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Crimes Committed Against the Society According to the Georgian Traditional (Folk) Law

1. Introduction

Present work discusses several crimes committed against the society and considered under the Georgian traditional law. Based on the materials, it is evident that local traditional law was used for the punishment of criminal actions directed against the specific family name, family branch, specific family and person as well as for certain crimes, which were perceived as the crimes directed against the residents of specific territorial unit (for example, community, village).

The object of impingement for the crime against the society is the societal, public interest. The above could be any interest, important or the one bearing minor importance.

In the mountainous Georgia crimes directed against the society (for example betrayal to the society) could be directed against the interests of the whole ravine as well as local territorial unit. In particular, crime against the society could be committed against the community of the whole Svaneti over the Bali (all communities of Svaneti over the Bali) and all twelve communities of Khevsureti or Pshavi, as well as against the specific communities or villages in the above areas. In this regard, we would borrow from the entry made by M. Kedeladze. According to his definition, the following would be assigned "samani" punishment (outlawing from the society): 1. Khevsureti traitor; 2. Community betrayer; 3. Village betrayer.[1]

Among the crimes against the society the betrayal of community, village was considered as the heaviest crimes. In some mountainous regions of Georgia, the definition of community betrayal is different compared with other regions. In this regard, the definition of community betrayal in the traditional law of Pshavi is worth mentioning. The above mentioned issue has been studied in depth by *D. Jalabadze.* In Pshavi the above type of criminal action was referred to as the betrayal to community and sacred icon. Composition of such crimes was quite diverse and included various types of criminal actions. *According to the definition provided by D. Jalabadze,* in general terms, "any action, violating the traditions, habits of society, which are taken as dogmas by society can be considered" as the betrayal to the community.[2] Such action could be demonstrated in the form of robbery of community, denunciation, reproaching, offence to the community icon and other irrelevant behaviors.[3] *D. Jalabadze* notes that even the experts of Pshavi

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1 *Kedeladze M.,* Khevsureti Materials, 1951, Personal Archive, Notebook № 18, 1. Archive of *M. Kedeladze* is Stored in the Archive of the Institute of History and Ethnology, Tbilisi State University (in Georgian).

2 *Jalabadze D.,* Crime and Punishment in the Georgian Traditional (folk) Law, Tbilisi, 2003, 36 (in Georgian).

3 Ibid, 37.

denomination cannot comprehensively list the specific actions considered as community betrayal and they limit themselves with the indication of facts known to them (heard or witnessed). According to his definition, the reason for the above was that, according to the traditional law, recognition of any action as the betrayal to community was done based on the assessment of each specific fact.[4] Inhabitant of village Magaroskari, local teacher Ivane Kartvelishvili provided *D. Jalabadze* with relatively comprehensive information regarding the subject of our work. According to his information: "Theft of bowls-treasures and even showing them to other was considered as the betrayal to community…. for these cases the exile from the village was considered. Forbidden relationship with men ("relationship with men" – forbidden sexual relationship followed with pregnancy – D. J.) - in this case both parties were punished; the following crimes were included in the betrayal to the community: theft, forbidden sexual relationship, revealing the community secrets, deforestation of community forests, misappropriation of community land, non-fulfillment of community assignment - the case when somebody avoids common activities, such as during the war, or construction of castles, towers and other works, - in such cases one would say that the person dishonored the community and would be punished via the slaughtering of a calf, or his/her livestock would be confiscated in favor of the community."[5] *D. Jalabadze* notes rightly that according to the provided materials, in line with the traditional law, betrayal to the community considered not only betrayal in a narrow sense but also such actions, which visually did not contain signs of betrayal, however, were inflicting averse damage to the common interests of the community (society).[6]

Hence, based on the above, in Pshaveti traditional law the betrayal to the community implied the betrayal in a narrow sense (betrayal with the direct meaning of the word), as well as in a wider sense, it included factually all actions directed against the essential interests of the society (community, village). Non-existence of comprehensive list for such actions shall not surprise us, due to the casuistic nature of traditional law. It was fully possible to consider some new case as an action directed against the village residents, community and accordingly to assign punishment against the perpetrator. Hence, all actions that could be assessed as the betrayal to community could not be defined preliminarily. Naturally, there were specific actions, which were generally perceived as betrayal to community and therefore, information providers from Pshaveti indicated to those actions.

Betrayal to the community could be demonstrated in the active actions (for example, robbery of community) or inactiveness (for example, "avoiding community duties").[7]

In Mtiuleti, betrayal to the community also considered the actions against the community. For example, residents of Khando considered non-delivery of payment in kind from the community shrine – "Kovladtsminda" owned vineyards as the betrayal to the community.[8] The same could be stated in

4 *Jalabadze D.,* Crime and Punishment in the Georgian Traditional (folk) Law, Tbilisi, 2003, 36 (in Georgian).
5 Ibid.
6 Ibid, 37-38.
7 Ibid, 38.
8 *Topchishvili R.,* Georgian Ethnography, Ethnology, Tbilisi, 2006, 118 (in Georgian).

relation to the Khevsureti. One can also find in the materials from Khevsureti, that some actions directed against the society were mentioned as the betrayal to the community.[9]

Perception of community betrayal as icon betrayal is not surprising in the traditional law of Pshaveti and other mountainous regions of East Georgia. In the mountainous regions of Georgia local shrines – cross-icons – were playing critical and important role in terms of social organization of the society. Some of them were patrons of community organizations, others – patrons of territorial-ethnic groups (Pshav-Khevsurians, Tushetians, Mokhevians, Mtiul-Gudamakrians).[10] Society was organized around the cross-icons. The institution of servitude to the cross, servitude to the icon was playing the especially important role. The deity, patron of each territorial unit was considered as the lord of residents of the relevant territory. The community was considered as the servant of its patron deity and each member of community – the servant of his/her cross-icon.[11] The populated area of cross-icon was considered as the cross- icon ownership. Based on the above, criminal action directed against the community, village, society in general committed in the East Georgia mountainous regions was also considered as the action committed against the lord cross-icon.

We mainly consider those criminal actions, which in its composition include the betrayal of community and icon in Pshavi, as separate crimes against the society, as according to the local traditional laws of the most regions of Georgia, they are considered as independent criminal actions.

The subject of majority of criminal actions against the society could be only the member of the given society. For example, betrayal to the community and icon could be committed by the member of the given community and the servant of the given icon; moreover, such actions could include non-fulfillment of decisions made by the society, non-participation in the common activities, and non-obedience to the rule of holiday and etc. The subject of other crimes directed against the society could be the outsider, not the member of the given society (for example, looter of the church and cross-icon, one impinging the common property of the society).

2. Betrayal to the Society

The old Georgian law knows quite well the crimes directed against the state. Iv. Javakhishili includes in this category of crimes "cowardice", "betrayal", "infidelity", which were encountered quite often in the Georgian reality, as well as offence to the King.[12] Research conducted by Iv. Javakhishvili concerning the old Georgian criminal law goes back to XIV century. Crimes directed against the state are

9 See *Merabishvili J.,* Materials on the Traditional Law of Khevsureti, Ethnographic Notebook, 1988, 79 (in Georgian).

10 See *Bardavelidze V.,* One of the Oldest Stages of Development of the Astral Deities' Pantheon of Georgian Tribes (composition of pantheon, hierarchy of deities and their nature), Materials for the Ethnography of Georgia, X , 1959, 158 (in Georgian).

11 *Bardavelidze V.,* Governance System of Khevsureti Community, Science Academy Herald, Soviet Republic of Georgia, 1952, Vol. VIII, № 10, 625 (in Georgian).

12 *Javakhishvili Iv.,* Works in Twelve Volumes, Vol. VII, History of Georgian Law, Book II, Tbilisi, 1984, 210, 217 (in Georgian).

confirmed in the monuments of the old Georgian criminal law. For example, we can discuss the law book of Vakhtang VI. According to the article 222 of the above book, the betrayal to the country and the religion represents the heavy crime; against the person committing such crime "anything bad ….. is justified".[13] Mentioned above general sanction may imply any type of punishment, including execution, indicating to the especial heaviness of the given crime. Article 220 considers mutilating punishment for moving to the enemy's side during the war; as for the article 221 – for the revealing the secret of the castle, followed by the attack of the enemy's army.[14] For the latter crime, again the general punishment is envisaged – "whatever happens to him, would be lawful".[15] The above sanction could also consider execution. If we consider that Vakhtangi law book does not directly indicate the punishment via execution and the mutilating punishments are also encountered rarely, we could include the above type crimes under the heaviest crimes envisaged under the above monument. Betrayal to the country, which directly considers actions against the King, rebel against the King, attempt to overrule the king, moving to the enemy's side, revealing the secret of the fortress – the above are the elements of crime - betrayal to the country - composition. The objects of such infringement are state order and safety, and therefore, represent the public crime.

Treason of the state was also considered as an especially heavy crime in Samegrelo principality. For example, Don Christepore De Castel mentions that in Samegrelo principality execution punishment was rarely applied. Such punishment was not traditional in this region and along with the robbery of the church was only applied for the liquidation of the principal or attempts to overthrow the state order.[16] In this region heavy mutilating punishments were also used against the rebellions, in particular, such punishments included burning of eyes and amputation of hand and leg.[17] The above data indicate that liquidation of the principal or such attempt was a public crime and was equalized with the treason.

According to the Svaneti historical monuments (XIV – XV centuries), the person committing actions against the society, "betrayer of the ravine" could also be punished via the execution. The above mentioned documents also indicate that such actions also considered non-fulfillment of military duty, not only commitment of anti-society crime but also non-disclosure of such action.[18]

Let's now discuss betrayal to the society as the crime according to the Georgian traditional law based on the materials of traditional law for the second half of XIX century and XX century. According to the above materials, we encounter the data which present the betrayal to the society as the especially heavy crime.

In the mountainous regions of Georgia, betrayal to the society could be directed against the whole region, ravine as well as against the specific community or village or the interests of the village.

In this case we are talking about the betrayal to the society in a narrow sense; the above includes actions against the rules- order, justice established in the society, actions directed towards the

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13 Monuments of Georgian Law, Edited by *I. Dolidze,* Vol. 1, Tbilisi, 1963, 539 (in Georgian).
14 Ibid, 538-539.
15 Ibid, 539.
16 *Don Christepore De Castel,* Notes and Albumabout Georgia, Tbilisi, 1977, 46 (in Georgian).
17 *Archanjelo Lambert,* Description of Samegrelo, Tbilisi, 1938, 74 (in Georgian).
18 *Ingorokva P.,* Svaneti Historical Monuments, Section Two, Tbilisi, 1941, 5, 43 (in Georgian).

infringement of freedom, support to the outsiders in the infringement of society freedom and property and etc. The above implies approximately the same actions, which under the old Georgian law were considered as the treason, but traditional law was punishing such actions directed against the common interests of certain territorial unit –society, people residing in inter-community union, community or village.

Folk (traditional) law was effective in parallel with the law norms established by the state, and in some mountainous regions of Georgia, even during the XIX-XX centuries, the domination of traditional law over the law established by the state was in place. Under the traditional law action was considered as directed against the society, as the betrayal to society to the extent that society not the state authorities and the law established by the law considered action as such. Society was reflecting in the traditional law its attitude and was punishing the criminal action directed against the society via the relevant norm of the traditional law.

In the regions of Georgia the betrayal to the society was considered as the heaviest crime, according to the traditional law. The above is well observed in the general notes preserved in these regions. For example, pelting down, exile is encountered in Meskheti, Khevi, Pshavi, Mtiuleti.[19] We encounter exile from the village in Adjara too.[20] In Svaneti the betrayers of the community were not even buried in the sanctified soil.[21] Falling of betrayers into disfavor from the community, village was spread in the mountainous regions of Georgia. For example, in Shatili the doyen would disfavor the betrayer and state: "Disfavor the betrayer and the traitor of the village…."[22] Exile, extirpation, disfavoring are the heaviest punishments applied for the betrayal to the society in the traditional law, indicating to the especial heaviness of such crimes according to the Georgian traditional law.

In Svaneti and Khevsureti betrayal to the community, village is also mentioned as "breaking the community, village."[23]

According to the available materials, we can establish some idea on the specific actions considered as the betrayal to the society (inter-community union, community, and village) according to the traditional law of various regions of Georgia.

In the mountainous regions of Georgia (Svaneti, Pshav-Khevsureti, Khevi and etc) each community enjoyed full independence and had its own governance bodies. Communities of mountainous Georgia were assigning special importance to their independence and were protecting it. With Eg.

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19 *Kekelia M.,* Materials on Meskheti Traditional Law, Ethnographic Notebook, 1986, № 1, 69; *Kekelia M.,* Materials on Khevi Traditional Law, Ethnographic Notebook №1, 1984, 51; *Vazha-Pshavela,* Pshaveti Old Law and Family Rules, Full Collection of Works in Ten Vol, Vol. IX, Tbilisi, 1964, 71; *Makalatia S.,* Pshavi, Tbilisi, 1985, 76, 92; *Topchishvili R.,* Ethnography, Ethnology of Georgia, Tbilisi, 2006, 118 (in Georgian).

20 *Merabishvili J.,* Materials on Adjara Traditional Law, Ethnographic Notebook, 1989, 14 (in Georgian).

21 *Gujejiani R.,* From the History of Mentality of Inhabitants of Georgian Mountains, Tbilisi, 2008, 107 (in Georgian).

22 *Ochiauri Al.,* Calendar of Georgian Folk Holidays, Tbilisi, 1988, 74; same author - Calendar of Georgian Folk Holidays, Khevsureti II, Tbilisi, 2005, 251, 290 (in Georgian).

23 *Ochiauri Al.,* Calendar of Georgian Folk Holidays, Tbilisi, 1988, 74; *E. Gabliani*, Free Svaneti, Tbilisi, 1927, 70 (in Georgian).

Gabliani, we encounter the case when Jamagi Chelidze from Ushguli with two friends went to Nalchiki, principal of Caucasus in XIX century; they introduced themselves as the fully authorized representatives of Ushguli community. It turns out, that they asked the principal to accept Ushguli under the subordination to Russia. Population of Ushguli heard about this and for such a huge betrayal decided to severely punish the perpetrators. The criminals saved themselves only via the repentance and urging the forgiveness.[24] Impingement of freedom of the community was considered as the biggest betrayal in Svaneti and was punished with the maximal punishment. According to *B. Nizharadze,* convention of the society was punishing with execution "Veri Mukdeni" – the traitor to the country; in particular, the member of the society, if he attempted to help any noblemen to seize society for the servitude for the private interests, was considered as the traitor. If the criminal had some justification for the action, then the execution would be replaced with the exile of the person and his family from the community.[25] Author provides as an example for such crime the case, which took place in Ipari society. The local Givo Gulbani gave shelter to the nobleman Gela Devdoriani, who intended to become the lord of Ipari residents. Society became aware of Givo Gulbani's evil intention; he was killed via the impaling upon the ridged pole.[26]

Assisting foreign country and foreign people in animosity against own community, village, letting the enemies for the destruction of own community-village was considered as the betrayal to the society.[27] In this regard, we can remember famous work of Vazha-Pshavela "Exiled", where due to the personal animosity of Chonta, Bakha leads Kists to Pshavi and helps them in destruction. For the above betrayal people requested to pelt down Bakha, however Khevisberi (head of the community), Chucha made them change the punishment and the culprit was exiled.[28]

We encounter the classical example of community betrayal in the materials recorded in Khevi. The information provider to R. Kharadze remembers: "Agula Chkareuli joined Leks. The army was entering his homeland, raiding his villages and liquidating people. The community installed the cursing Samani (stone, symbolizing the exile) in every village…".[29] The person leading the enemies into own villages and raiding the villages together with the enemies, killer of brothers was announced as the betrayal by the whole society and disfavored.

Uncompromised attitude to the community betrayer in Khevi is well demonstrated in the works of *Al. Kazbegi.* These works are interesting for us, as they demonstrate actions considered by the society as betrayal in this region of Georgia. In this regard "Khevisberi Gocha" is an interesting work. In this novel, after the battle ended with the victory, the gathered community led by the Khevisberi discusses several

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24 *Gabliani E.,* Free Svaneti, Tbilisi, 1927, 48 (in Georgian).

25 *Nizharadze B.,* Historical-Ethnographic Letters, Tbilisi, 1962, 85 (in Georgian).

26 Ibid, 86.

27 *Gabliani E.,* Free Svaneti, Tbilisi, 1927, 65, *Razikashvili Al.,* Not Forgetting the Past, Tbilisi, 1984, 16; *Merabishvili J.,* Materials on Khevsureti Traditional Law, Ethnographic Note-Book, 1988, 79 (in Georgian).

28 V*azha-Pshavela,* Exiled, Full Collection of Works in Ten Volumes, Vol. VII, Tbilisi, 1964, 293 (in Georgian).

29 *Kharadze R.,* Relics of Communal Governance in Khevi, Works of *Javakhishvili Iv.,* History Institute, Academy of Science, Soviet Republic of Georgia, Vol. IV, Section 2, 1959, 172 (in Georgian).

criminal actions. First of all they are suing Osetians, who found shelter in Khevi for the murders committed in their homeland due to the fear for revenge. Khevi community accepted them, allowed them to live peacefully during six years; however, during the war they betrayed the Khevi population, showed to the enemies the paths and helped them to come over the Khevi army in surprise, causing the significant number of victims among the Khevi population. The betrayal to community committed by these two Osetians was evident and Khevisberi announced the decision to pelt them down; people agreed to this verdict.[30] Community decided on the exile of one of the central personages of the novel – Gagua, as he was accused for leading enemy to Khevi. Only after the confession made by Onise, the above accusation was removed. Onise explained to people that he lost himself and enemy got unnoticed.[31] Society evaluated as the betrayal to the community behavior of hero of *Al. Kazbegi* other novel – "Elguja"- Gagi, who approached Russians for the help against his fellow-countryman Elguja.[32]

According to the data observed in Khevsureti, getting scared in the army and running from the battle was also considered as betrayal to the society, which could be followed with "ordering the Samdzakhi („samZaxis") as it was considered as a very shameful fact.[33]

There are specific data from Samegrelo confirming the responsibility for the betrayal to the village based on the traditional law. According to the data obtained from this region, it is evident that betrayal to the community implied revealing the secret of military importance to the enemy. For example, "Sazogadoshi Katua" (Society convention) punished one local resident for the disclosure of fortress secret with burying alive, which was considered as immensely humiliating punishment and later the person was assigned the punishment of exile from the community ("Temidan moWkiru").[34] In Samegrelo, person referred to as Rukhaia was exiled from the society, who happened to inform the local manager about the decision of "Skhunu" (executive body elected by the society convention).

The research made it evident that betrayal to the society could be demonstrated in various types of criminal actions. However, mainly it was manifested via the assistance to the enemy, outsider against the own society provided by the member of the given society; namely, society betrayers with their actions were supporting outsiders, enemies to get ruling over the community, village, helping enemies in the implementation of invasion over the society (community, village) via showing the road, path, disclosing secret of the fortress, secrets of military nature, participation in the attack to own community together with the enemy and etc. Moreover, betrayal to the society could be demonstrated via the non-fulfillment of military duty, non-fulfillment of assignment given by the society during the battle with the enemy, approaching outsiders for the help in fighting against the fellow-countrymen and etc. Mentioned above actions could be demonstrated in action or inaction (for example, non-fulfillment of military duty).

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30 See *Kazbegi Al.,* Works, Vol II, Tbilisi, 1948, 308-309 (in Georgian).

31 Ibid, 312-313.

32 *Kazbegi Al.,* Works, Vol. I, Tbilisi, 1948, 27, 34 (in Georgian).

33 *Ochiauri Al.,* Khevsureti Materials, II, collection Georgian Traditional Law, 2, 1990, 179 (in Georgian).

34 *Eliava G.,* Folk Institution of Self-Governance in Ancient Samegrelo, Materials for the United Scientific Session Devoted to the 60 years Anniversary of Establishment of the Soviet Government in Georgia, Gegechkori, 1981, 66 (in Georgian).

There were rare cases of committing betrayal to the society in the various regions of Georgia, due to the assignment of extremely heavy punishments for such crimes.

3. Breaking into the Church and Cross-Icon

Old Georgian law considered breaking into the church, its robbery as the heaviest crime. It is sufficient to provide as an illustration well known church monument, "Law of Catholicon", second article, according to which: "Whoever breaks into the church unlawfully, to be taken to the post".[35] "To be taken to the post", according to the document implied execution, execution via hanging. Italian missioners confirm the facts of execution for breaking into the church in Samegrelo principality; however, such a severe punishment was not actually used for other cases, not taking into consideration murdering the principal and attempt to overthrow the state authority.[36] In this regard, A. Lambert is providing us with the interesting information. According to the Italian missioner, the nobleman of Samegrelo did not have a habit to execute perpetrators for any offences, however heavy it could be, if we take into account the case with his vizier. He had established execution punishment for only one case, namely for breaking into the church. Principal could forgive perpetrator any other crimes via the payment of cash, or due to the patronage from somebody; only the one breaking into the church would not be able to stir the pity of principal with money or urge, and must be punished with execution. Some golden and other precious items were stolen in several churches. Despite the efforts it was not possible to identify thieves for a long time. Finally the thieves were captured, beheaded and their heads were hanged near the place where the crime was committed.[37] We also encounter execution punishment for breaking into the church in Svanetian historical monuments. For example, in the decision of whole Svaneti area of first half of 14th, 15th centuries it is indicated that one breaking into the church, as perpetrator committing other heavy crimes must be punished via execution.[38] Mentioned above tendency is observed in the traditional Georgian law of the period under the research.

According to the materials of Georgian traditional law of second half of XIX century and XX century, the information regarding the breaking into the church and stealing the cross-icons are mainly encountered in Svaneti and Pshav-Khevsureti materials.

In Svaneti located over the Bali there are about one hundred large and small churches; among other means the local traditional law was also protecting them from impingement. According to the Svanetian traditional law, breaking into the church was considered as one of the heaviest crimes and it is not surprising that *B. Nizharadze* reviews such crimes along with the treason to the country and confirms application of similar punishments for these two types of crimes; in particular, execution, and in case of existence of some evidences to be considered and indulgence – execution could be replaced with exile of

35 Monuments of Georgian Law, ed., by *Dolidze I.,* Vol. I, Tbilisi, 1963, 294 (in Georgian).
36 *Don Christepore De Castel,* Notes and Album aboutGeorgia, Tbilisi, 1977, 74 (in Georgian).
37 *Archanjelo Lambert,* Description of Samegrelo, Tbilisi, 1938, 73 (in Georgian).
38 See *Ingorokva P.,* Svaneti Historical Monuments, Section II, Tbilisi, 1941, 5 (in Georgian).

the whole family.[39] He presents as illustration the old story preserved in Ushguli society oral traditions, according to which two brothers, with the surname Ratiani were executed for the robbery of the church; in particular, their stomachs were tore into pieces using the spears stolen from the church.[40] Punishment via execution for breaking into the church and stealing church treasures is also recorded in Eg. Gabliani work.[41] According to D. Davituliani, the following punishments were considered for impingement of the church: 1. Execution via pelting down and 2. Exile from Khevi.[42] M. Kovalevski also confirms the facts of punishment via pelting down for breaking into the church.[43]

According to the available materials, in the majority of specific cases, execution sentence for breaking into the church was implemented via pelting down.

In XIX century Eg. Gabliani tells us story about very interesting case of breaking into the church: Balkareti lord Devetger Murzakulov and his uncle had stolen in Svaneti with an intention to rob St. Barbare and St. Kvirike churches. Devetger broke the doors to St. Barbare church in Ushguli, had taken everything from the church. However, his uncle did not manage to rob Kali church. Next day people from Ushguli pursued Devetgari, however did not manage to overtake him; but they managed to capture his uncle with the retinue. Ushguli representatives sent one of the caught persons to Devetger with the note: "If you don't return back our church property, we'll kill your uncle and accompanying persons." Devetger himself brought back the items stolen from the church, but one chaplet was missing, given by Devetgar as present to his lover. He did not return it and for this reason Ushgulians killed him near the defense wall of the church, which is still referred to as "Devetgari Nadgar Bachao" – the stones of Devetger execution. For the long time Balkareti lords were not in terms with Ushguli, however then they agreed on reconciliation. They sent 12 men as judge-mediators. Devetger's near relations were asking for his blood the blood of 15 peasants, as in Balkareti such was the price for killing the noblemen. Mediators sentenced Ushguli population with payment of 200 oxes. Out of the above 200 oxes 100 oxes were transferred to Ushgulians for robbing the church and remaining 100 oxes had to be transferred to representatives of Murzakulo. Ushgulians sold church land, paid in kind 70 oxes immediately, and 30 oxes later.[44]

D. Davituliani tells us the same story in a slightly different way: "according to oral traditions, in XIX century one nobleman from Balkareti, Devetger Murzalov and two accompanying persons robbed Ushguli St. Barbare church during the night. The thieves did not manage to leave Ushguli and they were captured by the dawn by village inhabitants. Community convention was called. Convention sentenced the robbers to execution. At the entrance to the village the road edge is still confined with stones, at this place all three robbers were pelted down. This place is still referred to as "Saviare Lashtkhvaal" (grave yard of Osetians)."[45] In two versions of this one case, despite some differences, there is one common line

39 *Nizharadze B.,* Historical-Ethnographic Letters, Tbilisi, 1962, 85 (in Georgian).
40 Ibid, 86.
41 *Gabliani Eg.,* Free Svaneti, Tbilisi, 1927, 65 (in Georgian).
42 *Davituliani D.,* Svaneti Traditional Law, Manuscript, Tbilisi, 1974-1975, 100 (in Georgian).
43 *Kovalevski M.,* Traditional Law in Caucasus, Vol. II, Moscow, 1890, 35 (in Russian).
44 *Gabliani Eg.,* Free Svaneti, Tbilisi, 1927, 24 (in Georgian).
45 *Davituliani D.,* Indicated Work, 107 (in Georgian).

– the ones breaking into the church (in both versions of the story robbery of Ushguli St. Barbare church is mentioned) are sentenced to the execution by the society and as it is evident, the perpetrators were pelted down.

It is interesting that in Svaneti located over Bali, application of execution sentence by society based on the traditional law against the persons breaking into the church is encountered even in XX century after the establishment of soviet ruling. D. Davituliani has identified the case, when in 1937 year, in Kala the perpetrators robbed St. Kvirike church. Local residents captured the criminals the next day and pelted them down.[46] Information provider to *M. Kekelia* from Kali also remembers the fact of breaking into St. Kvirike church. With the high probability D. Davituliani and M. Kekelia's informer from the village Kali (Grisha Khardziani) are describing the identical case. *M. Kekelia's* informer provides relatively comprehensive information regarding the above mentioned fact. It becomes clear from his story that three persons participated in the breaking into the church: two "students from the town" and one local inhabitant – Galaktion Ch. Two students from the town were pelted down by the society. They were planning to do the same with Galaktion Ch., however his family elder men asked the society no to do so and that they would themselves exile the guilty relative. At the end the society just exiled Galaktion Ch; later his relatives have never visited St. Kvirike holiday, one of the most important holidays in Svaneti.[47] The informer stresses the fact that exiled perpetrator had still been killed for completely different crime.[48] Allegedly, locals demonstrated generosity towards the perpetrator, took into consideration the request from his relatives, did not punish him with execution and stayed content with the exile. The same information provider to *M. Kekelia* remembers one additional specific case from the Ushguli reality. Namely, someone named *Gagi Ch.* had broken into Ushguli St. Barbare church, due to the above he was exiled and never returned back.[49] Unfortunately, the story does not indicate the reason for not sentencing the person breaking into the church to execution and instead exiling him.

In case of impossibility to identify the person breaking into the church, as in case of non-identification of perpetrator for other crimes, cursing, disfavoring of perpetrator (perpetrators) would take place, which according to the belief of people would surely cause unhappiness of the perpetrators. In thirties of the last century the Etseri church was broken. Neither people, nor the law-enforcement bodies were able to identify the criminals. There was only suspicion about some persons. The society has jointly cursed the committers of crime. Very soon the persons under suspicion were arrested for other case and executed via shooting; very soon several siblings of the suspected persons died, then their children died, so there were no men left in the family. The divine punishment made the identity of the perpetrator obvious for the society.[50]

Now let's discuss the issue of robbing cross-icons in the data available from Pshav-Khevsureti.

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46 *Davituliani D.,* Indicated Work, 110 (in Georgian).110.

47 *Kekelia M.,* Materials on Svanetian Traditional Law, Ethnographic Notebook №5, 1968-1969, 80 (in Georgian).

48 Ibid.

49 Ibid.

50 *Gujejiani R.,* Form the History of Georgian Mountain People, Tbilisi, 2008, 109 (in Georgian).

As mentioned above, in Pshav-Khevsureti robbing the cross-icon is considered under the composition of betrayal to the community (cross-icon) and therefore belongs to the heavy crimes directed against the society.

It is known that cross-icon in Pshav –Khevsureti possessed its bowls-treasures. The cross-icon in Pshav-Khevsureti possessed large volume of treasures (gold and silver, crosses, copper items, valuable service vessels, swords – belts), which was under the custody of specially appointed person – treasure keeper (in Pshaveti – "bowl keeper").[51]As the settlement territory of the cross-icon was considered as an ownership of the cross-icon, therefore, the treasures located on the same territory were also considered as the ownership of cross-icon. The servants were prohibited to use the treasures for economic purposes, as treasures must have been only kept in the cross and used for servicing the cross.[52] Location of cross-icon's bowl-treasures was a secret, conditioning existence of its hiding places, known to only limited circle of persons, in particular, to about two treasure keepers. The treasures had to be reliably protected and hidden.[53] Despite the above, there were still cases of steeling the cross-icon bowl-treasures.

D. Jalabadze presents information provided by the Pshaveti, namely village Magaroskari inhabitant, Ivane Kartvelishvili, according to which "Steeling the bowl-treasures and even showing it to somebody else was considered as the betrayal to the icon and community. For example, if somebody indicated to the location of bowl-treasures and the treasures were stolen, then the one disclosing information was also responsible for steeling." The punishment considered for the above crime was an exile.[54] On the other hand, L. Razikashvili indicates on the punishment of person for icon robbing in the form of pelting down.[55]

There are data on the imposing the heavy punishment for steeling the cross-treasures in Khevsureti materials for the 80-90-ies of XX century. For example, Giorgi Tsiklauri from Roshka indicates that steeling from the icon was considered as the heaviest crime and one committing such crime would not be allowed back to the community and would be exiled.[56] According to one additional information provider, in case of steeling something from the icon there was special punishment „samdzakhi".[57] This form of exile was applied for the heaviest crimes in Khevsureti.[58] According to another information provider from Khevsureti, steeling the treasures of cross-icon was causing punishment via execution, namely through pelting down.[59] *N. Jalanadze* describes the specific case, according to which, Giorgi from Bgarikati, famous in Khevsureti for his bravery, had broken into the church together with another person and had stolen bowls-treasures. The village found out the identity of the robber and imposed the

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51 See *Eliashvili Zh.,* Ancient Social-Religious Institutions and Ancient Structure of Population in the Mountainous Regions of East Georgia, Tbilisi, 1982, 107-108 (in Georgian).

52 *Kiknadze Z.,* Georgian Mythology, I, Kutaisi, 1996, 104 (in Georgian).

53 Ibid, 105.

54 *Jalabadze D.,* Crime and Punishment in Georgian Traditional (folk) Law, Tbilisi, 2003, 37 (in Georgian).

55 *Razikashvili Al.,* Not Forgetting the Old, Tbilisi, 1984, 15 (in Georgian).

56 *Kekelia M.,* Materials on Khevsureti Traditional Law, Ethnographic Notebook, 1988, 52 (in Georgian).

57 Ibid, 67.

58 About "*Samdzakhis Dakveta"* (`samZaxis dakveTɔ"), see *Davitashvili G.,* Crime and Punishment in Georgian Traditional Law, Tbilisi, 2011, 305-307 (in Georgian).

59 *Merabishvili J.,* Materials on Khevsureti Traditional Law, Ethnographic Notebook, 1988, 17 (in Georgian).

execution via pelting down over the guilty person. With the purpose to get forgiveness they have enticed him to the icon; his own cousin used the hand-cudgel for liquidating him; however, George with his dexterity managed to escape.[60]

Based on the presented data, it is clear that punishment via execution, exile from the community was considered for breaking into the church and steeling cross-icon according to the traditional law of Svaneti and Pshav-Khevsureti. In most of the specific cases, we encounter punishment via execution. As it was detected on the basis of research, in Svaneti, according to *B. Nizharadze* the punishment for breaking into the church was mainly execution; however, in case of existence of some "evidences to be considered for forgiving" the person could be just exiled from the society. What is specifically considered by *B. Nizharadze* under the evidences to be considered as the basis for forgiving is not clear. Probably some specific motive or reason for committing the crime could be considered as evidence that would be considered by the society convention (in this case the court body) as the circumstances extenuating the responsibility. In one of the specific examples, indicated above, it was demonstrated that the society did not punish one of the persons breaking into the church with execution, as the society considered the request of relatives of perpetrator. It is a fact that in this case, society perceived as the factor to be taken into consideration the above request and the perpetrator was only exiled from the society. It seems that the society was making decision on the punishment via the execution or exile from the society based on the circumstances of specific case.

In Khevsureti punishment via execution is also observed; however, there are also cases of exile from the society. We can assume that there is a similar situation as in the Svaneti located over Bali; in other words, the person steeling bowl-treasures of cross-icon was punished via execution, as provided in one of the above given examples. However, in specific cases, they could use relatively light punishment. Imposing relatively light punishment instead of execution for the above type crimes could be caused by the tendency of making responsibility imposed on the basis of traditional law lighter during the later period.

Talking about the fact that impingement of bowl-treasures of cross-icon was considered as the betrayal to the community we must mention that the above would be valid only if accused person was inhabitant of given society (community, village), servant of the stolen cross-icon. Committing of the above crimes by outsider (not the member of the given cross-icon) could not be considered as the betrayal to the community and icon, as the stranger could not be the subject of such crime. In this case, steeling the bowl-treasures of cross –icon had to be considered as the independent crime under the Pshav-Khevsureti traditional law. Breaking into the church, or steeling cross-icon by the outsider could not be punished via the exile, as the society could only impose such punishment, based on the nature of punishment, only over the member of the society.

Any society considered breaking into the church, robbery of cross-icon as the heaviest crime, demonstrated in the heaviness of punishments considered for such offences. However, society perceived especially painfully commitment of such crimes by the member of the society. It is not accidental that in

[60] *Jalabadze N.,* Some Aspects Related to the Traditional Law in Khevsureti, Georgian-Caucasian Ethnographic Studies, 1987, Tbilisi, 1990, 169 (in Georgian).

Svaneti this crime was actually equalized with the treason of the country, and in Pshav-Khevsureti – it was considered as the betrayal to the society in general. It does not mean that breaking of the outsider into the church or steeling the cross-icon would consider any concessions. In this case it was only possible to punish the perpetrator if the society would manage to catch the criminal. According to the materials, in general, punishment via execution was recorded against the outsiders committing the above types of crimes. According to the data provided by *M. Kekelia's informer,* as the research has confirmed, the co-villager who broke into the church was exiled, and his accomplice two "students from the city", in other words non-residents of the village were executed. Nobleman from Balkars and persons accompanying him, who broke into the Ushguli church in XIX century were also punished via execution based on the decision of the community convention. It was fully possible to have revenge act following the execution of the outsider. In the above case, for Balkar residents this execution via pelting down was an ordinary murder and for the long time they were not in terms with Ushgulians, meaning that they were planning for revenge. Finally they agreed with the payment of relevant blood price. As it was described in Eg. Gabliani story, mediators assigned over Ushguli population payment of 200 oxes for the murder of nobleman from Balkar; however, 100 oxes were deducted for breaking into the church and only 100 oxes were to be paid. If the church breaker was Ushguli representative, then his family would not be able to oppose Ushguli community and would not be able to ask for payment of composition, as it was done by Balkars. Decision of community convention was mandatory for the member of community and each member had to obey. Presumably, representatives of other communities of Svaneti would not support its member, who broke into the church in other community, as everybody understood the heaviness of crime of breaking into the church. As for the family, relatives of nobleman from Balkar they did not respect the sacred nature of Svanetian church; moreover, they possessed power and stopping the animosity with them was in the interests of Ushguli residents. Therefore, Ushguli society agreed to conduct mediation court hearing with the purpose to reach the peace and paid the imposed composition in full.

