mit der Aufnahme von Georgien in die Vereinten Nationen am 31.06.1992 die Unabhängigkeitserklärungen Südossetiens von der Staatengemeinschaft praktisch ignoriert wurde. Diese Position blieb bis zum Beginn des „Fünf-Tage-Krieges“ im August 2008 aufrechterhalten und kommt letztlich durch die Resolution 1808 des UN-Sicherheitsrats vom 15.04.2008 zum Ausdruck, in deren Art. 1 die Verpflichtung der Staatengemeinschaft zur Achtung der Souveränität, Unabhängigkeit und territorialen Integrität Georgiens bekräftigt wurde. Behauptungen dahingehend, dass die Beteiligung an den Waffenstillstandsverträgen, wie zum Beispiel in Sotchi am 16.06.1996¹³² oder im Memorandum vom 16.06.1996¹³³ die Behandlung Südossetiens als partielles Völkerrechtssubjekt widerspiegeln, sind wenig überzeugend. Zum einen wurde die Sotchi-Vereinbarung ausschließlich zwischen Russland und Georgien ausgehandelt, zum anderen war neben Russland, Georgien, der OSZE und Südossetien auch die Republik Nordossetien am Zustandekommen des Memorandums von 1996 mitbeteiligt. Die Kooperationen Südossetiens nach 2008 im Rahmen der mitgegründeten „Gemeinschaft nicht-anerkannter Staaten“ mit Abchasien, Bergkarabach, und Transnistrien fallen bei der Bewertung seiner Völkerrechtsunmittelbarkeit nicht ins Gewicht. Südossetien bleibt die Mitgliedschaft an bedeutenden internationalen Organisationen nach wie vor verwehrt.

c) Zwischenergebnis

Aus der Prüfung folgt, dass die Effektivität der Staatsgewalt nach innen zumindest rudimentär vorhanden ist, deren Unabhängigkeit jedoch nicht bejaht werden kann. Die äußere Souveränität ist ebenso wenig ausreichend begründet.

II. Die Anerkennung

Die Bedeutung der Anerkennung als Völkerrechtssubjekt durch andere Staaten zeigt sich *par excellence* in Situationen, in denen ein Gebilde unter Kuratel anderer Staaten gestellt ist. Die völkerrechtliche Anerkennung ist eine einseitige verbindliche Erklärung eines anderen Staates zur Staatsqualität eines Gebildes.¹³⁴ Sie kann

¹²⁶ Gordijenko, dekoder v. 8.06.2016.

¹²⁷ Nußberger, South Ossetia, MPEPIL-Online.

¹²⁸ IIFFMCG, Vol. II, 132.

¹²⁹ Ebd., 133; a.A. Bültermann 2017, 165 f.

¹³⁰ Turmanidze 2010, 343.

¹³¹ Nußberger, South Ossetia, MPEPIL-Online.

¹³² UN Peacemaker, Sotchi.

¹³³ Ebd., Moskau.

¹³⁴ Evans 2006, 250.

ausdrücklich oder implizit durch Aufnahme diplomatischer Beziehungen erfolgen.¹³⁵ Nach der heute herrschenden deklaratorischen Theorie ist die Anerkennung eine reine Formalität.¹³⁶ Dagegen hält die positivistische konstitutive Theorie die Anerkennung als eine Bedingung der Staatwerdung.¹³⁷ Jenseits dieses Streits kann durch eine Anerkennung die Frage nach dem Vorliegen der Staatseigenschaft im bilateralen Verhältnis dahingestellt bleiben. Nichtsdestoweniger bleibt das Völkerrecht auch in dieser Hinsicht „wirklichkeitsnah“¹³⁸. Wie der Kosovo-Fall zeigt, bietet eine erhebliche Anzahl von Anerkennungen zumindest ein Indiz für die Etablierung der neuen Herrschaft und eine quasi-Heilung mangelnder Staatsmerkmale. Im Fall Südossetiens ist vorzubringen, dass Südossetien bisher lediglich durch fünf Mitgliedstaaten der Vereinten Nationen, nämlich Russland, Nicaragua, Venezuela, Nauru und Tuvalu anerkannt wurde.¹³⁹ Botschaften betreibt die sog. Republik lediglich in Russland und Abchasien.¹⁴⁰ Eine so geringe Resonanz der Staatengemeinschaft ist für die Bewertung der Staatsqualität durch Anerkennung nicht ausreichend.

III. Ergebnis

Infolge der Unerheblichkeit der erfolgten Anerkennungen ist festzustellen, dass der Annahme eines befriedeten *de facto*-Regimes wegen erheblicher Zweifel am Selbststand Südossetiens nicht ohne Weiteres zuzustimmen sei.¹⁴¹ Aufgrund der Tatsache, dass vor 2008 nicht mal von einer befriedeten Lage in Südossetien gesprochen werden kann, erscheint die Einstufung als ein „*entity short of statehood*“ für diese Phase überzeugend.¹⁴² Für die jetzige Phase, in der mittlerweile nach fast neun Jahren die Situation sich beinahe als befriedet erweist und eine konsolidierte Kontrolle über das entsprechende Gebiet zu bejahen ist, ließe sich Südossetien zwar als ein befriedetes *de facto*-Regime einstufen. jedoch ist wegen der mangelnden Unabhängigkeit eine Parallele zu den sog. „*Puppet Regimes*“¹⁴³ nicht ganz abwegig.¹⁴⁴