"Breaking" the church and cross-icons implies impingement of treasures and bowl-treasures kept in the church. Term "breaking" in this case does not mean obvious actions, violence against the specific persons. For taking the treasures from the church, shrine the doors to the building had to be broken; however, the crime was generally committed secretly. For indicating to the impingement of church or cross-icon we often encounter the term – "robbery". Using this term was not caused by the fact that the authors or local information providers meant getting possession of treasures of the church and cross-icon via the intended, obvious actions visible to others, in other words, robbery under the modern criminal law. It seems that for steeling the property from the church or cross- icon, it was common to use word steeling, robbery in the folk oral traditions, whether it was conducted in an observable manner or secretly.

Based on the specific examples provided above, it is clear that impingement of treasure was implemented secretly. This is clearly demonstrated in the description of fact of breaking the Ushguli church by the Nobleman from Balkar. He and accompanying persons entered Svaneti secretly and broke the church during the night. In Svaneti and Pshav-Khevsureti, obvious, open impingement of the church and cross-icon in front of somebody else, was extremely dangerous and therefore, in general, such crimes were committed in a secret manner.

Subjectively, the above discussed crime could be only committed intentionally, and objectively – via action. As it was demonstrated in the information provided by Pshaveti resident, person indicating the location of icon's bowl-treasures to other person, but not participating personally in the steeling of bowl-treasures, would be considered as the co-participant of the crime and would get the punishment similar to the one imposed over the executor of the crime. In this case we are dealing with assistant as the co-participant of the crime.

4. Infringement of Common (Village-Community) and Cross-Icon Property

Infringement of the common property of the society shall be also considered as the crime directed against the society. In this case, we are dealing with infringement to the immovable (any community or village had in possession immovable property, land. The above could include arable lands, pastures, hay lands, forests), as well as movable property, and non-fulfillment of proprietary liabilities against the society (community, village). In this section we also discuss the issue of infringement to the property in the possession of cross-icons existing in the mountainous regions of East Georgia. In this case we are not talking about the treasures of cross-icon, infringement of which was discussed earlier. It is known that, in the mountainous regions of East Georgia the cross-icons had their own lands, including arable lands, as well as forests and etc. Cross- icons could also own live-stock (calves, sheep); herdsman appointed by the icon or selected by the community was responsible for looking after the livestock.[61] For example, almost all the land in Gudani was in the possession of Gudani Cross. Gudani population was cultivating lands based on the shared principle, as they did not have their own arable lands. Gudani Cross also had a forest located in the south, opposite to the village and owned the calves for sacrifice.[62] It must be noted that some cross-icons also possessed lands and vineyards in low-lands. For example, St. George's icon in Pshavi possessed 8-9 tenth of vineyards and 15 day arable lands in Khodasheni.[63] Income generated from these lands was mainly used for the holidays of cross-icon. Cross-icon lands were cultivated by the village population. Each family cultivated its share of land, planted (the seed must have been from the icon wheat), collected the yield and delivered it to the icon threshing floor. The delivered sheaves would be threshed by the persons employed in the cross-icon, responsible for the threshing and storing the icon wheat,[64] then the threshed wheat would be placed in the barn. In some communities, co-villagers could collect the yield from "cross wheat fields" collectively.[65] Part of the lands of cross-icon was transferred

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61 *Zoidze O.,* Ownership Law (Work –Pshaveti Traditional Law, Section II, chapter II), Collection of Works "Georgian Traditional Law, 4, Tbilisi, 1993, 53 (in Georgian).

62 *Ochiauri Al.,* Calendar of Georgian Folk Holidays, Khevsureti II (Bide Khevsureti, Shatili –Migmakhevi), Tbilisi, 2005, 231-232 (in Georgian).

63 See *Zoidze O.,* Land Law (Work –Pshaveti Traditional Law, Section II, chapter III), Collection of Works "Georgian Traditional Law, 4, Tbilisi, 1993, 73 (in Georgian).

64 Dasturi – in mountainous regions of East Georgia member of logistics staff of cross-icon, with the function of threshing and storing the icon wheat (in Georgian).

65 *Ochiauri Al.,* Calendar of Georgian Folk Holidays, Tbilisi, 1988, 5 (in Georgian).

to the families for use. For the use of cross-icon land, beneficiary family was paying to the cross-icon the fee in kind.[66]

Appropriation of the above lands, it's illegal exploitation and use for personal benefit (for example, ploughing-cultivation of land, cutting the forest for the personal benefit), steeling the yield from such land, non-payment of fees defined for the use of such lands, infringement to the movable property would cause imposing certain punishment from the society in accordance with the traditional law. There is relevant information in the materials available to us.

According to one of the notes recorded in Meskheti (note was recorded in the village Arali, Adigeni district), the village inhabitant ploughed and cultivated the common land, namely pasture of the village; due to the above, the village inhabitants held a meeting and made a decision on "hitting the offender with the village fists",[67] representing quite widely spread public punishment in Meskheti. The same punishment was imposed over Petre Ch., who sold grove owned by the village to the Tatar noble man living in the neighboring village.[68] Appropriation of public land plot in Kartli was causing the punishment of public nature.[69] In the materials one often encounters imposing responsibility for the cutting the common forest, as well as so called icon forest based on the traditional law. For example, in Kartli for cutting the public forest imposing of some kind of public punishment is observed.[70] In many areas, the disfavoring of person cutting the forest is observed for stopping the further cutting of forests. For example, in Khevi, village Sioni, there is an icon forest located next to the St. Mary church, the icon forest is surrounded by the village forest, which had been destroyed mercessly. Quite a while ago the village inhabitants held a meeting and led by the priest disfavored the forest cutters; after above mentioned event the forest grew and got beautiful.[71] In Adjara, namely in one of the villages of Shuakhevi region, there was a forest protecting village from avalanches. According to the belief of people the one violating the prohibition would become victim of the sin. Therefore, nobody was cutting the trees in the forest.[72]

According to the data recorded in Khevsureti, there were fruit trees possessed by the community (village). For example, on the territory of Shatili there were trees of wild pears, crab-apples, crab trees and plums. Inhabitants would decide on a day, go there together and collect the fruits. The collected yield would be then distributed among the households.[73] Quite often the fruits were stolen. For example, the

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66 The amount of payment was different for different communities. For example, in Pshaveti, Gogolaurta community the payment was preliminarily defined and it equaled to five liters of grains. The yield level did not matter. The user of Iakhsari (deity) lands should deliver part of the harvest. See *Zoidze O.,* Land Law (Work –Pshaveti Traditional Law, section II, chapter III), Collection of Works Georgian Traditional Law, 4, Tbilisi, 1993, 73 (in Georgian).

67 *Kekelia M.,* Materials on Khevsureti Traditional Law, Ethnographic Notebook, 1986, №2, 12 (in Georgian).

68 Ibid, 22.

69 *Zhordania G.,* Kartalini People's-Criminal Courts, «Trans-Caucasia», 1911, #257 (in Russian).

70 *Zhordania G.,* Kartalini People's-Criminal Courts, «Trans-Caucasia», 911, #257 (in Russian).

71 *Kekelia M,* Materials on Khevi Traditional Law, Ethnographic Notebook, 1986, № 2, 50 (in Georgian).

72 *Davitadze L.,* Historical-Ethnographic and Folk Materials (recorded in 1981year), Fund of Manuscripts, Adjara State Museum, №827, 4 (in Georgian).

73 *Ochiauri Al.,* Calendar of Georgian Folk Holidays, Khevsureti II (Bude Khevsureti, Shatili –Migmakhevi), Tbilisi, 2005, 251 (in Georgian).

speech made by the head-priest of Anatori made at the cross is provided in Al. Ochiauri materials: "This year the fruit trees had a good yield; however, village did not benefit much. Some people were coming, steeling fruits and takeing home pears, apples and plums, some of them were young girls and boys, some were older… do not take fruits, even if taken, throw them down for rotting under the tree, if taken, don't bring them home, there are lots of people in the area for people gathering, so take fruits there. Even if brought home by youngster, parents – reprimand them, and again take the fruits to the area for people's gathering."[74] It is clear from the materials that there was a penalty considered for steeling the fruits. For example, head of Anatori cross has imposed penalty – two poods[75] of barley in favor of the Anatori cross over one local person for stealing the fruits.[76]

Certain public punishments were established for the destroy of harvest of cross-icon or community/village. Again the head of Anatori cross was announcing the persons whose livestock had destroyed Anatori cross harvest. The leaders of the cross were also penalizing the ones damaging the harvest of the cross.[77]

According to the materials, appropriation- dissipation of common funds of the society was also considered as infringement to the common (village-community) property. Relevant example is recorded in the reality of Khevi. In the village Gergeti Gogia Tsiklauri was exiled, who had dissipated "the money of the village required for the pasturing in the mountains."[78]

We shall also consider non-fulfillment of proprietary liabilities against the society (village, community) as the crime belonging to the category under discussion; namely such offences include non-payment of duty, fees. It was mentioned above that often certain households were cultivating cross-icon lands for certain payment in kind. It is natural that certain punishment would be considered for non-fulfillment of the above liability. In this regard the prominent examples are encountered in the Mtiuleti-Gudamakari reality. The shrine of Khando community – "Kovladtsminda" had vineyards in the village Aragvispiri located in lowlands. Kashiashvili (initially – Davituri) family, migrated to Aragvispiri from Khando was looking after the vineyards; they were delivering wine from the lowlands for the icon holidays as the payment for used vineyards. In the period of collectivization, Kashiashvili family stopped bringing of wine (duty), as the government confiscated the icon vineyards. Khando inhabitants did not take into account the above circumstances and cursed the community members migrated to lowlands – and installed the cursing stone in the area inhabited by Davituri family: "We don't any more need their wine and land, or this people".[79] It is demonstrated here that society did not take into account reasons for non-payment of duty in kind and one infringing the common property was punished with disfavoring and

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74 *Ochiauri Al.,* Calendar of Georgian Folk Holidays, Khevsureti II (Bude Khevsureti, Shatili –Migmakhevi), Tbilisi, 2005, 271-272 (in Georgian).

75 „*Gverdi"* –half pood.

76 *Ochiauri Al.,* Calendar of Georgian Folk Holidays, Khevsureti II (Bude Khevsureti, Shatili –Migmakhevi), Tbilisi, 2005, 272 (in Georgian).

77 Ibid, 272.

78 *Kharadze R.,* Relics of Communal Governance in Khevi, Works of *Javakhishvili Iv.* History Institute, Academy of Science, Soviet Republic of Georgia, Vol. IV, Section 2, 1959, 172 (in Georgian).

79 *Topchishvili R.,* Ethnography, Ethnology of Georgia, Tbilisi, 2006, 118 (in Georgian).

exile. Exile of persons for non-fulfillment of duty payment is also observed in the cases described in the work of R. Kharadze and Al. Robakidze.[80]

Provided information indicates that above mentioned offence could be committed via action as well as inaction (for example, non-payment of duty) and intentionally. We have also stressed the fact that when talking about common (village-community) or icon-cross property infringement, we imply the action, which is not related to the attempt of perpetrator to attain some prerogative, privilege in the society.

5. Striving for Attaining Prerogative in the Society – "Gabudakeba"

In the mountainous regions of Georgia, characterized with the absence of lord, the title-right type differences (Mountainous regions of Eastern Georgia, free Svaneti, over Bali Svaneti), the society was very painfully perceiving the strive of some member of the society to achieve prerogative, advantage (in terms of right or property) over the community co-members. Such behavior in the above regions was considered as the crime directed against the society and considered quite a heavy punishment.

Vax. Itonashvili in his work covers this type of offence, reasons and motives for committing such crime. Talking about Mtiuleti and Gudamakari, he notes the following: "The community was applying all efforts not to allow the rising of some members in exchange for the subordination of others and to timely exile the indocile community members, who after the promotion in service for the lord (mainly the King) or gaining some advantage were less considering interests of people and not even avoiding the evident coercion. Coercion, first of all implies, the situation when certain community member would take into possession community (village) lands without permission and often with the use of force and by this would try to radically improve his position. People would say about such person: "Gabudakda and does not take into account anybody."[81] Term "Gabudakeba" is recorded in Mtiuleti-Gudamakari. In the Scientific literature it is defined as such action of community member, which is directed towards the accumulation of property and aims at separation from the community.[82] In other words, community member was considered to be "gabudakebuli", who via his indocility, willfulness was trying to achieve the prerogative in the society using the society. Z. Kiknadze provided us with comprehensive definitions of "gabudakebuli" and "gabudakeba". According to his definition, community member trying to "transform proprietary advantage into the social… advantage, in other words. to transform the prestige conditioned by the proprietary wealth into the respect and request excessive respect from other members of the community."[83] "Gabudakeba" means behavior, demonstrated in the separation from the society, community with the sign of wealth.[84]

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80 *Kharadze R., Robakidze Al.,* Mtiuleti Village in the Past, Tbilisi, 1965, 64 (in Georgian).

81 *Itonishvili V*., Social Structure of Mtiuleti and Gudamakari Population in XVIII Century, Herald, Academy of Science, Soviet Republic of Georgia, 112-113 (in Georgian).

82 *Kharadze R., Robakidze Al.,* Mtiuleti Village in the Past, Tbilisi, 1965, 64 (in Georgian).

83 *Kiknadze Z.,* Georgian Mythology, Kutaisi, 1996, 117 (in Georgian).

84 Ibid.

For clarifying the essence of "Gabudakeba" as a crime, the specific examples, provided in the scientific literature will be very helpful.

One of such cases was encountered in the reality of Mtiuleti: "In the village Gvidakveshi seven days' area of icon lands were transferred to the family "O" for shared use. The family was paying as duty 9 jugs of vodka, one sheep and one liter of liquid candle. They had to bring the duty in kind to the icon on the Kashveti holiday (this holiday was in the period of hay harvesting); the sheep to be paid in duty had to be wether and of at least two poods. Family paying the above duty was hiring 12 hey cutters, they were generating quite a good income from icon lands and mountains. Despite the above, the family decided not to pay any more the duty in a defined volume and reduced the payment. Then the community requested the family to return the land to the community – in order to transfer it to other family, which would pay determined duty in kind. However, the family rejected to transfer land to other family. When the people saw that the family got "gabudakebuli", decided to exile the family."[85]

According to the people's belief "gabudakeba" represented action condemning the cross. According to the definition provided by Z. Kiknadze, the one, who has become "gabudakebuli" with the wealth, feels independent from the community and rejects the cross as the divine lord.[86] He provides as examples the stories from Mtiuleti and Pshavi, according to which "gabudakebuli" families were extending their territories at the cost of the village, by which they were repudiating community and cross. They tried to create their own, community independent from the cross and equalize it with the cross. For the above reason the cross would disfavor such families and would even liquidate such family. Author also presents stories from Pshaveti, according to which the whole village jointly participated in the liquidation of one, who became "gabudakebuli" with wealth.[87]

Above mentioned data show us that in Mtiuleti-Gudamakari, the strive of society member to attain prerogative, the necessary element of offence "gabudakeba" was the motivation of perpetrator to achieve some prerogative over the other members of the society via his/her actions. Without such factor certain action of society member cannot be qualified as the above crime. It was demonstrated in the provided data that the member of society for achieving prerogative in the society forcefully appropriated the community, village lands, willfully reduced the duty to be paid, and then did not obey to the request of the society, namely to return the icon lands to the community. All the above actions – unpermitted appropriation of community land, willful reduction of duty to be paid, non-obedience to the request of the community – could be reviewed as the independent offence, however when such actions were carried out for achieving some advantage over the society members, then such actions were considered as the strive for attaining prerogative over the society members, "gabudakeba", which was considered as the heavy crime. The prerogative, towards which the society member was striving, was expressed in the possession of more rights, respect compared with other members of the society, separation from the society, community, first of all demonstrated via the possibility, right for non-obedience to the decisions made by the community; moreover, such prerogative implied power over other members of the

85 *Kharadze R., Robakidze Al.,* Mtiuleti Village in the Past, Tbilisi, 1965, 62-63 (in Georgian).
86 *Kiknadze Z.,* Georgian Mythology, Kutaisi, 1996, 119 (in Georgian).
87 *Kiknadze Z.,* Georgian Mythology, Kutaisi, 1996, 118, 120-121, 123 (in Georgian).

community, in general achieving social advantage. Persons distinguished in the society with their proprietary status dared to strive for such advantage, due to proprietary status they deemed that could become independent from the community. In XVIII century Mtiuleti, as demonstrated by Vax. Itonishvili, such strive could be demonstrated by the persons positionally promoted by the King. Drive for gaining such prerogative, expressed in specific, including above discussed, actions based on our observation was representing already committed offence. As evident from the data, in most cases the community was not allowing its member to implement his intentions in terms of gaining some prerogatives. When the community noticed that its member became "gabudakebuli", ignoring the community, not obeying to the decisions of the community, with the habit to demonstrate the violence, oppressing others, infringing property of others that would cause extremely negative attitude from the community and earlier or later, would cause disfavoring from the people and relevant punishment.

"Gabudakeba" as a crime, was causing exile in Mtiuleti. In the above provided example it was demonstrated that the village exiled "gabudakebuli" family and confiscated 7 day area lands of the icon used by the family for the payment of duty; then the community did not transfer the land to other family, not to allow other family to become "gabudalakebuli". The land was distributed among the households; however, as not every family wanted to cultivate the above plots, the one with smaller plots and in a poorer condition received the land; they were sharing the land and paying the duty.[88] It seems that with the consideration of past experience, village society distributed the land in the way to exclude the possibility for getting another "gabudalakebuli" family, showing us how unacceptable was for the society "gabudalakebuli" family.

Use of such a heavy punishment for "gabudakeba", as exile had a purpose to improve the "gabudalakebuli" family. In particular, the family would still remain in the household, was not exiled and fully isolated from and left by the society and should fully understand the power of the community, impossibility to live without the community. The society would only forgive "gabudakebuli" family, when convinced that the family understood and repented the committed crime. The "gabudakebuli" family would be outlawed for at least three years and only after three years it would be possible to reach peace in case of relevant repentance and asking for forgiveness from the community.[89] Outlawing of "gabudakebuli" family had preventive meaning, as all members of the community knew that community was trying its best to have all members in subordination and non-obedience to the community, strive for the prerogative would cause the full isolation. Hence, as noted by Vakh. Itonishvili, sober inhabitant of Mtiuleti would manage his business in the way not to oppose the society and not to become the object for outlawing. Therefore, "gabudakeba" would rarely take place.[90]

Some data regarding the strive towards gaining the prerogative, as a crime, is also found in the traditional law of Khevi. Here it was especially unacceptable to make any person a noble man or to demonstrate any signs of strive towards any social inequality. According to available information, the

88 *Kharadze R., Robakidze Al.,* Mtiuleti Village in the Past, Tbilisi, 1965, 64 (in Georgian).

89 *Kharadze R., Robakidze Al.,* Mtiuleti Village in the Past, Tbilisi, 1965, 64-65 (in Georgian).

90 *Itonishvili V.*, Social Structure of Mtiuleti and Gudamakari Population in XVIII Century, Herald, Academy of Science, Soviet Republic of Georgia, 113-114 (in Georgian).

population would not let stay in Khevi person becoming nobleman. According to R. Kharadze information provider, "in the past our area had a condition that the one becoming a nobleman should have been liquidated by Khevi jointly."[91] According to R. Kharadze data, there were distinguished commanders of the Georgian Kings, famous with their bravery in Khevi: Giorgi Marsagishvili and Glakha Kamarauli from Karkucha, Gurbelai from Kosa, Ninia from Kusheti and etc. When the Tatar army invaded Georgia, Giorgi and Glakha have showed the distinguished bravery. The King granted noblemanship to them, but they refused to become noblemen, stating that they would not betray the Khevi rules. Later, enemy again invaded Georgia and now Gurbela showed himself. He was also granted the noblemanship and he also followed the Khevi rules and refused.[92] These people clearly knew very well the attitude of Khevi society towards the acceptance of noblemanship and with the consideration of the above they made relevant decision. Shiola Gudushauri, who made his name in the battle against Leks, behaved unlike the above persons (XVII century). He accepted noblemanship from the King and decided to subordinate the Khevi. The community held a meeting in relationship to the above and made decision to execute Shiola.[93] This example illustrates the attitude of the community towards the attempt to establish inequality in terms of rights.

Representatives of some families also tried to gain prerogative in Khevi, causing very strict reaction from the community. For example, Gudushauri family residing in the village Sno was trying to gain family name prerogative. In case of blood-vendetta they were requesting so called compensation bull "sagometo khars" and in case of letting the woman get married – payment of double price. Khevi community members had given joint condition that duty for marrying the woman should not have been more than 50 manet; however, the family did not participate in giving such promise, demonstrating separation from the community and were requesting the payment of duty different (double) from the one requested by the community for letting the woman married. Community was resisting the above family name prerogative demonstrated by Gudushauri family. Namely, according to the community decision, as Gudushauri family was not showing respect to other people, all members were prohibited to marry Gudushauri women, or to let marry woman to Gudushauri representative.[94] R. Kharadze describes specific case, when the community exiled one person due to non-obedience to such violation and for strengthening the disfavoring, approximately in 1867 or 1968 years installed the disfavor stone.[95]

Striving for the family name prerogative was observed in the village Stepantsminda from the representatives of *Kazbegi family* at the end of XIX century. According to the letter published in the newspaper "Iveria", representatives of *Kazbegi* name intended to appropriate the Stepantsminda lands and announced these lands as their property, as they were considering themselves as noblemen. Local peasants considered above claims as unjustified, as they never had a lord, and representatives of Kazbegi

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91 *Kharadze R.,* Relics of Communal Governance in Khevi, Works of *Javakhishvili Iv.* History Institute, Academy of Science, Soviet Republic of Georgia, Vol. IV, Section 2, 1959, 176 (in Georgian).

92 Ibid, 177.

93 Ibid.

94 Ibid, 174-176.

95 Ibid, 174.

name could not present any document from the King confirming noblemanship; moreover, Russia had granted noblemanship only to Gabriel Kazbegi and not to all representatives of the name. *Kazbegi* representatives decided to acquire rights over the mentioned lands via the court and applied to the district court; the court did not satisfy their request. Then they appealed court decision in the higher court. Irritated with the above behavior, local peasants decided to exile *Kazbegi* name, with the exception of Colonel *Giorgi Kazbegi,* who did not participate in the struggle of Kazbegi name representatives for the appropriation of lands.[96]

Striving to gain prerogative in the community was also considered as the extremely heavy crime in Svaneti over Bali. Community could not cope with any attempt to subordinate the community. It is known that at various times for the above reason six noblemen were liquidated only in Ushguli: *Kvarkvare and Puta Dadeshkeliani, Suram Gardapkhadze, Bezhan Kipiani, Kavsheb Devdariani and Kipian Kipiani.*[97] The above clearly shows the reaction of the community to the threat of overruling the community coming from outside. *According to R. Topchishvili*, there are number of facts of burning families in the tower for opposing the community due to the desire to achieve the advantage in the community.[98]

In this regard the old story described in the work of *B. Nizharadze* is interesting. Person named Gulbani residing in the village Ipari has given shelter to nobleman Devdoriani, who intended to become the lord of village Ipari inhabitants. Society got aware of Gulbani's intention and executed him.[99] *B. Nizharadze* generalizes this case and indicates that, if any member of society attempted to help any noblemen to subordinate the community for the personal interests, according to the people the "very mukdeni" (betrayer of the society) would be punished via execution.[100] As confirmed by the research, community was executing not only the one intending to become the lord of the community but also the member of the community supporting such actions. Society would consider such person as betrayer to the society, as demonstrated during the discussion of the crime and would deal with him accordingly.

It is worth noting that in old times, in Svaneti society was not forgiving even own noblemen crossing the limit in relationship with the peasants and attempts to gain the additional prerogatives. There is a story from the past preserved in the oral tradition, according to which community members could not accommodate to the arrogance and negligence of peasants, demonstrated by noblemen from their community member. Due to the above reasons peasants have almost fully liquidated the representatives of the surname Japaridze from Mestia; as for the Choluri community – representatives of Gardapkhadze name.[101]

These data demonstrate that attempt of community member to attain prerogative, lordship in the community or support to others in achieving such goals was considered as one of the heaviest crimes directed against the society in Khevi and Svaneti over Bali, like in Mtiuleti-Gudamakari. For this crime it

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96 Newspaper *Iveria*, 1898, № 228 (in Georgian).

97 *Davituliani D.,* Svaneti Traditional Law, Tbilisi, 1974-1975, Manuscript, 106 (in Georgian).

98 *Topchishvili R.,* Ethnography, Ethnology of Georgia, Tbilisi, 2006, 119 (in Georgian).

99 *Nizharadze B.,* Historical-Ethnographic Letters, Tbilisi, 1962, 86 (in Georgian).

100 Ibid, 85.

101 Ibid.

was possible to impose over the whole family, name, specific persons the punishment of execution as identified in the research. For the above crimes, we also encounter such heavy punishment envisaged under the traditional law as exile. It is interesting that it was possible to use disfavoring without exile for "Gabudakeba" in Mtiuleti. Application of disfavoring instead of exile for "gabudakeba" was applied for simpler cases.[102] It seems that, above implies such cases of "gabudakeba", which were demonstrated in actions less harmful for the community and therefore, community would not deem it expedient to apply the exile as a punishment.

6. Conclusion

Based on the research, one can state that according to the materials of Georgian traditional law of the second half of XIX century and XX century there are crimes recorded, which were directed against the specific territorial unit (for example: inter-community union, community, village). Together with other crimes, they include the following: betrayal to the society, breaking of the church and cross-icon, infringement of common (village-community) and cross-icon property, striving to achieve prerogative in the society. For each of the above crimes the object of infringement was the common interest of society members. Various public types of punishments were used against the persons committing above crimes, including execution, exile and disfavoring.

[102] See *Kharadze R., Robakidze Al.,* Mtiuleti Village in the Past, Tbilisi, 1965, 65 (in Georgian).

Medea Matiashvili*

Filicide in Old Georgian Law

1. Introduction

Paradicium or killing of relatives was prohibited by legislation in almost every epoch and country and as a rule, was considered as a category of the aggravated crime. It is known that even by Roman law a person committing such a crime was severely punished.[1] Namely according to Pompey's law a murderer of a close relative was punished by *Poena Cullei* ("punishment by sack") – a murderer was placed into a leather sack together with a dog, a cock, a snake and a monkey and the sack was thrown into the nearest sea or river.[2]

Of course old Georgian law was also prohibiting killing of a family member. Such crimes were thought to be the „heaviest sins"[3] and were reproached as by secular, as well as by ecclesiastical and traditional jurisdiction. In addition to the right to life of other members of the family old Georgian law was individually separating and protecting a child's right to life.

The purpose of the present article is to ascertain how an issue of filicide was regulated in old Georgian law and to state the parent's responsibility for committing this crime. For achieving this purpose there will be discussed as direct sources – norms of positive, ecclesiastical and traditional law, as well as indirect sources – hagiographic and historic monuments.

In the article filicide is conditionally divided into general and special components. To the first component belongs killing of a child (here killing of the born child, except a newborn baby is meant), but to the second component – killing of babies (newborn babies) and killing of a fetus. Just on the basis of the law history specifics killing of a fetus (killing of the unborn child) was included into a crime classification as killing of a child.

2. Filicide

The only monument of old Georgian law foreseeing prohibition of filicide is a Law Book of Vakhtang Batonishvili. Namely paragraph 78 of the law, including two objects by nature, protects life of father and child. The paragraph is saying: „If father kills his child or a child kills his/her father, the

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1 *Tagantsev N.S.,* About Crimes Against Life According to Russian Law, Petersburg, 1871, 1.

2 Monuments of Rome Law, The Institutes of Justinian, translation from Latin, Foreword, Notes and Bibliography was done by Doctor of History Sciences Professor *Surguladze N.,* Tbilisi, 2002. 266. Also see *Scott S. P.,* The Civil Law**,** XI, Cincinnati, 1932, <http://droitromain.upmfgrenoble.fr/Anglica/ 48_ Scott.htm#IX>, [29.04.2015].

3 *Javakhishvili Iv.,* History of Georgian Law, Vol. I, Complete Works in 12 Volumes, Vol. VII, Tbilisi, 1984, 204.

matter must be settled according to law".[4] The norm does not clarify the child's gender and accordingly protects child's life without distinction of the gender. It must be noted that none of the monuments of old Georgian law, neither secular, nor ecclesiastical, envisages general norms prohibiting infringement on child's life.[5] It's true that the old Georgian law is aware of the special constituent of filicide, destruction of an embryo, but does not envisage killing of the born child. So until the XVIII century a norm prohibiting killing the child either did not exist or has not reached us, though in the history of Georgia there is very interesting information about the rule introduced by Rev, king of Kartli. The rule concerns banning of a severe tradition of sacrificing of lads and indirectly protects child's right to life. „King banned killing and sacrificing of lads to idols and instead of it introduced a rule of sacrificing of a sheep or a cow. And just for this reason the king was named Rev Right".[6] This story is also described by Vakhushti „Description of Kingdom in Georgia": „King Rev abolished sacrificing of girls and boys to the idols and ordered to sacrifice animals instead of them, but in the epoch of Christianity on the mountains in the place of the former idols churches were built with crosses on them and people were coming and staying overnight there".[7] According to this information it is ascertained that king banned the tradition of sacrificing of boys and girls to the idols, which had been dominated for many years and instead of it he established a rule of sacrificing of a sheep and a cow. So it means that king passed a law, which banned filicide, generally „killing of lads". It is obvious that the first-rate purpose of this normative act was banning of sacrificing of boys and girls, the tradition which had been dominated for years and not forbidding parents to kill their own child. Besides from this fact it is not clear who the subject of the crime, a parent or other person, for example, other member of the family, most probably parents would have been just the persons who would have taken the decision of sacrificing of their own child and finally would have carried out it. So it can be thought that the subject of this crime was parent. It can be said that this was the first attempt of reaching us the norm of banning of killing of the born children. Though as it was mentioned, the purpose of the norm was not banning of killing children in general, but banning of a severe tradition of sacrificing of children. For this reason it is not right to create illusion as though in Georgia killing of a child had been banned since the III century.

1.1. Filicide According to One Georgian Hagiographic Monument

One of indirect sources, containing information about relations between parents and children, especially parent's right to the child's life is Georgian hagiographic monument „Martyrdom of nine spiritual brothers christened by saint Embazi but born from their own mothers". It is the monument of the

4 Code of Vakhtang VI, the Text was Ascertained and Bibliography was Attached by *Is. Dolidze,* Tbilisi, 1981, 205.

5 This tendency was not only characteristic for Georgia. According to *G. Nadareishvili's* observations killing a child was banned in Russia only in 1649 and the penalty for such action was lighter than for killing a man. See *Nadareishvili G.,* Old Georgian Family Law, Tbilisi, 1974, 164-165.

6 *Mroveli L.,* Life of Georgian Kings, Life of Kartli, Vol. I, 2012, 52.

7 *Vakhushti,* Description of Kingdom of Georgia (Geography of Georgia), Tbilisi, 1941, 18-19.

IX century and is supposed to be telling a story happened in the gorge Kola located in Tao.[8] The author of the monument is unknown and the place of its creation is also obscure. In scientific literature there is an opinion that this monument might not be original Georgian hagiographic work and might be translation from Armenian.[9] The reason for such opinion is anachronism found in this monument (since originating of Christianity in Georgian pagan country „martyr facts and cases of persecution of Christians have not been confirmed")[10] and the style uncharacteristic for Georgian hagiography („the monument does not contain any sign of nationality").[11] Though the author E. Gabidzashvili thinks the weakness of this position and is confessing that in Armenian literature there is no prototype of this monument.[12] An argument as if for the VI century such spreading of heathen culture and persecution of Christians is „untypical and later".[13] At his time Iv. Javakhishvili explained this case very clearly and remarked, that in spite of the firmly establishment of Christianity in V-VI centuries „it is possible that even for a long time after it in some remote corners heathenism might have faithful supporters and sincere worshippers".[14] Undoubtful is the fact that the Georgian gorge Kola, named in the monument, is located in Tao, in the outfall of the River Mtkvari: „There was a big village named Kola near the outfall of a big river named Mtkvari".[15] Thus let the work be even translated, the fact is that it fits the Georgian context and somehow is still describing the reality of Georgia. Accordingly by means of the present indirect source it is partially possible to clarify the issue how killing of the child was regulated until the XVIII century.

The story is about killing of own children by pagan parents. The monument is begun with the description of people of one of the big villages of the gorge and it is said that the majority of people in the village was pagan: „Most people in the village were worshipping pagan idols and very few people were Christian worshipping the God".[16] In such circumstances the main characters of the monument were growing up, which at one winter night secretly were christened, „they didn't dare be christened in daytime, as they were afraid of the pagans. "[17] When their parents found out about christening of their children, they got very crossed, took them from the Christian house to their pagan house insulting and cursing them and beat them severely".[18] The children were in such state for seven days. Parents were not able to make them change their mind and for advice they applied to the head of their village, which was

8 See *Javakhushvili Iv.,* Old Georgian Writing (V-XVIII centuries), History Purpose, Sources and Methods before and Now, Tbilisi, 1945, 61-66.

9 *Gabidzashvili E.,* Works I, Monographic Essays, Tbilisi, 2010,205.

10 Ibid, 257.

11 Ibid, 205.

12 Ibid, 205-206.

13 Ibid, 257.

14. *Javakhishvili Iv* ., Old Georgian Writing (V-XVIII centuries), History Purpose, Sources and Methods before and Now,Tbilisi,1945,62.

15 *Abuladze I.,* Georgian and Armenian Literary Relations in IX-X centuries, Research and texts, Tbilisi, 1944, 184.

16 Ibid, 184.

17 Ibid, 18.

18 Ibid, 184.

also heathen, but the head charged the parents to judge them themselves saying: „They are your children and you have the right to do whatever you want". The parents did not delay, took their children in front of people and the head to their Christening place and beating them severely killed them".

The monument is very important for the history of Georgian law. It contains important information about Georgian family. Just for this reason researchers of Georgian law paid attention to this monument. From this point of view the monument was first discussed by Iv.Javakhishvili. According to the author from the monument it is clear that parents were granted unlimited rights on their children".[19] The same opinion is shared by G. Nadareishvili, when he says that according to the monument „In early feudal epoch the Georgian family was more like the Roman than the Greek family".[20]. State was not interfering in such relation; moreover the chief was giving parents complete freedom of actions. So in the VI century in Georgia, namely in Kola gorge parents had rights to death-life of their children. Of course it is difficult to generalize this fact on the whole Georgia, as Christianity was starting its existence in Georgia in the V-VI centuries and because of this circumstances this issue is changed to some extent. It especially concerns east Georgia, Meskheti, where „Christianity roots were firmly established".[21] At the same time in this period there is not any other information denying parents' unlimited power in relation to their children. Accordingly it can be thought that in spite of the fact that sacrificing of children to the idols was banned in a heathen society, parents still had the absolute right to punish their children. It is interesting whether the situation is changed in the period of spreading and dominating of Christianity, whether child's life is protected by ecclesiastical law. From this point of view the work discussed above is very important. The first, the fact that martyrdom is written just on this theme is designating many things – Christian doctrine disapproves the parents' action and glorifies fellows faithful to religion. Apart from it the author gives his own position openly. It is seen well in the text. He speaks of those parents as being „godless" and „faithless" and about their action he says the following: "Even animals have mercy on their children, opposite to these godless parents who did not show mercy towards their own children".[22] The author is reproaching the parents' action and finally in the epilogue he applies to gospel. "If one brother kills the other one or father kills his child, their parents will condemn their action and kill them."[23] Though it should be mentioned that the author of the monument is not an eye-witness of these events. He is estimating the events of the VI century three centuries later. It is known that the IX century

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19 *Javakhishvili Iv.*, Old Georgian Writing (V-XVIII centuries), History Purpose, Sources and Methods before and Now, Tbilisi, 65-66.

20 *Nadareishvili G.,* Protection of Human Respect and Dignity According to Georgian Feudal Law Monuments and Court Practice, Journal "Almanakh", 14, 2002, <http://www.nplg.gov.ge/gsdl/cgi-bin/library.exe?e=d-01000-00---off-0period--00-1--0-10-0--0-0---0prompt-10--..-4----4---0-1l--11-en-00---10-help-50--00-3-1-00-0-00-11-1-1utfZz-8-00-0-11-1-0utfZz-8-10&a=d&cl=CL4.2&d=HASH901f402e4c00ab74ddc382.7>, [13.04.2015].

21 *Kesarieli P.,* from the work: *Javakhishvili Iv.*, Old Georgian Writing (V-XVIII centuries),History Purpose, Sources and Methods before and Now, Tbilisi, 61-62.

22 *Abuladze I.,* Georgian and Armenian Literary Relations in IX-X centuries, Research and Texts, Tbilisi, 1944, 186.

23 Ibid,186.

is a century of rising of Christianity; it is the time when „a bishop is a second king". Accordingly the attitude of Christianity to the similar actions best of all must be seen in this period. It should be also noted that a monument of ecclesiastical law acting in Georgia in that period has not reached us. The only legislative monument, which might belong to the IX century, is a fragment of Bagrat Kuropalati's law book and there is not a norm about banning of filicide in it either. For this reason it is very hard to state how the state and church were estimating similar actions in this period. Besides „in Koloelian martyrdom" the background of martyring of fellows was devotion to Christianity, which is due to the author's attitude. He is reproaching the parents' action, because they killed their Christianity devoted children. In any case considering the existed monument and the attitude of its author can be said that in this period Georgian church must not have been loyal to killing of a child by parent.

1.2. Rules Acting in Old Georgian Family – Parent's Right on His Child

It is interesting to know parent's right on his child in real life, whether parents could kill their own children. For this purpose it is necessary to discuss relation between parents and children in a Georgian family. It is known that a big Georgian family is considered to be democratic due to solidary management. The head of the family does not exercise unlimited powers; he is restricted by the family board, though towards his children he has more rights, than in family management. He also carries authority in the individual family with his family members, for example, characterizing Georgian family N. Khizanishvili remarks: „In our country as in Rome, a family was based on boundless force and rights of a father. All members of the family obeyed this force".[24] Besides father had the right to sell or mortgage his child.[25] About father's rights was talking Vazha Pshavela when he was discussing old family rules of Pshavelians. According to him father was the head of the family, his word was a law for all the members of the family; everybody in the family obeyed him. Son could not get married without his father's permission and for daughter father was choosing her future husband".[26] Father had such rights despite his social status. A peasant father had the same rights on his children, as a nobleman or ecclesiastic father.[27] The fact that in the Georgian family children's freedom belonged to their parents is indisputable. A child was family property and he/she could not take an independent decision without his/her family. It concerned both genders. According to the general rule in old days in Georgia children could not get a big family separated in their father's life.[28] Children could not get married without consideration of their parents' approval.[29] It is not surprising, because in Georgia a forcible marriage was prohibited only in 1928.[30] As a rule, the family was

24 *Khizanashvili (Urbneli) N.,* Selected Juridical Recordings, Tbilisi, 1982, 30.
25 Ibid, 31.
26 *Vazha Pshavela,* Ethnographic Letters, Tbilisi, 1937, 127.
27 *Khizanashvili (Urbneli) N.,* Selected Juridical Recordings, Tbilisi, 1982, 31.
28 For example see *Itonishvili V.,* Mode of Family Life of Mokhevians, Tbilisi, 1970, 111; *Itonishvili V.,* Mode of Life of Mountaineers of Kartli, Tbilisi, 1974, 49, *Tsetskhladze G.,* Family Life of Population of Guria, 1991, 86, Family and Family Life in Adzharia (Historical-ethnographical research), Tbilisi, 1990, 101.
29 For example see *Baliauri N.,* Stsorproba in Khevsureti, Tbilisi, 1991, 42.
30 *Nsdareishvili G., Khetsuriani J.,* About Some Bad Habits (Historical essay), Tbilisi, 1979, 41.

governed by the oldest man in the family, who was leading activities of family members. It is known that everybody „obeyed him without objection in his small kingdom".[31] But there are the following questions: To what extent was the power of the family head? Did he have the right on his child's life-death? Could he put his child to death and could not bear the responsibility for it, as it takes place in despotic families in Central Caucasus where „if father had even killed his son, it would not have been reasonable for a stranger to intervene in this matter".[32] According to Khizanashvili, in Georgia father's power was not beyond selling a child or punishing him.[33] This estimation of the scientist must be right. It is less supposable that in Georgia parent could have had the right on his child's death-life. This opinion is confirmed by the following circumstances: Georgian secular law is directly banning killing of a child by his/her parent (Article 78 of Vakhtang Batonishvili's Law Book). Accordingly killing of child by father is a crime. Besides child's life is estimated like father's life. It's true that by church faith it is not separately foreseen a general norm of banning killing of child, but it must be supposed that according to ecclesiastical law killing of child is also a crime and is punished similarly as an intended killing. It is confirmed by the circumstances that church law (namely, big religion law and small religion law) severely punishes killing of a fetus (a person committing such a crime is punished according to a law on homicide),[34] accordingly despite the nonexistence of a special norm (banning killing of a child) it prohibits committing such an action. If law equalizes a fetus to living man and punishes a special subject of this crime (mother or a person who has given mother a medicine) according to the law on homicide offenders, it will inevitably protect the born child's life. Presumably a legislator cannot see the necessity of separating an object of this crime and protects it under common kindness, human life.

1.3. Georgian Traditional Law about Filicide

It is interesting how Georgian traditional law is about filicide. In Georgian scientific literature it is not the novelty that crimes against life and health of close relatives are considered as private offences.[35] Accordingly such a crime is circumstances of excluding or mitigating responsibility.[36] According to a common rule vendetta within the family name was not taking place, but in case of killing of a family member it was only confined by reproaching morally.[37] Of course killing of a child is not an exception. Moreover, such an action in number of cases it is more forgivable than killing of a parent or a

31 *Sakhokia T.,* Travelling, 88, see from work: *Mgeladze V.,* Labor Organization Family Management in Old Adzharia, Issues of life and Culture of Adzharia Population, Tbilisi, 1967, 81.

32 *Itonoshvili V.,* "Family Life of Mountaineers of Central Caucasus, I, Family Life of Nakhs and Ossetians, Tbiisi, 1968, 89.

33 *Khizanashvili (Urbneli) N.,* Selected Juridical Recordings, Tbilisi, 1982, 32.

34 Big Religious Law, chapter 10 about women which after fornication get rid of their unborn child or take medicine for this purpose, this law was prepared for publication by *E. Gabidzashvili , E. Giunashvili, M. Dolaqidze, G. Ninua,* Tbilisi, 1975, 207.

35 *Daviasshvili G.*, Crime and Punishment in Georgian Traditional Law*,* Tbilisi, 2011, 212.

36 Ibid, 220.

37 For example see *Davitashvili G.*, Crime and Punishment in Georgian Traditional Law*,* Tbilisi, 2011, 214, Georgian Traditional Law, ed., by. *M. Kekelia,* III, Tbilisi, 1991, 75.

brother/sister. Vazha Pshavela writes: in the lineage circle vendetta did not take place: a killer of his own relative was liberated from vendetta and additional payment. Father might have killed his child, brother - his brother without having been punished; nobody would have demanded vendetta from them, community would not have made them answer for, but they have been disparaged and people would have looked on him with disgust calling him a killer and „sinful".[38] So a murder did not pay blood and was exempted from additional payment. In case of ordinary murder, when reconciliation was reached, a family of the killed person was authorized to take any article from the killer's family, including the estate.[39] The same rule concerning killing of a family member in Pshavi is described by Makalatia only with the difference that here the scientist is talking about patricide and says that in Pshavi patricides were not demanded to pay blood, but they were considered to be loathsome and were called sinful".[40]

A different rule is acting in Khevsureti, namely father killing his son does not pay blood. „For killing of a wife or a son there is no payment by blood, there is only a small payment. In case of killing of a wife or a child father pays the whole cow to the in laws",[41] while for killing a father or a brother by Khevsurian tradition blood is foreseen. For example, in case of killing of father, the second brother could make his killer-brother pay "half blood",[42] but in case of killing of a brother the grandson of the killed brother has demanded "the whole blood" and got it.[43] Similar to the other regions in Svaneti killing of a son by his father did not require paying the special compensation ("Tsori"),[44] while in Adjaria cases of physical abuse of a child or grandchild committed by father were rare,[45] so presumably father must not have had the right to kill his child here at all. Although exemption from blood payment does not mean permission, encouraging or/and exercising of father's rights. The circumstance that mostly in Georgia a killer of a family member was not made pay blood was due to the economic factor. Within the family name line taking blood had no sense, because in such a case the family would have had double loss. In due course of time M. Kovalevski paid proper attention to this fact and he explained it by non-existence of the public start of a crime.[46] By the author's explanation society considered a crime as a material loss, inflicted by one community to the other one and accordingly a crime committed by a family member did not cause this loss and paying for blood was losing its sense.[47] According to the author it is not surprising that a killer of mother-father is not punished at all – does not pay the payment, while killing of an uncle (uncle from mother's side, which lives separately) causes the payment inevitably.[48] The scientist explains

38 *Vazha Pshavela,* Ethnographic Letters, Tbilisi, 1937, 127.
39 Ibid, 126.
40 *Makalatia S.,* Pshavi, Tbilisi, 1985, 76.
41 *Makalatia S.,* Khevsureti, Tbilisi, 1935, 88.
42 *Ochiauri A.,* Personal Archive, Traditions of Khevsureti, Manuscript, Notebook 2, 13,1945, see from work of *Davitashvili G.,* Crime and Punishment in Georgian Traditional Law, Tbilisi, 2011, 213.
43 *Baliauri N.*, Stsorproba in Khevsureti, Tbilisi, 1991, 80.
44 *Kovalevski M*., Primeval Law, 2nd nd., Family, 1886, 34.
45 *Achugba T.,*Family and Family Mode of life in Adzharia (historical-ethnographic research), Tbilisi, 1990,101.
46 *Kovalevski M*., Primeval Law, 2nd nd., Family, 1886, 34 .
47 Ibid.
48 Ibid, 35.

that if there is not foreseen the fact that the society considers a crime as a material loss and paying blood is just compensation of this loss, it does not envisage rectification of an injustice, intimidate of the criminal or put him right, then it is impossible to understand how the patricide manages to live peacefully with his relatives.[49] D. Jalabadze is also right, when he says that disuse of such rule of vindictiveness did not mean permission and approval of such killings.[50] The fact that such a person was called „sinful", which meant a person committing a crime, confirms that „in the eyes of people such an action was a criminal action".[51] By a general rule a killer was called „a carrier of the dead", as the sin was following him after death and in the future life he was obliged to be in service to the man who he had killed.[52] Opposed to the patricide, persons committing killing did not wear any distinguished sign and were reprimanded more lightly than killers of parents. Generally in scientific literature there is an opinion that considering the general development of law history killing of a child in Georgia must have been much lighter crime than killing of a parent,[53] which is confirmed by ethnographic materials. From this point of view Article 78 of Vakhtang Batonishvili's Law Book, which equally estimates father's and child's lives, must be undoubtedly progressive.

So according to old Georgian law killing of a child by his/her father is a crime. The first special legislative norm, protecting child's right to life belongs to the XVIII century and equally protects father's and child's rights to life. Killing of a child is not permissible according to old Georgian church and traditional law too. It's true that church law is not aware of general component elements of killing of the born child, but it is protected under the common kindness, human right to life. According to traditional law a killer of own child is not made pay blood, a person committing such an action is reproached and called sinful.

2. Infanticide (New-Born Babies)

Facts of infanticide (the new-born) by different reasons in Georgia are confirmed by Georgian ethnographic and historic sources, namely killing of bastard children (new-born babies), killing of infants because of sex selection and killing of infants by burying them alive. First of all here will be discussed killing of bastard children. It is known that such action was done by mother, a special subject criminated in a moral crime. By this action she was hiding her crime and by different ways was getting rid of her child. The following part will be describing a second type of killing of infants – a habit of killing of infants. A person committing this action was mainly mother again, though in this case motive of crime was different – the infant is killed because of the undesired female sex and finally there will be represented facts of burying babies alive, known in the history of Georgia, where the performer of the

49 *Kovalevski M.*, Primeval Law, 2nd nd., Family, 1886, 35.

50 *Jalabadze D.,* Crime and Punishment in Georgian Traditional (folk) Law (by Traditional Law of Pshavi), Tbilisi, 2003, 102.

51 Ibid.

52 Georgian Traditional Law, ed., by *M. Kekelia,* III, Tbilisi, 1991, 34.

53 *Nadareishvili G.*, Old Georgian Family Law, Tbilisi, 1974, 164 - 165.

crime was again a woman. Though the above mentioned killing will be represented from this point of view, it is very interesting to discuss fairytales of Georgian folklore, created on a child-swallowing motive. On this issue the proper records are found in Georgian and Svan languages.[54] For example, a fairytale known from Racha is „Genje- swallowing Her Children". The main character of the fairytale is Genje – a bride, swallowing her own children since birth. Only one child called Shavia will be saved owing to the grandmother – Genje's mother-in-law.[55] The Svan fairy-tale „Alavgani", created on the child-swallowing motive, does not differ greatly from this story. Here the main character, Alavgan's wife is a giant's woman, who wants to eat her child, but she can't, because father is helping his child.[56] It is interesting that in both fairytales mother is trying to eat her children and their savors are mother-in-law and father. Besides in both cases children are taking revenge on their own mother: „The son returned home by help of father and grandmother takes revenge on his wicked mother, kills her throwing her into water".[57] The children-eating motive is characteristic not only for Georgian mythology. Analogous fairy-tales can be also found in Greek mythology, but opposed to antique mythology children-eater mother in Georgian fairytales is always mother and not man.[58] M. Chikovani ascribes it to the struggle between matriarchy and patriarchy. According to him „Georgia and generally the Caucasus maintained the characteristic features of matriarchy by means of folk-lore for a longer period than Greece. The motive of children-eater mother must be by one-stage older event than the appearance of man his event".[59] So it must be thought that the given mythological works are the echo of matriarchy, maintained by the Caucasus for a long time. Though later matriarchy gave way to patriarchy and accordingly the female sex lost its „power", it maintained responsibility – the first subject of killing of new-born children is mother again and she is punished for committing this action. In spite of the fact that killing of infants could have had two subjects (parents), according to the practice spread in Georgia women more frequently committed such an action than men. In case of killing of illegitimate children it is somehow understandable that at this time mother, a subject of crime, was trying to conceal another crime, fornication and just on this motive was killing her own child. But it is not clear in case of killing of a child because of sex selection the decision about getting rid of child most likely would not have been made only by her.

2.1. Killing of an Illegitimate Infant (New-Born)

It is known that „Georgian feudal family law created a peculiar presumption of innocence for a husband"[60] and in spite of more or less normative equality declared harlotry as a crime of „females". Accordingly „settling" of the problem created as a result of the crime was the duty of the woman. The

54 *Chikovani M.*, Issues of Georgian and Greek Mythology, Tbilisi, 1971, 14.
55 Ibid, 14-15.
56 Ibid, 15.
57 Ibid, 17.
58 Ibid.
59 Ibid.
60 *Nadareishvili G.*, Divorce by Georgian Law, Issues of Georgian Law History, I, Tbilisi, 1973, 338.

same rule was in case of fornication. According to the practice established in Georgia killing of the illegitimate (as a result of fornication) child was done by a woman and in consequence of it the woman was mostly punished for carrying out this action, though it is interesting why she was punished for killing her own child or for immoral action, or perhaps for both reasons. For law and order of that period protection of moral kindness was more important than protection of illegitimate child's life. Accordingly in Georgian traditional law killing of the illegitimate child was only perceived as a result of moral crime and not as a separately committed crime. To illustrate it there will be discussed one very interesting information confirmed in the ethnographic material, concerning killing of the own illegitimate child carried out by the woman. In Piraketa Khevsureti one woman had a sexual relationship with a married man. The woman became pregnant and gave birth to a son. The woman killed the child herself sticking a needle into the soft top of the baby's head and escaped to Pirikita Khevsureti, to Shatili".[61] Brothers brought the woman back, made her tell from who the baby was and when they found out that the woman's lover was a married man, they did nothing against that man. „We have nothing to do with this man, as it is not our shame".[62] But they defined the following punishment for their sister: „We will drive out our sister from Khevsureti and will not allow her to live anywhere with a Khevsurian man".[63] It should be noted that brothers did not mention a fact of killing of the child committed by the woman and accordingly the punishment defined by them was only for committing a moral crime. It should be mentioned that in Khevsureti for a moral crime, for raping a woman was punished with the same punishment – turning out of the village. According to *N. Baliauri*, in the village of Akhieli a woman, which gave birth of a child from a man of her surname, was turned out of the village: „A man and a woman of the same surname had an illegitimate child. The man was not killed, but the woman was turned out from the village. The woman got married in the village of Gudani in Piraketa Khevsureti. The woman's father did not reconcile with her for over twenty years„.[64] Besides in this last case the woman had not committed killing of the illegitimate child. It comes out that traditional law does not envisage an additional punishment for killing of an illegitimate child.

As it was already mentioned traditional law knows a special kind of moral crime – „raping", which can be considered as a material crime (here it is necessary to have a result, pregnancy and birth of a child). It was a separate type of crime and was severely punished. A subject of this crime could have been as a woman, as well as a man. According to Vazha Pshavela in old times for giving birth to an illegitimate child „both – a woman and man were taken to the bridge and punished by stoning".[65] The using of this punishment is also confirmed by the ethnographic material.[66] Criminalization of raping was not rare. It is known that it was not only Georgian phenomenon; it was considered as a crime in many

61 *Baliauri N.,* Stsorproba in Khevsureti, Tbilisi, 1991, 79.
62 Ibid.
63 Ibid.
64 Ibid, 80.
65 *Vazha Pshavela*, Ethnographic Letters, Tbilisi, 1937, 98.
66 *Jalabadze D.,* Crime and Punishment in Georgian Traditional (folk) Law (by traditional law of Pshavi), Tbilisi, 2003, 126.

countries and punished severely.[67] Besides separation of this crime might have been caused by its spreading. In Georgia very specific tsola-dgoma (lying and standing in the literal translation) rules of man-woman relationship were acting (tsatsloba and stsorproba*), when a sexual connection was banned, but of course this rule was not so rarely violated.[68] (* translator's comment: stsorproba in Khevsureti means the following: a young Khevsuri couple (a single man and a single woman) could lie together during the night with a sword placed between them. They could caress each other up to the waist only. Sexual intercourse between the pair was strictly forbidden. The same practice in Pshavi is called tsatsloba).

So Georgian traditional law was struggling against moral crime „gabichianeba" (raping). It was severely punishing a person committing it, but was saying nothing about facts of killing of the illegitimate child. It means that killing of a bastard was not a separate crime and accordingly a person committing this action was not punished separately, but it must not be explained as if killing of the new-born child was realization of mother's right. A special moral crime, "gabichianeba" , was just absorbing killing of a child by its mother and for this action an additional punishment was not foreseen.

2.2. Infanticide Because of Sex Selection

The next type of infanticide is a habit of killing infants confirmed in Georgia, which was spread in Svaneti because of sex selection.

Infanticide was not only the Georgian phenomenon and this terrible kind of killing was observed in many countries of the world.[69] Of course infanticide was not always happening because of gender. For example in Ossetia infants were killed regardless of gender, because of material difficulties.[70] In Svaneti a motive of infanticide was sex selection. A privileged sex certainly was male. It is interesting why a family preferred a son. This issue was studied by M. Kovalevski and as a result the following reasons were found: the practice of selling of peasants' children by feudal lords (parents preferred killing their daughters themselves, as they knew that the lord would deprive them of her. There was no sense in feeding and bringing up their daughter, which was predestined for selling);[71] The Svans were trying to decrease population number artificially because of hard economic conditions (Svaneti was isolated from the outer world during ten months in the year, accordingly people were in very hard conditions, there was not enough food for them and therefore they were trying to decrease the population growth by this way);[72] The successor of family name is a man and not a woman;[73] material loss – dowry; from the

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67 For example in Ukraine a woman committing such an action was tied to the church door with her hair and every passer-by was cursing her in public and spitting at her, see *Gamba J.,* Travelling in Amiercaucasus, I, Tbilisi, 1987, 65.

68 *Baliauri N.,* Stsorproba in Khevsureti, Tbilisi, 1991, 79, *Makalatia S.,*Tsatsloba in Pshavi and Stsorproba in Khevsurieti, (Ethnographic Materials), Tbilisi, 1925, 2-3.

69 *Kovalevski M.,* Primeval Law, 2nd nd., Family,1886, 41.

70 Ibid, 42.

71 Ibid, 43.

72 Ibid, 43-44.

family, where she was born, a woman takes more, than brings in;[74] It is admitted that new-born sons need more care, than daughters and for this purpose killing of daughters must be indirectly supported.[75] And finally the Svans believe that on each killed girl the heaven sends a son to the family.[76] Such superstition is also mentioned by N. Chimakadze. According to him "In old times in Svaneti there was a tradition of killing of a female new-born, because they believed that the God would give them a son".[77]

It's clear that reasons were very different from economic to pure cultural. In patriarchal society exaltation of a son is not novelty. Similar to other countries in Georgia folk-lore saved proverbs confirming this privilege, for example, the following proverbs: "Having a daughter child is better than childlessness", "A woman's hair is long, but brains not", "A woman has nine saddles. If she has time to put one of them on your back, she will manage to put all of them on you." and so on.[78] As it was mentioned such attitude to female sex was not only the Georgian phenomenon and was characteristic for other countries too, for example, in China there was a proverb of the same contents: "A daughter is such goods, which causes loss".[79]

As for ways of killing, the direct information on ways of female filicide in Svaneti is not confirmed. Presumably similar to filicide for different reasons here killing could have been done as by action (e.g. in Khevsureti by sticking a needle into the top of the head) or by inaction - without giving food (as in Ossetia, were infanticide was done because of material difficulties).

It is known that killings and abortions for the purpose of sex selection have great influence on demographic parameters and significantly change natural balance.[80] It is interesting to know what kind of influence the existence of this habit had on population number of Georgia and specifically of Svaneti. In

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73 Unfortunately gender selection is still a problem for modern Georgia. High rate of gender disbalance in Georgia has been observed since 1990. In Georgian society sons were always privileged secretly due to the necessity of a male heir. The insisted desire of having a son was closely connected with the patriarchal system dominated in the country, the special role of sons from the point of view of looking after the old parents and demand of continuer of family name". See Sex selection on gender in Georgia, context, evidence, results and possible solutions, report abstract, report is prepared for *UNFPA*- by K.Z. Gilmoto, Tbilisi, 2014, 2-3.

74 *Kovalevski M.,* Primeval Law, 2nd., Family, 1886, 45.

75 Ibid.

76 Ibid, 42-45.

77. *Chimakadze N.*, Free Svaneti, Old Georgia, Collection of Historical and Ethnographical Works, under the Editorship of *Takaishvili E.,* II, Division four, Ethnography, Tbilisi, 1913, 22.

78 *Mskhaladze A.,* Proverbs, Issues of Life and Culture of Adzharia, 1967, 104 See from work *Chelebadze N.,* Woman and Family (According to ethnographic data of the II half of the XIX century and the beginning of the XX century), Tbilisi, 2005, 30.

79 *Nadareishvili G.*, Essay from Law History, Tbilisi, 1986, 117.

80 Because of sex selection by gender scientists suppose changing of demographic picture by 2050 in Georgia too. "It's true that all possible demographic changes are difficult to be foreseen, as a result of different scenarios of sex ratio at birth, there will be quite different results, from the point of view of sex disbalance in adult population - males share might be in excess, which might be overcome at the expense of the international migration", see Sex selection by gender sign in Georgia, context, evidence, results and possible solutions, report abstract, report is prepared for *UNFPA*- by *K.Z. Gilmoto,* Tbilisi,2014, 2-5.

1897 in Georgia census operation was carried out, by which there were stated structural indicators of Georgian population, including sex composition.[81] According to the census male sex was 53.3% of the whole population, female – 46.7%.[82] The reason of it was assumed female mortality and in general "Unequal social-legal state of woman in society and family".[83] Infanticide for the purpose of sex selection is only confirmed in Svaneti,[84] therefore it must not have influenced on the whole population of Georgia, but it really influenced on population of Svaneti. It is known that a small number of women in the XX century were just ascribed to the existence of such severe habit, which finally caused spreading of abduction of wives.[85]

It is interesting to what extent this habit was spread in Svaneti and whether mother killing her new-born daughter was punished or no. According to the article of N. Chimakadze, which was written in 1905, this habit in Svaneti was not spread in that period so much, as before. "This disgusting habit was gradually lessening",- writes the author.[86] This information is very important. It means that in the beginning of the XX century in free Svaneti a habit of infanticide significantly decreased. What was the reason of it? It is less likely that the above mentioned reasons did not exist anymore; it is known that economic situation in Svaneti was hard again; [87] Surname was still continuing by male line and the Svans again believed that the God would give them a son. The answer to this question is given by the author of the article. According to him owing to the society recovering Orthodoxy there were appointed legal priests and because of this "killing of daughters was terminated almost completely, only here and there in remote corners it was taking place but secretly from the government".[88] So according to the information spreading of Orthodoxy, legal priests and the fear of expected punishment caused decrease of this habit significantly. Unfortunately the author says nothing about the punishment threatening the committer of such action. This issue more precisely in details is discussed by B. Nijaradze, namely the author concerns such issues as spreading of a habit of infanticide in Svaneti and punishment of persons committing this crime. According to him "The fact that this deplorable habit existed in Svaneti" can't be denied, but it was not so frequent and was caused neither from those reasons, nor remained unpunished, as it was said by travelers in Svaneti, mountaineers, the Russians and even some of our people".[89] As B. Nijaradze

81 *Jaoshvili V.,* Population of Georgia in the XVIII-XX centuries, Tbilisi, 1984, 103.

82 Ibid.

83 Ibid, 103-104.

84 According to the opinion of *G. Ride* a small number of the Khevsurian family might have been caused by killing of daughters. This position considered to be absurd in literature, it is also criticized by Itonishvili and to confirm his opinion he gives Al. Kazbegi's words: Many times I have had opportunities to understand habits of these people, very often I visited them, but I have never heard of such habit, see *V. Itonishvili,* Georgian ethnographic essays, Tbilisi, 1989, 142.

85 *Kovalevski M.,* Primeval Law, the 2nd ed., Family, 1886, 42.

86 *Chimakadze N.*, Free Svaneti, old Georgia, Collection of Historical and Ethnographical Works, under the Editorship of *E. Takaishvili,* II, Division four, Ethnography, Tbilisi, 1913, 22.

87 *Margiani I.,* Svaneti*,* Ethnographic Letters about Svaneti, Composed by *G. Avaliani, G. Zurabiani,* Tbilisi, 1973, 118.

88 *Chimakadze N.*, Free Svaneti, Old Georgia, Collection of Historical and Ethnographical Works, under the Editorship of *E. Takaishvili,* II, Division four, Ethnography, Tbilisi, 1913, 22.

89 *Nijaradze B.*, Free Svan, Historical - Ethnographic Letters, I, Tbilisi, 1962, 109.

explains, "Killing of daughters was an action against traditional justice",[90] i.e. according to traditional law this action was a crime. Accordingly mother, killer of her daughter, was getting a definite punishment for committing such an action. Types of punishment were the following: she will not be buried in sanctified earth, will be banned to approach churches and icons, to mention the God, to take part in public sacred holidays and carrying out of sacrificing habit.[91] Moreover sometimes such a woman was getting even a frustrating punishment additionally. So according to Svan traditional law killing of a daughter is a crime and a person committing it – mother - is punished and the punishment is implied in deprivation of the action right.[92] It must be noted that B. Nijaradze is saying nothing about the punishment of father for the same crime. The main committer of this crime was mother and of course she must have been punished, but it is less likely that the decision on killing was taken only by mother without father's wish and knowledge. Though B. Nijaradze writes, that "this case will be reproached by her children and grandchildren forever"[93] that means also responsibility of her descendents, children and grandchildren for the crime committed by mother, but there is not mentioned anywhere father, mother-in-law, father-in-law and other members family, which most likely if not organizers, would really have been inciters of this crime. It comes out that in practice analogous to killing of an illegitimate child killing of unwanted daughter was done by mother.

So a habit of killing of daughters is confirmed in Svaneti. Presumably in old times it was a spread method for ridding of unwanted daughters, but at the end of the XIX century and at the beginning of the XX century it significantly decreased. This killing was done for the purpose of sex selection. The preference of the privileged sex was due to different reasons.

It is important that according to Svan traditional law this type of killing was a crime. By the ethnographic material it is confirmed that this crime was mainly committed by mother. .

2.3. Burying of an Infant Alive

The third form of infanticide is killing of a new-born child/infant by burying it alive. A. Lamberti writes about such severe killing. According to the author, such action in Samegrelo was not considered as a crime and a person committing this action was not punished.[94] By A. Lamberti's explanation a local governor was not settling this issue and ascribing the reason of this action to the non-existence of a mechanism of registering of new-born children: "When our people were asking him to take measures against it, his permanent answer was: I cannot do anything, as I don't have an account of new-born children of my subordinates".[95] So in Samegrelo infanticide was not a crime and it was established as an admissible practice of getting rid of children. What were reasons for killing of children in Samegrelo?

90 *Nijaradze B.*, Free Svan, Historical - Ethnographic Letters, I, Tbilisi, 1962, 109.
91 Ibid.
92 For this type of punishment see *Davitashvili G.,* Crime and Punishment in Georgian Traditional Law, Tbilisi, 2011, 526-527.
93 *Nijaradze B.*, Free Svan, Historical-Ethnographic Letters, I, Tbilisi, 1962, 109.
94 *Lamberti A.,* Description of Samegrelo, Tbilisi, 2011, 100.
95 Ibid.

According to A. Lamberti there were several reasons. The first and the most widespread reason was widows' wish to get rid of the child from the first marriage. The subject of the action was mainly a mother: "More frequently mothers were burying their new-born children. Such terrible action was done by those widows, which had been pregnant from the first husband and if for the second marriage they had not been able to become pregnant, a new husband was getting rid of this poor baby, but as taking pity on the baby he can't kill him/her by knife, but he is even more cruelly killing the baby, he is digging a pit and burying the new-born child".[96] Children were also buried alive because of poverty and a large family, having many children.[97]*A. Lamberti* says nothing about practice of killing of children for sex selection, though considering other reasons of infanticide and the tendency of impunity in Samegrelo, it will not be surprising that infanticide would have been done just because of this latter reason. From the information presented by *A. Lamberti* it is clear that a husband wants to get rid of the child left from the previous marriage of his wife, but more often the action – "burying" is carried out by the child's mother. A man might be possible to be killing a baby, but as in the description given by *Lamberti* the talk is mostly about mothers and widows, it should be supposed that getting rid of baby carried out by a husband's own hand was happening rarely.

So conditionally there are three types of infanticide: killing of illegitimate infants, killing of daughters because of sex selection and killing of babies left from the previous marriage by burying them alive. According to the widespread practice the first two types of infanticide were considered as a crime opposed to the latter type of killing and a committer (mainly mother) was punished properly. Killing of daughters for sex selection was only confirmed in Svaneti, but getting rid of babies by burying them alive – only in Samegrelo. As for killing of illegitimate infants, this type of crime was observed in the whole Georgia.

3. Killing of Embryo

Old Georgian law protects life of an unborn child or embryo. This type of crime is banned by monuments of as secular as well as of church law. Besides the subject of crime might be as special: mother, grandmother (presumably nurse-midwife), as well as general: other woman or man.

From Georgian secular law monuments in the Code of Vakhtang VI there are existed foreign law monuments, namely Greek and Armenian law, which protect the right of life of embryo. Articles 77 and 78 of Greek law concern this kind of killing. The composition of article 77 is the following: "If a woman takes some medicine and kills her child in her belly, she must be sent to prison and wise Levan declares, if a man finds out that his wife killed the child in her belly, he must kick her wife out of house and get separated from her".[98]

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96 *Lamberti A.,* Description of Samegrelo, Tbilisi, 2011, 100.

97 Ibid.

98 Greek Law from the Code of Vakhtang VI, the Text was Published, Vocabulary and Terms were added by *T. Bregvadze,* Tbilisi, 1964, 47.

The title of the article is worth noticing: "Law of wise Levan about a woman who kills her own child by taking medicine".[99] A legislator speaks of an embryo as a child. The same tendency is also observed in church law. Besides the fact that here the talk is just of an embryo and not of a born child is doubtless. It is clear from disposition of this article itself "If a woman takes some medicine and kills her child in her belly". Article 77 has a special subject – mother. Article is material and depends on the result - "takes some medicine to kill her child in her belly" – i.e. only asserting that she has taken medicine is not enough for punishing of mother, the main thing is a result, that she "must kill her child in her belly". Objectively a crime is expressed by an action. Taking medicine is a way of committing a crime. In old times the most common way of getting rid of embryo was taking medicine, as just this way is named by the majority of articles banning such an action. As for a sanction, mother was exiled for a certain time ("to be exiled for some time"). The article also foresees an additional punishment. "If a man finds out that his wife killed the child in her belly, he must kick her wife out of house and get separated from her" – says the legislator. The next article of Greek law is also banning killing of an unborn child, though opposed to the previous composition there are two objects in Article 78. It protects life of both- an embryo and mother. Composition of the article is the following: "If some person, a man or a woman gives medicine to a woman to kill her child in her belly, if the person is poor, king must capture him/her, order to cut his/her hair, to mire, mount him on a donkey and disgrace him/her in public in market. If the person is rich, he/she must be deprived of property and exiled. But if the woman, whom the medicine was given for the purpose of killing her child in her belly, dies, the person giving medicine for killing a baby, must be beheaded.".[100] This article does not have a special subject. The action can be done by any person. From the objective point of view a crime is expressed by action. A person is giving medicine to mother. Both parts of the article are material, i.e. for the end of the crime it is necessary to get the result (in case of the first part death of the baby in the belly, of the second part - mother's death). At the same time the second part of the article is like a qualificatory composition, namely a crime with a collateral result – a result is giving medicine to the woman and killing of the child in her belly, but a collateral result is mother's death. It will be implied in punishment. For carrying out of the first part a subject is punished considering social status "if the person is poor, king must capture him/her, order to cut his/her hair, to mire, to mount him on a donkey and disgrace him/her in public in market. If the person is rich, he/she must be deprived of property and exiled". It should be noted that a legislator more severely punishes the person giving medicine than the subject of Article 77, mother. In the latter case mother is threatened by exiling for a certain period and turning out of home by her husband, but a poor subject of Article 78 gets additional punishment - cutting hair, miring, mounting on a donkey and disgracing in public in market. A subject of the second part of Article 78 is in a worse state, punished by death penalty: "The person giving medicine for killing a baby, must be beheaded and if the woman suddenly dies, that person still must be beheaded."

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99 Greek Law from the Code of Vakhtang VI, the Text was Published, Vocabulary and Terms were added by *T. Bregvadze,* Tbilisi, 1964, 47.

100 Ibid.

As it was mentioned before, Armenian law is banning killing of an unborn child. Namely Article 201 of Law version of Mkhitar Goshi says the following: "If a woman, which because of leading a depraved life or for some other reason either takes medicine to kill the unborn baby in her belly or chokes a baby on giving birth to it, must die instead of the baby. If a midwife somehow or suddenly chokes a baby, she must pay the payment set by law because the baby is her care and if she does not pay it, she will be responsible by law of the next world (must give an answer for blood)".[101]

This article also consists of two parts. The subject of the first part is mother, of the second – midwife. By the first part actus reus is expressed by carrying out the following action by mother: "either takes medicine to kill the unborn baby in her belly or chokes a baby on giving birth to it". Of course killing of fetus by taking medicine means getting rid of the unborn embryo in the belly. It is interesting to know what "chokes a baby on giving birth to it" means. By Sulkhan-Saba explanation "choking" is "killing by clutching at the neck".[102] Accordingly "chokes" in Article 201 means killing by clutching at the neck. We should make it clear: what is meant here – choking of the born child or destruction of the embryo; "chokes a baby on giving" must mean strangle at birth carried out by the woman and not choking of the new-born child. In any case the action must be carried out on giving birth or on delivery and not later. Thus it is very difficult to make it clear whether a baby is already born (is already out of mother's vagina) or not. Besides it must have been of no importance. Presumably in old times mothers were also using this method - killing by clutching at the neck i.e. choking to get rid of their children. That's just why it got into the disposition of his article. As opposed to Greek law Armenian law punishes mother more severely. For such action capital punishment is envisaged:"must die instead of the baby". In scientific literature the sanction of the present article is admitted as the influence of talion idea.[103]

The second part of the article, as it was already said, has a special subject – grandmother (presumably here is meant a midwife, which helps the woman in delivery). Actus reus is expressed by carrying out the following actions by the midwife: "damages or suddenly chokes a baby". Here it is not clear whether the born baby or embryo is meant. It can be thought that "damages" concerns the embryo, but "chokes" like the composition of the first part must be denoting choking of the baby carried out in the process of delivery. Though as opposed to the first part here "on giving" is not clear what is meant by a legislator – choking of the child carried out by the midwife after the birth of the child or action done in the process of delivery (until the fetus finally comes out of mother's body). Like the first part it will not be of decisive importance, because if the legislator was protecting the child in mother's belly, he would be protecting life of the born child too. As for the sanction, the midwife has to pay what is set by law, because the baby is her care and if she does not, she will have to answer according to the law of the next world "must give an answer for blood". Here it is important that a midwife is expecting such punishment for committing the action involuntarily or carelessly ("she must pay the payment set by law because the baby is her care"). So subjectively this crime is imprudent and a legislator is punishing the midwife for impru-

101 Monuments of Georgian Law, I. the Code of Vakhtang VI, Texts were published, Research and Vocabulary were Attached by prof. *Dolidze I.,* Tbiisi, 1963, 297.