E. Rechtsfolgen

Wie die Untersuchung in den Abschnitten C und D gezeigt hat, ist die Zugehörigkeit Südossetiens zum georgischen Staatsverband (wegen der Ablehnung eines Sezessionsrechts und der Unwirksamkeit der Unabhängigkeitserklärungen) *de jure* nicht beendet. Als ein befriedetes *de facto*-Regime darf jedoch Südossetien nicht mehr als ein Nullum betrachtet werden, vielmehr wird es durch das Gewaltverbot geschützt. Für die Annahme einer *militärischen* Besetzung durch Russland i.S.v. Art. 42 f. Haager Landkriegsordnung ist zunächst auf die Weitergeltung der oben genannten Waffenstillstandverträge hinzuweisen. Jede Truppenstationierung Russlands, ungeachtet der Bestimmungen dieser Verträge, samt seiner faktischen Kontrolle¹⁴⁵ würde dieser Annahme einer Besetzung grundsätzlich stattgeben. Mangels Legitimität und Staatlichkeit kann eine militärische Überpräsenz Russlands auch nicht durch eine Intervention auf Einladung seitens Südossetiens gerechtfertigt werden.¹⁴⁶

¹³⁵ Arnauld 2014, 38.

¹³⁶ Kaczorowska 2010, 226.

¹³⁷ Lorenzmeier 2016, 54.

¹³⁸ Zu der besonderen Wirklichkeitsnähe des Völkerrechts, siehe: Krüger, in: FS Spiropoulos 1957, 265, 284.

¹³⁹ Nußberger, South Ossetia, MPEPIL-Online.

¹⁴⁰ Tibilow, SR v. 07.08.2013.

¹⁴¹ Vgl. Zimmermann, TAZ v. 11.08.2008.

¹⁴² IIFMCG, Vol. II, 134; Vgl. Waters, in: Walter/Ungern-Sternberg 2014, 188.

¹⁴³ Zum Puppet-Charakter: Slomanson, in: MJIL 2009, 3.

¹⁴⁴ Turmanidze 2010, 344.

¹⁴⁵ Die faktische Kontrolle Russlands stellt an sich einen Verstoß gegen das Interventionsverbot aus Art. 2 Abs. 1 UN-Charta i.V.m mit dem Prinzip der souveränen Gleichheit der Staaten dar.

¹⁴⁶ Vgl. Heintze, in: JILPAC 2014, 132.

F. Ausblick

Die Bedeutung und Reichweite der Anwendung des Selbstbestimmungsrechts gehört nach wie vor zu den ungelösten Fragen des Völkerrechts. Im Hinblick auf die Sezession ethnischer Völker lassen sich die Worte des Hochkommissars der Vereinten Nationen in Bosnien und Herzegowina zitieren, der sagte: „inter-ethnic conflicts cannot be met by setting up new national States, which tend sooner or later towards the destructive, illiberal and inhumane ideal of ethnic purity“.¹⁴⁷ Denn vielmehr müsste die Ausübung des Selbstbestimmungsrechts zur Vielfalt und nicht zur Zersplitterung von Nationen beitragen. Stellt man zudem die Wahrung und die Verwirklichung des Weltfriedens sowie die internationale Sicherheit als die höchsten Ziele der Weltgemeinschaft, ausgedrückt in Art. 1 I UN-Charta, in den Vordergrund, so ist das Argument, dass das Interesse souveräner Staaten auf Stabilität ihrer Staatsordnung¹⁴⁸ nicht auf Kosten der Existenz der Völker zu wahren sei, plausibel. Denn bei Verbrechen, welche die Existenz der Völker gefährden würden, macht auch der Sicherheitsrat nun des Öfteren¹⁴⁹ von seinem durch Art. 39 UN-Charta eingeräumten Ermessensspielraum Gebrauch und stellt im Rahmen eines positiven Friedensbegriffs die Bedrohung des Weltfriedens wegen eines möglichen *spill-over* fest.¹⁵⁰ Konsequenter ist allerdings auch die Feststellung, dass gerade Menschenrechte, insbesondere das Selbstbestimmungsrecht, in sicheren und friedlichen Zuständen viel effizienter geschützt werden können. Zumindest effizienter, als bei der Annahme eines Sezessionsrechts, das einen „Dominoeffekt“ auszulösen droht und wodurch zu chaotischen und oft feindseligen Zuständen kommen kann.¹⁵¹ Durch das Bereitstellen internationaler Mindeststandards und Maßnahmen, welche gerade die „Extremfälle“ verhindern, kann mit gutem Gewissen entgegen der Verfechter der *remedial secession* von einem Volk der Versuch erwartet werden, seine Selbstbestimmung innerhalb des existierenden Staates zu realisieren. Es wäre wünschenswert, dass eine umfassendere Studie der Frage nachgeht, inwieweit, und womöglich abseits der klassischen Instrumente des Völkerrechts, solche *objective guarantees* zur Aussicht gestellt oder von den Staaten eingefordert werden können. Denn das Völkerrecht hat leider in letzter Zeit wegen der egoistischen Nichtbeachtung seiner Grundsätze durch einige Staaten – zuletzt was das Selbstbestimmungsrecht anbelangt eminent im Kosovo-Fall - an seiner Geltungskraft verloren.

¹⁴⁷ Bildt, in: SUR 1998, 190.

¹⁴⁸ Murswiek, in: AVöR 1993, 312.

¹⁴⁹ Vgl. SC Res. 668 v. 05.04.1991.

¹⁵⁰ Arnould 2014, 439.

¹⁵¹ Vgl. Döldermann 2002, 161.