102 *Sulkhan-Saba Orbeliani*, Georgian Dictionary, I, ed., by *Abuladze I.*, Tbilisi, 1991, 200.

103 *Vacheishvili A.,* Essays from Georgian Law History, I, Tbilisi*,* 1945, 100.

dence, but law does not say anything about the mid-wife's action committed on her "own will". Presumably such a crime will be punished as a simple kind of killing; therefore a legislator does not separate it out.

Georgian church law pays a significant attention to the right to life of embryo and a person encroaching on it is punished as a killer. A small church law says: "Persons, which will give medicine to mothers to kill their child in the vagina and mothers, which will take that medicine and kill their unborn child in the vagina, will be punished according to the law about murderer".[104] This article has many subjects. The action might be committed by any person "which will give medicine to mothers to kill their child in the vagina" and also a special subject – mother, "which will take that medicine". The crime is material, a special subject - mother will be punished only when the action has a result "will kill their unborn child in the vagina". As for other persons, which are giving mother medicine for abortion, from the point of view of disposition as if a material character of the crime is not seen "which will give medicine to mothers to kill their child in the vagina", but next a legislator writes: "mothers, which will take that medicine and kill their unborn child in the vagina", the second part of the present sentence, result - "will kill their unborn child in the vagina" – is also a component of the actus reus of a non-special subject, i.e. for committing a crime a result – killing of the unborn child by mother - is necessary. As for punishment for this crime according to law a committer is punished as a murderer. According to small church law willful killing is defined as follows: "A man, which on his own will and purpose kills somebody and then comes to repent and for confession, must be left without receiving the Communion for twenty years".[105] The legislator defines detailed schedule of this twenty-year punishment: "For the first four years he must stand outside the church confessing his sin and entreating believers, which were entering church, to pray for him. For the next four years he must stand in the yard of the church and join believers listening to reading of apostolic letters and gospel. For the next five years he must be with them and next seven years he must be with kneelers prayers, who are inside the church and when a deacon is heard to be saying: "Killers, go out of the church", he goes out and will be standing there together with believers until the end of the mass for four years and only then he can receive the Holy Communion".[106]

Banning of killing of unborn infants is also foreseen by a "big church law". In "legal regulations" of this monument there is separately discussed the mentioned crime – Chapter "i"(10) concerns mothers, which after whoring are getting rid of their born children or are taking medicine for abortion.[107] In this chapter there are three laws: Ankviri Council Canon Law "ka" (21), Maxis Council Canon Law "Ja" (91), Canon Laws of Basili b (2), ჱ (8), nab (52). By Major Canon Law similar to Minor Canon Law a killer of a child in the belly is punished according to the law for murder: Canon Law of Basili (2) – "it is a law for murder, which can't be forgiven",[108] Laws of Basili ჱ(8) "In addition to them those who gave medicine to a woman to kill her infant in the belly are also killers",[109] Laws of Basili nb (52) "As a killer

104 Minor Canon Law, Prepared for Publishing by *EL. Giunashvili,* Tbilisi, 1972, 71.
105 Ibid, 77.
106 Ibid, 77-78.
107 Major Canon Law, prepared for publishing by *E. Gabidzashvili, E. Giunashvili, M. Dolaqidze, G. Ninua*, Tbilisi, 1975, 207.
108 Ibid, 401.
109 Ibid, 479.

by law".[110] Punishing somebody as a killer means to use a punishment for purposeful killing. Major Canon Law for purposeful killing envisaged the following punishment: "For purposeful killing a killer must be avoided and only at the end of his life he will receive the Communion" (Ankviria Canon Laws collected by Fathers kb 22.").[111]

According to the mentioned articles a subject of crime of killing of the unborn child might be mother or somebody else, who gives her medicine, for example, ¶(8) article of Basil has many subjects. Objective aspect of crime consists of preparing and giving medicine, taking and using it "Those, who are giving medicine to pregnant women to kill a child in their body, are killers and so are the women taking medicine prepared by them".[112] From this article there is not seen the necessity of result. It can be said that in this case crime is formal. For its termination for a special subject consumption of the medicine, but for others it is even enough preparing and giving medicine to the woman. So a legislator punishes a person giving medicine i.e. other person and a consumer of the medicine, i.e. mother similarly as he punishes killers.

Major Canon law also concerns reason of banning of the crime,[113] according to which as a result of an act (killing of unborn babies) mothers also were dying, therefore in fact a legislator is protecting two kindness – life of the unborn child and life and health of mother. The present article has no special subject. The objective aspect of crime might be carried out by any person, including mother. Besides the legislator uses the terms - *„მოპოვნება"*, which means introduce, bring in and *„მუცლისა შინა კვლისა ჩჩვილთაისა მოპოვნებასა"*, which might mean banning of spreading of this method of infanticide.

So according to the monuments of Georgian secular and church law killing of an unborn baby is banned. The crime has many subjects; a crime committer is mostly mother, though other persons helping her are punished, such as a person making medicine, a person giving it to mother and a midwife. Church law punishes this crime committer as a homicide offender, but monuments of foreign law are defining punishment by the subject of the crime and the result an accordingly are setting penalties, such as exile, turning out of home and different humiliating punishments and even death penalty.

3. Conclusion

So according to old Georgian law killing of a child by mother is a crime. Georgian law knows special components of filicide, such as: killing of a new-born child and killing of embryo. The first legislative norm, which protects the right of a child to life belongs to the XVIII century and it equally estimates the father's and the child's right to life. Filicide is inadmissible by Georgian church and traditional law. Though church law does not know general components of filicide with the exception of

[110] Major Canon Law, prepared for publishing by *E. Gabidzashvili, E. Giunashvili, M. Dolaqidze, G. Ninua*, Tbilisi, 1975, 492.
[111] Ibid, 240.
[112] Ibid, 479.
[113] Article B2.

killing of embryo, it is protected under general kindness, human right to life. It is known that traditional law does not make a killer pay blood, but he reproaches the committer of this crime and calls him sinful. Parent has not unlimited power on his/her own children.

Killing of new-born children and destroy of embryo belong to a special type of killing. Conditionally there can be distinguished three different types of infanticide: killing of illegitimate infants, killing of daughters because of sex selection and killing of infants from the previous marriage by burying them alive. According to a widespread practice in contrast to the latter one the first two types of killing were considered as a crime and a person committing it (mainly mother) was punished properly. Moreover mother of the illegitimate child was punished because of moral crime and not for killing her own child.

As for destroying embryo according to the monuments of Georgian secular and church law killing of a baby in mother's body was banned and a person committing such an action was punished as a killer, but foreign law monuments are setting penalties, such as exilement, turning out of home and different humiliating punishments and even death penalty.

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Limits of Notary Authority in the Process of Issue of Writ of Execution

I. Introduction

Implementation of execution based on the notary document is especially important for ensuring uninterrupted civil turnover.

Objective of granting by the legislator the authority to issue writ of execution to the notary is creation of conditions for speedy civil turnover, reduction of disputes at the court and saving costs required for court processing. However, existence of mentioned above concept in the given form does not ensure realization of its actual goals and, moreover, writ of execution issued by the notary creates „basis for unfair civil turnover".[1] The boundaries of authority granted to the notary are not wide, often resulting in recognition of writ of execution issued by notary as fully or partially void by the court. The above mentioned generates doubts regarding the purpose of the above establishment and creates danger for infringement of interests of parties participating in the civil turnover.

Objective of the present work is to define conditions necessary for the issuance of writ of execution by the notary, not considered under the Georgian legislation, discussion of expediency of the extension of notary's authority boundaries required for the effective application of this concept and discussion of level of court involvement in deciding the authenticity of writ of execution issued by the notary.

Research is based on the analysis of practice, as well as normative, logical, doctrinal and comparative legal methods.

The work reviews specific liabilities to be fulfilled, which are subject to the writ of execution issued by the notary; characteristics of above liabilities are identified and in each case, the need for the participation of debtor in the process of issuing the writ of execution by the notary is discussed. The work demonstrates impact of outcome resulted via the issuance of writ of execution by the notary over the stability of civil turnover. The work defines basis necessary for issuing writ of execution by the notary. It discusses the cases of considering writ of execution issued by the notary as void. The research also provides justification of expediency of widening authority boundaries for the notary for ensuring the effective realization of objectives set for the concept of writ of execution. The work also discusses circumstances hindering the realization of writ of execution and using the example justifies the need for the participation of debtor in the process of issuing the writ of execution by the notary for ensuring the fair civil turnover.

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1 *Zoidze B.,* Reception of the European Private Law in Georgia, Tbilisi, 2005, 294 (in Georgian).

II. Essence and Importance of writ of Execution Issued by the Notary

1. Creation and Development of Concept – Writ of Execution

Creation and development of writ of execution is related to the medieval ages and period following the French Revolution.[2] Act subject to execution can be reviewed in three different directions in terms of its development; however, it must be noted that all three directions suffer the influence from European culture.[3] Notary act subject to execution represents the original form of law and order, which created the transitional stage "from self-assistance to the court".[4] "Execution document"[5] was created in medieval centuries in Italy and then was codified by various countries.[6] Its creation is also, in part, related to Italian traders, as originally trade relationships had a requirement for the existence of execution paper, when the execution was only possible based on court decision connected with long processes.[7] Later, the Roman law has at some level regulated mentioned relationships, however, only the court could issue payment order. Gradually the Notary institution acquired important functions and the writ on execution further developed in 19th century, in the 1804 year through the "Civil Code of France"[8].[9] Notary writ on execution achieved the last stage of development after its inclusion in the "multilateral conventions"[10] and by this way issuance of writ on execution by the notary, as much simpler system compared with the court decisions, has been provided at the international level.[11]

The notary is granted with the authority to issue writ of execution in number of countries of continental Europe, such as: Germany, Austria, Belgium, Portugal, France, Spain, Italy,[12] Georgia also belongs to the above group of countries. In the German Law the issue on issuing the writ on execution by notary is regulated by the law on "notary institutions"[13] as well as Civil Procedural Code of Germany[14] (hereinafter referred to as CPCG).

Georgian law of feudal period was also considering the possibility for the enforcement of court decisions and other jurisdiction acts. [15]

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2 *Puigvert W.,* Die notarielle Urkunde und die Naturalexekution, Dissertation, 2004, 14.

3 Ibid,15.

4 "Übergangsphase von der Selbsthilfe zur gerichtlichen Durchsetzung", *Puigvert W.,* Die notarielle Urkunde und die Naturalexekution, Dissertation, 2004,15.

5 "Die vollstreckbare Urkunde".

6 *Puigvert W.,* Die notarielle Urkunde und die Naturalexekution, Dissertation, 2004, 15.

7 Ibid, 16.

8 Code Civil.

9 *Puigvert W.,* Die notarielle Urkunde und die Naturalexekution, Dissertation, 2004, 16.

10 Multilateralen Konventionen.

11 *Puigvert W.,* Die Notarielle Urkunde und die Naturalexekution, Dissertation, 2004, 16.

12 Ibid, 53 ff.

13 Bundesnotarordnung (BnotO).

14 Zivilprozessordnung (ZPO).

15 *Chkonia Z.,* Evolution of Civil Enforcement Law in Georgia, Journal: „Justice and Law", №2 (41)'14, 129 (in Georgian).

Legislation regulating Georgian notary law is based on the principles of Latin notary system. In Latin notary system countries, in parallel with the enforcement based on the court decision, there is an enforcement based on the notary action also permitted.[16] Enforcement of execution inscription made by the notary bodies was considered by the Procedural Code of Civil Law of Georgia of 1964 year;[17] the notary was also granted with the authority to implement the execution inscription according to 1996 year law of Georgia on "Notary"[18]

At present, in the Georgian law the issue on issuing the writ of execution by the notary is regulated under the law of Georgia on "Notary", order No 71, issued by the Minister of Justice of Georgia on 31 March 2010, on the approval of instructions on the "Rules for the implementation of notary actions" (hereinafter referred to as instruction on "Rules for the implementation of notary actions"), law of Georgia on "Enforcement proceedings" and specific norms of Civil Code of Georgia (hereinafter referred to as CCG).

Order No 321, issued by the Minister of Justice of Georgia on 29 August 2001 on the approval of instructions on the "Rules for the implementation of notary actions" did not consider issuing of execution writs by notary.[19]

The authority to issue writ of execution was granted to the notary under the order No 2359, issued by the Minister of Justice of Georgia on 22 December 2005 on the approval of instructions on the "Rules for the implementation of notary actions".[20] The latter was separating notary confirmation and notary certification, as the forms of notary actions and was indicating the contract certified in accordance with the notary rules[21] and not the contract confirmed in accordance with the notary rules[22] as the basis for

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16 *Sukhitashvili D.,* Notary Law, Tbilisi, 2012, 308 (in Georgian).

17 Ibid, 305.

18 *Sukhitashvili D.,* Notary Law, Tbilisi, 012, 305 (in Georgian).

19 Order № 2359 Issued by the Minister of Justice of Georgia on 22 December 2005 on the Approval of Instructions on the "Rules for the Implementation of Notary Actions",Georgian Legislative Herald, № 150,27.12.2005,Article 1666, non-effective, LEPL "Legislative Herald of Georgia," (in Georgian), <https://matsne.gov.ge/ka/document/view/1354228>.

20 Order №71, Issued by the Minister of Justice of Georgia on 31 March 2010–LHG, №33, 31.03.2010, Article 517, annulled, LEPL "Legislative Herald of Georgia, <https://matsne.gov.ge/ka/document/view/62422>, Compare–*Sukhitashvili*, Notary Law, Tbilisi, 2012, 306 (in Georgian).

21 Article 13. Forms of Notary Actions.
1. Notary carries out notary action in the form of notary confirmation or notary certification. In case of notary confirmation, notary confirms the full contents of deal (document) to be confirmed, its compliance with the valid legislation and compliance of will of parties with the valid law (in Georgian).
Order №71, Issued by the Minister of Justice of Georgia on 31 March 2010–LHG, №33, 31. 03. 2010, Article 517, annulled, LEPL "Legislative Herald of Georgia. <https://matsne.gov.ge/ka/document/view/62422> (in Georgian).

22 Article 13. Forms of Notary Actions.
3. In the process of notary certification notary does not certify the authenticity of facts established in the document, notary certifies that signature to the document belongs to the specific person; notary also certifies the correctness and correspondence of document copy and extract with the original document, correctness of translation of document from one language to other language.
Order № 71, issued by the Minister of Justice of Georgia on 31 March 2010 – LHG, № 33, 31. 03. 2010, article 517, annulled, LEPL "Legislative Herald of Georgia, <https://matsne.gov.ge/ka/document/view/62422 (in Georgian).

issuing the writ of execution. The instruction on "Rules for the implementation of notary actions" valid at present, [23] in terminology terms does not differentiate notary confirmation and notary certification; however, in mentioned above instruction the notion of "notary act"[24] covers the contents, which was considered under the notary confirmation; and the idea of notary certification is realized in the notion of "private act".[25] But the instruction on the "Rules for the implementation of notary acts" obligates the notary to implement notary acts in compliance with the public act form, if it needs to certify the act (deal, certificate and etc), for authenticity of which the Georgian legislation envisages application of notary form; the above, on the other hand, does not exclude the right of person to conclude the deals in compliance with the public act form, for proving authenticity of which, Georgian legislation does not consider application of notary form.[26]

According to the paragraph two of the Austrian law on "Notary",[27] notary act has a public form, if in the process of drafting of the act, the notary identifies parties and other participating persons (witness, translator/interpreter), checks the full text of the deal and reads it to the parties and if there is a stamp placed at the end of the notary act.[28]

Attention must be focused on the fact that presently valid instruction on the "Rules for the implementation of notary actions", article 15, paragraph one names as "certification" the notary action, in which the notary must check identity of parties (representatives), their authorities, legal capacities, authenticity of will expression and must ensure compliance of deal with the legislation, adequate reflection of parties' will in the deal, must explain to the parties the contents of the deal and its legal outcomes, provide advice.

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23 Order №71, Issued by the Minister of Justice of Georgia on 31 March 2010 on the approval of instructions on the Rules for the Implementation of Notary Actions (in Georgian).

24 Article 15, Instructions on the "Rules for the Implementation of Notary Actions, Public and Private Acts (in Georgian).
1. For the certification of act (deal, certificate and etc), for the authenticity of which it is envisaged to adhere to the notary form in accordance with the Georgianlegislation, notary is responsible to check the identities of parties (their representatives), their authorities, legal capabilities, authenticity of expressed will, adequate reflection of parties' wills in the deal; notary is responsible to define the contents of the deal and legal outcome, to provide advice.
2. Notary act prepared in accordance with the rules envisaged under paragraph one of the above article is the public act (in Georgian).

25 Article 15, instructions on the "Rules for the Implementation of Notary Actions", Public and Private Acts (in Georgian).
6. In the process of certification of signatures to the deal or other document, notary is liable to only check identity and legal capacity of parties (their representatives) and certify authenticity of signature of signing persons.
7. Notary act prepared in accordance with the rules envisaged under paragraph six of the above Article is the private act (in Georgian).

26 Article 15 (3), Instructions on the Rules for the Implementation of Notary Actions, Public and Private Acts (in Georgian).

27 Notariatsordnung (Österreich), (öNO) §2, 2010.

28 *Puigvert W.,* Die notarielle Urkunde und die Naturalexekution, Bremen, 2004, 56-57.

2. Role of Writ of Execution in the Stability of Civil Turnover

In general, fulfillment of liability is mostly implemented voluntarily; however, in the absence of such will, forced fulfillment of such liability is ensured by the state based on the court decision.[29] Often satisfaction of creditor's claim against the debtor is achieved via the enforcement, based on the legally effective court decision or via the immediate enforcement of decision.[30] In accordance with the paragraph 784 of CPCG, in addition to the court acts, the law also considers other acts, based on which it is possible to achieve enforcement.[31] In this regard notary occupies special place in the German law; the notary, as an "Independent carrier of public authority"[32], similarly to the court, issues writ of execution.[33] In the Georgian law issuing writ of execution by the notary is implemented based on the delegation of function by the court.[34]

Via the issue of writ of execution by the notary the creditor's claim against the debtor is executed. In the Georgian law execution is implemented without participation of debtor in the process – in other words independent from his/her will. Will of the debtor is fully excluded in case of enforcement. Expression of debtor's will is made through the contract, stating that enforcement will be implemented based on the writ of execution issued by the notary.[35] There is a position expressed in the legal scientific literature that notary act serves the purpose to avoid the creation of dispute between the parties.[36] For specific cases the state establishes notary certification for proving the authenticity of deals with the purpose to protect rights and legal interests of subjects of the law.[37]

The basis for delegating the function of issuing of writ on execution to the notary by court,[38] in addition to the reduction of number of disputes at the courts, is ensuring the quick satisfaction of creditor's claims through the simplified procedures.[39] The above is undoubtedly important based on the interests of civil turnover, as the objective of private legal relationships is, first of all, establishment and facilitation of stabile civil turnover.[40] However, norms regulating the process of issuing the writ of execution by the notary are formulated in the way that this establishment cannot ensure stability of civil turnover and under the given conditions it can be considered as the threat for violation of such stability and debtor's interests. As the authorities of notary in the discussed process are limited, creditor's rights

29 *Sukhitashvili D.,* Notary Law, Tbilisi, 2012, 308 (in Georgian).
30 *Müller J.,* Notarielle Vollstreckungstitel, RNotZ, 2010, 168; See Articles 267 and 268, CCG (in Georgian).
31 Ibid,168.
32 Bundesnotarordnung (BnotO), §1 (Als unabhängige Träger eines öffentlichen Amtes).
33 *Müller J.,* Notarielle Vollstreckungstitel, RNotZ 2010, 168.
34 *Shotadze T.,* Mortgage as the Means for Securing the Bank Credit, Tbilisi, 2011,181 (in Georgian).
35 *Chanturia L.,* Credit securitization Law, Tbilisi, 2012, 105 (in Georgian).
36 *Puigvert W.,* Die Notarielle Urkunde und die Naturalexekution, Dissertation, 2004, 16 ff; *Sukhitashvili D.,* Notary Law, Tbilisi, 2012, 22 (in Georgian).
37 *Sukhitashvili D.,* Notary Law, Tbilisi, 2012, 9 (in Georgian).
38 *Shotadze T.,* Mortgage as the Means for Securing the Bank Credit, Tbilisi, 2011, 18 (in Georgian).
39 *Witdehaag I. (ed.), Kurtauli S.,* Review of Georgian Enforcement System, 2013, 203 (in Georgian).
40 Decision №-as-110-1347-05 of the Chamber of Civil Cases, the Supreme Court of Georgia, date: 17 January 2006 (in Georgian).

are extensive and the debtor is rightless. Therefore, it is expedient to determine the limits of notary's authority in the way that its implementation does not contravene the public order and does not "throw aside participant of turnover."[41]

III. Bases for the Issue of Writ of Execution by the Notary

1. Rules on the Issue of Writ of Execution

1.1. Persons Authorized for Issuing the Writ of Execution

Notary issues writ of execution within the framework of Notary activities.[42]

Comprehensive list of acts subject to execution is provided in the law of Georgia on "Enforcement proceedings", article 2.[43] There is no legal definition for writ of execution in place. Based on the analysis of norms regulating the above establishment the general notion of writ of execution issued by the notary can be developed. According to such notion, the writ of execution issued by the notary is an act issued by the notary based on the application of creditor, in the event of existence of relevant bases envisaged under the law; such writ of execution, independently from the will of debtor, ensures satisfaction of creditor's claim via the implementation of enforcement.

Writ of execution must be issued by the notary, who certified the notary act subject to execution.[44] In case of notary absence, the person appointed as his/her substitution[45] must issue the writ of execution and in case, if notary (substitute) has his/her authority suspended or terminated, then the writ of execution is issued by any other functioning notary chosen at the discretion of creditor;[46] the latter notary shall request certified copy of notary act to be executed and information about its annulation (changes) and information on the circumstances hindering the implementation of notary actions.[47] Such circumstances are in place, if, for example, according to the given notary act the writ of execution has already been issued by another notary.[48]

Writ of execution issued by the notary shall include details defined under the paragraphs 3 and 31, article 21, law of Georgia on "Enforcement proceedings". Writ of execution is issued in number corresponding to the number of creditors or/and debtors.[49]

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41 *Zoidze B.,* Reception of the European Private Law in Georgia, Tbilisi, 2005, 297 (in Georgian).

42 Sub-paragraph "o", Article 38 (1), Law of Georgia on "Notary (in Georgian).

43 *Witdehaag I. (ed.), Kurtauli S.,* Review of Georgian Enforcement System, 2013, 203 (in Georgian).

44 Article 72(3), Instruction on the Rules for the Implementation of Notary Actions, Article 40 (3), Law of Georgia on Notary (in Georgian).

45 See Decision as-315-297-2014 of the Chamber of Civil Cases, the Supreme Court of Georgia, dated 05 December 2014 (in Georgian).

46 Article 72 (4), Instruction on the Rules for the Implementation of Notary Actions (in Georgian).

47 Ibid.

48 Ibid.

49 Ibid, Article 72(5).

1.2. Person with Right to Request Issue of Writ of Execution

In accordance with the contents of paragraph two, article 20 and article 24, law of Georgia on "Enforcement proceedings", creditor or his/her successor have right to request the issue of writ of execution. Notary is authorized to issue writ of execution based on the written application from creditor or his/her successor.[50] A writ of execution may be issued in favor of creditor's assignee, if succession is clear or the document of succession is executed by the relevant authorized body or certified by a notary.[51] The basis for succession is in place, when according to the norms of material law, it is admissible to change the subject of rights and liabilities, when the new subject fully or partially undertakes the rights and liabilities of his/her predecessor,[52] or certain rights of such predecessor.[53]

2. Importance of Agreement Between Parties for the Issue of Writ of Execution

Existence of written agreement between parties is the necessary precondition for issuing writ of execution by the notary.

In accordance with the paragraph 5, article 38, law of Georgia on "Notary", under the presence of relevant bases, notary issues the writ of execution, if there is an agreement between parties on the above and the notary has defined in the written act the legal outcomes of issuing the writ of execution.

The appeal court has considered the writ of execution as void on the basis that the contract text itself, establishing the essential conditions of the contract, did not contain the authority of notary to issue writ of execution; due to the above, the appeal court assumed that parties did not agree about the issuing of writ of execution by the notary. Accordingly, the court decided that writ of execution was issued with the violation of rules defined under the law and due to the above, based on the article 54 of the Civil Code of Georgia declared the writ of execution as void.[54]

According to the definition provided by the appeal court, for equipping notary with the authority to issue a writ of execution, due to non-fulfillment of liabilities generated on the basis of contract, it is necessary: to have agreement between parties on the above issue and notary must define in the notary act the legal outcomes of issuing the writ of execution.[55] In addition to the above precondition, notary shall issue writ of execution if the liability of debtor is confirmed without a reasonable doubt.[56]

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50 Article 40 (1), Law of Georgia on Notary (in Georgian).

51 Article 24, Law of Georgia on Enforcement Proceedings (in Georgian).

52 Decision №bs-242-239 (ks-14) of the Chamber of Administrative Cases, the Supreme Court of Georgia, dated 17 June 2014; Decision №as-154-147-2011 of the Chamber of Civil Cases, the Supreme Court of Georgia, dated 04 April 2011 (in Georgian).

53 *Kholuashvili D.,* General Review of Succession of Rights, Journal: "Justice and Law", №2 (33)'12, 51 (in Georgian).

54 Decision №as-689-655-2013 of the Chamber of Civil Cases, the Supreme Court of Georgia, dated 16 January 2013; compare–Decision №as- 1793-1770-2011 of the Chamber of Civil Cases, the Supreme Court of Georgia, dated 24 January 2014 (in Georgian).

55 Decision №as-689-655-2013 of the Chamber of Civil Cases, the Supreme Court of Georgia, dated 16 January 2012 (in Georgian).

56 *Sukhitashvili D.,* Notary Law, Tbilisi, 2012, 308 (in Georgian).

3. Definition of Legal Outcomes of Issuing the Writ of Execution – Definite Nature of Writ of Execution

Written definition of legal outcomes of issuing the writ of execution represents one of the preconditions for issuing the writ of execution by the notary.

According to the general principles of execution, execution is implemented based on the writ of execution and in the framework of such writ, meaning that "Means and rules of enforcement defined by the writ of execution are exactly the action and mechanism, which must be enforced with the writ of execution".[57]

In the German law, the claim for payment to be enforced is mainly considered as appropriately defined, when value of claim is directly determined by the contract or it is possible to calculate such value based on other document.[58] In case if value of claim to be enforced is not defined in the notary act and it is possible to define the value of claim to be executed based on the tangible legal act existing outside the notary act, the claim is considered to be defined.[59]

4. Liabilities to be Enforced Subject to the Writ of Execution Issued by the Notary

4.1 Claim to Transfer the Right on the Property

Writ of execution can be issued for the enforcement of claim regarding the transfer of rights over the property.[60]

The contracts, based on which claim on the transfer of rights on the property is admitted based on the writ of execution issued by the notary in accordance with the law, are considered in specific norms regulating pledging and mortgaging under the Civil Code of Georgia.

Despite the fact that, in accordance with the instruction on the "Rule for the implementation of notary actions", notary confirmation and notary certification do not any more bear the meaning, which was considered under the order No 2359, issued by the Minister of Justice of Georgia on 22 December

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57 *Kiknadze N.,* Mortgage as a Mean for Securitization of Claim and Rule for the Sale of Item under Mortgage. Journal Justice and Law, №4 (35) 12, 125 (in Georgian).

58 Bestimmtheit eines in notarieller Urkunde begründeten Vollstreckungstitels-BGH, 05. 03.1996, VIII ZR 212/94, <http://www.dnoti.de/rechtsprechung/bestimmtheit-eines-in-notarieller-urkunde-begruend/f2518abd-de58-43e1-9dbf-f70a3fd19902?mode=detail>.

59 Bestimmtheit eines in notarieller Urkunde begründeten Vollstreckungstitels-BGH, 05. 03.1996, VIII ZR 212/94, <http://www.dnoti.de/rechtsprechung/bestimmtheit-eines-in-notarieller-urkunde-begruend/f2518abd-de58-43e1-9dbf-f70a3fd19902?mode=detail>.

60 For example this is a case, when contract defines that transfer of ownership right over the property shall be implemented following the completion of construction works; if the above is not fulfilled, creditor can request to transfer ownership right over the property based on the writ of execution issued by the notary. See also: Decision №as-899-845-2012 of the Chamber of Civil Cases, the Supreme Court of Georgia, dated 22 November 2012 (in Georgian).

2005 on the approval of instructions on the "Rules for the implementation of notary actions",[61] certain norms of CCG are not harmonized with the effective instruction on the "Rule for the implementation of notary actions". In particular, according to the 284 (1) article of CCG, the pledged item can be assigned to the pledgee or sold based on a writ of execution issued by a notary; however the deal concluded between the parties shall be notarized. According to the article 289 (11) of CCG, mortgage agreement made to secure a claim arising from a loan agreement shall be certified by a notary; and according to the article 302 (31), under the agreement made in writing between the creditor and the owner the parties may stipulate that the mortgaged immovable items can be transferred to the creditor and sold based on a writ of execution issued by a notary. In such case, the transaction between the parties shall be notarized.[62]

For ensuring establishment of correct practice and homogeneity, it is expedient to make changes to the indicated norms of CCG, namely to formulate article 284 of CCG, section one with the following amendments: "The pledgee and the pledger may indicate in a written agreement that the pledged item may be assigned to the pledgee or sold based on a writ of execution issued by a notary. In such case, the agreement between the parties shall be notarized complying with the public act form requirements and notary shall define in written form legal outcomes of issuing the writ of execution"; to formulate article 302 of CCG, section 3^1 with the following amendments: "Under an agreement made in writing between the creditor and the owner the parties may stipulate that the mortgaged immovable thing can be transferred to the creditor and sold based on a writ of execution issued by a notary. In such case, the transaction between the parties shall be notarized complying with the public act form requirements and notary shall define in written form legal outcomes of issuing the writ of execution." Above mentioned is important, additionally in a sense that authority to issue writ of execution will depend on the following issue – whether the notary act to be subject to the enforcement is certified by the notary.

4.1.1. Sale of Item under Mortgage and Transfer into Ownership of Creditor Based on the Writ of Execution Issued by the Notary

CCG considers sale of mortgaged item independently from the court; in particular, via the issue of writ of execution by the notary.[63] Notary implements the above mentioned authority based on the delegation of functions by the court.[64] In accordance with the section 3^1, article 302 of CCG, for the notary to implement such authority, notarized agreement between parties[65] is a sufficient basis to transfer the mortgaged item into ownership of creditor or be sold based on the writ of execution issued by the notary.

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61 Order №71, Issued by the Minister of Justice of Georgia on 31 March 2010–LHG, № 33, 31.03.2010, Article 517, annulled, LEPL Legislative Herald of Georgia <https://matsne.gov.ge/ka/document/ view/ 62422> (in Georgian).

62 See *Kiknadze N.,* Mortgage as a Mean for Securitization of Claim and Rule for the Sale of Item under Mortgage. Journal Justice and Law, №4 (35)'12, 123 (in Georgian).

63 *Shotadze T.,* Mortgage as the Means for Securing the Bank Credit, Tbilisi, 2011, 181 (in Georgian).

64 Ibid, 181.

65 Term Deal Confirmed Based on the Notary Rules is used in the Article 302 (31) of CCG; however, as it was mentioned, it is expedient to harmonize the mentioned norm of CCG with the effective instruction on the

The appeal court stated that rules for issuing writ of execution by the notary is defined via two legislative act norms, namely: section 3^1, article 302 of the Civil Code of Georgia and section 5, article 38, law of Georgia on "Notary".[66] Accordingly, in order to equip notary with the authority to issue writ of execution over the item under mortgage, it is necessary to have agreement of parties on the above issue and notary shall define in written form legal outcomes of issuing the writ of execution. Above mentioned conditions must exist cumulatively; otherwise, writ of execution issued by the notary, as the deal contravening the rules and prohibition defined under the law, can be considered as void.

For example, despite the fact that in the notary act the notary defined legal outcome of issuing the writ of execution, the appeal court considered as void appealed writ of execution in accordance with the article 54 of CCG with the basis that agreement text establishing the essential conditions of contract did not contain an agreement over the issuing of writ of execution by the notary.[67]

Sale of item under mortgage based on the writ of execution issued by the notary does not ensure protection of right of creditor and debtor in equal manner. Debtor is fully excluded from this process as notary, without oral hearing of parties, issues writ of execution based on the contractual agreement.[68]

It is true that creditor and debtor via the conclusion of contract, express their will, agree that enforcement will be implemented based on the writ of execution issued by the notary,[69] however, they cannot be carriers of all types of negative contractual risks.[70]

The fact that notary has right to issue writ of execution without requesting the documents on non-fulfillment of liabilities indicates on the principle of priority of creditor's interests in the enforcement proceedings. For the realization of notary's above authority it is sufficient to have creditor providing information/data on the value of principle and additional liabilities and indicating that unfulfilled claim for enforcement of which the writ of execution is to be issued does not depend on the fulfillment of any counter (substitute) liabilities by the applicant or on the fact that applicant has fulfilled such liability.[71] Even in case of existence of fulfillment of counter liabilities by creditor, creditor is fully released from the liability to provide evidences confirming the fulfilled liabilities. Norms regulating issue of writ of execution by notary does not consider any responsibilities for provision of incorrect information by the creditor. According to the general rule, if it turns out that mortgagee has presented writ of execution with the violation of law or without justification, the owner is entitled to claim returning of property or reimbursement of incurred losses based on the norms on unjust enrichment.[72]

Rules for the Implementation of Notary Actions, Indicating to the Deals Certified in Accordance with Notary Rules.

66 Decision №as-689-655-2013 of the Chamber of Civil Cases, the Supreme Court of Georgia, dated 16 January 2014 (in Georgian).

67 Ibid.

68 *Shotadze T.,* Mortgage as the Means for Securing the Bank Credit, Tbilisi, 2011,181 (in Georgian).

69 *Chanturia L.,* Credit securitization Law, Tbilisi, 2012, 105 (in Georgian).

70 *Zoidze B.,* Reception of the European Private Law in Georgia, Tbilisi, 2005, 294 (in Georgian).

71 Article 40 (1), (2), Law of Georgian on Notary (in Georgian).

72 *Chanturia L.,* Credit Securitization Law, Tbilisi, 2012, 104, 105 (in Georgian).

It is significant deficiency of norms regulating the issue of writ of execution by the notary, that article 102 of the Civil Procedural Code of Georgia is not effective for enforcement proceedings; according to the latter article, each party shall prove the circumstances, which are bases for his/her claims and counter-claims, accordingly the mentioned norm "names both parties equally as subjects for the burden of proving".[73] Although, via the conclusion of mortgage agreement debtor undertakes the risks related to the sale of or transfer of ownership over the item under mortgage, but the risk has its limits.[74] Actually, debtor is deprived of the right to present evidences proving fulfillment or partial fulfillment of liabilities. Indication of creditor on non-fulfillment of liability by debtor, must not be considered as a sufficient evidence[75] for issuing the writ of execution by notary and debtor must be provided with the opportunity to present evidences confirming fulfillment of liability; the notary shall be granted with the authority to transfer mortgaged item into the ownership of creditor or to sell such item based on issuing of the writ of execution only in case if debtor, within the time defined by notary, fails to present evidences confirming the fulfillment of liabilities. There is a position expressed in the legal literature,[76] according to which debtor in such relationship must have right to apply to the court with the request to review the case essentially,[77] that equipping debtor with such authorities at the stage of issuing the writ of execution would hinder enforcement process, as debtor by this way will always have opportunity to avoid the outcomes accompanying the non-fulfilled liability. It is evident that claims created by the debtor artificially should not cause hindering of the enforcement process.[78]

According to the paragraph 1147 of the German Civil Code (hereinafter referred to as GCC), claims of creditor are satisfied from the value of land plot or items under mortgage via the forced execution process.[79] Mentioned paragraph does not directly indicate, who is issuing writ of execution based on which it is possible to enforce the item under mortgage; however several authors have expressed their position, that in practice such actions are often implemented based on writ of execution in accordance with the article 794 (1)5 of GCC.[80] Indicated paragraph, as it was already mentioned, indicates on the issue of writ of execution by the court or notary.

Based on the presently effective legislation, procedure for the implementation of notary actions is different from court activities and it precludes the competitiveness.[81] Although, during the imple-

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73 *Kvinikadze K., Chkhaidze G.,* Burden of Proving in Civil Proceeding and Its Subjects–Claimant, Defendant, third Parties., Journal Justice and Law, N1(44)15,118.

74 *Zoidze B.,* Comments to CCG, Book Three, Tbilisi, 2001, 349 (in Georgian).

75 *Shotadze T.,* Mortgage as the Means for Securing the Bank Credit, Tbilisi, 2011,184 (in Georgian).

76 Ibid, 183.

77 Ibid.

78 Ibid.

79 Civil Code of Germany, translated and ed; by *Chechelashvili Z.*, Tbilisi, 2010, 222 (in Georgian).

80 *Kropholler J., Florian I., Heiden P.,* Civil Code of Germany, Comments for Learning Purposes., Tbilisi, 2014, 781; *Prütting W*., Weinreich, WKD_Kommentar_BGB, §1147 BGB Befriedigung durch Zwangsvollstreckung, <http://www.haufe.de/recht/deutsches-anwalt-office-premium/pruettingwegenweinreich-wkdkommentarbgb-bgb-pruettingwegenweinreich-bgb-1147-bgb-befriedigung-durch-zwangsvollstreckung_idesk_PI17574_HI5714350.html>.

81 *Sukhitashvili D.,* Notary Law, Tbilisi, 2012, 11 (in Georgian).

mentation of notary actions the parties shall not be equipped with the processual rights, which are realized in case of protection of rights through court, however, prior to the issue of writ of execution by notary, for the protection of interests of both parties, debtor shall be granted with the authority to present evidences. Granting authority to present evidences to debtor does not mean prioritization of only his/her interests; the above will be also reflected over the creditor's interests, as it will facilitate avoiding the generation of disputes and review of lawfulness of notary actions by the court; the latter on the other hand, will ensure prompt satisfaction of creditor's claim.

Issuing writ of execution by notary without requesting relevant documentation from debtor creates the basis for the following – due to presentation of incorrect data by creditor writ of execution could be issued for liabilities, which have already been fulfilled. The above contravenes number of fundamental principles of the private law, roughly violates essence of right on ownership and infringes the interests of debtor as owner. As if item under mortgage is sold based on the writ of execution, and debtor, in reality, has already fulfilled liability, concept of fair buyer will complicate or make impossible to return owned property. Therefore, limited authority granted to notary shall not become the basis for restricting somebody's rights. Therefore, it is expedient, prior to issuing writ of execution for the item under mortgage, to make notary responsible to issue writ of execution only in case if debtor fails to present documents confirming the fulfillment of liabilities within the reasonable time allocated by the notary.

4.1.2. Sale of Subject of Collateral / Transferring to the Pledgee, based on the Writ of Execution Issued by the Notary

Transferring to the pledgee and sale of subject of collateral can be carried out on the basis of the writ of execution issued by the notary. According to the Article 248 (1) of the Civil Code of Georgia, in order to implement transfer to the pledgee and sale of subject of collateral on the basis of writ of execution issued by the notary, it is required that the collateral agreement, concluded in written form implies the agreement on the above-mentioned; moreover, the legal outcomes of issuance of writ of execution shall be explained by the notary in the notary act; these two conditions shall be in place cumulatively, in order to make possible transferring (sale) of subject of collateral to the pledgee on the basis of writ of execution, issued by the notary.

Therefore, in accordance with the effective legislation, submission of the written application and notarially certified agreement to the notary by the creditor represents sufficient basis for the issuance of writ of execution. The regulatory norms for issuance of writ of execution by the notary, do not consider the participation of debtor or pledgee in the given process, that is significant deficiency for this establishment; since, if the pledgee unlawfully represents the writ of execution, then the tool of self-protection for the owner is only to require the property back or compensate inflicted damage, on the basis of regulatory norms on unjustified enrichment. In most cases, the institute for bona fide purchaser makes impossible to return the item, and the damage compensation is not a great relief for the property forfeited debtor without availability of any legal basis.

It is true that the writ of execution, issued by the notary, simplifies the realization process, because, in this way, it is possible to meet the creditor's claim without court decision,[82] but the participant's rights must not be sacrificed to the interests of simplification of civil turnover.

In accordance with the paragraph 1233 of the Civil Code of Germany, it is possible to sell the subject of collateral on the basis of writ of execution;[83] however, the mentioned norm does not specifically indicate, on the basis of which body, issuing the writ of execution, it is possible to sell the subject of collateral. Unlike the Civil Code of Georgia, the Civil Code of Germany provides more warrantees for protection of the owner's interests, during implementation of sales of collateral subject on the basis of writ of execution; in particular, in accordance with the paragraph 1234 of the Civil Code of Germany, if the warning is reasonable, then the pledgee shall inform the owner about the sale in advance and indicate the selling price for the collateral subject; in that case, in line with the second part of the same paragraph, sale may not take place after the expiry of one month following the warning.[84] However, based on the mentioned norm, there is a possibility that the debtor's interests are not be properly protected, because it does not determine in which cases the warning of the debtor would not be reasonable, but the interests of the debtor are protected in the way that the debtor has the possibility to voluntarily comply with the obligation and personally determine the basis for meeting the requirements.

However, in accordance with the second part of Article 284 of the Civil Code of Georgia, the pledger and the pledgee may agree on different rules for sale of subject of collateral, by which the parties may themselves determine the guarantees for protection of their rights; but there are frequent cases, when the parties fail to realize the real consequences of expression of their will. In accordance with the paragraph 7, Article 25 of the Law of Georgia on "Enforcement Proceedings", the seven-day period, defined for the debtor to voluntarily fulfill the obligation, is very short and, actually, less ensures voluntary fulfillment of obligation. Since, "the loss of property rights" is implemented forcibly through the sale of subject of collateral and on the basis of writ of execution, that may appear to be extremely painful burden for the owner, it is expedient that the Civil Code of Georgia considers the sale of subject of collateral as it is regulated under the Civil Code of Germany, and to regulate it at the legislative level; but, before issuing of writ of execution about transferring of subject of collateral to the pledgee or its sale by the notary, the notary shall investigate the circumstances of the case, in particular, the debtor shall be given a deadline presentation of evidences confirming the fulfillment of liabilities, or about availability of counter (substitute) liability of the creditor. There is possibility that other contractual liability existing between the creditor and the debtor, by which the parties consider, for example, deduction of counterclaims. However, in the process of issuance of writ of execution, the notary cannot be equipped with an authority of essential discussion of case, but, in case if the debtor submits documentary proven real evidence, the notary shall not issue the writ of execution.

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82 *Chanturia L.,* Credit Securitization Law, Tbilisi, 2012, 155 (in Georgian).

83 BGB § 1233 (2). Hat der Pfandgläubiger für sein Recht zum Verkauf einen vollstreckbaren Titel gegen den Eigentümer erlangt, so kann er den Verkauf auch nach den für den Verkauf einer gepfändeten Sache geltenden Vorschriften bewirken lassen.

84 *Chechelashvili Z.,* (translator and editor), the Civil Code of Germany, Tbilisi, 2010, § 1234 (in Georgian).

4.2. Matured Claim for Payment of Cash Indebtedness

The basis for issuance of writ of execution by the notary is the written statement of the creditor or its legal successor.

The writ of execution can be issued for execution of matured claim for payment of cash indebtedness. The notary checks, whether the term for fulfillment of liability is due, on the basis of the notary document, for which the applicant requests to issue the writ of execution and which is submitted to the notary. But the notary does not examine those circumstances, whether the failure to fulfill the obligation by the debtor is caused by violation of counter liabilities from the side of creditor. The notary excludes existence of such obligation of creditor only based on the statement submitted by the creditor, where it has to be indicated that unfulfilled claim, for execution of which the writ of execution is to be issued, does not depend on fulfillment of any counter (substitute) liability by the applicant.[85] The statement of the creditor shall not be considered as sufficient basis for issuing of writ of execution, because, the debtor is completely deprived from the right to prove the contrary; and the creditor may submit inaccurate data, which will significantly damage the debtor. It is expedient to equip the notary with the authority to define the term for the debtor for presentation of confirmatory evidences for the existence of counter liabilities from the side of creditor. **The notary shall be given an authority to issue the writ of execution only in case if such evidence is not submitted by the debtor.**

4.3. Claim of Non-Matured Liabilities

In accordance with the sub-paragraph "d", paragraph 5, article 72 of Instruction "on the Rules for the implementation of notary acts", if there is a basis for premature satisfaction of non-matured claim, indicated in the notary act, the writ of execution may be issued towards the non-matured claim. The indicated norm is ambiguous, because it is interesting what the words "indicated in the notary act" refer to, in particular, it is not distinguished from the formulation of norm, should there be an agreement on non-matured satisfaction of claim, or what may be the basis for non-matured satisfaction of claim; there should be a reference about it in the Notary Act. For example, in accordance with the Article 627 of the Civil Code of Georgia, the lender is entitled to immediately request repayment of the debt, if the borrower's proprietary status is essentially worsening, threatening the loan repayment. In this specific case, the basis for pre-mature satisfaction of non-matured claim is created by essential deterioration of borrower's proprietary condition. Before the maturity of fulfillment of claim, the basis for satisfaction may occur under such circumstances, as: initiation of bankruptcy proceedings on debtor's or owner's property, or declaration of compulsory execution or compulsory management, alienation of subject of hypothecation without consent of mortgagee, and etc.[86]

Proceeding from the above mentioned, it is expedient to clearly determine the conditions for issuance of writ of execution towards the claim of non-matured liabilities under the sub-paragraph "d", paragraph 5 of the article 72 of instruction "on the Rules for the implementation of Notary Acts".

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85 Sub-paragraph "d", § 1, Article 40, he Law of Georgia on the Notary (in Georgian).

86 *Zoidze B.,* Property Law of Georgia, 2nd ed., Tbilisi, 2003, 348 (in Georgian).

5. Participation of Debtor in Enforcement Proceedings

Debtor represents weakest party to the enforcement proceedings. The regulatory norms for issuance of writ of execution by the notary do not give an authority to debtor to participate in the process of issuance of writ of execution and/or submit the evidence proving the fulfillment of liability, which creates the risk of infringement of debtor's rights; in particular, the regulatory norms for issuance of writ of execution do not authorize the notary to refuse to issue the writ of execution, even in case if the debtor submits the document proving the fulfillment or partial fulfillment of the liability. It is expedient to authorize the notary to request the debtor to submit the evidence proving the fulfillment of liability. In this case the debtor shall be obligated to present evidence, proving the fulfillment of liability, to the notary, but, if such evidence is not presented by the debtor, the notary shall issue the writ of execution on the basis of creditor's claim.

The purpose of writ of execution, issued by the notary – to reduce the load created for the court by disputes and for the parties to ensure satisfaction of their claims without any extra costs – could not be reached. If the notary is authorized to discuss the evidence, submitted by the debtor regarding fulfillment of obligation, and/or hear the debtor's position with regard to reduction of disproportionately high penalty, this ensures reduction of disputes in the court, as well as protection of interests of the parties. Proceeding from the above mentioned, it is recommended, as well as required to entitle the notary to request the debtor to present the document proving fulfillment of liability, before issuance of writ of execution, and in case of submission of such document, the notary shall be equipped with an authority to refuse to issue the writ of execution.

In case if the debtor fails to present the evidence, then the scope of procedural authority of debtor shall be considered, in terms of admissibility of debtor's request to annul the writ of execution. In particular, in case if the debtor fails to present the evidence on fulfillment of liability, or fails to submit the position about the amount of penalty within the period specified by the notary, the debtor shall not be given an authority to appeal the writ of execution. But in case if the debtor presents the real evidence on the valid reasons for failure to submit the evidence within the period specified by the notary, the debtor, based on the mentioned, shall not be refused on the admissibility of claim. The regulation of procedure for issuance of writ of execution by the notary in such form will strengthen an authority of issuance of writ of execution by the notary, also, exclude the possibility to artificially interrupt the execution process from the debtor's side and ensure avoidance of dispute generation in the court, based on the writ of execution.

IV. Annulment of Writ of Execution

Cases of total and/or partial annulment of writ of execution, issued by the notary, are common in court practice,[87] because, issuance of writ of execution by the notary, in most cases, cannot provide a fair civil turnover and places an unacceptable burden over the debtor for the latter.

[87] See the Decision №as-1279-1221-2013 of 30th September, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia; Decision №as-315-297-2014 of 5th December, 2014 of the Chamber of Civil

In cases when the subject of dispute is the annulment (cancellation)[88]/partial annulment (partial cancelation)[89] of writ of execution, issued by the notary, by the reason of reduction of penalty,[90] indicated in writ of execution, there are frequent cases, when the court makes amendments to the writ of execution issued by the notary, in the part of liabilities to be executed. In particular, when the party applied to the court with the request to reduce the amount of penalty, indicated in writ of execution issued by the notary,[91] almost in all cases the court has reduced the amount of penalty, indicated in the writ of execution.[92] Proceeding from the practice of the Supreme Court of Georgia, the legal basis for annulment of writ of execution or making amendments to it by the court, in most cases is imposing disproportionately high penalty over the debtor by the writ of execution that is against the public order.[93]

According to the Cassation Court "the interests of provision-realization of free and fair civil turnover and economic freedom, as the constitutional principle, requires proportionality of penalty rate and principal amount, as well as reasonable compliance to the amount of penalty imposed over the party towards the principal amount of contractual indebtedness. However, the agreed penalty may exceed the expected damage, but the principles of equality of parties of the agreement and fairness of terms and conditions of the agreement, shall not be violated".[94]

Cases of the Supreme Court of Georgia; Compare: Decision №as-378-355-2014 of 8th May, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia (in Georgian).

88 Decision №as-689-655-2013 of 16th January, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia; Decision №as-330-314-2013 of 1st July, 2013 of the Chamber of Civil Cases of the Supreme Court of Georgia; Decision №as-1279-1221-2013 of 30th September, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia; Decision №as-406-384-2013 of 3rd October, 2013 of the Chamber of Civil Cases of the Supreme Court of Georgia; Decision №as-507-481-2013 of 8th July, 2013 of the Chamber of Civil Cases of the Supreme Court of Georgia (in Georgian).

89 See Decision №as-315-297-2014 of 5th December, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia; the Decision №as-378-355-2014 of 8th May, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia (in Georgian).

90 Decision №as-270-254-2014 of 26th December, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia; the Decision No-as-315-297-2014 of 5th December, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia (in Georgian).

91 Decision № as-270-254-2014 of 26th December, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia; Decision №as-bs-727-711(k-12) of 7th March, 2013 of the Chamber of Administrative Cases of the Supreme Court of Georgia (in Georgian).

92 See Decision №as-270-254-2014 of 26th December, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia; Decision №as-315-297-2014 of 5th December, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia; Decision № as-524-497-2014 of 15th September, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia; Decision №as-896-854-2013 of 10th February, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia. Compare: Decision №as-330-314-2013 of 1st July, 2013 of the Chamber of Civil Cases of the Supreme Court of Georgia (in Georgian).

93 For example, see Decision №as-507-481-2013 of 8th July, 2013 of the Chamber of Civil Cases of the Supreme Court of Georgia; Decision №as-896-854-2013 of 10th February, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia (in Georgian).

94 Decision №bs-1469-1403 (k-09) of 21st April, 2010 of the Chamber of Administrative Cases of the Supreme Court of Georgia. See also Decisions №bs-1478-1440 (2k-10) of 17th March, 2011; №bs-12-11(k-11) of 14th February, 2011; №bs-1048-1019 (2k-10) of 25th January, 2011; №bs-335-324(2k-10) of

However, the parties determine the content of the agreement themselves[95] and the notary, during drawing up the notary act, cannot interfere in expression of subject's will and they are free to determine the amount of penalty; but generally, the penalty determined under the agreement is often disproportionately high and the writ of execution is issued with the request of imposing of penalty in the amount, which is determined under the agreement. When the notary issues the writ of execution, by which too heavy burden is imposed upon the debtor for civil turnover, the notary shall be equipped with an authority to reduce disproportionately high penalty to reasonable amount, which provides, on one side, protection of debtor's interests, and on the other side, reduction of court disputes with the request to annul writ of execution issued by the notary.

Consequently, if, under the practices determined by the general courts, annulment of writ of execution of notary, on a basis of reduction of penalty, is possible by the court, then any amount of penalty that will be indicated in notary's writ of execution, may become the basis for applying to the court from the side of debtor, in order the court to finally evaluate the penalty, imposed by the notary. However, the above mentioned contradicts the aim of legislator – to avoid procedural actions and unnecessary costs, related to the hearing of the case.[96] As it was already mentioned above, the legal successor of creditor also has the right to request issuing of the writ of execution. The creditor may apply to the notary with the application on issuance of writ of execution, and before issuance of writ of execution, the legal basis for creditor's succession may be originated, if imposing of penalty by the parties is considered for every overdue day, clearly, imposing of penalty on the debtor for those overdue days, when the issue of legal succession is under consideration, is unfair.

During issuing the writ of execution, it is most important that "the contents of the agreement do not go beyond the essence of this or that specific institution".[97] Reduction of penalty, defined by the parties, is typical for the order prescribed by the law and "does not represent the threat for contractual freedom",[98] because, while establishing the relationships, the parties are not always able to determine expected consequences of their will, "but the contractual freedom shall be implemented under contractual order".[99]

In order the writ of execution of notary not to become "the basis for unfair civil turnover",[100] in addition, the court not to become the guarantor for recovery of public order and debtor's infringed interests, based on the writ of execution of notary, it is recommended that the notary to be given an authority to reduce the penalty, during issuing of writ of execution, similar to court, and to add 2nd part

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16th September, 2010; №bs-155-148 (k-10) of 13th May, 2010 of the Chamber of Administrative Cases of the Supreme Court of Georgia. About reduction of penalty, see Chantladze, Definition of expression of will, Reduction of penalty, Principle of nominalism, Review of Georgian Law. 5/2002-1, 168 -174 (in Georgian).

95 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 285 (in Georgian).

96 *See Sukhitashvili D.,* Notary Law, Tbilisi, 2012, 22 (in Georgian).

97 *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 285 (in Georgian).

98 Ibid, 286.

99 Ibid, 287.

100 Ibid, 294.

to the Article 420[101] of Civil Code of Georgia, with the following contents: "During issuance of writ of execution the notary is entitled to reduce disproportionately high penalty, taking into consideration the circumstances of the case".

Before issuing of writ of execution the notary shall examine authenticity of the notary act, for execution of which it is requested to issue the writ of execution. The notary shall be given an authority to issue the writ of execution only in case if the deal, for securing of execution of which the writ of execution must be issued, is valid. Otherwise, the writ of execution, as "subsequent result of invalid transaction"[102] may be declared as annulled by the court. It is true that annulment of the deal is the authority of court, but when the basics of annulment of deal is in place from the very beginning, provision of execution of such deal by the notary significantly damages the debtor's, as the participant of civil turnover, interests. Especially, taking into consideration the fact that "appeal of writ of execution and/or the notary document, for execution of which the writ of execution has been issued, does not suspend the execution, in accordance with the paragraph 5, article 42 of the Georgian "Law on Notary"." For example, if the hypothecation agreement is concluded, the authenticity of which is made disputable by the debtor, in addition, realization of mortgaged immovable subject is determined by the issued writ of execution, even in case of annulment of notary act to be executed, and the writ of execution by the court, the debtor's, as the owner's interest is totally infringed, because, the institute of bona fide purchaser impedes and, in most cases, makes impossible to return soled property to the debtor. The tools for self-protection used by debtor could be applying to the court, requesting the prohibition of conducting an auction, in the form of claiming security measures; but there is a possibility that even the above cannot protect a debtor from unfair results. Despite the fact that there was a valid court decision on suspension of auction, an execution bureau still has not stopped enforcement proceedings and, nevertheless, has conducted an auction, as a result of which the apartment, registered in the name of defendant, was sold.[103] That is why the participation of debtor in the process of issuance of writ of execution by the notary, is required.

Proceeding from the above-mentioned, it is expedient to entitle the notary to issue the writ of execution only for the notary act, which is fulfilled in compliance with the requirements determined

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101 Article 420 of the Civil Code of Georgia; Reduction of penalty by the court. The court may reduce disproportionately high penalty, taking into consideration the circumstances of the case (in Georgian).

102 Decision № as-1279-1221-2013 of 30th September, 2014 of the Chamber of Civil Cases of the Supreme Court of Georgia (in Georgian).

103 See Decision №bs-727-711(k-12) of 7th March, 2013 of the Chamber of Administrative Cases of the Supreme Court of Georgia, which indicates that, in accordance with the provisions of the partnership, the Chairman of partnership and co-Chairman were not authorized to, without written consent of founder members, make a credit and, proceeding from the mentioned requirement, for the purpose of providing the creditor's claim to mortgage immovable property owned by partnership. Nevertheless, the mortgage agreement has been concluded with Limited Liability Company by the partnership in a way that the founder members of individual apartment-building partnership did not issue the written consent on the mentioned. The deal was certified by the notary. The notary issued the writ of execution, according to which the individual apartment-building partnership has been imposed to pay the amount in favor of LTD; in addition, in case of non-payment of the amount, the mortgaged immovable property, owned by the partnership, had to be sold (in Georgian).

under first paragraph,[104] Article 15 of Instruction "on the Rules for the implementation of Notary Acts"; in other words only for the act, the compliance with the legislation, identities of the parties (representatives), authority, legal capacity, authenticity of expression of will of which is examined by the notary. However, the mentioned norm determined the given requirements for the act, for authenticity of which observance of notary form is determined under Georgian Legislation; but the mentioned rule should apply not only towards such deals,[105] but towards the deals, which should be subject to execution.

V. Factors Impeding the Issuance of Writ of Execution

In accordance with the part 5, sub-paragraph 1, paragraph 795 of Civil Procedural Code of Germany, notarization of confirmation of request has the legal power only in case if it is implemented by the German notary, under an authority given to the notary, in compliance with the appropriate form provided for it.[106] The scope of authority of notary is determined by the federal land borders of Germany, and notary document, issued outside the borders of Germany, has not the legal power,[107] for the purpose of issuance of writ of execution by the notary. The above mentioned considers that German notary is authorized to issue the act, having the power subject to execution, within the territory of Germany.[108]

In accordance with part 5, sub-paragraph 1, paragraph 794 of the Civil Procedural Code of Germany, it is inadmissible to implement execution based on the writ of execution of notary, if expression of will (of debtor) is required for execution.[109] For example, if the subject of collateral is future property, which was not in possession of pledger in the moment of pledging,[110] and if in future the pledger fails to fulfill the obligations and the creditor requires to issue the writ of execution for execution of requirement, the writ of execution is not issued, because, in order to have the subject of execution, it is required the debtor to express the will on the purchase of property. The mentioned is not directly stipulated by the Georgian Legislation and it is recommended to take it into account as one of the impeding circumstances for issuing the writ of execution.

In accordance with part 5, sub-paragraph 1, paragraph 794 of the Civil Procedural Code of Germany, it is not permitted to fulfill an execution based on the writ of execution of notary, if it refers to

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104 Article 15 (1), Instruction on the Rules for the implementation of Notary Acts. For certifying of the act (transaction, certificate, etc.), for authentication of which the observance of notary form is determined under the Georgian Legislation, the notary is obliged to check the identity of the parties (representatives), authority, legal capacity, authenticity of expression of will and ensure the compliance of transaction with the legislation, as well as adequate reflection of will of parties in the transaction, explanation of contents of the transaction and legal consequences to the parties, to give advices (in Georgian).

105 For authenticity of which observance of notarial form is determined under the Georgian Legislation (in Georgian).

106 *Müller J.,* Notarielle Vollstreckungstitel, RNotZ 2010, 168.

107 *Müller J.,* Notarielle Vollstreckungstitel, RNotZ 2010, 168.

108 *Müller J.,* Notarielle Vollstreckungstitel, RNotZ 2010, 168.

109 ZPO § 794 (1) 5, (..."nicht auf Abgabe einer Willenserklärung gerichtet ist"...)

110 *Chanturia L.,* Credit Securitization Law, Tbilisi, 2012, 148, 149 (in Georgian).

legal relationships of renting of residential apartment.[111] Georgian law on Notary does not considers such specific limitations as impeding circumstance for issuing the writ of execution; in accordance with the Article 72 (1) of Instruction "on the Rules for the implementation of Notary Acts", the expiration of time set by the law on limitation period of fulfillment of obligation is indicated, but it is not regulated how the notary checks the limitation period; it means that the mentioned completely represents the subject of notary's assessment, whereas it is actually possible that the debtor does not indicate the limitation period as the basis for refusal to fulfill the liabilities. Exclusion of debtor from the process of issuing of writ of execution unfairly creates the basis for issuing of writ of execution in this part too, without examining the circumstances of the case. In addition, it is possible to have expired limitation period, but the debtor not making the mentioned as disputable. In such case the creditor should not be deprived of the opportunity to require compulsory fulfillment of liabilities through issuing of writ of execution. Since the legal requirement becomes "expired" in case of generation of dispute,[112] the limitation period shall not always become the basis for refusal of satisfaction of claim. If the debtor does not refuse to fulfill the obligations, on limitation period basis, the notary shall be equipped with an authority to issue the writ of execution.

The above-mentioned is one more example verifying that participation of debtor in the process of issuance of writ of execution is not only expedient but necessary in order to ensure satisfaction of interests of creditor and fair civil turnover in short period of time.

VI. Conclusion

The scope of authority given to the notary is limited in the process of issuance of writ of execution, which causes the misbalance of interests of parties and is not able to ensure realization of real purpose of establishment of writ of execution. Under the given conditions this establishment shall be considered as threat for stability of civil turnover and basis for infringement of debtor's interests.

In the process of issuance of writ of execution by the notary, investigation of significant circumstances of case is not made and notary issues the writ of execution only on the basis of application submitted by the creditor and notary act.

Sale of item under mortgage based on notary's writ of execution cannot ensure equal protection of interests of creditor and debtor. The debtor is completely excluded from this process, as the notary issues the writ of execution on the basis of contractual agreement, without oral hearing of parties.

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111 ZPO § 794 (1) 5 ("aus Urkunden, die von einem deutschen Gericht oder von einem deutschen Notar innerhalb der Grenzen seiner Amtsbefugnisse in der vorgeschriebenen Form aufgenommen sind, sofern die Urkunde über einen Anspruch errichtet ist, der einer vergleichsweisen Regelung zugänglich, nicht auf Abgabe einer Willenserklärung gerichtet ist und nicht den Bestand eines Mietverhältnisses über Wohnraum betrifft, und der Schuldner sich in der Urkunde wegen des zu bezeichnenden Anspruchs der sofortigen Zwangsvollstreckung unterworfen hat").

112 *Atabegashvili D.,* Limitation Period for Contractual Requirement and Its Place in Judicial Practice, Journal "Justice and Law N4 (43)14, 119 (in Georgian).

Significant gap in regulatory norms for issuance of writ of execution by the notary is that the Article 2 of the Civil Procedural Code of Georgia is not valid in enforcement proceedings. However, during fulfillment of notarial activities, the parties cannot be equipped with all the procedural authorities, which are implemented during protection of rights in line with juridical order, but before issuance of writ of execution by the notary the debtor shall be given an authority to present his considerations and evidence, for the purpose to protect the interests of both sides. Giving the authority to the debtor to present the evidence does not mean only the preference of his interests, the above mentioned also serves creditor's interests, as this will facilitate the avoidance of generation of dispute and review of lawfulness of notarial activities by the court, which, itself, ensures rapid satisfaction of creditor's claim.

It is expedient to authorize notary to determine the term for fulfillment / partial fulfillment of obligation and/or presentation of evidence by debtor confirming existence of counter obligations from the side of creditor. The notary shall be given an authority to issue the writ of execution only if such evidence is not submitted by the debtor.

In case of non-submission of evidence by the debtor, the scope of procedural authorities of the debtor should be reviewed, towards the issue of admissibility of claim on the annulment of writ of execution from the side of debtor. In particular, in case if the debtor fails to submit the evidence on fulfillment of liabilities, or fails to submit the position regarding the amount of penalty, within the period specified by the notary, the debtor shall not be given the right to appeal the writ of execution any more. But, in case if the debtor submits the real evidence of valid reasons for non-submission of evidence to the court, within the terms determined by the notary then the debtor, on the mentioned basis, shall not be refused on the admissibility of the claim.

Nevertheless, under the current Instruction "on the Rules for the implementation of Notary Acts", the notarial validation and verification are no longer bearing the contents, which were considered under the Order No.2359 of 22nd December, 2005 issued by the Ministry of Justice of Georgia about instruction "on the Rules for the implementation Notary Acts", particular rules of Civil Code of Georgia are not in compliance with the current Instruction "on the Rules for the implementation of Notary Acts". In order to introduce proper practice and ensure uniformity, it is recommended to make amendments to the Article 284 of the Civil Code of Georgia, in particular, to formulate article 284 of Civil Code of Georgia as follows: "The pledgee and the pledger may indicate in a written agreement that the pledged item may be assigned to the pledgee or sold based on a writ of execution issued by a notary. In such case, the agreement between the parties shall be notarized complying with the public act form requirements and notary shall define in written form legal outcomes of issuing the writ of execution"; to formulate section 3,[1] article 302 of the Civil Code of Georgia as follows: "Under an agreement made in writing between the creditor and the owner the parties may stipulate that the mortgaged immovable thing can be transferred to the creditor and sold based on a writ of execution issued by a notary. In such case, the transaction between the parties shall be notarized complying with the public act form requirements and notary shall define in written form legal outcomes of issuing the writ of execution."

The cases of annulment of writ of execution or making amendments to it is frequent, and, proceeding from the practice of the Supreme Court of Georgia, in most cases the legal basis for above mentioned is imposing of disproportionately high penalty over the debtor under the writ of execution.

In order the writ of execution of notary not to become the "basis for unfair civil turnover",[113] in addition, the court not to become as the guarantor for restoring of public order and debtors interests, infringed on the basis of writ of execution of the notary, it is recommended, during issuing the writ of execution by the notary, similarly to the court, to give the authority to reduce the penalty and to add the 2nd part to the Article 420 of the Civil Code of Georgia with the following contents: "During the issuance of writ of execution the notary may reduce disproportionately high penalty taking into consideration the circumstances of the case".

[113] *Zoidze B.,* Reception of European Private Law in Georgia, Tbilisi, 2005, 294 (in Georgian).

Nino Lipartia*

Family Mediation – Alternative Means of Discussion of Family Legal Disputes

1. Introduction

Mediation, as an alternative means of dispute solution takes its start in the XX century, though its contemporary history in Georgia counts only a few years. For the last 15 years by Georgian state a number of measures have been carried out for supporting and developing implementation of alternative means of dispute solution.

In the modern world an effective solution of disputes has become a necessary attribute of any activity. A traditional means of disputes solution requires very many resources. In accordance with the value of the dispute subject material expenditure is increasing and the loss of time creates a serious problem. One of the bases of development of alternative means of dispute solution is sparing of different kinds of resources. Disputes protracted for years are less effective for participants of the dispute. Accordingly arbitrage and mediation are alternative means of dispute solution without court.

In Georgia the development of mediation started a few years ago. As a result of the performed changes in legislation there were emerged notary, court, medical and tax mediation. Development of alternative means of dispute solution is mainly the state will, as the main purpose of its development is to discharge a court system. Despite many measures performed according to the state will, the process of development of the above mentioned means is going very slowly. According to the changes made in the Georgian Civil Procedural Code there was defined to pass an obligatory mediation stage on certain categories of cases, namely after disagreement of the parties at the obligatory mediation stage the case can be transferred to the court again to trial on the merits. The main purpose of consideration of the obligatory mediation in the first place is to develop and increase the society's confidence to it and to decrease a number of disputes in the court.

Divorce mediation is an alternative means of dispute solution, when by help of an impartial and neutral professional family legal controversies are settled. At the same time a mediator is trying to reach an agreement between parties on different issues arisen from divorce. Family and divorce mediations differ from each other. The term "divorce mediation" means a solution process of the dispute arisen during the divorce, but an issue of regulation of relations between the other members of the family, including relatives, parents, grandmother-grandfather and grandchildren is left unforeseen. The mentioned issues can be settled within family mediation.[1]

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1 *Casals M.M.,* Divorce Mediation in Europe, An Introductory Outline-Electronic Journal of Comparative Law, Vol. 9. 2, Girona, 2005, 1-2.

By means of family mediation spouses, other members of the family are settling disputes without the interference of the court. As opposed to talks, when parties or their representatives are reaching the agreement through direct discussions, in the mediation process an impartial, neutral person is helping the parties reach the agreement.[2] Mediation is a structured, though informal, process, which is conducted by an independent person according to recognized principles and technique.

Development of family mediation was caused by increasing of a number of divorces in the second half of the XX century. According to the statistical data in 1867 the number of divorces in the United States of America was less than 10 000. In 1967 the number of divorces reached 500 000, which was doubled by 1981. According to the contemporary data 45% of marriages are finished by divorce.[3] Such increase of divorces became a reason of overloading of the court system of the USA. The divorce process is naturally accompanied by strained relations between the family members. From the financial point of view it causes spending quite a big amount of resources.[4] First of all expensive proceeding became a base of requiring an alternative means. Almost in more than half of the states of the USA the compulsory existence of divorce mediation is foreseen by legislation.[5]

2. Positive and Negative Aspects of Family Mediation

Divorce mediation has a lot of positive sides compared to the traditional means of dispute solutions, because in the process of divorce parents of the under age children in the presence of a mediator are reaching an agreement on different important questions, rather than disputing by the rules of court. Accordingly the existence chance of further divorces is decreasing. Furthermore because of completion of the dispute with reaching the agreement the effectiveness of the mediation process is expressed by the existence of positive psychological and emotional aspects of the parties.[6] P

Professor Kenneth J. R. distinguishes 18 positive aspects: 1) mediation makes communications between the parties open; 2) the parties are reaching an agreement by help of the third person and the dispute is not solved by court; 3) peaceful solution of disputes prevents problems; 4) By means of mediation problems are taken from a court hall into a neutral space; 5) the settled dispute is going on for a long time, because it is a voluntary agreement of the both parties; 6) mediation is faster and cheaper than a court process; 7) mediation helps the parties identify problems, it decreases misunderstanding between the parties; 8) mediation is conducted in a private space; 9) mediation enables to settle all kind of disputes, including those which do not have a legal ground; 10) mediation can be carried out more

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2 *Casals M.M.,* Divorce Mediation in Europe, An Introductory Outline-Electronic Journal of Comparative Law, Vol. 9.2, Girona, 2005, 1-2.

3 *Saccuzzo P.D.,*"Contoversies In Divorce Mediation" 1. Cited, "*Kenneth J. R.,* Symposium, Alternate Dispute Resolution, 44, 1984, 1725.

4 *Jensen R.H.,* Divorce-Mediation Style, 83, A.B.A J. 1997, 54.

5 *Craig A., McEwen C.A., Rogers H.N., Maiman J.R.,* Bring in the Lawyers, Challenges in Dominant Approaches to Ensuring Fairness in Divorce Mediation, Vol. 79, *Minn Rev L.,* 1995, 1317, 1404-10.

6 *Kaslow W.F., Folbert J., Milne A. (eds.),* The Psychological Dimension of Divorce Mediation, in Divorce mediation: Theory and Practice, 1988, 83, 1988.

easily than court process; 11) by means of mediation it is possible to eradicate not only the dispute, but its reasons as well; 12) it lessens the strain between the parties; 13) it enables the dispute parties to restore business relations; 14) it assists the adjustment of the children to the divorce process, as well as the cooperation between parents after divorce; 15) decreases the feeling of unfairness, defeat to the children; 16) decreases the state interference into the discussion of family legal issues[7].

In spite of the above mentioned positive aspects mediation can have the following negative aspects as well: 1) it is not used for settling all the categories of disputes; 2) it can't be considered as a fast and cheap means in judicial proceeding in every case; 3) it needs communication of disputing parties and a desire to settle the dispute; 4) after completing the mediation process unsuccessfully the discovered information can be used against the party in court[8]; 5) the resolution has a nonobligatory character and by an unconscientious party the mediation can be used as a means of lingering of the dispute[9]. In spite of so many negative aspects popularity of mediation is increasing day by day.