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Impact of the OECD Multilateral Instrument on International Tax Law

The Multilateral Instrument to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) is one action by the OECD to address tax-base erosion and profit shifting (BEPS), i.e., double non-taxation or strategies consisting of artificially shifting profits to low-tax locations where there is no substantial economic activity and at the same time, very little corporate tax being paid. MLI aims to modify bilateral double-taxation agreements. It is an international agreement that modifies, in an umbrella manner, the relevant provisions of bilateral double-taxation agreements. Standard clauses contained in the MLI should replace, modify or supplement the relevant clauses in bilateral agreements. MLI marks a new opening in international tax law, offering for the first time the ability to harmonise the rules governing cross-border taxation.

Keywords: *MLI, withholding tax, hybrid mismatch, OECD, BEPS, double taxation*

1. Introduction

The problem of what is termed tax-base erosion and profit shifting (BEPS), or various similar terms used by experts, officials, and academics in recent years, has affected economies since at least the beginning of the last century. However, the global economic and financial crisis accelerated the process of creating supranational mechanisms to fight tax avoidance. The OECD (together with the G20) has become an important forum for creating a cooperation framework in this area. The multilateral instrument (MLI) proposed by the Organization, a type of treaty in line with international law, has the potential to change the model global taxation framework and to solve the problems of the countries most affected by tax avoidance. It will harmonise the regulation of some taxation aspects between the parties signing this convention. Since the creation of model tax treaties by the League of Nations,¹ there has not been such a breakthrough document, not least because the treaty introduces unification of disclosure requirements and a systemic and cross-border approach to transnational corporations. Thus, not only is the content revolutionary but also the novel form of hard law.

To understand how international tax law works and why MLI opens a new chapter in it, one should realize that the fiscal efficiency of economic activities conducted by international corporations depends to a large extent on the network of more than three thousand bilateral double-taxation treaties, which determine taxation rules on cross-border income.² About 75% of them are based on the OECD Model Tax Convention on Income

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¹ League of Nations, Double Taxation and Tax Evasion Convention for the Allocation of Business Income between States for the Purposes of Taxation, 1935; *Christians A.*, BEPS and the New International Tax Order, *BYU Law Review*, №1603 (2017), 1603-1647; *Friedlander L.*, and *Wilkie S.*, Policy Forum: The History of Tax Treaty Provisions – And Why It Is important To Know About It, *Canadian Tax Journal*, №4 (2006), Vol. 54, 907-921.

² *Avi-Yona R.*, The Structure of International Taxation: A Proposal for Simplification, *Tax Law Review*, №74 (1996), 1301-1360.

and on Capital (Model Convention).³ These agreements are constructed in a modal way, as the convention itself allows for the alternative construction of many clauses. Therefore, as a rule, there is no convergence between the individual territories in the use of, *inter alia*, methods of avoiding double taxation of capital income. Often, competition between jurisdictions, each seeking to attract the largest group of investors, is reflected within the provisions of agreements on the avoidance of double taxation. International tax law in the traditional sense is not based on the idea of cooperation, but on the idea of competition of tax regimes. At present, there is no mechanism recognised by the international community for solving tax disputes of a trans-jurisdictional character. Tax competition between states has become increasingly aggressive, and the tax-planning strategies of international capital groups prevalently have included the establishment of a special purpose vehicle (“SPV”) located in a jurisdiction considered to offer harmful tax competition, commonly referred to as a “tax haven”. The drawbacks of such operations on the budgets of highly developed countries have been significant, and thus, tax havens are considered jurisdictions whose core “business” is based on the benefits of tax avoidance by companies mainly from Europe and the United States.⁴

The unification of all double-taxation conventions in a way that eliminates the risk of double income-tax avoidance, abuse of double-taxation agreements, and complex corporate structures whose only business objective is tax avoidance would not be practically feasible on a global scale. Therefore, the concept of MLI as an umbrella agreement that legally modifies the relevant provisions of bilateral agreements on the avoidance of double taxation is, at the level of legal construction under international tax law, a breakthrough.

2. MLI as the Hard Core of the BEPS Project – the OECD System Response to Gaps in International Tax Law

So far, the existing soft legal instruments proposed by the OECD, such as guidelines or recommendations, and even model legal provisions adopted to promote specific legal solutions, are not always effective measures to influence the regulatory framework (including tax regulations) in the member states. Their effectiveness depends largely on countries that, through peer review and peer pressure, can mobilise other countries to better comply with the OECD principles. In the field of international tax law, the long-term problem is the tax-avoidance methods used by transnational corporations based on, i.e., discrepancies in tax law between countries. This is a good incentive for the OECD and the countries losing the most tax through avoidance for them to create a multilateral mechanism to uniformly regulate the international tax system. Although the OECD since 1998 has been warning on excessive aggressive tax planning stemming from, i.e., leaky international tax law, the global economic and financial crisis accelerated state changes in tackling tax avoidance. From September 2013, G20 leaders adopted the so-called BEPS Action Plan, developed with the OECD. The plan was to be a comprehensive, systemic solution to the problem of the increasing scale of tax avoidance and was in the end based on three pillars: strengthening the consistency of corporate income tax (CIT) rules at the international level, attributing tax to actual business operations, and increasing tax transparency. As a tool for system solutions for fiscal problems arising from BEPS, the plan has two basic objectives:

- to ensure taxation of actual business activity in the jurisdiction in which the activity takes place,
- to eliminate double *non*-taxation, while refraining from double taxation.

The BEPS standards are to be introduced by the OECD and G20 states. However, to improve the effectiveness of the entire political project (i.e., so the developed standards are globally respected), all jurisdictions in the world were invited to cooperate. An effect of this intended inclusive character of the project was that about 40

³ Lang M., *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties*, Cambridge 2012, pp. 2-10.