3. Comparative-legislative Analysis of Family Mediation

Family mediation regulates family relations, which are connected with ceasing of the registered marriage, separation of unregistered couples and solution of legal issues connected with the custody and care of children of minority age.

Family, as a value, is recognized by Article 10 of the European Convention of Human Rights, because it is considered as the most important element of society.[10] The state at almost every stage of development paid a special importance to regulation of family legal relations. On this basis it can be supposed that the main reason of bringing of family legal disputes out of court was connected with emotional factors connected with the dispute. Mediation procedurally is emphasizing human nature and emotional character of relations and its results are directed to regulation of relations between persons. Accordingly it regulates family legal relations best of all. Just it was the reason of the very fast growth of mediation popularity in different countries.

3.1. Family Mediation in Eastern Europe

Nowadays in the countries of Eastern Europe mediation is only at the initial stage of its development owing to their soviet past. In Bulgaria and Hungary the Parliament accepted a legal regulating legislative base of mediation only a few years ago. Unfortunately in Czechia there are not any

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7 *Kenneth J.R.*, Symposium, Alternate Dispute Resolution, 44 LA. L. Rev. 1725, Louisiana Law Review, Family Law, Vol. 44, 1984.

8 *Kenneth J.R.*, Symposium, Alternate Dispute Resolution, 1984, Louisiana Law Review, Family Law, Vol. 44, 1745.

9 *Schiffer K.J.* (Hrsg), Mandatspraxis Sciedsverfahnen und Mediation 2 neu Bearbietete und Erweirte Auflage, *Heymann C.*, Koln, *Berline, Munchen* 2005, 262-264, refered to: *Tsertsvadze G.,* Alternate Dispute Resolution, Tbilisi, 2010. 59.

10 *Iaon U.U., Dorin I.,* European Policies in Mediation as an Alternative in the Courts of Law, Acta Universitatis Danubius, Vol. 10, № 1/2014, 28.

alternative means of solution of legal disputes. Experts certified by the court are involved as specialists in that legal procedure, which concerns nonresident parent or child and their function is only giving a recommendation. Accordingly it must be said that family mediation is not foreseen by Czech legislation.

According to Article 3.54 of Legal Code and Articles 231 and 376 of Civil Legal Code of Lithuania on discussing a family legal dispute court is obliged to take all kinds of measures for reconciling the parties. Legislation of Lithuania is confined only by this scanty record. The development of mediation began only from 2010 and it is foreseen as court as well as obligatory court mediation, though it is early to talk about using it widely[11]. The situation is nearly similar in all the countries of East Europe.[12]

In Hungary a law about mediation was accepted in 2002, though the usage of it widely has not begun yet. Its purpose was to settle issues connected with family legal disputes, namely, belonging of a child, charging alimony, parent's rights. At the same time there is "well-being mediation of children", which regulates parent's and child's relations in case there is no agreement between parents in this connection. [13]

Despite lots of controversies in 2004 the parliament of Bulgaria accepted a law about mediation,[14] which did not single out family mediation separately. According to Civil Legal Code of Bulgaria a subject of mediation can be settling of a civil, commercial and administrative dispute, connected with user's rights and other physical or legal persons.[15]F Furthermore mediation can be used according to Code of Criminal Procedure.[16]

3.2. Family Mediation in South Europe

In South Europe family mediation is at a different stage of development. In Italy mediation has quite a long history, though the development of family mediation is more confined, in spite of the fact that at legislation level and by different authorized agencies there was taken a decision about popularization of mediation. Legislative reforms have already come into effect, though there have been still problems between the mediation and other social service centers. A representative of the mediation center participates in a family legal dispute of a certain category, namely according to Article 342 of

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11 *Casas M.M.,* Divorce Mediation in Europe, Electronic Journal of Comparative Law, Vol. 9, 2, 2005, <http://www.ejcl.org/92/art92-2.pdf>.

12 *Antokoloskaia CF.M.* in *Boele - Woelki,* Braat and Sumner, European Family Law in Action, Vol. I, Question 17, 2005, 22.

13 *Weis E.,* Braat and Sumner, European Family Law in Action, Vol. I, Question 17, Hungary, 2005, 226-227; *Weiss E., Szeibert O.,* Parental Responsibilities, National Report: Hungary Question 57, <http://www.ejcl.org/92/art92-2.html>. An English version of the Hungarian Act LV of 2002 on Mediation was provided by Orsolya Szeibert at the Academy of European Law conference "Divorce Mediation".

14 Some conservative members of Bulgarian parliament thought that mediation was a danger for legislation, as it was privatizing the court system.

15 Additional materials are given in: *Todorova V.,* Possibilities and Limits of Family Mediation: The Case of Bulgaria, A Paper Delivered at the Academy of European Law Conference Divorce Mediation.

16 The 2nd part of Article 3 of Bulgarian Law on Mediation.

Legal Code of Italy when a judge is taking decision about leaving family by one parent, he/she is obliged to include the family mediation center of the same territory into the judicial proceeding[17].

In Spain family mediation started its development in 1980, when a team of psychologists directly participated in settling disputes, conducted in family courts. At the end of 1980 family mediation there were created service centers in Barcelona, Madrid and other important cities. In 1990 popularization of family mediation was carried out by different associations and by legislation of Catalonia there was begun working on a project of a law about mediation, which was introduced by the parliament of Catalonia in 1999. Because of different political reasons the acceptance of the law was only reached in 2001.[18] According to the law there was created a society center, in which professional mediators were taking part. Unlike Catalonia a law about mediation in Spain was accepted only on the 5th of May in 2012. By means of this act in Spain legislation there were incorporated norms envisaged by the directive of the European Parliament and the European Union about mediation. In accordance with the law mediation could be used in family, business, school and other spheres, though especially popular is family mediation.[19]

3.4. France

In France mediation is carried out either without court[20] or in the process of judicial proceeding[21]. Parties are applying to mediation without court, when they want to avoid judicial proceedings and get over problems existed with solution of divorce and other family relations. Unfortunately in France there is no legislative act regulating mediation outside court. The case can be transferred to court mediation directly before starting a dispute or already at hearing stage. The above mentioned changes were carried out in a new Code of Criminal Procedure. The mentioned norms don't concern only family mediation; they can be used in settling any legal dispute. In France court mediation is successfully used in hearing disputes in civil, commercial, family and labor law spheres.[22]

Carrying out court mediation in France is only connected with the parties' will. The court is authorized to transfer the case to the mediator at any stage of hearing according to the parties' will.[23] On choosing a mediator it is necessary to have the consent from the parties and to foresee their opinions. The characteristics of the mediator must be taken into account, namely, the mediator must have the proper knowledge and experience in relation to the dispute subject and must have experience in the mediation sphere and the most important thing is his/her impartiality.

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17 Family Mediation Centre.

18 *Casals M .,* La Mediación Familiar, Madrid, 2005, 1125.

19 *Vilar S.B*., Arbitration and Mediation in Spain, <www.academia.edu/12504094/ARBITRATION_AND_MEDIATION_IN_SPAIN>.

20 Is referred as Médiation Indépendente Conventionelle.

21 Is referred as Médiation Judiciare.

22 *Deckert K*., Mediation in Freinreich – Rechliuchter Rahmen und Praksche Erfahnen, In *Kopt K., Steffek F.,* Mediation, Rechstatsachen, Rechtsvergleish, Regelungen "Mohr Siebeck", Tubing 2008,11; *Tsertsvadze G.,* Mediation–Alternate Form of Dispute Solution, Tbilisi, 2012, 86.

23 *Casals M.M.,* Divorce Mediation in Europe, Electronic Journal of Comparative Law, Madrid Vol. 9. 2, 2005, 12, <http:// www. ejcl. rg/p. 14>.

If there is a parties' will, the court takes a decision about appointing a mediator, then defines issues to be discussed by the mediator and the presumable time during which the case must be returned to the court. After appointing the mediator the court arranges meeting of the mediator and the parties. The mediator gets general information connected with the dispute from the court. In spite of handing over the case to the mediator it does not mean going beyond the court.[24]

The mediator is authorized to settle dispute between the parties in a 3 month term after having been handed over the case. On the mediator's request this term can be extended by 3 months by the court only once. The court is entitled to cease the mediation process at any stage, if it thinks that: a) continuation of the mediation will not be fruitful and it will only be procrastination of the process; b) if the parties are willing to end the mediation process; c) if the mediator is applying to the court in connection with the above mentioned.

After ending the mediator's authority he/she is obliged to inform the court about the results of the mediation process and to hand over the agreement reached between the parties to the judge. The final decision is made by court, which dismisses the proceeding and proves the agreement act.[25]

According to the changes made to Legal Code of France in 2002 the court is authorized to offer the disputing parties the inclusion of the third person into the mediation process, which will help the parties with reaching the agreement in issues connected with realization of the parent's rights.[26] Furthermore the court is authorized to arrange an informative meeting of family mediation[27]. The purpose of the informative meeting is to give the disputing parties the information about the dispute, to explain them their rights and obligations and results of ending the dispute with agreement. Later the nsimilar norm was added in the process of proceeding of a divorce case.

From 2004 a new procedural law of domestic relations came into effect, which announced mediation as a main means of discussing and settling family disputes. The court is authorized in case of the parties' wish to hand over the case of any category to the mediator.

Despite the institutional or professional mediation having been established, the success of family mediation was not so much, as the authorized persons had expected. The rate of discussing family legal disputes by mediators is still low today. According to the data of the Family Mediators' Association in 2001 only 10% of disputing parties applied to mediation. The awareness of society is the best way for growing the popularity of mediation. For this purpose it is foreseen by legislation to arrange an informative meeting before starting a dispute.[28]

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[24] *Casals M.M.,* Divorce Mediation in Europe, Electronic Journal of Comparative Law. Madrid, Vol. 9. 2, 2005,12, <http://www. ejcl. rg/p.14>.

[25] *Dechert K*., Mediation in Ranlreich–Rechlitscher Rahmen und Ptrakische Erfarnen, In: *Hopt K., Steffek J. F.,* Mediation, *Steffek F.,* Mediation, Rechstatsachen, Rechtsvergleish, Regelungen "Mohr Siebeck", Tübingen, 2008, 211; *Tsertsvadze,* Mediation–Alternate Form of Dispute Solution, Tbilisi, 2012, 18.

[26] Loi 2002-3005, du 4 mars 2002, relative à l'autorité parentale.

[27] Parts 1 and 2 of Article 255 of Legal Code of France.

[28] *Casals M.M.,* Divorce Mediation in Europe, Electronic Journal of Comparative Law, Vol. 9, 2, 2005, 17.

3.5. England and Scotland

In England family mediation occupies a central place in the process of carrying out reforms connected with divorce. The family law, which was accepted in 1996, was contemplating the decrease a negative effect in the process of divorce, namely: a) to minimize the negative influence connected with divorce on the parties and family members; b) to increase the probability of continuing the further relations positively after divorce.

According to the second part of the law a spouse wanting divorce is obliged to attend the informative meeting about divorce three months in advance before submitting an action. At the informative meeting the information about family mediation will be given to the party[29].

The third part of the law envisages comparatively effective ways for using mediation at the initial stage of the dispute. According to the law an applicant is obliged to apply to a mediator registered by state to get the information about mediation. At the preparatory meeting the mediator is obliged to give the applicant information about the positive aspects of mediation. According to this law family mediation is not obligatory. Only in case of the wish parties can apply for the mentioned cheaper and more effective means of dispute solution.

The use of mediation has been increased for the last years. The court is entitled to hand over the case to the mediator not only before starting discussion of the case, but at any time until taking the final decision.[30] In accordance with the family procedural rules accepted in 2010 a judge is authorized to appeal the parties for mediation.

After these changes a number of divorce mediation from 400[31] increased to 14 500,[32] two third cases from which ended successfully.

Unlike England mediation in Scotland is absolutely independent from court. Development of mediation in Scotland was done by judicial legislation. Mediation is voluntary and court can take decision connected with using mediation only in specific cases, if there is a written agreement between the parties about using mediation.[33] The court role is only confined by the mentioned one. Family mediation law of 1995 is the only legislative source about mediation. By the mentioned law is not foreseen court interference in any way and is only directed to encourage mediation. Article 2 of the law gives a list of dispute categories to be discussed in accordance with this law. Accordingly this list is long, as it comprises a number of dispute categories caused by family legal relations, for example relations connected with upbringing and taking care of a child and etc.

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29 Detailed information is given: Family Law: The Ground for Divorce , Law Com. № 192, 1990.

30 *Farlane M.T.,* Mediation: The Future of Dispute Resolution in Contemporary Scots Family Law, Aberdeen Student Law Review, 39, <https://www.abdn.ac.uk/law/documents/Mediation-TheFutureofDispute Resolutionin ContemporaryScotsFamilyLaw.pdf>.

31 The data was fixed in 1997.Information is Given in the Following Material: Family Law: The Ground for Divorce, Law Com. № 192, 1990.

32 The data was fixed in 2009. Information is Given in the Following Material: Family Law: The Ground for Divorce, Law Com, № 192, 1990.

33 *Wise M.,* New Development in Mediation in Scotland, International Family Law Journal, 2009, 42.

One of the advantages of this law is its first Article, which envisages obligation of keeping confidentiality of the information received during mediation. The parties can't use the information which they were aware of in the mediation process[34], though there is some exception in the law, namely the announcement made during the mediation process can be accepted as the evidence at judicial proceeding in case of agreement.[35] Because of this record the law about mediation was criticized by lots of critics.

I think the above mentioned record can become an obstacle for parties for using this institute, because considering the process of competitiveness a party or its representative will give the participant of the mediation only the information, which he/she wants and will try to refrain from giving the information, which might be used against his/her position in the future.

3.6. G Germany

In Germany the development of mediation began from 1980s. A new family mediation and the first project of protecting victims were grounded in 1985. Since the mentioned period mediation development policy has been worked up by associations and different organizations. Since 1990 there have been made changes to the Code of Criminal Law and Procedural Code of Criminal Law of Germany, which implied solution of the dispute connected with protection of victims by means of mediation.

According to the changes made in Civil Code in 2000-2002 there were envisaged alternative means of dispute solution. In 2011 there was accepted a law about supporting mediation.

In Germany there are different qualifying requirements to a mediator. Namely, psychologists, social workers, economists and lawyers having experience of working in a private sector, non-government organizations and companies are authorized to work as a mediator. Furthermore mediation can be offered by a judge in discussing civil and administrative disputes.

According to Civil Procedural Code of Germany a judge is authorized to complete the dispute with agreement before starting proceeding.[36] This case differs from classical mediation, because it is carried out in the court hall directly by the judge. According to the law about mediation accepted in Lower Saxony in 2002 mediation was carried out directly by the judge dealing with disputes, which was mentioned under the name of judicial mediator. Apart from institutional mediation on request of a party or by the representative's recommendation there is also possible so called ad-hoc mediation. Especially in commercial mediation an agreement for mediation is specially foreseen in order avoid a lawsuit.[37]

According to the changes made to the Civil Procedural Code of Germany in 2002 the agreement sitting can be performed outside court. On hearing a family legal dispute a party is obliged to attend the informative meeting to get the information about mediation. Particularly in order to complete the dispute

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34 Civil Evidence Family Mediation-Scotland Act 1995, S. 1. (1).

35 The mentioned norm can be compared with English legislation, according to which the parties are obliged to observe confidentiality of the information mentioned during the mediation process.

36 Article 278 of the Code of Civil Procedure of Germany.

37 *Thomas T., Loode S.,* Mediation, Made in Germany a Quality Product, ADRJ, 2012, Vol. 23, 66.

with agreement it is possible to set an agreement meeting before starting hearing, where a dispute status and all details and facts important for the case will be discussed. A judge is authorized to put any question concerning the dispute subject. At the meeting the detailed information about ending of the dispute with possible agreement must be given to the disputing party and explained the legal effects of the ending of the dispute with agreement.

Agreement institute differs from mediation, though the aim and the result can be identical in both cases. The aim of both of them is to settle the dispute fast and smoothly, though performers are different persons. In case of mediation the process is governed by an independent mediator, while in judicial case an agreement process is carried out by a judge.[38]

In Germany family mediation is the most developed form of mediation. During 2008 about 20 000 divorce cases were discussed by mediators. According to the family procedural law accepted in 2009 the issues of parents connected with a child can be settled through mediation by the corresponding "youth" service[39]. In accordance with this change te agreement sitting can be performed outside court. On discussing family legal dispute the party is obliged to attend the informative meeting in order to get the information about mediation.

3.7. The United States of America

Like other European countries the development of mediation in the United States was favored by the increased number of divorce. It became necessary to settle the issue by alternative means. Accordingly there were taken different decisions. The issue about divorce depending on dispute nature and the wish of disputing parties can be discussed by different ways, namely by an administrative authority, arbitration, mediation or any commission corresponding to negotiation[40]. For a long time mediation and negotiation procedures were considered to be the same, though the difference between them is quite big. The main purpose of the negotiation procedure is eradication of the basis of divorce and is directed to reconciliation of the parties. Mediation is carried out by a neutral third person and its purpose is ending the dispute with the agreement. By help of a mediator the disputing parties come to an agreement on different issues, such as division of property, attribution of a child, relation with the child, alimony and others.[41] After coming to agreement the parties are getting divorced.

In the USA mediation is done by a public as well as by a private sector. Public legal subjects of mediation are raised in accordance with the law and their authorization is carried out on the basis of court

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38 The similar possibility is foreseen in Article 218 of the Code of Civil Procedure of Georgia, namely, the following: "Court must do everything possible and take all measures foreseen by law, so that the parties will end the case with conciliation. With the purpose of ending the case the judge is authorized on his/her own initiative or by solicitation of a party to announce a break in the process of legal sitting and without the presence of other persons to listen only to the parties or their representatives. 2. The judge can point out possible effects of dispute solution and offer the parties conciliation conditions.

39 The mentioned service, called Jugendämter, is subordinated to the local government.

40 e.g. Conciliation.

41 *Kenneth J.R.*, Symposium, Alternate Dispute Resolution, Luisiana Law Review, Family Law, Vol. 44, 1725, 1984, 20.

or administration agency.[42] In different states there is created a specialized authorized service, which discusses any legal family dispute connected with divorce.[43]

Mediation might be obligatory or voluntary. The obligatory mediation is carried out when relations connected with the under-age is to be settled, especially when there are discussed issues of custody or care, possibility of seeing a child and issues connected with the relation with the child. In other cases court is authorized to hand over the case to the mediator at any instance of proceedings on the basis of solicitation of the party.

In 2001 a homogenous act was worked up in the USA, which can be taken and put into effect by the states as their own law. For the situation of 2008 this law is implemented in eight states and Columbia district. The above mentioned act comprises regulating norms of mediation as supported by the court, as well as held basing on a private initiative[44]. Compulsory court mediation was foreseen just by this mentioned act[45], namely, obligations of the parties regardless of their wish basing on the decision of the arbitration,[46] court or administration agency to hand over the case of dispute to mediation.[47]

4. Family Mediation in Georgia

Development of alternative ways of dispute solution in Georgia began about two decades ago. In 1997 in Georgia there was accepted a law "About private arbitration", which did not cause serious and important results, though legislative changes connected with mediation started later.

According to the law accepted in 2011 changes were made to the civil procedural code and the whole chapter connected with mediation was added. At the same time there was developed an independent form of medical, notary mediation. With the implementation of the institutes mediation service of medical insurance was abolished.

In Georgian legislation the term "family" or "divorce" mediation is not foreseen. Instead of it there is foreseen solution of family legal disputes by help of a mediator, which belongs to the family mediation sphere. Considering the fact that family mediation concerns relations risen as a result of divorce, it can be said that divorce mediation already exists in Georgian legislation.

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42 *Comenaux A.,* Guide Implementing Divorce Mediation, In public Sector 21 Conciliation, CST, Rev. 1, 1983. 25.

43 For example, according to the Civil Procedural Code of California (Chapter II, Articles 1730–1772) there is created a court of settling family legal disputes. In 1984 according to Louisiana legislation two important changes came into effect, which were connected with defining attribution of a child and relation with him/her. In the mentioned category of cases mediation was obligatory in case of lack of agreement regardless the parties' wish. Mediator was appointed by the court, which was proving the agreement reached between the parties.

44 *Kulms R.,* Alternative Streibeilugung Durch Mediation in Den USA, In: *Hopt K.*, *Steffek J.F.,* Mediation, Rechstatsachen, Rechtsvergleish, Regelungen "Mohr Siebeck", Tubing 2008, 211. *Tsertsvadze G.,* Mediation, Alternate Form of Dispute Solution, Tbilisi, 2012.

45 Uniform Mediation Act, Where is the source searched from?

46 The 1st part of Article 3.

47 *Kokhreidze L.,* Legal Aspects of Court Mediation, Journal "Justice and Law", № 4, (39), 13.

Since the 1st of January of 2012 mediation based on court has come practically into effect in Georgia[48], within which court favors conformity of the mediation process with the law and in case of intention of the parties it is ready to prove and give juridically compulsory force to the conditions agreed between the parties.[49]

Fulfillment of mediation is connected with carrying out organizational and procedural principles. The main organizational principles are voluntariness and neutrality. From the organizational principles we should note confidentiality, independence and equality of the parties.[50]

According to Article 187[1] of Code of Civil Procedure cases that are subordinated to court mediation can be handed over to a mediator for the purpose of ending the dispute with agreement. According to Article 187[3] of the same Code court mediation can be extended to include: a) family legal controversies, with the exception of adrogation, invalidation, limitation and revocation of the parental right; b) inheritable legal controversies; 3) neighboring legal controversies and 4) on any kind of controversies in case of agreement of the parties. In this latter case it is admissible to hand over the case to the mediator at any stage of its proceedings. This record reveals that in the Cod of Civil Procedure there has been envisaged as compulsory, as well as voluntary mediation. As it was mentioned above compulsory mediation is also envisaged in the USA and Canada. Moreover from statistical data it is obvious that voluntary mediation is more effective than compulsory mediation.[51]

By Article 2 of Code of Civil Procedure a disposition principle is foreseen, which implies a party's desire to apply to court with action for settling of civil legal dispute. In civil court proceedings parties' will has very often a crucial importance. A party is authorized at its own discretion to define a dispute subject, to recall his/her plaint, to release a claim. A defendant is authorized for confession of action; the parties jointly are authorized to end the case with conciliation.

Ending the case with conciliation is often encouraged even by court, as according to Article 218 of the Code of Civil Procedure of Georgia, 1. Court must do everything possible and take all measures foreseen by law, so that the parties will end the case with conciliation. With the purpose of ending the case the judge is authorized on his/her own initiative or by solicitation of a party to announce a break in the process of legal sitting and without the presence of other persons to listen only to the parties or their representatives. 2. The judge can point out possible effects of dispute solution and offer the parties conciliation conditions. 3. A judge can offer the parties the possibility of ending the case with conciliation by means of handing over the case to the mediator. Basing on the above mentioned norm the court is attempting to end case with conciliation at the proceeding stage. Furthermore at its own discretion it can set a preparatory meeting, if there is some supposition that the parties might reconcile.[52]

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48 The mentioned institute is known as Court based mediation.

49 *Tsertsvadze G.,* Mediation, Alternate Form of Dispute Solution, (General Review), 2012, 78.

50 *Kokhreidze L.,* Legal Aspects of Court Mediation, Journal "Justice and Law", № 4, (39), 13, 21.

51 According to the data of the Ministry of Canada in 2008-2009 in case of Compulsory mediation 40% of cases were ended with reconciliation, but in case of non-compulsory mediation, for example, in 2004-2005 family legal cases-79%, 2008-2009–81%. The data are taken from *L. Kokhreidze's* Article: Legal Aspects of Court Mediation, Journal Justice and Law, №4, (39), 21 .

52 First Part of Article 205, Code of Civil Procedure.

Accordingly it can be said that foreseeing of court mediation was completely ineffective, because when there is the parties' will, the parties had a right to end the case with reconciliation with direct participation of the judge without the interference of an independent mediator. Court mediation states the obligations of the parties to hand over cases of the category foreseen by the Code to the mediator regardless of their will for the purpose of ending the case with reconciliation. In this case the non-existence of the parties' will is to be foreseen. The court is obliged to subordinate cases of family legal (with the exception of those foreseen by law), neighboring and inheritable legal controversies to the mediator.

4.1 Contradiction of Compulsory Mediation to the Constitution

Compulsory mediation is considered as a norm being in contradiction to the Georgian constitution, because according to Article 42 of Georgian constitution every human has the right to apply to the court for defending his/her rights and freedom. The mentioned right is also guaranteed by European Convention of Human Rights, according to which everybody in clearing up his/her civil rights and obligations or grounds of the accused criminal charge has the right of his/her case being discussed by independent and impartial court fairly and publicly in reasonable time[53]. Georgian constitution as well as the international agreement unanimously recognizes human's right on fair court, which must be accessible for every person. The right of fair court is foreseen equally for a country citizen, a person not having citizenship or a citizen of other country. At the same time dispute category or the scope is of no importance. Turning to the court is a person's constitutional right and its restriction by a legislative act is inadmissible. In the decision made by the constitutional court it is said that this right implies not only the possibility of turning to the court, but it provides the perfect legal protection of the person. Right of access to the fair court means lodging a complaint in the court about all those decisions which are infringing the human's basic right.[54] By the International European Court of Human Rights has taken several decisions against Georgia about the right of access to the fair court services.[55]

Alternative ways were considered to be contradictive to the constitutional norm. According to the Code of Civil Procedure "Private property dispute based on equality of persons, which can be settled by the parties between each others, can be transferred to the arbitration to discuss as agreed by the parties."[56] The mentioned alternative means of settling of disputes during a certain period was considered to be contradictive to the constitution, though it was finally explained that arbitral justice is completely based on the autonomy principle of the parties. Basing on the main principles of civil legal relations parties are confining the granted rights themselves and choosing arbitration court as a dispute discussing organ. It is natural that the mentioned fact can't be regarded as restriction of a constitutional right of a party. In order to discuss the dispute by arbitration the existence of an arbitration agreement is necessary. In case of discussing the case by arbitration without the parties' agreement the court refuses to recognize and

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54 Decision of Constitutional Court of Georgia, dated on the 28th of June, 2010 №1/466, §14.

55 Football Club "Mretebi" against Georgia, on the 31st of July, claim № 38736/04.

56 Article 12 of Code of Civil Procedure.

execute the arbitration decision. The parties' agreement was also necessary in order to take an obligatory decision by the medical mediation service. Without the parties' agreement the medical mediation service could accept only the recommendation which would not restrict the right of the party to apply to the dispute discussing agency according to the general rule. In case of the existence of the agreement the service would accept the decision, which through the Court of Appeals would be recognized and executed. The mentioned institution was abrogated in Georgian legislation at all, though during its existence there were very different thoughts of its positive and negative sides.

Disputes about non-constitutionality of the obligatory mediation began quite a long time ago. In 2004 by the Court of Appeals of England was taken a decision, according to which the obligatory mediation was regarded as a norm contradicting to Article 6 of the European Convention of Human Rights, namely in case against Halsey v. Milton Keynes General[57]. In the mentioned decision the court explained that the main worthiness of mediation and the main reason of its effectiveness is its voluntary character, when the party is not restricted by a non-obligatory result of the mediation process.[58] The Court of Appeals explained that in case of non-existence of a will the result is difficult to reach and the obligatory mediation causes increased expenditures and lingering of the procedure, which accordingly lowers the effectiveness of the above mentioned mediation.[59] The party is deprived of the right to apply to court directly at its own discretion and demand to realize its right. Despite its positive results the procedure of the obligatory mediation very often procrastinates the procedure, because in case of non-existence of the agreement process is continued in court. Accordingly apart from three instances there is also the fourth obligatory stage, the term of which is defined by quite a long period.[60] The increased period of time and expenditures are hindering effectiveness of the procedure, which is a right guaranteed by Article 6 of the European Convention. The timely accessibility to fair court is a request of the European Convention and Court. Basing on it is admitted that the obligatory mediation is causing unlawful restriction of the mentioned right.[61]

The obligatory mediation is also foreseen in the directive 2008/52/EC of European parliament and European Council of the 21st of May, 2008 "About Some Aspects of Mediation in Civil and Commercial Matters", Article 5 of which states discretion for a judge to transfer the case to mediation at his/her own discretion. Finally by the decision of the court of European justice on the 18th of March was

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57 H*alsey v. Milton Keynes General NHS.*

58 *Woolf L.*, Access to Justice, Interim Repor*,* 1995, *Woolf L.,* Access to Justice Final Report, 1996. Editors Vol.1 of the White Book comments to the §1.4.11; <http://tcdgsu.ie/wp-content/uploads/2014/01/ full_ jpr_2009 vol_8.pdf>.

59 According to English law a judge was entitled to transfer the case to mediation regardless the parties' wish. The Ireland legislation did not envisage the exact explanation in connection with it. According to the law of civil responsibility and court procedure the mediation could have been initiated by the party only in case of its wish, though at the same time court was authorized to address the parties before starting the procedure with the request of using mediation.

60 According to court procedures of England a judge is obliged to suspend the trial for 28 days and transfer the case to mediation.

61 *Hanks M*., Rerspectives of Mandatory Mediation, Forum: Perspectives on Mandatory Mediation, 2012, 45H; < http://www.unswlawjournal.unsw.edu.au/sites/all/themes/unsw/images/Melissa-Hanks.pdf>.

explained that "Obligatory court mediation does not object to the right of fair court, because mediation does not have a result obligatory for the parties, proceeding is not delayed by a significant term and expenditures are not disproportionately high."[62] This can be shared by Georgian legislation in relation to the court mediation. According to Article 1871 of the Code of Civil Procedure only cases of certain category come under the obligatory court mediation but in case of the parties' wish - all categories. At the same time the Code of Civil Procedure foresees decrease of expenditures in case of ending the dispute by means of mediation and a tax is defined by 1% of the value of dispute subject.[63]

4.3. Family Mediation Rule in Georgia

According to Georgian Code of Civil Procedure court obligatory mediation is for some categories of cases. Consequently its performance is done according to the rule envisaged by Code of Civil Procedure. On filing an action in court a judge transfers the case to a mediator, who promotes coming to an agreement between the parties in connection with dispute issues. The judgment commitment of transferring the case to mediation is not appealed.[64] This record must not be understood, as if the whole volume of the case materials is transferred to the mediator in order to get all the circumstances of essential importance. Only a copy of the court commitment, containing necessary and exhaustive requisites to contact with the parties, is sent to the mediator. There are also stated terms of mediation, which comprises 45 days, though it is not clear the starting point of this term. It is reasonable to start counting of this term from the day of receiving the commitment by the mediator, though the law does not define the concrete term during which the commitment must be sent to the mediator. So it is reasonable that the lawful term of sending the commitment to the mediator would have been defined by the same code. Thus the following must be added to the Code of Civil Procedure and the 3rd part of Article 187 must be formulated in the following way: the commitment about transferring the dispute case to the mediator is sent to the party, which is not present at declaring the commitment and the mediator during 5 days from its acceptance.[65] I think setting this term imperatively will much more decrease the procedural terms.

In order to carry out the mediation process parties are obliged to attend the meeting. As the completion of the mediation process successfully depends absolutely on parties' wish, their non-appearance hinders the mediation procedure significantly.[66] Accordingly by the Code of Civil Procedure there are certain sanctions for non-appeared parties. In case of non-appearance of a party by an inexcusable reason at a meeting set in the court mediation process, the party will be imposed to cover the whole court costs regardless of the result of the trial and a fine in the amount of 150 GEL. By the 2nd and the 3rd parts of the same article the punishment of the non-appeared party is mitigated and the mentioned

62 *Berti G.D., ECJ* Finds Italian Rules on Mandatory Mediation Consistent with EU Law International Law Office, 29 April 2010, <http://www.internationallawoffice.com/Newsletters>,

63 a^3 subparagraph of Article 30 of Code of Civil Procedure of Georgia .

64 Part 2 of Article 187^1 of Code of Civil Procedure .

65 *Kokhreidze L.,* Legal Aspects of Court Mediation, journal 'Justice and Law, №4, (39), 29.

66 Ibid, 30.

fine and compensation of expenditures will not be imposed to the person in case of finishing the mediation court with agreement.

Supposedly the norm of exemption from expenditures is foreseen purposefully for the development of mediation. In spite of the fact that mediation is voluntary and parties are authorized to complete the dispute with agreement, a strict sanction for non-appearance of the parties by an inexcusable reason is envisaged lawfully. There is an opinion that in case of non-appearance of the parties the existence of the sanction turns mediation into the obligatory procedure, which completely contradicts its essence. [67]

I think that for fruitful mediation the direct involvement of parties and their wish to end the dispute with agreement is necessary. For this it is necessary appearance of the parties at the fixed meeting. Non-appearance of the parties is one of the reasons of failure of the mediation process. Accordingly by this sanction the party is somehow forced to participate in the mediation process, the result of which depends on his/her direct wish.

If an agreement between the parties is not reached during the period of time specified for mediation, a plaintiff is entitled to produce a complaint according to the general rule, but if the mediation process is ended with reaching an agreement, court is proving a conciliation act and discontinues the proceedings.

By the above mentioned norm a legislator subjected the final product of mediation to court control, as well as tan arbitration decision. Court supervision over the agreement between the parties is absolutely justified, especially when the dispute is of family legal category, where juveniles' interests must be taken into consideration. The court is authorized at its own discretion to prove conditions of agreement, in which juveniles' interests will be taken into account.

5. Conclusion

Implementation of alternative means of settling disputes in Georgia must be admitted as a progressive moment. Development of arbitration and mediation is directly connected with strengthening of entrepreneurial relations in the country. In developing countries with the development of commercial economic relations a number of applying to court is increasing. Implementation of alternative and effective means of settling disputes is practically disburdening the court.

Family mediation is directed to settle dispute issues arisen from divorce painlessly without discussion, where there are more considered the additional mechanisms for protection of interests of spouses and juveniles.

Completion of mediation successfully is strengthening trust to this alternative means and for future disputes has some preventive importance. Despite some institutional deficiencies from the point of view of legislative regulations and practical activities introduction of mediation institute must be admitted as a progressive step.

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[67] *Allen T.,* When Dispute, Mediation is Always Relevant, Mediation and Justice, 2010, №10, 52-53, indicated: *Kokhreidze L.,* Legal Aspects of Court Mediation, journal 'Justice and Law, №4, (39), 13.

Solomon Menabdishvili*

Competitive and Legal Assessment of Restrictions on Horizontal Agreements

1. Introduction

Article 101 of Treaty on the Functioning of the European Union, and Article 7 of law of Georgia "On Competition" refers to both horizontal and vertical agreements. Horizontal agreements are concluded between economic agents operating at the same level of production and distribution chain. Such agreements result in the reduction or elimination of competition, when they relate to price fixing, market division, production limitation or other restrictions on market performance. Reduction of competition between economic agents also can be through a relatively soft form of cooperation, which increases market transparency and reduces uncertainties related to conduct of competitors, for example, exchange of information.

Co-operation of economic agents can result in significant efficiency and economic benefits, and help companies to cope with the market changes, for example, agreements on research and development, and joint production.

Competition among economic agents can involve the price, quality, innovation, and other conditions. A company can win over consumers of its rival if it will offer them lower prices, higher quality products and services, innovative products, which better meet consumer needs.

The term "cartel" is usually associated with transactions, such as price fixing, market division, production limitation and collusive tenders.[1]

It is worth mentioning that Article 7 paragraph 1 of law of Georgia "On Competition" contains an exhaustive list of the types of prohibited agreements, while paragraph 1, Article 101 of Treaty on the Functioning of the European Union does not include such list.

These articles prohibit restrictions on prices and other terms of trade, for example, market distribution, production restrictions, discriminative conditions, binding, and other practices that limit competition. The practice proved that there are many instances when economic agents at the same time are engaged in other anti-competitive activities, e.g. they inhibit the production too along with price fixing.

Subparagraph ‘a’, paragraph 1, Article 101 of Treaty on the Functioning of the European Union and subparagraph ‘a’, paragraph 1, Article 7 of law of Georgia "On Competition", prohibit the direct or indirect fixing not only of prices, but also of other trading conditions. In addition to the sale prices, the competitors may agree on other trading conditions to be offered to customers, e.g. discounts, product

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1 *Ezrachi A.*, EU Competition Law: An Analytical Guide to the Leading Cases, 3th ed., Oxford Hart Publishing, 2012, 119.

quality, after-sale services, and product delivery conditions. Agreements, which limit the conditions for sale of goods and services, may have a restrictive effect on competition. For instance, an agreement on not offering any discounts, as well as an agreement on condition, that products will not be sold in installment, in fact, is a price restriction. These agreements enhance the price fixation.

In some markets, a non-price competition is especially important because of the limited possibility of price reduction. For example, in oligopolistic markets, one oligopolist can attract customers of his rival, because it offers better after-sale services, or free delivery service.

Let us discuss the most common types of horizontal co-operation among economic agents, which can restrict or eliminate competition in the market.

2. Price Fixing

Horizontal price fixing is considered the most restrictive trade practices. Price competition is regarded as a fundamental aspect of competitive conduct of economic agents operating in the market. Judgment of European Court of 25 October 1977 on case 26-76 reports that price competition is so important that its limitation is unacceptable.[2]

Price fixing can be used by companies to stabilize market situation, deal with the cyclical recession and protect themselves from competition.[3] As a result of such a practice, consumers are deprived of economic welfare, which transfer to the cartel members.[4]

The Commission stated that price competition is designed to decrease a price to the lowest possible level. Each manufacturer is free to determine its own price, at which time he may take into account the current and future conduct of competitors. However, one must keep in mind that Treaty on the Functioning of the European Union prohibits any cooperation among economic agents, which is aimed at coordinated price fixing and successfully eliminates uncertainties among competitors related to significant elements of their conduct such as the amount of price increase, time and place.[5]

It is worth noting that if competition law does not provide for punishment for the fixation of prices, competitors often resort to this practice, join the cartel and get huge profits. As the case law shows, in some industry sectors, such as cement, chemicals, construction sector, there are frequent cases of concluding cartel deals.[6]

In turn, the agreeing on common price and its implementation is associated with certain expenses and risks. Reaching an agreement on common prices among the different size enterprises is more difficult than among the same-size enterprises. For example, a firm that produces different products will

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2 Judgment of European Court of 25 October 1977 on case 27-76, Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities, § 21,<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61976CJ0026&from=EN>, [26.05.2015].

3 *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012,522.

4 *Ezrachi A.*, EU Competition Law: An Analytical Guide to the Leading Cases, 3th ed., Oxford Hart Publishing, 2012, 120.

5 *Jones A., Sufrin B.*, EU Competition Law Text, Cases and Materials, 4th ed., Oxford University Press, 2011, 803.

6 *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 522-523.

be in favor of higher prices. In addition, account shall be taken to the fact that when agreement is reached, the parties shall be committed to the terms of the agreement. However, companies are often willing to deviate from the terms of agreement allowing them in some cases, to yield relatively greater benefit, than by fulfilling the terms. For example, a party to the agreement may sell goods to clients and consumers at a lower price and offer discounts.[7]

The desire to depart from terms of agreement poses a threat to the existence of cartel. Therefore, to ensure stabilization of cartel it is necessary to reveal any infringements of agreed terms, for which monitoring system shall be in place. Besides, punishment mechanism is required for effective functioning of cartel, which will force economic agents involved in the cartel to comply with terms of the agreement.

Price fixing agreements are designed to restrict competition according to content of the first paragraph of Article 101 and accordingly, there is no need to show that they really are able to yield such outcome. In such cases, the Commission finds it unnecessary to define the market or to take into account the deterrent power of the purchaser. However, it is necessary to find out whether such agreements yield noticeable results for competition and trade among the Member States. Article 101 has extra-territorial force, meaning that it also applied to the agreements made outside the EU, although implemented in the European Union.[8]

Article 101 of Treaty on the Functioning of the European Union declares illegal all agreements, which directly or indirectly limit price competition. Economic agents can apply direct cost limitation through a unified price system. As for the indirect limitation, it can occur by making economic agents not offer discounts or agree on unified discount system. Sales agreements, which restrict price competition, for example, agreements on recommended prices, maximum prices, maintaining the sale price collectively, price diversification by geographical markets, as a rule, are in breach of Article 101.[9]

Commission concluded that sugar prices have not been fixed, however the parties to the agreement could rely on the conduct of other market participants, and follow a joint strategy of high prices in the "atmosphere" of mutual certainty at the regular meetings of economic agents.[10] According to the Commission, regular and constant practice of setting the recommended rates and their circulation among the members of trade association violates first part of Article 101. The Commission imposed a fine of EUR 60.3 million to three banana manufacturers for sharing their intentions regarding the price by phone that was aimed at elimination of competition.[11]

Commission is skeptical about pre-announcement of price. Such a practice, even though agreed with clients, indicates that economic agents have negotiated and reached an agreement on the price.[12]

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7 *Jones A., Sufrin B.*, EU Competition Law Text, Cases and Materials, 4th ed., Oxford University Press, 2011,799.

8 *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 523-524.

9 Ibid, 524.

10 EU Court of First Instance, 2001 decision on the case T-202/98, § 60, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=46523&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=186412>, [25.05.2015].

11 *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 525.

12 Ibid.

Commission also disapproves the work of the joint sales agency, as this type of work in rare cases meets the conditions stipulated in Article 101, Part III.

Very often, along with price fixation, the economic agents cooperate on a variety of conditions, e.g. the competing economic agents agree on market sharing, allocation of quotas, exchange of sensitive information and collusive tenders.[13]

Article 101 is used with respect price of fixation of services as well. The EU Commission has fined banks several times for having fixed service prices, e.g. Helsinki Agreement, concerning the Eurocheques; so-called Lombard Club with participation of Austrian banks. In 1999, the Commission fined also Greek companies, who have agreed on ferry service prices between Greece and Italy.[14]

Article 101 applies also to price fixation in liberal professions. By the decision of June 24, 2004, the Commission fined Belgian Architects Association EUR 100,000 for setting a minimum fee for architectural services in Belgium.[15]

Article 101 prohibits fixation of both sale and purchase prices. In the EU, there are two outstanding cases of purchase price fixing in tobacco industry. Concerning the cases T-24/05[16] and T-12/06[17] the European Court ruled that tobacco manufacturers agreed on various terms, including the prices and other trading conditions to be offered to tobacco farmers and packaging companies. In order to coordinate purchase activities and ensure coordinated action on public auctions, they have also agreed on particular suppliers and regular exchange of information on the amount of tobacco required for purchase. According to the Commission, the parties to the deal have restricted competition though purchase price of tobacco was lower based on their agreement, and customers would have benefited too as they would pay lower price. Besides, Competition Authority argued that the price competition was limited, there was no quality competition among economic agents and hence, only the positions of procuring firms strengthened based on their deal against the tobacco farmers and intermediary companies.[18]

3. Division / Sharing of Markets and Customers

Elimination of competition among independent economic agents can take place not only by price fixing but also in other ways; for example, if economic agents agree to share the markets among them by geographical area; for example, according to the principle of "internal" market, economic agents will sell

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13 EU Court of First Instance, 2002 Judgement on the case: T-9/99, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47208&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=189342>, [25.05.2015].

14 *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 527.

15 Ibid, 528.

16 EU Court of First Instance, 2010 Decision on the case : T-24/05, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=79489&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=192261>, [25.05.2015].

17 EU Court of First Instance, 2011 Decision on the case: T-12/06, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=109284&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=192780>, [25.05.2015].

18 *Whish R., Bailey D.*, Competition Law,7th ed., Oxford University Press, 2012, 528.

only in those countries where they produce goods.[19] Firms may also share markets in terms of clients. For example, one economic agent will provide trading facilities, and other one will provide public institutions. Market division is more efficient than price fixing in view of the position of economic agents, as in case of market division, costs and difficulties related to price fixing are avoided.[20] In case of market division competition is totally eliminated on the market, because a particular area or segment of consumers/clients is allocated exclusively to one of the economic agents and he decides at his discretion what price to set on particular area or for customers / clients, as well as the quality and the quantity of goods to produce.

Geographical distribution of market from the perspective of customers is a serious limitation, because they are deprived of the right to choose, while they have it during a price-fixing thanks to the goods of various suppliers available on the market. Restriction of price competition forces the parties to the agreement to compete with each other on other conditions, such as quality and service. In case of market distribution, market competition is eliminated among economic agents.

In the context of the EU, agreement on geographical market-sharing is seen as a particularly grave violation. Along with the abovementioned anti-competitive effects, such practice causes insulation of geographical markets preventing integration of market - one of the main goals of the European Union. Therefore, this violation has a double meaning in the European Union.[21]

In the report on Competition Policy (1971), the Commission points out that "Market-sharing agreements are particularly restrictive of competition and contrary to the achievement of a single market. Agreements or concerted practices for the purpose of market-sharing are generally based on the principle of mutual respect of the national markets of each Member State for the benefit of producers resident there. The direct object and result of their implementation is to eliminate the exchange of goods between the Member States concerned. The protection of their home market allows producers to pursue a commercial policy-particularly a pricing policy in that market which is insulated from the competition".[22]

Some economists believe that the geographical division of market, in some cases, comes with certain efficiency. In particular, it reduces distribution costs of manufacturers. For example, if Italian company supplies the Italian customers and clients with goods and services, this will be cheaper, than in case of German or French companies as the latter suppliers will have to bear additional expenses related to transportation of goods/services from Germany and France. If the manufacturer finds out that export of goods is profitable, he will desire to send goods or services to another country for sale and consider the distribution costs too. However, if market-sharing agreement is restrictive of such possibility of economic agents, consumer welfare will reduce making clear its anti-competitive outcome.[23]

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19 *Ezrachi A.*, EU Competition Law: An Analytical Guide to the Leading Cases, 3th ed., Oxford Hart Publishing, 2012, 140.

20 *Whish R., Bailey D.*, Competition Law,7th ed., Oxford University Press, 2012, 530.

21 *Jones A., Sufrin B.*, EU Competition Law Text, Cases and Materials, 4th ed., Oxford University Press, 2011, 811.

22 The EU report 1972, 25, <http://ec.europa.eu/competition/publications/annual_report/ar_1971_en.pdf>, [24.05.2015].

23 *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 531.

4. Limiting Production and/or Innovation

Economic agents may also yield huge benefit from agreement on limiting production. In particular, production quotas will be established for each party to the agreement. Very often, the cartel members agree on quota system, under which each of them shall provide the market with part of product for a certain period. Limitation of production automatically causes imbalance between supply and demand eventually leading to a rise in prices. Normally, excess production is followed by a reduction in prices, while the reduction in production leads to a price increase.

Most of the cases relating to price fixing also include production limiting, as often, price fixing is not possible without control of production. In some cases, quota system is easier to implement than price-fixing agreement.[24]

Production limiting agreement requires careful monitoring because excessive production by one of the agreement party may lead to market price cuts unless this scheme is implemented in parallel with a price-fixing practice.

Both, price-fixing agreement and quota arrangements are associated with costs, because some firms are larger, or more efficient or faster growing, than the others that can complicate quota-related ne gotiations. Once the quotas have been set, specific mechanism should be introduced to prevent violations of the agreed quota system. To that end, parties to arrangement shall be asked to provide detailed information on production and sales to trade associations at certain intervals. The agreement can also provide for punishment for the violation of agreement terms. In particular, the economic agent, who exceeds his quota, will pay compensation to the economic agent, who could not bring his share of quota on the market for sale.[25]

Quinine cartel was the first case, in which the Commission has fined the economic agents for having involved in the cartel activities. The parties have limited their production that resulted in price increase.[26]

Organization of the Petroleum Exporting Countries (OPEC), which can be regarded as a formal international cartel organization, does not provide for price fixing, while it determines the amount of oil to be produced and exported by its member countries. After the negotiations held in 1973, oil production quotas have been estimated leading to quadrupled prices on the market and huge profits gained by agreement parties.[27]

Economic agents can also agree not to carry out investments, and not to develop goods placed on market and/or production processes. This kind of agreement is restrictive of innovation that prevents dynamic development of market being one of the objectives of competition.[28]

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24 *Jones A., Sufrin B.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 808.

25 *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 533-534.

26 *Jones A., Sufrin B.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 808.

27 Ibid .

28 *Bishop S., Walker M.*, The Economics of EC Competition Law: Concepts, Application and Measurement, 3rd ed., Sweet & Maxwell, 2010, 45.

5. Discrimination

According to the Treaty on the Functioning of the European Union, and law of Georgia "On Competition", discriminatory trade is prohibited for economic agents holding a dominant position, as well as the independent economic agents are not allowed to offer joint discriminatory conditions to their clients.

Article 7, paragraph 1.d of law of Georgia "On Competition" bans any practices which "apply dissimilar conditions to equivalent transactions with the particular trade parties, thereby placing them at a competitive disadvantage".

Discriminating conditions imply e.g. selling equivalent goods and services to various trade partners at different prices, while their production cost is identical. Discriminatory conditions also include selling equivalent goods and services to various trade partners at similar prices, while their production costs differ.

Selling at different prices can be justified in various circumstances. For example, dissimilar prices can be due to different transportation costs.

Offering dissimilar prices to clients can be regarded as a practice restrictive of competition when it leads to the limited competition. Naturally, if a manufacturer supplies one of the retailers at a lower price, than the other retailer, the first one will be able to attract more clients at a lower price, thus placing the other retailer in competitive disadvantage.

6. Tying

Treaty on the Functioning of the European Union, and law of Georgia "On Competition" prohibits any concerted practice related to bundling of products/services mostly applied by economic agents in dominant position, e.g. case of bundling Windows Media Player with its operational system by Microsoft.[29]

Article 7, paragraph 1.e of law of Georgia "On Competition" prohibits practice related to "entering into contracts subject to acceptance by other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts".

Two types of tying-bundling are practiced; 1) simple tying, when two products are just sold together. For example, when we buy shoes, we purchase two products together - shoes and laces. In fact, it is hard to imagine buying shoes without laces, while the laces can be purchased separately. 2) Mixed tying-bundling takes place when two different products are sold separately, but when offered together, they are sold at a discount. For example, if vitamin A price is GEL 10 and vitamin B price is GEL 10 as well, in case of selling together, the price of a bundle is GEL 15.

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[29] Judgment of the EU Court of First Instance, 2007 on the case: T-201/04, <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30dd17040805290847729aeecfbfc51df687.e34KaxiLc3qMb40Rch0SaxuQah90?text=&docid=62940&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=49814>, [25.05.2015].

Main problem of tying-bundling with respect to the competition law is that economic agents might apply such practice for strengthening their position from one market to another one ultimately aiming at expulsion of competitors from the market. For example, if a firm being in a dominant position on the vitamin A market, has a weaker position on vitamin B market, he may have the desire to sell vitamin A only together with vitamin B. Such a conduct by its nature or according to commercial usage has no connection with the deal on vitamin A. Market strategy that is aimed at strengthening the market power and/or expulsion of competitors from the market, is disapproved by competition authority and accordingly prohibited.

7. Manipulative Tenders

In manipulative tenders, the economic agents cooperate with each other when participating in tenders for supply of goods and services. Instead of responding with the lowest possible bid price to tender announcer, parties to a tender agree in advance as to who must win the tender. Such concerted actions are in breach with part one Article 101 and are qualified as price fixing or/and market sharing practice.

According to the Commission, competition is essential for tender system. Bids proposed by economic agents must be the result of their individual economic calculation and other bidders shall not possess information about competitors' bids, otherwise this will lead to restriction of competition.[30]

The practice proved that there are rare cases of manipulative tenders in the European Union. As for the USA, research conducted in 1993 showed that 70% of cartel agreements investigated by Justice Department concerned collusive tenders, especially the governmental ones. Jones A. and Sufrin B. believe that such practice may cause larger increase in prices than during a typical price fixing.[31]

Concerted action of economic agents in tenders usually results in price increase. Manipulative tenders take place in various forms, when (1) economic agents participating in tender agree in advance on a winner and, accordingly, the latter will have the lowest bid price in his tender offer; (2) parties to a tender agree in advance on a winner and only the latter submits a bid while the other economic agents do not participate in tender; (3) economic agents participating in tender make a deal on market sharing by territorial indicator according to so–called "Respect for territoriality" principle (for example, the economic agent operating in Belgium, will win in tenders called in Belgium, the economic agent operating in Netherlands, will win in tenders called in Netherlands); (4) economic agents participating in tender agree on sharing the tenders by the tender announcers (e,g, one economic agent participates in governmental tenders only, another one – in tenders announced by legislative body, the third one - in tenders announced by municipal bodies); (5) firms participating in tender may also make deal on sharing tender announcers on the principle of long and good relationships established with them. For example, if

30 Judgment of 1973 of the Court of First Instance, on the case: 73/109/EEC, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31973D0109&from=EN>, [26.05.2015].

31 *Jones A., Sufrin B.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 813.

a company 'A' was the winner of the tender announced by any government institution a couple of times, accordingly, preference is given to company 'A' to take part in tender called by the same institution and only he must win the tender. Regarding the case of insulated pipes, the Commission found that the economic agents participated in tenders based on the principle of long-term relationship with customers;[32] (6) the economic agents involved in biddings may agree that after one of them wins a tender, they will share the work required under the tender. For example, secretariat of the trade association will distribute the assignment among the cartel members.

The Court of First Instance on the case T-29/92 found that twenty-eight economic agents involved in Netherlands construction industry had been united in trade association, which allowed them to establish joint price regulation system. The agreed conditions of the system were obligatory for member economic agents. After having examined all the evidence of the case-file, the court found that prior to bidding the economic agents shared information with each other and defined the winner. According to the economic agents, the Dutch government was aware of the abovementioned system and they have approved it. Therefore, as the economic agents argued, Article 101 should not have been applied to their activities. However, according to the Commission, approval of any anti-competition action by any government of the member states does not constitute a basis for avoiding responsibility under Article 101.[33]

The European Commission has imposed one of the largest fine - 992 million Euros to four economic agents on the case of lifts and escalators[34], for operating cartels of manipulative tenders on the installation and maintenance of lifts and escalators for over decades in Belgium, Germany, Luxemburg and Netherlands. The Commission was particularly insulted by the cartel, which not only influenced the European market of purchase, installation, maintenance and modernization of lifts and escalators, but the cartel installed and provided maintenance services to EU institutions.

As was mentioned above, according to Article 101 of EC Treaty, EU competition authority qualify the manipulative tenders as the price fixing or/and market sharing. It is worth noting that in contrast to Article 101, the list of prohibited practices referred to in Article 7, paragraph 1, of law of Georgia "On Competition" includes manipulative tenders too. In particular, subparagraph 'f' of the Article prohibits "setting terms of a tender proposal agreed with undertakings or other parties participating in public procurement, with the objective of ensuring material gain or advantage, which substantially prejudices the legal interests of the purchasing organization."[35]

It is noteworthy, that on 16 July 2010, article 195^1 was added to Criminal Code of Georgia, according to which concerted action during governmental tenders is punishable, in particular, "prior agreement or other transaction by persons participating in procedures under the law of Georgia on "state procurement" with the objective of ensuring personal, or other material gain or advantage, which –substantially prejudices the legal interests of the purchasing organization". Violation of the article shall be

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32 *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 537.

33 Ibid, 537.

34 Judgment of the Court of First Instance, 2011 on the case: T-138/07, <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130deff12a2adf4e74cebaa5ff87432f826b3.e34KaxiLc3eQc40LaxqMbN4ObxqOe0?text=&docid=107317&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=332165>, [26.05.2015].

35 Law of Georgia on Competition, <http://competition.ge/ge/page2.php?m=62>, [26.05.2015].

punishable by fine or by imprisonment for up to two years in length. The same action, perpetrated repeatedly shall be punishable by fine or by imprisonment from two to four years in length. Annotation of the article reads that violation of this article by legal entities is punishable by deprivation or liquidation of the right of economic activity and fine.[36]

Provisions of Article 7, paragraph 1, f and Article 195[1] apply to the state tenders only and concerted actions in tenders announced by private or international organizations shall not be punishable.

8. Exchange of Information

Purpose of the Competition Law is to create and maintain competitive environment on the market. The law calls for economic agents to plan their business strategies on the market independently (e.g. what and how much products to produce, determine the sale price and select a market, decide what discounts to offer to customers and when, etc.)

Appraisal of information exchange is interesting in the light of Competition Law. At first glance, exchange of information among the competitors seems to be unable yield anti-competitive results for the market. When economic agents make independent decision on competitive market without any cooperation among them, there is an information vacuum, the uncertainty, as to what kind of strategies will be implemented by the competing economic agents. These uncertainties pose threat to the competition the economic agents try to eliminate and replace with cooperation through exchange of information.

The Commission founds that exchange of information can contribute to the increase of effectiveness of various types. For example, economic agents may: eliminate the problem of information asymmetry and make markets more effective; improve their effectiveness by comparing the best practices of each other; save costs by reducing inventories that enables for example faster delivery of perishable products to customers or/and is associated with instable demand.[37] The exchange of information can also benefit the customers in terms of search-related cost reduction and making better choice.[38]

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36 Criminal Code of Georgia, <https://matsne.gov.ge/ka/document/view/16426>, [26.05.2015].

37 Case referred to in paragraph 110 on the applicability of the article 101 of EC Treaty to Horizontal Cooperation Agreements is interesting. It concerns the perishable carrot juice on which the demand is unstable. The juice had to be sold and consumed in one day after the date of production. Selling of the product by retailers gradually decreased that led to the reduction of production. To resolve the problem, five producers have agreed to found an independent market research firm to gather daily information on unsold juice in each sales outlet. The data obtained should have been published on its webpage next Sunday. Statistics would allow the producers and retailers to predict the better location for placing the demand and product. According to the Commission, the information exchange system designed by the parties enabling the better forecasting of excessive and insufficient supply, would substantially reduce the cases of unhappy customers and increase the sales on the market. Despite the risk of restrictive effect of the information exchange system on competition, the exchange of information takes place in a public and joint manner, which in the Commission's opinion, contains lower anti-competitive risk, than in case of non-public and the individual exchange. Therefore, exchange of information in this particular case, does not go beyond the limits, which is necessary to remedy the market failures. Thus, the Commission expects that this type of information exchange will meet Article 101(3) criteria.

38 Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements), § 57, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC0114(04):EN:NOT>, [10.05.2013].

Richard Whish believes that economic agents are unable to compete with each other in statistical vacuum. He argues that the more information they have on the market conditions, the volume of demand, production level and investment plans of competitors in a given industry, the easier is to find rational and efficient solutions of production and marketing strategies. According to Richard Whish, the competitors may benefit, so as not to endanger the customers when exchanging different information, e.g. on methods of inventory, stock control, accounting, or drafting standard contracts.[39]

Jones A., Sufrin B. however, consider that exchange of the statistics enabling economic agents to assess market demand and production level, or competition costs, might also be helpful. Besides, they believe that exchange of the technical, or other information not limiting freedom of the parties to determine independently their market conduct, should not be problematic with respect to the competition.[40]

The Commission founds that exchange of information will also yield negative results and restriction of competition if the competitors are aware of each other's market strategy. Exchange of information, especially disclosure of strategic one among the competitors results in the increased coordination.[41] The extent of negative influence of specific information exchange on the market depends on a variety of factors, including:

1. The market characteristics, in which information is exchanged, such as concentrated, transparent, stable or symmetric market;
2. Type of information exchanged;
3. Frequency of information exchange.[42]

The expediency of the exchange of information also depends on whether it is a support mechanism for illegal activities. If it is, e.g., exchange of information allows identifying offenders of unlawful agreement, the exchange of information, as well as the basic agreement shall be considered illegal.[43] In other words, if the exchange of information supports the price fixing or other cartel activities, such a practice will obviously attract attention of the competition authority.[44]

Commission opinion regarding the above three factors is detailed in the Guidelines adopted in 2010 on the applicability of the Article 101 of EC Treaty to Horizontal Cooperation Agreements and is based on the case-law of the European Union.

Based on the market characteristics, Commission found that the probability of anti-competitive outcomes is high on transparent, concentrated, non-complex, stable and symmetric markets. In these markets, economic agents can easily agree on the common terms of cooperation, fulfill the agreed

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39 *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012,540.

40 *Jones A.,Sufrin B.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 822.

41 Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements), § 35, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=-CELEX:52011XC0114(04):EN:NOT>,[10.05.2013].

42 Ibid,§58.

43 *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012,541.

44 *Jones A., Sufrin B.*, EU Competition Law Text, Cases, and Materials , 4th ed., Oxford University Press, 2011, 821.

conditions and punish the violators. Usually, exchange of information enables strengthening transparency and eliminating uncertainties on market. In this case, account shall be taken to the level of market transparency existed prior to enactment of the information exchange system and whether this level has been changed by the information exchange. According to the Commission, in tight oligopolistic markets, the impact of information exchange on competition may be more adverse, than in less tight oligopolistic market, because a group of enterprises accepts more readily the conditions. Besides, the exchange of information in a very fragmented market must not have extremely negative effect on competition. In difficult market conditions, it is difficult for economic agents to achieve anti-competitive outcomes. However, according to the Commission, information exchange system simplifies these conditions. Negative result of this practice is more conspicuous, when the demand and supply conditions for relevant product are relatively stable, because in instable conditions, it is difficult for economic agent to determine exact reasons of sales decline (reduction of the level of demand or a lower price offered by a rival). In case of symmetric market, economic agents strive to agree on common conditions, as they have similar expenses, demand, market shares, product range, and production.[45]

As regards to the nature of exchanged information, the Commission argues that sharing of strategic data among the competitors will more likely lead to the violation of Article 101, than other information, as it significantly reduces the strategic ambiguity, chances of the parties to make independent decisions and consequently the incentives to compete one against the other. According to the Commission, strategic information may refer to current prices, discounts, reduction, rise or advantages, list of clients, production costs, volume, turnover, sales, production, quality, marketing plans, risks, investments, technologies, research and development programs and their outcomes. The Commission regards any price and quantity-related data that are followed by the information on costs and demand as strategic information. However, if economic agents compete in research and development, the technological data might be the most strategic.[46]

The bigger the market share of economic agents exchanging the information, the bigger the risk of anti-competition effect.[47]

Along with the nature of information, it is important to determine whether the information is presented in combined form, or it is individualized. When disclosing combined information, during which it is quite difficult to obtain individual data on companies, the probability of adverse effect on competition is lower, than in case of individual data exchange. The Commission sees no problem in collection and dissemination by trade associations or market research-oriented firms of the combined data related to sales, production, price of components and raw materials data, because this practice may be profitable for suppliers and clients due to providing a clearer picture of the economic situation in the sector. Besides, such a practice enables market players to make informed decisions individually, in order

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45 Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, §77-85, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=-CELEX:52011XC0114(04):EN:NOT>, [10.05.2013].

46 Ibid, § 86.

47 Ibid, § 87.

to tailor their strategy to market conditions. According to the Commission, disclosure of such information in tight oligopoly will have negative impact on competition. Disclosure of individualized information promotes establishing common market conditions and punitive strategy by economic agents, as it allows the coordinated firms to identify the violators of the conditions and market entrants. One should not rule out the possibility that the combined data exchange can also lead to anti-competition outcomes in certain situations.[48]

Account shall be taken to the age of information too. The newer the information, the more risky its exposure is, with respect to competition law. It is unlike to achieve the collusive objectives by proliferation of historic, i.e. old data, as based on them, it is difficult either to predict the plans of the competitors, or agree on common strategy. However, the Commission states that there is no predetermined threshold to determine whether the exchanged information poses risk to the competition due to its old age. Competition Authorities consider that historic data depends primarily on the relevant market characteristics and the frequency of price re-negotiations in the industry. It is also dependant on the type of data and exchange frequency.[49]

Usually, the more frequently economic agents exchange information, the higher the risks of violation of competition law. Exchange of information is more required in instable markets, than in stable ones to ensure approximation of unified strategies of the economic agents and exposure of violators.[50]

Based on the EU case law, exchange of public information is not deemed restrictive of competition. The Commission states that information is "genuinely public" if equally accessible (in terms of costs of access) to all competitors and customers. Obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information. Competitors exchange the public information quite frequently. However, the Commission does not regard such information as genuinely public if the costs involved in collecting the data deter other companies and customers from doing so.[51] To illustrate this latter case, in paragraph 109 of the Guidelines, the Commission cites the following example: four fuel supplier companies, which own all the gas stations in the country, change fuel prices by phone. They believe the fuel price is public, as it is indicated on the boards of each gas station, and consequently, exchange of information on current price does not constitute a practice restrictive of competition. While the Commission thinks it to be genuinely public, as collecting the same data through other way requires a significant amount of time and transport costs. Besides, exchange of information took place on a systematic basis and covered the entire country's market, the latter being a close, non-complex, stable oligopoly. Thus, the Commission states that such practice creates a climate of mutual understanding with regard to price, promotes anti-competitive effects on the market and, therefore, contradicts part one of Article 101.

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48 Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, §89, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=-CELEX:52011XC0114(04):EN:NOT>, [10.05.2013]

49 Ibid, § 90.

50 Ibid, § 91.

51 Ibid , § 92-94.

8.1. Information Sharing Peculiarities

Information exchange can take place in various forms: (1) when the data are directly shared between competitors; (2) when the data are shared indirectly through common agency, e.g. trade association; (3) when the data are shared by market research organization, suppliers or/and retailers. Information can be shared using different means, for example, by mail, e-mail, phone, meetings, etc.

Arrangement on information exchange can be in the form of a separate agreement, it could also be a part of other anti-competitive agreement, concerted practices, or decisions of economic agents according to the content of Article 101. A concerted practice, according to the case law, is a form of coordination between economic agents, through which practical cooperation of economic agents consciously replaces competition risk.[52] The Commission claims that if the economic agent discloses the strategic information to its competitor and the latter receives the information, this conduct can also be qualified as the concerted practice, because according to the existing case law, the concept of concerted practice does not require the existence of bilateral contact.[53]

Main problem related to the information sharing in terms of competition is likely anticompetitive outcomes in the market. The main goal of exchange of information is to eliminate the uncertainty, and that is why it is considered a violation in terms of the competition object.[54] According to the case law, there is no need for economic agents to clearly agree on price increase. The exchange of information may be just enough to identify anti-competitive purpose.[55] However, if information sharing is not restrictive of the competition object, than its outcomes shall be analyzed including full analyses of the context, in which the data has been shared. The analyses is detailed in preliminary judgement of the EU Court of Justice on the case C-238/05,[56] which states that compliance of information exchange system with EU competition rules cannot be assessed abstractly. It depends on economic conditions of relevant market and specific characteristics of information exchange, such as the goal, accessibility and participation, and the type of information that may be public or confidential, combined or detailed, historic or current, as well as the information periodicity, exchange frequency, significance for fixing prices, production volume or service conditions.

The Commission finds that sharing of strategic data among the competitors can artificially increase the transparency of the market, eliminate the uncertainty associated with the market functioning, facilitate economic agents' coordination and approximation of their actions. It also may adversely affect

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52 Judgment of the Court of First Instance, 2009 on the case:C-8/08,§ 26, <http://curia.europa.eu/juris/-document/document.jsf;jsessionid=9ea7d2dc30dd5050f3735d2f436abe8a99e6e9d7ac33.e34KaxiLc3qMb40Rch0SaxuRaN90?text=&docid=74817&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=754310>, [25.09.2015].

53 Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Aagreements, §62, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=-CELEX:52011XC0114(04):EN:NOT>, [10.05.2013].

54 Ibid, § 72.

55 *Whish R., Bailey D.*, Competition Law,7th ed., Oxford University Press, 2012, 542.

56 Judgment of the Court of First Instance, 2006 on the case: C-238/05, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-238/05>, [10.05.2015].

competition by increasing internal stability in the market, especially if data exchange enables the firms to monitor the performance of concerted terms. Besides, negative impact of information exchange can be due to increased external stability. In particular, the increased market transparency will enable the firms to find out when and where the other companies tried to enter the market, and facilitate the parties to collusive agreement to act against the new entrants. It is worth mentioning that the exchange of commercially sensitive information places the companies willing to enter the market in unfavorable competition conditions compared to the parties to collusive agreement impeding their entry to market.[57]

Though the goal of competition law is not to allow competitors to cooperate, in order for them to determine independently the market policy, it is clearly mentioned in the case law that it does not deprive economic agents of the right to adapt reasonably to existing or expected conduct of competitors. However, any direct or indirect contact between competitors is excluded, if such contact has as an objective or effect creation of competition conditions that do not correspond to the normal competitive conditions. Therefore, no direct or indirect contact between competitors is allowed which aim at or result in influencing the market conduct of actual or potential competitors, among them disclosure of the course of market conduct they have accepted or will accept to facilitate collusive agreements. The Commission states that exchange of information may constitute a concerted practice if relating to a disclosure of strategic information, which leads to reduction of strategic uncertainty in the market and contributes to secret agreement. Exchange of strategic information is regarded as a violation of competition law, as this practice is equivalent to the concentration among competitors.[58] According to the Commission and the European Court of Justice, even attendance at the meeting, where the economic agent(s) share their strategic plans with competitors, can be qualified as a violation of Article 101, even though no clear agreement on a price increase has been reached at this meeting. When an economic agent receives information from competitors, it is assumed that he adapts his market conduct to such information, unless clearly stated by him that he does not want to receive such information.[59] The Court of Justice and the Commission argue that the competing economic agents must apply "public distancing" from meeting and issues discussed to avoid punishment. We'll discuss this particular situation in more detail in a separate section below.

Where an economic agent makes an unilateral announcement that is genuinely public, this generally does not constitute a breach of Article 101. Although, each case requires thorough study to rule out presence of collusive practice. Where such an announcement was followed by public announcements by other competitors it might be a strategy for reaching common agreement and the possibility of finding an infringement of competition law cannot be excluded.[60]

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57 Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, § 65-70, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC0114(04):EN:NOT>, [10.05.2015].

58 Ibid, § 61.

59 Ibid, § 62.

60 Ibid, § 63.

8.2. Decisions of EU Competition Authority Regarding the Practice of Sharing Information

To gain insight into the sharing of information in practical terms, the case law of the European Union will be helpful, which the European Commission, the EU General Court (formerly the Court of First Instance) and the European Court of Justice have jointly developed over the years.

A. Case 48-69

On 31 May 1967, the Commission has initiated an investigation concerning the rise in prices of paints in Europe, which took place in 1964-1967 and about seventeen economic agents and their representative offices in Europe were involved, mainly in the Netherlands, Belgium, Luxembourg and Germany. The case file showed that the parties also resorted to concerted practice in France and Italy, albeit with a slight difference. By decision of July 24, 1969, the Commission accused the economic agents for participation in concerted practice and imposed fines. One of them, Imperial Chemical Industries LTD appealed against the Commission decision. However, the court has not considered the opinions of the applicant and the contested decision was left intact. The competition authority has determined that the product market was oligopolistic and there was a small elasticity of demand (ED) for the product.[61] According to the case file, the firms stated their intention regarding the price increase in advance for a certain period that allowed them to observe each other's reactions in different markets and to adapt accordingly. The court argued that by pre-announcements the economic agents eliminated all uncertainties between them concerning their future conduct and hence, they have eliminated the majority of risks as well, which followed the independent change in their conduct in one or more markets. Based on the case file, the court came to the conclusion that a general and uniform price increase in different markets might be explained by the common intent of relevant economic agents to regulate the level of prices and the situation caused by price competition and to avoid the risk associated with any changes of the price or competition conditions.[62]

B. Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 - C-129/85

By decision[63] of 19 December 1984, # 85/202/EEC, the Commission accused the pulp producers of advance agreement on price. Economic agents announced prices in advance, on a quarterly basis, which was qualified by the Commission as a concerted practice, which might result in the elimination of

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61 EU court decision 1972 on the case 48-69, Imperial Chemical Industries Ltd. v Commission of the European Communities, § 73-74, <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61969J0048&lg=en>, [12.05.2015].

62 Ibid, § 100- 113.

63 The EU Commission 1984 decision on the case: 85/202/EEC, <http://eur-lex.europa.eu/LexUriServ/-LexUriServ.do?uri=CELEX:31985D0202:EN:NOT>, [15.05.2015].

price uncertainty. According to the Commission, the pre-announcement of prices artificially made the market more transparent and promoted the coordinated action of the parties, which was in breach of Article 85.1 (presently Article 101.1).[64] However, after appealing, the European Court of Justice on case[65] of 31 March 1993 decided that there was no violation of Article 101, though the price was announced in advance by the enterprises. For better understanding of the case, the Court invited the experts, which have been assigned to study the pulp market. In their view, price announcement system should be considered in the context of a long relationship that existed between the producers and clients resulting from the pulp production method and cyclic nature of market. Each type of paper was produced from a specific mixture of wood materials, which was difficult to change and thus relationship between mixture producers and paper producers was based on close cooperation. This relationship was getting even closer in light of the fact that they also had to defend it from the uncertainties arising from the cyclical nature of the market.[66] In addition, pulp was mostly sold to a relatively small number of big paper manufacturers which were in close alliances with each other and exchanged information on the price change.[67] High degree of transparency of the pulp market also was caused by the links between vendors, which was further enhanced in the European Union due to the agents working with several manufacturers at the same time, as well as by the dynamic trade pressure.[68]

According to experts, the demand for pulp was inelastic. Pre-announcement of the price enabled buyers and clients to plan their future production costs.[69] Most importantly, the Court found that the Commission had not confirmed any agreement or concerted practice regarding the exchange of information between the pulp producers and their clients.