⁴ Avi-Yonah R., *Globalization Tax Competition, and Fiscal Crisis of the Welfare State*, *Harvard Law Review*, 1573 (2000), 1573-1676.

developing countries, as well as international organisations—the UN, IMF and World Bank Group—contributed to the project outside the OECD and G20 states.⁵ Such a broad contribution to the preparations may be a prognosis of permanent unavoidable changes in the global legal tax system. The plan included a set of actions to be completed by the OECD/G20 in cooperation with other entities within two years. They are, in turn:

- Action 1: Addressing the Tax Challenges of the Digital Economy
- Action 2: Neutralising the Effects of Hybrid Mismatch Arrangements
- Action 3: Designing Effective Controlled Foreign Company Rules
- Action 4: 2 Limiting Base Erosion Involving Interest Deductions and Other Financial Payments
- Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance
- Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances
- Action 7: Preventing the Artificial Avoidance of Permanent Establishment Status
- Actions 8–10: Aligning Transfer Pricing Outcomes with Value Creation
- Action 11: Measuring and Monitoring BEPS
- Action 12: Mandatory Disclosure Rules
- Action 13: Guidance on Transfer Pricing Documentation and Country-by-Country Reporting
- Action 14: Making Dispute Resolution Mechanisms More Effective
- Action 15: Developing a Multilateral Instrument to Modify Bilateral Tax Treaties

The plan provides for the introduction of four minimum standards (measures 5, 6, 13 and 14, including standardisation of company information for tax services in individual countries). The aim was to increase the transparency of cross-border transfers of profits (mainly capital dividends and interest) and the convergence of domestic tax systems. Consequently, it was supposed to limit the possibility for transnational corporations to exploit differences between tax systems while at the same time preventing the favouring of some countries at the expense of others (level playing field).⁶

The BEPS package is international soft law, i.e., it is not binding or it lacks elements characteristic of international law in the strict sense. This means that the introduction and respect of BEPS solutions on a global scale depends solely on political will and the cooperation of states. However, paradoxically, soft law although not armed with legal sanctions, is becoming an increasingly popular tool among international organisations.

This is because the states, apart from obeying the imposed “external” rules, they co-decide the final shape of the agreements and thus recognize that the solutions they have developed are satisfactory for them. Also, the entities that sign these agreements may motivate other peers to comply with these rules. This is also the case with the BEPS action plan; on one hand, the OECD has limited means to put pressure on states but, on the other hand, thanks to the peer-review mechanism⁷ within the framework of specialised bodies (e.g., the Global Forum on Transparency and the Exchange of Information for Tax Purposes), the organisation may encourage the worst implementing countries to greater efforts.⁸ In the case of the BEPS agenda, however, its soft law character is only a transitional stage of the project, and an international agreement was designed as the final outcome of the whole BEPS plan.

⁵ *Kalia A.*, International Tax Reform and “Brexit” (presentation), ACC Arizona Meeting, 16 October 2016, <<https://www.dlapiper.com/~media/Files/Insights/Publications/2016/10/International%20Tax%20Reform%20and%20Brexit.pdf>>, [07.11.2017].

⁶ OECD, Background Brief, Inclusive Framework on BEPS, Paris, January 2017, <<http://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf>>, [07.11.2017].

⁷ OECD, Peer review: A tool for co-operation and change, Paris 2002, <<https://www.oecd.org/dac/peer-reviews/1955285.pdf>>, [07.11.2017].

⁸ <<http://www.oecd.org/tax/transparency/>>, [08.11.2017].

Because aggressive tax optimisation can be limited only through a global solution, the key to the success of the entire initiative was to encourage the non-OECD/non-G20 members to cooperate within the BEPS project. Therefore, one of the provisions of the G20 summit of November 2015 in Antalya was to establish a framework that would allow such cooperation. Furthermore, the developing countries were even also encouraged to cooperate in earlier phases of the project by an invitation to participate in working sessions, co-organised by regional or national tax organisations along with the OECD. Cooperation with these countries seems particularly important, since they have more loose CIT regimes than OECD countries and can be used by transnational corporations to transfer profits from the firm's country of residence (i.e., by the exploitation of loopholes or inconsistencies in the tax laws of various countries).

Throughout the whole process of forging the BEPS package, the organisation's attitude to make the solutions developed within this framework a global standard is noticeable. However, even the best standard may perish at the stage of implementation into domestic law. Therefore, the OECD included a fifteenth goal of the BEPS Action Plan, specifically the preparation of a real international treaty, and not just a standard that might be abandoned by the states. One may ask what is the purpose of another OECD tax convention, since one of the well-known OECD standards, and widely recognised as a reference point in international tax law, is the Model Convention.

3. OECD Model Convention and MLI

The strength of the position of the OECD as an organisation that sets international regulatory standards for its member states varies across the areas of economic policy. The OECD legal instruments that comprise model regulations or generally formulated standards of conduct vary in popularity, and even the member states take different approaches to implementation of the rules in their domestic legal framework.

The idea of shaping standardised solutions for taxing cross-border income, which would then be adopted by the OECD member states as a template for bilateral agreements to avoid double taxation, dates to the 1960s. At that time, the OECD Tax Committee proposed the organisation adopt a legal instrument that would contain these template provisions. In 1963, the OECD adopted the first set of recommendations for the avoidance of double taxation (Draft Double Taxation Convention on Income and On Capital). The first version of the Model Convention was adopted by the OECD in 1977, and since then it has been frequently revisited and updated. The current version of this document is based on a 2014 review.⁹

As with other OECD legal instruments adopted so far (e.g., OECD Corporate Governance Rules), the Model Convention is not an international agreement but a specific set of model clauses that OECD member states should consider when concluding or revising bilateral agreements on the avoidance of double taxation.¹⁰ The vast majority of such active agreements are based on clauses contained in the Model Convention.¹¹ Official commentary on the convention, published and regularly updated by the OECD, represents the basic guidelines for interpretation of the provisions of bilateral agreements on the avoidance of double taxation.¹² This official commentary is a widely accepted practice in tax consultancy, as well as in case law.

⁹ OECD, Model Tax Convention on Income and on Capital, (Full Version), Paris 2015, <http://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version_9789264239081-en>, [30.11.2017].

¹⁰ Ibid, p. 13: "As recommended by the Council of the OECD, member countries, when concluding or revising bilateral conventions, should conform to this Model Convention..."

¹¹ Lennard M., The UN Model Tax Convention as Compared with the OECD Model Tax Convention—Current Points of Difference and Recent Developments, „Asia Pacific Tax Bulletin”, Vol. 1/2 (2009), 4-11.

¹² Lang M., Brugger F., The Role of the OECD Commentary in Tax Treaty Interpretation, „Australian Tax Forum”, №23 (2008), 95-108; Engelen F., Some Observations on the Legal Status of the Commentaries on the OECD Model, „Bulletin for International Taxation”, №105 (2006), 105-109; Tillinghas D.R., Commentaries to the OECD Model Convention: Ubiquitous, Often Controversial; But Could They Possibly Be Legally Binding?, Tax Management International, №35 (2006), 580-581.

The MLI,¹³ signed by 68 OECD member countries in Paris on 7 June 2017, changes the international tax landscape in a revolutionary way. While the Model Convention served as the “gold standard” for double-taxation treaties, the MLI is an international agreement containing provisions that modify or replace provisions in relevant double-taxation agreements concluded between countries that have ratified MLI. Building agreement between the OECD member states on MLI is therefore — from the perspective of this organisation—the result of the solutions developed under the BEPS long-term project. The moment of entry into force of the MLI, based on the date of ratification by the fifth signatory to the convention, marks the caesura in international tax law at which begins the stage of harmonising the global approach to the problem of tax-base erosion and tax avoidance of cross-border capital income.

4. MLI’s Structure and Scope of Application

The MLI can be divided into seven parts: (1) scope and interpretation: Art. 1 and 2; (2) hybrid mismatches: Art. 3-5; (3) abuse of double-taxation conventions: Art. 6-11; (4) avoiding a permanent establishment status: Art. 12-15; (5) improving the methods of dispute resolution: Art. 16-17; (6) arbitration: Art. 18-26; and, (7) final provisions: Art. 27-39. Within MLI, there is a so-called minimum standard, i.e., a set of rules that should be mandatory for all countries acceding to the convention. These are the provisions of art. 6, 7 and 16. The application of other MLI regulations are voluntary for parties to the convention. When signing the MLI, a state submits a declaration to the depositary of the convention on the application of regulations that go beyond the minimum standard. These statements have a different form: they include reservations about the non-application of MLI provisions to all or selected double-taxation conventions, statements about the use of specific, optional MLI provisions, including the choice of a specific solution from these MLI provisions that have been formulated in an alternative manner. Each state also specifies to the depositary which double-taxation agreements the MLI will be applied. Poland has reported 78 double-taxation agreements to align with the MLI. They are named in the MLI as Covered Tax Agreements.

A specific double-taxation agreement will only be covered by the MLI if both parties notify it pursuant to Art. 2, para. 1 (a) (ii) MLI. The MLI modifies such agreements compulsorily within the scope of the minimum standard established by it (Articles 6, 7 and 16), and the remaining scope may be applied through MLI instead of the provisions of the double-taxation agreement, if the notification points to the replacement of a specific part of the agreement with MLI provisions. The MLI may also modify the provisions of agreements without repealing them. If the specific provisions of the MLI refer to a part not included in the agreement, they are applied to such an agreement directly as a supplement.

5. The Problem of Taxpayers with Dual Residency

If a given entity (referring to taxpayers other than natural persons) can be treated by more than one country as a tax resident based on the provisions of the relevant double-taxation agreement, the tax authorities of the signatories will try to determine through mutual agreement on whose territory the given entity will be considered resident for the purposes of the agreement, considering the location of the actual management, place of incorporation, or another method of establishing the taxpayer and any other relevant circumstances. If the state does not reach agreement in this respect, the taxpayer will not be able to take advantage of the benefits of a given double-taxation agreement. With regard to this solution within Art. 4 MLI, Poland has declared that this provision will apply to all notified double-taxation agreements.

¹³ Multilateral convention to implement tax treaty-related measures to prevent base erosion and profit shifting.

6. Methods of Avoiding Double Taxation

One of the barriers to optimal capital allocation in the modern economy is double taxation of cross-border income. At the same time, a serious fiscal problem for many jurisdictions is abuse of provisions of existing double-taxation agreements to achieve effectively zero tax in each of the states that are parties to the agreement.¹⁴ This phenomenon is called double non-taxation of income. The problem faced by international tax law is the effective elimination of this phenomenon in a neutral way, that is, in a way that does not affect the taxpayer's decisions regarding the location of investments in a given jurisdiction due to specific tax conditions. At the same time, this tax law is designed to prevent "double taxation" of income.

International tax law uses two basic methods of avoiding double taxation: (a) the exemption method and (b) the credit method (also sometimes called the deduction method). The exemption method states that income earned in country A by a taxpayer who is a resident of country B is exempt from tax in state A, and is taxable only in state B together with the other income of the taxpayer (principle of taxation of global income in the taxpayer's state of residence). In a situation in which income freed from withholding tax in country B would be simultaneously exempted under national law from taxation also in state A, then this would be a classic case of "double non-taxation".

The second method of avoiding double taxation applied in international tax law—the credit method—allows states to effectively deal with the risk of double non-taxation. According to this method, income earned in state A by a resident of state B would be taxed in state A (income tax in the source country), and the tax paid abroad would be subject to a tax deduction in the state of residence. The application of this method guarantees that the income of the taxpayer is always subject to taxation in the state where it was obtained (source country), and the double taxation of this income in the state of residence of the taxpayer is made by deducting the tax paid at the source from the tax the taxpayer would pay from his whole income in the state of residence. In the case of the credit method, the tax paid in the source country to be credited may not exceed the amount of tax payable in the country of residence. In practice, this means that if rates in the source country are higher than rates in the taxpayer's country of residence, the taxpayer cannot fully benefit from the tax paid at the source. Thus, the MLI's application of this method of avoiding double taxation as the basic method strengthens the situation of a structural lack of neutrality in the system of international tax law. The choice of such a method is justified by the motive to protect the tax base in the taxpayer's residence country.

The MLI, in Article 5, proposes three options (A, B, C) for a state to choose the appropriate method of avoiding double taxation. Option A provides that if a double tax agreement obliges the taxpayer's residence to exempt income earned in the source country and the source country waives taxing it or significantly restricts its taxation, then the taxpayer's state of residence has the right to apply to this income the credit method to which this income may be subject in the country of the taxpayer's residence (the so-called *switch-over clause*). Option A under the MLI has been chosen by, among others, Luxembourg.

In the case of option B, the country of residence would be entitled to use the proportional credit method instead of the exemption method for capital income, such as dividends, that can be deducted from the tax base in the source country. Option C, based on Art. 23B of the Model Convention, provides for the replacement in covered tax agreements, the method of exclusion with a credit method. If, in accordance with the covered tax agreement, the income of a taxable person in one of the contracting states is exempt from tax in that state, the state may, when calculating the amount of tax on the other income or property of that person, take into account the exempt income or assets. Option C was chosen by majority of the European MLI signatories for all covered tax agreements.

¹⁴ Morris A., *Moberg L.*, Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition", *Columbia Journal of Tax Law*, №4 (2011), 1-64.

7. Abuse of Double-Taxation Agreements

One of the issues in international trade that are extremely problematic for developed economies from a fiscal perspective is the issue of abuse by international corporations of provisions of individual double-taxation agreements and the creation of multi-layer structures of SPVs in different jurisdictions. One of the more well-known designs of this type is the “double Irish with a Dutch sandwich” used in the past by corporations such as Google and Apple. This aggressive tax-planning scheme used the provisions of double-taxation agreements, including the U.S.-Ireland agreement (and in one version, an Ireland-Malta agreement) to minimize tax burdens.¹⁵ In relation to the problem of abuse of double-taxation treaties, the MLI refers to the recommendations under Action 6 BEPS, which include:

- acceptance of the principal purpose test clause (PPT), Art. 7, par. 1 MLI,
- adoption of the PPT clause along with a simplified provision aimed at limiting the award of contractual benefits (limitation of benefits, or LOB),
- adoption of an extended clause aimed at limiting the award of contractual benefits (a broad LOB provision).

Poland decided to accept the PPT clause. Included in Art. 7, par. 1 MLI, the definition of PPT provides that an advantage derived from MLI cannot be granted on part of income or capital if, taking into account all relevant facts and circumstances, that it is justified to state obtaining this advantage was one of the main objectives of the agreement or transaction that led directly or indirectly to the benefit in question, unless it was found that the grant of the advantage in these circumstances is considered consistent with the object and purpose of the relevant provisions of the concluded tax treaties. According to Art. 7, par. 2 MLI, if there is no PPT clause in the Notified Double Taxation Agreement, which would refuse to grant the taxpayer all or part of the benefits resulting from the contract in a situation where the basic purpose of the arrangement or transaction would be to benefit from the contract, the PPT clause included in Art. 7, par. 1 MLI would be retained.

Because the adoption of the PPT clause for some countries would mean the loss of an important argument in terms of their investment attractiveness, in Art. 7, par. 4 MLI, the following optional PPT modifying clause provides:

“Where a benefit under a Covered Tax Agreement is denied to a person under provisions of the Covered Tax Agreement (as it may be modified by this Convention) that deny all or part of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits, the competent authority of the Contracting Jurisdiction that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income or capital, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement. The competent authority of the Contracting Jurisdiction to which a request has been made under this paragraph by a resident of the other Contracting Jurisdiction shall consult with the competent authority of that other Contracting Jurisdiction before rejecting the request.”

In the doctrine, there are voices that the PPT clause in the version adopted by the MLI may not be fully consistent with EU law. The main argument against PPT is too much freedom of the tax authorities to determine

¹⁵ Lang M., *BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties*, Tax Notes International, №7 (2014), Vol. 74, 655-664.

a taxpayer's intentions when designing the structure or transaction¹⁶, as well as unclear criteria for assessing whether it is reasonable to conclude the basic structure's purpose (though not the sole one) was to generate tax benefits resulting from a given agreement on the avoidance of double taxation. In proving the incompatibility of the PPT clause with European law,¹⁷ the authors most often refer to the judgments of the Court of Justice of the European Union (CJEU) in the cases of SIAT¹⁸ and Itelcar.¹⁹ The CJEU, in judgments in these cases, took the position that the principle of legal certainty is one of the foundations of the EU, and the taxpayer should know the rights and obligations resulting from tax regulations at the moment of making decisions having tax consequences. The tribunal had reservations about the way in which the criteria for assessing whether a given transaction or structure is "artificial" were met by the general anti-avoidance rule (GAAR) adopted in national law. The wide discretion given to tax authorities in decisions regarding the classification of transactions based on PPT may also give rise to reservations in light of older CJEU case law (see the judgment in the Biehl case). It seems, however, that the declaration by most EU countries of the application of Art. 7, par. 1 MLI determines that the doubts raised in the doctrine will not be seriously considered in the practice of tax authorities because of a lack of tribunal case law relating directly to compliance under Art. 7, par. 1 MLI and related to the Treaty on the Functioning of the European Union.

8. Limitation on Benefits, LOB

MLI introduces the LOB clause as a method to counteract the abuse of provisions of double-taxation agreements by taxpayers who are only formally resident in a given country, and their real relationship with the state of residence can be considered seeming. The LOB clause is intended to provide for the granting of benefits from a given double-taxation agreement through additional conditions so that only a taxpayer who is an actual resident of one of the contracting states can use them. The conditions contained in the LOB clause (Article 7, par. 8-12 MLI) provide for the granting of benefits from a given agreement to taxpayers who only have the status:

- a) a natural person,
- b) the contracting state, its body, local government or agency,
- c) public benefit organizations,
- d) the pension fund,
- e) a company listed on the stock exchange,
- f) a company whose at least 50% of shares are held by the person or persons listed in point a-e for at least six months in a year,
- g) companies conducting active operations,
- h) a company in which at least 75% of shares are held by people who enjoy the benefits of other agreements on double taxation agreements, which the tax authorities of the Contracting State granted tax benefits by means of a discretionary decision.

Art. 7, par. 9-12 MLI defines individual categories of taxpayers, indicating criteria on which a given company can be considered for the purposes of the convention as, among others, a listed company or a company conducting actual activity. For example, for a listed company, the MLI recognizes such a company as one whose principal class of shares is regularly traded on at least one recognized stock exchange.

¹⁶ Corwin M., Eggert J., Zubler M., Practical Questions for Multinationals in an MLI World, Tax Executive, 20 November 2017.

¹⁷ Kemmeren E.C.C.M., Where is EU Law in the OECD BEPS Discussion, EC Tax Review, Nr 190 (2014), tom 23 (4), 190-193.

¹⁸ CJEU judgement, 5 July 2012, case C-318/10 (SIAT v. Etat Belge).

¹⁹ CJEU judgement, 3 October 2013, case C-282/12, (Itelcar- Automoveis de Aluguer Lda v Fazenda Publica).

9. Payment of Cross-Border Dividends

The standard in double-taxation agreements is a clause that allows the state of income source to apply a lower tax rate on dividends paid to a non-resident shareholder (“withholding tax”) when the shareholder has a certain level of capital involvement in the subsidiary. Art. 8, sec. 1 MLI has introduced an additional condition for the application of a reduced rate of withholding tax in the Covered Tax Agreements: The need to have a share in a subsidiary for at least 365 days.²⁰ For this provision, most MLI signatories plan to apply Art. 8, para. 1 MLI, however it they notified a reservation in this respect, as many of the double-taxation agreements concluded by those countries contain a provision conditioning a lower rate of withholding tax on dividends paid to non-residents in the form of an obligation for a non-resident to hold shares in a subsidiary for a period of 24 months.

10. Real Estate Clause

Included in Art. 9, par. 1 MLI, the so-called Real Estate Clause foresees an analogous holding period, to dividend profits for shares or stocks, with the difference that it concerns shares in companies that invest in real estate. This clause pertaining to provisions of double-taxation agreements stipulates that profits derived by a resident of a territory with contractual jurisdiction over the transfer of ownership of shares in a company may be taxed in the other contracting jurisdiction. It comes into effect when a certain proportion of the value of these shares or rights from immovable property situated on the territory of the other contracting jurisdiction is exceeded (or when part of the property of that entity exceeds a specified amount of immovable property / real estate). This clause will apply if:

- the value threshold condition is met any time in the 365 days preceding the transfer of ownership; and,
- shares or comparable property rights such as shares in a partnership or a trust (to the extent that these shares or majors have not yet been covered by the provisions of the contract), in addition to any shares or property rights already covered by the provisions of the contract.

According to Art. 9, par. 4 MLI, that income may be taxed in the country of the location of the immovable property provided that at any time during the 365-day period preceding the sale of the shares or comparable property rights, the value of these exceeding 50% came from real estate.

11. Avoiding Foundation of a Permanent Establishment

MLI in Art. 10-15 comprehensively refers to the problem of the artificial prevention of the formation of an establishment by a taxpayer to avoid the territorial attribution of profits generated by the jurisdiction where the establishment is located.²¹ According to Art. 10 MLI, when an enterprise of state A receives income in country B, and this income according to the rules of country A can be attributed to an enterprise located on the territory of state C (and countries A and B are linked by a double-taxation agreement) and profits attributed to this establishment are exempt from taxation in state A, then the benefits provided in the double-taxation agreement will not be granted for the part of the income taxed by state C in the amount of less than 60% of the tax that would be imposed by state A on the part of the establishment located on the territory of state A. In such a case, the income will be taxed in accordance with the internal legislation of state B, irrespective of other provisions of the double-taxation agreement. This regulation will not apply if the income is obtained from state B in connection

²⁰ *Vincent F.*, Transfer Pricing and Attribution of Income to Permanent Establishments: The Case for Systematic Global Profit Splits (Just Don't Say Formulary Apportionment), *Canada Tax Journal*, №2 (2003), Vol. 53, 409-416.

²¹ Compare: OECD, Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7-2015 Final Report 9-13, 2015, <<http://oecd-library.org/docserver/download/2315341e.pdf>>, [30.11.2017].

with the business activity of the undertaking or is incidental to such activity (having a different character than economic activity like making, managing or simply holding a company investment in an own account, unless such activities constitute banking, insurance, or securities trading activities run by a bank, insurance company, or licensed broker in securities, respectively).

The above MLI clause aims at fiscal protection of the source of income if the taxpayer uses the provisions of the double-taxation agreement in a situation where the income earned by a company in a third country (not a party to the agreement) is not subject to taxation or has significantly reduced taxation. This provision is also intended to counteract the transfer of assets (stocks, bonds, etc.) to an establishment in a third country that applies harmful tax competition (tax haven).

Bearing in mind that Art. 12-15 MLI is not part of the minimum standard, signatories are not obliged to apply them.

12. Arbitration

MLI in Art. 18-26 contains detailed rules on arbitration. These rules do not fall within the scope of the minimum standard and are only valid if both Contracting States have agreed to be bound by them. According to Art. 19, para. 1 MLI, a taxpayer who presents a matter to the competent authority of the contracting state and who believes that the actions of one or both MLI parties of states or their tax effect on the taxpayer would be incompatible with the provisions of a given Covered Tax Agreement²², and the authorities of both countries cannot reach agreement on the interpretation of the provisions of the relevant double-taxation agreement, then the matter may be subject to an arbitration procedure under MLI. The arbitration proceedings may follow two scenarios:

- a) a “final offer”, in which each of the authorities in the double-taxation agreements proposes to resolve the matter, leaving the final choice to the arbitrators;
- b) an “independent opinion”, in which arbitrators issue a decision based on their own independent judgment formed through analysis of evidence collected in the case.²³

If each country chooses to proceed according to a different scenario, the arbitration will not take place. Most EU signatories of the MLI has decided that it will not apply MLI rules in the field of arbitration due to the costs of such proceedings to the state budget.

13. Impact of MLI on International Economic Relations

The entry into force of MLI is a pivotal point in the reform of international tax architecture. The implementation of the entire BEPS project, of which MLI is the hard core, is based on five pillars:

1. adoption of legal norms by member states in the scope of individual BEPS activities
2. change existing double taxation conventions;
3. joining MLI;
4. practical implementation by member states of model solutions (in particular, the Model Convention) issued by the OECD;
5. submission to periodic peer reviews by member states.

Each of the five pillars plays a separate role in shaping the standards of international tax law according to the concept outlined in the BEPS. Hitherto, the *acquis* addressed to OECD member countries was a kind of

²² Govind S., Turcan L., The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive), Bulletin for International Taxation, 2017, Vol.71, №3/4.

²³ Compare: Bravo N., The Proposal for a Multilateral Tax Instrument for Updating Tax Treaties, Cambridge 2012, p. 343.

quasi-legal incentive, a recommendation requiring member states to adapt their regulatory framework to soft instruments issued by the OECD, such as guidelines (e.g., Guidelines for State Treasury companies) or rules (Corporate Governance Principles).

The implementation of OECD legal instruments has always been the Achilles' heel of this organisation. Traditional peer reviews carried out by all substantive OECD committees often showed a significant level of divergence between member states in the level of compliance with the objectives and rules exported in soft legal instruments. Therefore, against the background of previous experience, the adoption of MLI by the vast majority of members of the organisation (apart from a few exceptions, such as the U.S.) is a breakthrough in both the political and legal dimensions. The political dimension affects the vital fiscal interests of each of the member states. The broad consensus that, regardless of the degree of affluence, some worrying phenomena in the sphere of economic activities of international corporations affect all OECD member jurisdictions may indicate the determination of highly developed economies to eliminate the phenomenon of progressive erosion of tax base and transfer of profits to a jurisdiction using harmful tax competition.

In the legal dimension, the MLI breakthrough is even more evident. The idea that the international convention is to be a tool that structurally modifies (by law) the provisions of existing umbrella agreements on double-taxation is a precedent. The construction of the MLI as a legal document in which the so-called minimum standard includes non-controversial provisions and a number of provisions containing optional clauses, subject to the will of the contracting states, testifies to a modern, modular approach to the complex problem of income-tax avoidance and the inclusive *ratio legis* of the entire document. This common denominator (minimum standard) has allowed a relatively large number of countries to start the difficult BEPS implementation process, and for a smaller group, it has allowed far-reaching harmonisation of clauses in bilateral agreements that create a new, consistent quality in the taxation of cross-border income, especially capital income such as dividends and interest.

With respect to double-taxation agreements concluded by the most of the UE countries, certainly one of the most significant effects of joining the MLI will consist of replacing the exemption method of foreign income in the country of taxpayer's residence, if the income was taxed in the other country (source country), by the ordinary credit method, effectively eliminating the risk of double-income tax avoidance. On the other hand, it should be remembered that this method conflicts with the principle of fiscal neutrality, sometimes exposing the countries applying it to a loss of investment attractiveness.²⁴

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