C. Case C-7/95 P

In terms of exchange of information, it is important to review the decisions of the EU competition authority concerning the case of *The UK Agricultural Tractor Registration Exchange.*

In the United Kingdom, the Union of Agricultural Engineers was founded in the 90's of the last century, which was a trade association. It was open to all manufacturers and importers of agricultural tractors, which were operating in the United Kingdom. At various times he had about two hundred members. On January 4, 1998, the Association informed the Commission about the agreement, which dealt with the information system in order to obtain individual exemption[70]. The information system was

64 Ibid, § 85.

65 Decision of The EU Court of Justice of 1988 on the Joined cases: C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 - C-129/85, <http://curia.europa.eu/juris/liste.jsf?num=C-89/85&language=en>, [25.09.2015].

66 Ibid, § 76.

67 Ibid, § 84.

68 Ibid, § 86.

69 Ibid, §103.

70 According to the then Regulation №17/62, which was adopted in 1962, economic agents were obliged to notify the Commission in advance the agreements reached between them and the Association's decisions to obtain the so-called Liberation.

based on the data of the UK Transport Department concerning the Agricultural Tractor Registration and was called *The UK Agricultural Tractor Registration Exchange.* Eight traders were the party to the notified agreement, who, according to the Commission, jointly owned 87-88 percent of shares in the United Kingdom market, while the remaining part of the market was divided among a number of small producers.[71]

The Commission after analyzing the agreement found out that the association of economic agents acted as a secretariat of the Agreement between the parties and the exchange of information enabled the parties to identify the sales of each competitor. The Commission also considered the market structure, type of the data delivered, detailed nature of the exchanged information and the fact that the parties regularly met at the Association Committee. According to the Commission, the agreement had restrictive effect on competition, since it raised transparency in the highly concentrated market and increased the obstacles for the market entrants being non-parties to the agreement.[72]

Finally, the Commission concluded that *The UK Agricultural Tractor Registration Exchange*, both its original and second versions were in breach with Article 85.1 (at present Article 101.1), because the information exchange enabled not only to identify the sales of each competitor involved in the agreement, but also to obtain information on sales and imports of their dealers.[73]

After examining the complaint, the Court of First Instance took into account the specific characteristics of the market, the type of information exchanged and the fact that in some cases the information was not sufficiently combined, and hence it allowed identification of sales, considered that the information exchange system yielded anti-competitive consequences.[74]

In assessing the circumstances of the case, the Court of First Instance considered the nature of the information exchanged, the frequency of exchange of information and the individuals to whom the information was transmitted. With respect to the nature of the information, the court revealed that it related to the sales at the territory of each dealer in distribution network, which was a business secret, and enabled the economic agents, participating in the agreement to obtain information on dealers' sales both at their territory and beyond. In addition, they also could learn about the sales of rival economic agents participating in the agreement and their dealers. The Court of First Instance also confirmed the fact that information on sales was disclosed systematically and in a short intervals. The Court confirmed that this information was spread among key suppliers to benefit them and expel other suppliers to from the market, while the consumers did not have any benefits.[75]

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71 Decision of The EU Court of Justice of 1998 on the case C-7/95 P, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995CJ0007:EN:HTML>, [20.05.2015].

72 Ibid, § 5.

73 Ibid, §10.

74 Judgment of the Court of First Instance ,1994 on the case: T-35/92, § 92, <http://eur-lex.europa.eu/-smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61992A0035>, [15. 05. 2015].

75 Decision of The EU Court of Justice of 1998 on the Case:C-7/95 P,§89,<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995CJ0007:EN:HTML>, [20.05.2015].

Having regard to the circumstances established by the Court of First Instance, the European Court of Justice stated in paragraph 90 of its judgment that the information exchange system reduces or eliminates the uncertainties concerning the functioning of the market and, therefore, this system can adversely affect competition among the producers.

In addition, the European Court of Justice, based on the Court of First Instance found that a trader willing to enter the United Kingdom tractor market was in unfavorable conditions, compared to the parties of the agreement unless he joined the agreement.[76]

The court considered that the information exchange system did not meet the requirements of Article 85.3, as it did not benefit consumers and no restrictions were required in order to improve the production.[77]

D. Case C-238/05

In terms of exchange of information, it is important to review preliminary judgment of the European Court of Justice of 23 November 2006 on the case **C**-238/05.[78]

On 21 May 1998, Asnef-Equifax, which was a member of the National Association of Financial Undertakings in Spain, lodged an application to Competition Protection Tribunal for authorization of register concerning the debtors' identity and economic activity, as well as special circumstances such as bankruptcy, insolvency, late payments, unpaid credit balance sheets, financial guarantees, mortgages, leasing transactions or temporary disposal of assets.

Contrary to the negative opinion of the Competition Protection Service, the Court authorized the proposed register. Asnef-Equifax did not agree with that decision and lodged an appeal before the Supreme Court. According to the latter, there was a reasonable doubt that the registry could have restricted the competition in the fragmented market, as it would allow to join the secret agreement, however it was also possible to authorize it based on article 81 (3).[79]

In order to eliminate this uncertainty, the Supreme Court decided to suspend the proceedings and appealed the European Court of Justice for Preliminary decision.

The European Court of Justice considered it necessary to study the agreement in economic and legal context in order to assess any effect on trade between Member States.[80]

The court found that the register was open to all institutions active in the field of loan and credit. In addition, the information was transferred electronically from the Register, i.e. more effectively than by the National Bank through an organized register.[81]

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76 Ibid, §93.
77 Ibid, §124.
78 Judgment of the European Court of Justice of 2006 on the case: C-238/05, <http://curia.europa.-eu/juris/liste.jsf?language=en&num=C-238/05>, [15.05.2015].
79 Ibid, §10.
80 Ibid, §35.
81 Ibid, §41.

The European Court of Justice considered that the consistency of the information exchange system with EU Competition Rules should not be assessed abstractly. It depends on economic conditions of market and specific characteristics of relevant system, such as its purpose, availability and participation, the type of information exchanged, it can be public or confidential, combined or detailed, historic or current, frequency of such information and its importance for the pricing, fixation of volume or service conditions.[82]

The Court stated that if the Register was in breach of Article 81 (1), it still can be subject to exemption under Article 81 (3) in case the four cumulative conditions are met.[83]

The European Court of Justice considered that according to the case circumstances, the register could prevent excessive credit debt of consumers, and provide better availability of credit. In spite of restrictive potential of competition based on Article 81 (1), the Court explained that it is necessary to assess the objective economic benefits inherent in the Register.[84]

Based on the above mentioned circumstances the court decided:

1. The Register does not have on competition restrictive effect on the client solvency, provided that the relevant market should not be concentrated. The market referred to in the case was fragmented. In addition, the system should not allow for identification of the borrowers or their market position and commercial strategy. Besides, it is important that the conditions of access and use should not be discriminatory for financial institutions in neither in factual nor legal terms. If such access is not guaranteed, some operators will be in unfavorable conditions due to the lack of information for risk assessment creating obstacles for new operators' entry to market.

2. If the register restricts competition under Article 81, the application of exemption provided by 81 (3) will be possible in case the four cumulative conditions are met. According to the European Court, it depends on the national court to decide whether these conditions are satisfied or not. To meet the conditions of fair sharing of the benefits by consumers, in principle, it is not necessary that each customer individually benefit from the agreement, decision or concerted practice. However, the overall result for the consumers should be useful in relevant market.

E. Case C-8/08

The EU Court of Justice on 4 June 2009 adopted a significant preliminary decision on the exchange of information regarding the case C-8/08.[85] It mainly dealt with a meeting between competitors, the exchange of information and their subsequent conduct in the relevant market.

According to the case file, on June 13, 2001, representatives of the Dutch mobile operators met. They discussed *inter alia* the reduction of standard compensation on the package of payment after

82 Ibid, §54.

83 Ibid, §65.

84 Ibid ,§67.

85 See Judgment of the European Court of Justice of 2009 on the case: C-8/08, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=74817&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=583042>, [30.05.2015].

rendering a service for dealers, which should have come into force on 1 September 2001. Confidential information has been disclosed as well between the parties attending the meeting.[86]

The Dutch Competition Authority, the NMA, took a decision on 30 December 2002 finding that the five operators Ben, Dutchtone, KPN, 02 and Libertel-Vodafone had entered into a concerted practice prohibited by Dutch Competition Law Article 6 (1) and imposed fines on them.[87]

Economic agents involved in violation of competition rules lodged an application against the decision before the Council of Trade and Industry, which suspended the proceedings, and appealed to the European Court of Justice for a preliminary decision.

The Court explained that a concerted practice pursues an anti-competitive object where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition. The question, whether the anticompetitive effect yields a result, and what kind of result it is, should be born in mind only when determining the amount of fine and assessing a claim for compensation for damage.[88]

The court argued that prohibition should not apply only those concerted practices, which have a direct effect on the prices to be paid by end users. The case deals with the payment to dealers after rendering a service, that also has a direct connection with the prices that the end users must pay.[89] The European Court of Justice recalls that to determine whether a concerted practice has anticompetitive object, a direct link between the practice and consumer is not an essential factor.[90]

The court considers that the exchange of information, which can eliminate the uncertainties between the parties such as a time, duration of price changes and other details of modifications by the economic agents, should be considered as having anti-competitive purpose. The present case relates to this very fact, because the modification relates to the reduction of the standard fee paid to the dealers.[91]

Subject to the above considerations, the European Court of Justice considers that a concerted practice has an anticompetitive object according to Article 81(1), where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition on a single market. In addition, the court recalls that prevention, restriction or distortion of competition, or a direct link between the concerted practice and consumer prices is not an essential factor. The purpose of the exchange of information between the competitors may have anti-competitive purpose, if the exchange is able to eliminate the uncertainties related to the intended conduct of the economic agents.[92]

According to the European Court of Justice, the concept of concerted practice referred to in article 81 (1), implies not only the agreement between the parties agree, but also the subsequent conduct of the

86 Ibid ,§11-12.
87 Ibid, §13.
88 Ibid, §31.
89 Ibid, §36-37.
90 Ibid, §39.
91 Ibid, §41.
92 Ibid, §43.

parties in the market and cause-and-effect relation between the agreement and conduct. However, the court also considered that if there is no evidence to the contrary to be submitted by the relevant economic operators, it should be presumed that the economic agents participating in the concerted action and remaining active in the market, take into account the information exchanged with competitors when determining their conduct in the market. In addition, account should be taken the fact that according to the case law, the concerted practice may be prohibited by Article 81 (1) regardless its result is anti-competition in the market or not.[93] The Court considers that presumption of random link is referred to in Article 81 (1) and constitutes an integral part of European community law.[94]

The court recalled that the presumption of random link between the concerted practice and market conduct is used only in presence of concerted practice and when the relevant economic agents remain active in the market. However, the Court reiterated that it does not share the opinion that a presumption of random link takes place only when economic agents meet regularly.

According to the European Court of Justice, the number, frequency and form of the meetings between competitors, which is required to agree their market conduct, depends on the subject of concerted practice and the market conditions. While in this particular case, which relates to a specific parameter of market competition, even a single meeting between competitors may be sufficient for the achievement of the anti-competitive goal set by the participating economic agents.[95]

The court considers that what matters is not how many times the economic agents meet each other, but whether the meeting(s) allowed the parties to keep in the mind the information exchanged between the competitors for determining their further market conduct and replace the competition risks with practical cooperation. Besides, the Court argued that economic agents participating in agreement have the right to present evidence and prove that although they successfully agreed with each other and remained active in the market, the concerted practice has not affected on their market conduct.[96]

Based on the aforementioned, the Court noted that if the economic agents involved in concerted practice remain active in the market, there is a presumption of random link between the concerted practice and the conduct of economic agents, even if the concerted practice is the result of a single meeting between participating economic agents.[97]

Since Article 7 of the law of Georgia "On Competition" contains an exhaustive list of the types of prohibited cartel activities while no exchange of information between competitors is provided for by the law, this action, in spite of its anti-competitive effect, could not be punished under that law.

93 Ibid, §51.
94 Ibid, §52.
95 Ibid, §60.
96 Ibid, §61.
97 Ibid, §62.

9. Attendance at the Meeting to Discuss Competition Restrictive Activities

As already mentioned, Article 101 prohibits the exchange of information among economic agents, directly or indirectly, because it can influence the future conduct of economic agents in the market. The exchange of information can be indirect, for example, via suppliers or intermediary, for example, a trade association. One of the common forms of information exchange is the meetings of the representatives of the economic agents, during which a variety of issues are considered. If the meeting has a clear anti-competitive purpose, attendance and participation in such meetings as a rule, is not desirable. After attending such meetings, the Cartel members often have to make excuses to avoid responsibility under competition law. Competition authorities in rare cases take into consideration the explanations and evidences presented by the economic agents, who attended and participated in the meeting regarding the exemption from liability.

It would be interesting to review the case law of the European Union with respect to the attendance/participation of the economic agents in meetings. EU legislation and case law does not include a direct requirement for the attending/ participating economic agents to report to the competition authority. However, in order to avoid fines, they must to fulfill the requirements set forth in case law.

Attendance even at a single meeting, on which an anti-competitive agreement was reached, will most likely be qualified as a violation of Article 101. Economic agents often argue that their attendance was not in breach of Article 101, as they had never participated in any cartel activity. However, the European Court of Justice stated regarding the case Aalborg Portland v. Commission that "having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it".[98] In that regard, the Court considers that a party, which tacitly approves of an anticompetitive activity, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement.[99]

According to David Bailey, after attending a meeting having anti-competition purpose, the economic agent has to prove effectively that he attended a meeting without an anti-competitive objective and other participants knew about it. The burden of proof shall bear an economic agent, and it is not easy to prove.[100]

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98 Judgment of the European Court of Justice of 2004 on joined cases: C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P,§82, <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30dd60d2bc7ca39e4c20ae48a2bb1b1c3842.e34KaxiLc3qMb40Rch0SaxuPbx50?text=&docid=48825&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=95197>, [09.03.2015].

99 Judgment of the European Court of Justice of 2005 on joined cases: C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, §143, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=59846&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=97504>, [09.03.2015].

100 *Bailey D.*, Publicly Distancing Oneself from a Cartel, World Competition 31(2), 2008, 178.

The notion of "public distancing" as a means of excluding liability according to the Court, must be interpreted narrowly. The court stated regarding the case T-303/02 that if the applicant had in fact "wanted to disassociate itself from the collusive discussions, it could easily have written to its competitors and to the secretary of association after the meeting to say that it did not in any way want to be considered to be a member of the cartel or to participate in meetings of a association which served as a cover for unlawful concerted actions". [101]

With respect to the polypropylene case[102], the Court stated that the economic agent, who attended the meeting, most likely would not be independent in determination of its further market operations.

Concerning the case *Commission v. Anic Partecipazioni SpA*, the Court presented a presumption that if economic agent participated in competitors' meeting, he will take account of the information exchanged with their competitors when determining their conduct on that market, unless the proof and explanation to the contrary is presented by the economic agent.[103]

Competition authorities believe that it is difficult to prove that the firm is no longer a party to the Agreement, if he did not take part in all cartel activities. It is also difficult to prove that the firm did not participate in cartel, if the firm actively disclosed information on prices.

The Commission claims that if the economic agent disclosed information in any period of the cartel activity, public distancing will be hard to achieve. The best way of avoiding responsibility is a denunciation to the administrative bodies, which will provide him a full or partial immunity from fines.

David Bailey states that according to case law, the notion of publicly distancing may be used in exceptional cases with the following six preconditions:

First, the 'public distancing' should be without undue delay. The sooner the economic agent is publicly distancing the better. Some commentators believe that if the firm wanted to disassociate itself from the meeting, which unexpectedly turned into an anti-competitive one, it must declare that it did not have any anti-competitive object which in turn needs a clear disapproval of the cartel.[104]

Second, the cartel objectives and the issues discussed and agreed at the meeting must be disapproved. The Court of First Instance decision on case T-303/02 states that silence by an economic agent representative in a meeting during which the parties colluded unlawfully on a precise question of pricing policy is not tantamount to an expression of firm and unambiguous disapproval.[105]

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101 Judgment of the Court of First Instance 2006 on case: T-303/02, §103, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=66334&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=104858>, [09.03.2015].

102 Judgment of the EU Commission of 1986 on the case: 86/398/EEC, <http://eur-lex.europa.eu/LexUriServ/-LexUriServ.do?uri=OJ:L:1986:230:FULL:EN:PDF>, [09.03.2015].

103 Judgment of the European Court of Justice of 1999 on case: C-49/92 P, §121, <http://curia.europa.eu/juris/-document/document.jsf?text=&docid=44311&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5539>, [31.05.2015].

104 Ibid, 193.

105 Judgment of the Court of First Instance of 2006 on the case: T-303/02, §124, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=66334&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=104153>, [10.03.2015].

For avoiding responsibility via publicly distancing, the economic agent participating in anti-competitive meeting should firmly and clearly inform the attending companies, that despite his attendance, he does not agree with unlawful actions taken by them.

It should be noted that the public distancing is required before the economic agents carry out respective action in the market. In addition, there is no need for publicly distancing that the relevant economic agent announces on its Webpage that he is distancing itself from any issues discussed and/or adopted a specific anti-competitive meeting.[106]

Third, unambiguous disapproval of cartel shall be clearly expressed before its members.

According to case law, the fact that the economic agent does not agree with the issues presented by the members of the cartel, is not sufficient for publicly distancing.

Actions to be taken and evidences to be presented by economic agent for publicly distancing itself from cartel, are provided in the judgment of the European Court on Case T-303/02. The company Westfalen argued that it had not attended all the meetings of the cartel, has not fulfilled the actions agreed during the meeting and always pursued aggressive commercial policy against its competitors. According to the Competition Authority, the fact that the company played exclusively passive role in the cartel, does not represent the basis for excluding liability under Article 101. It is still considered to be a party to an anti-competitive agreement.[107]

Fourth, while trying to stop participating in the cartel activities, the firm must be careful in disclosing its strategy and price-related intents. If its intentions are uncovered in the cartel, they quickly have to be rejected.

There is no doubt that publicly distancing is easier if the firm did not disclose any confidential or sensitive information. If the firm does not say anything and just gets the information, it should still meet the rest of five requirements for excluding liability via publicly distancing.

For publicly distancing itself from cartel, the firm should create the impression among the cartel members, that it does not share their anti-competitive actions, which is quite difficult in cases where the firm has already disclosed its pricing intentions. However, if the firm attended the meeting with its competitors and said something what it should not say, it will be hard for the firm to reject its action and prove that it disassociates itself from cartel. However, it still has a theoretical chance.[108]

Fifth, the firm must be able to prove that their subsequent commercial policy and the market behavior is defined independently and the information obtained during the meeting did not affect intentionally or unintentionally the company's further commercial activities,[109] which is difficult to prove as David Bailey states.[110]

Sixth, the company should no longer attend the next meetings, which include anti-competitive activities.

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106 *Bailey D.*, Publicly Distancing“ Oneself From a Cartel, World Competition 31 (2), 2008, 189.
107 Ibid, 197.
108 Ibid, 199.
109 Ibid, 200.
110 Ibid.

For excluding liability through publicly distancing, the economic agent must refrain from any further contact with the members of the cartel. Though Westfalen (case T-303/02) argued that it has not attended all cartel meetings, has not fulfilled the concerted actions and pursued aggressive competition against its competitors, deliberate participation in a second meeting with an anti-competitive purpose, completely overrides any claim that it distanced itself publicly and protested the cartel.[111]

David Bailey argues, that if a company wants to avoid liability resulted from anti-competitive meetings, it must fulfill the all six conditions mentioned above. The burden of proving the fulfillment of these conditions shall bear an economic agent. The claim that the company did not attend at meetings, or was a passive participant, or it still pursued an independent market policy, or objected or disapproved the issues discussed during the meeting, cannot be accepted by Competition Authorities unless the relevant evidence is submitted regarding the faithfully fulfilled the six conditions.[112]

10. Conclusion

Based on the above, one can say that horizontal cooperation among competing economic agents, which includes price fixing, limiting production or innovation, market division and the other activities, can reduce or eliminate competition in the market. Among them, relatively soft form of cooperation, such as exchange of information also can restrict competition, as it eliminates the uncertainties among competitors and artificially increases transparency.

The abovementioned types of horizontal cooperation among competitors are punishable under the laws in all developed countries, as they cause irreversible damage to the economy and consumers. The customers are forced to pay a disproportionately higher price under the cartel agreements, compared with the competitive market price.

111 Judgment of the Court of First Instance of 2006 on case: T-303/02, §102, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=66334&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=122539>, [10.03.2015].

112 *Bailey D*., Publicly Distancing" Oneself From a Cartel, World Competition 31(2), 2008, 202-203.

Aleksandre Tsuladze*

Dynamics of Development of the Judicial Mediation in the United States Based on the Example of California and Florida States

1. Introduction

For the purpose of elimination of the shortcomings, accompanying execution of justice in the courts (spending of time and human resources, denial of real interests and needs of the parties, "nominal" victory, dissatisfaction of the court users), in 70-ies of the past century US judicial system faced the issue of creation of the alternative ways of dispute solution, which would provide the opportunity of identification of optimal outcome for the disputing parties, maintenance of relations between them and resolution of dispute between them in the way, acceptable for the both parties. Alternative method of dispute resolution, applied in Ancient Greece – Mediation – proved to be one of the methods of dealing with the mentioned challenge. The success of the institute of modern mediation in the United States of America (hereinafter – the US) conditioned interest of European scientists and practitioners in it. Models and regulations of alternative ways of dispute resolution, formed in the US represent the benchmarks which even developed European states try to achieve.[1] It's obvious that development of mediation in Georgia has great procpects, but it's also obvious that its eficient implementation requires sharing of practical experience of mediation expansion in well-developed judiciaries and accummulated scientific knowledge with Georgian academic circles. Consequently, analysis of the US model is not just expedient but also necessary for studying and understanding of modern judicial mediation models.

2. Trajectory of Development of Mediation

2.1 Historical Background that Facilitated Establishment of Mediation

Mediation, as the process, leaded by the third, neutral person (mediator) for the purpose of reconciliation of the parties, existed in the US since the time of colonists,[2] although mediation, as the

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1 *Hopt J. K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 9.

2 *Ingen-Housz A.,* ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011, 423.
Ingen-Housz A., ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011, 192.

alternative of dispute resolution, offered by the court, originated in 70-ies of the 20th century, exactly when the lack of trust and dissatisfaction towards judicial authorities increased in the USA.[3]

National Conference, held in April 1976, known as *Pound Conference,* where over 200 judges, scientists and lawyers discussed the reasons of dissatisfaction of population with justice and the issue of efficiency of judicial system, laid foundation of development of mediation.[4] On the mentioned Conference, the acting Chairman of the Supreme Court of the US *Warren E. Burger* requested revision of the court system, as there was a risk that the courts wouldn't be able to operate efficiently even in the case of increase of the number of judges and judicial system would face even bigger threat.[5] He came forward with the initiative for the judges to offer cheaper and more efficient way of dispute resolution to the parties of dispute.[6] In his opinion: "A person, having legal problems, like a person, having health problems, needs relief, as soon as possible and with less expenses".[7]

On the same Conference, professor of Harvard University *Frank Sander,* for the first time, raised the idea of Multi-Door Courthouse, one of the main components of which was introduction of alternative methods of dispute resolution in judicial services.[8] The idea of Multi-door courthouse, developed by Professor Frank Sander, implies selection of the method of dispute resolution by the citizens with the help of the court, by means of which the parties to dispute, as well as justice would gain as much benefit as possible.[9]

As a result, placement of mediation, as one more judicial service, in the toolkit of justice, was preceded by establishment of other alternative mechanisms of dispute resolution, including early neutral evaluation and expert determination. Thus, on the initial stage, before offering conflict regulation through mediation to disputing parties, American courts were offering different mechanisms of alternative resolution of dispute, among which mediation gradually took leading role, which was also facilitated by financial crises of last decades. After reduction of budgetary funds, *inter alia*, judicial budget, efficient and valid means of disputes regulation by courts became even more demanded than before.[10]

Frank Sander's idea was popular among lawyers, but at the initial stage of policy making tension for development of the mediation was great; which was caused by the position of the lawyers with

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3 *Rogers H.N., McEwen A.C.,* Mediation: Law, Policy, Practice, The Lawyers Co-operative Publishing Company, Rochester, 1989, 34.

4 *Hebert C.,* Introduction-The Impact of Mediation: 25 Years After the Pound Conference, Ohaio State Journal of Dispute Resolution, Vol. 17, 2001-2002, 527.

5 *Rogers H.N., McEwen A.C.,* Mediation: Law, Policy, Practice, The Lawyers Co-operative Publishing Company, Rochester, 1989, 34.

6 It shall be mentioned that by this period the US judicial system was not over-loaded by numerous cases, although the number of cases was increasing every year.

7 *Rogers H.N., McEwen A.C.,* Mediation: Law, Policy, Practice, The Lawyers Co-operative Publishing Company, Rochester, 1989, 34.

8 *Ingen-Housz A.,* ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011, 423.

9 *Chern C.,* International Commercial Mediation, Informa, London, 2008, 7.

10 *Hopt J. K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1246.

different attitude towards mediation, who considered that the institute of mediation would complicate, increase the number of legal proceedings and the achieved agreement would not be realized in practice. Besides, there were skeptics, who considered setting of precedent as a primary goal of dispute resolution. Therefore, radically opposed to establishment of alternative means of dispute resolution.[11] Among criticizers was the professor of Yale University Owen Fiss, who published the article "Against the Agreement" in the law magazine of Yale University in 1984.[12] In the article, the author pointed out to the supporters of alternative methods of dispute resolution that "agreement can't ensure justice". Consequently, at first glance, public peace, created by reconciliation of dispute, deprives the court of the possibility of definition of legal norms, including constitution, due to which establishment of the values, required for legal state, would be impossible.

Past years made it obvious that the skeptics' opinions did not prove true and on the contrary, mediation brought many benefits to justice. Among them, satisfaction of court users, increase of trust and resolution of cases by the "truth" perceived by the parties shall be mentioned. The expectations of the opposers of the idea of establishment of mediation did not fulfill – mediation became a successful institution in the US.[13] Mediation process followed different trajectories in different states, which was conditioned by the existence of different views and approaches of mediators, judges, representatives of academic community.[14]

2.2 Formation of Culture of Dispute Resolution through Mediation and its Characteristics

In spite of contradictions, the US is the first state where mediation was institutionalized in judicial system.[15] Since 1980, for the purpose of easing the burden of courts, the US courts started utilization of mediation institution for family and civil disputes. Since then mediation became integral part of court. In its turn, since 1990-ies, the US judicial, legislative and executive authorities facilitated resolution of disputes of any category and complexity by means of mediation.[16] Today mediation is used before the litigation, as in legal proceedings in the first instant, at the appeal and supreme courts as well. Besides, various institutions and judicial acts, which where created gradually and consitetntly, to support its use.

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11 *Rogers H.N., McEwen A.C.,* Mediation: Law, Policy, Practice,The Lawyers Co-operative Publishing Company, Rochester, 1989, 41.

12 *Fiss O.,* Agians Settlement, The Yale Law Journal, Vol. 93, №6, 1984, 1073.

13 *Ingen-Housz A.,* ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011, 421.

14 *Ingen-Housz A.,* ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011, 422.

15 *Moore W. C.,* The Mediation Process: Practical Strategies for Resolving Conflicts, 3rd ed., Jossey-Bass, San Francisco, 2003, 23.

16 *Ingen-Housz A.,* ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011, 423.

Presently, the USA is one of the countries, which can say that it has the established culture of mediation, which implies problem solving lawyers, who are trying to find mutually beneficial outcome, as well as the community of judges and court users knowing the advantages of mediation. The above mentioned is translated into the number of disputes directed to mediation centers, as well in to the time of application (on early stage of conflict and enforcement) and total percentage indicators of agreement.[17]

It shall be mentioned that the attempt of legal society to establish the culture of dispute resolution through mediation, was facilitated by historical background, future-oriented vision and hard work of judges, as well as certain characteristics of American law and involvement of the bar association and scientific community in the process of implementation. As each of them made significant contribution to the formation of mediation cuture, they shall be discussed in more details:

1. In parallel with origination of mediation, the idea of Process Pluralism[18] was becoming more and more popular in the US scientific circles; it explains why it is better to resolve legal conflict using various methods, processes and approaches. Thus, despite certain obstacles, it was not difficult for the idea of alternative methods to find supporters in scientific circles and judicial policy makers. Besides, during introduction of judicial mediation, American justice did not aim only at management of case flow and reduction of cases, waiting for court hearing, like it was in many European countries. In the US is was clearly defined from the very beginning that the aim of mediation was provision of citizens with access to other alternative forums, better fitted to their needs, in the process implementation of justice.[19]

2. One of the main factors, which also facilitated popularization of ending of the dispute with agreement, was several peculiarities, characteristic for American legal proceedings: was the absence of the rule of imposition of legal expenses, born by the winner party, on defeated party.[20] In almost all states of the US, disregarding the outcome, the parties paid their expenses for legal proceedings themselves. Consequently, the winner party gets no compensation of the expenses, unlike the countries with German law, where certain amount (if not full) of the costs of legal service, born by the winner party, is reimbursed by the defeated party.[21] Besides, legal service in the US is quite expensive and the disputing parties, from financial viewpoint, prefer to resolve the dispute on the initial stage, in timely manner and with less expenses rather than winning the case after years of legal proceedings. Secondly, another characteristic feature of American law is high costs of the process of collection of evidences.[22] And finally, in the US, jury participates not only in hearing of criminal cases, but in hearing of civil law

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17 See <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014.aspx>, [30/12/2014].

18 *Menkel-Meadow J.C., Love Porter L., Schneider Kupfe A., Sternlight R.J.,* Dispute Resolution: Beyond the Adversarial Model, Aspen Publishers, New York, 2005, 4.

19 *Smith S., Martinez J.,* An Analytical Framework for Dispute System Design, Harvard Negotiation Law Review, Vol. 14, 2009, 146.

20 *Blackshaw S. I.,* Sport, Mediation and Arbitration, T.M.C. Asser Press, Hague, 2009, 243.

21 *Hodge C., Vogenauer S., Tulibacka M.,* The Costs and Funding of Civil Litigation, Hart Publishing, Oregon, Oxford and Portland, 2010, 28.

22 The related federal rules see <http://www.law.cornell.edu/rules/fre>, [30/12/2014].

disputed, which significantly complicates legal proceedings (from the viewpoint of predictability of the expected outcome) and makes it much more expensive.

3. American bar association and legal schools immediately started popularization of mediation; more importantly, they began modification of the notion of "good" lawyer, barrister, defender. In particular, if earlier good barrister was associated with good fighter, shooter and gladiator, who selflessly fought for winning legal and arbitrage proceeding, based on the principle of competition, in parallel with development of mediation (and conflict resolution methods, based on the idea of cooperation), they focused on the ability of lawyer to be "oriented towards problem solution"; consequently, not a "fighter", "gladiator" but "healer" and "peacemaker". It is expressed in explanation of the advantages of mediation (resolving the case with reconciliation) to client before applying to the court, and, more importantly, demanding resolution of dispute through court only after making sure that all methods of reconciliation, beneficial for their clients, were explored and there are not unused possibilities.[23]

Thus, in the US existed various conditions for the parties to choose dispute resolution by reconciliation without going to the court, unity of which leaded to interest of the court users in mediation, and further – satisfaction with the achieved result.

The expectation of certain part of American lawyers, who hopes that attitude of society towards legal conflict would change and the culture of undertaking responsibility by disputing parties would gradually establish, came true.[24] It, mostly, was achieved through close cooperation of persons, involved in the process of introduction of the institution of mediation. All the above mentioned conditioned the fact, that today mediation in the US is perceived as the institution, having various functions. Its purpose is reconciliation of parties, easing of court's burden, saving time and money of the parties and court. Besides, alongside with the function of reconciliation of the parties, it is considered as the means to achieve even more, in particular, as the means of listening to the parties, transformation of dispute through the informed and voluntary decision-making as a result of consideration of the case-related non-legal, but still important information and interests.[25]

3. Legal Regulation of Mediation

3.1 Federal Reguation

Years 1990 and 1996 are regarded as the starting point of establishment of alternative methods of dispute resolution in the courts of the United States, as in 1990 the "Act of Reformation of Civil Law"[26] was developed on legislative level, and in 1996 – the Resolution "On Civil Law Reform" by the

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23 *Abramson I. H.,* Mediation Representaion, 2nd ed., Oxford University Press, New York, 2011, 123.

24 *Rogers H.N., McEwen A.C.,* Mediation: Law, Policy, Practice, The Lawyers Co-operative Publishing Company, Rochester, 1989, 41.

25 *Ingen-Housz A.,* ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011, 422.

26 Civil Justice Reform Act, see <http://www.uscourts.gov/Statistics/civilJusticeReformActReport.aspx>, [24/12/2014].

Administration of President Clinton.[27] According to the act, all states, together with reduction of the costs of legal proceedings and time of case hearing, were encharged with a task to adopt action plans for development of fair, fast and cheap alternative methods of dispute resolution,[28] and the latter encharged federal services with a task to resolve private legal disputes using peaceful and less costly alternative methods.

Although none of the above-mentioned acts was giving preference to any of the forms of alternative methods of dispute resolution, mediation obtained dominating role by itself, and by 1997 more than half of state courts had developed mediation program. According to the "Dispute Resolution Act" of 1998,[29] all federal courts were required to develop individual mediation centers.[30] Besides, by "Dispute Resolution Act" the Congress encharges all state departments (not only the courts) to facilitate the development of alternative methods of dispute resolution and select one person, responsible for this project in their department – officer of alternative methods of dispute resolution.

They say that the "civil Law Reformation Act" facilitated development of mediation in judicial system; likewise, "Dispute Resolution Act" facilitated its establishment in executive branch.[31]As a result, the disputes, related to the issues labor, licensing, mining, taxation, ecological and energy resources are presently regulated through mediation in executive branch.

On the initial stage of development of mediation and other alternative methods of dispute resolution, the US Government, by developing federal acts, was trying to be involved in regulation process and control it at certain extent. However, the trend was changing gradually[32] and the methods of alternative resolution of disputes were becoming more and more independent (self-regulating). As a result, according to procedural rules, developed by individual courts of the states, bureaucratic interference of federal authorities was minimized.

3.1.1 Uniform Act

On certain stage of development of mediation institution in the USA the problem of unitizing of mediation arose, as due to the absence of uniform legislation, even fundamental issues of mediation process like preservation of confidentiality, were perceived differently by practicing mediators. By the end of the 20th century over 2500 legal acts dealt with mediation institution on the US territory, out of which 250 regulated[33] the issue of preservation of confidentiality in mediation process. Due to the above-

27 Executive Order № 12988, Civil Justice Reform, see <http://www.gpo.gov/fdsys/pkg/FR-1996-02-07/pdf/-96-2755.pdf>, [24/12/2014].

28 *Spencer D., Brogan M.,* Mediation Law and Practice, Cambridge University Press, New York, 2006, 29.

29 Dispute Resolution Act, see <http://www.adr.gov/ADR%20ACT%201998.pdf>, [24/12/2014].

30 *Spencer D., Brogan M.,* Mediation Law and Practice, Cambridge University Press, New York, 2006, 29.

31 *Spencer D., Brogan M.,* Mediation Law and Practice, Cambridge University Press, New York, 2006, 30.

32 *Bhatia K.V., Candlin N.C., Gotti M.,* The Discourses of Dispute Resolution, Peter Lang, Bern, 2010, 232.

33 Explanatory Note on why the states shall Uniform Act, see <http://uniformlaws.org/Narrative.-aspx?title=Why%20States%20Should%20Adopt%20UMA>, [24/12/2014].

mentioned reason, National Conference of Commissioners on Uniform State Law[34] developed "Uniform Mediation Act"[35] in August 2001. Considering, that scattered nature of regulatory norms in different legal acts was complicating the process of mediation, the purpose of adoption of Uniform Act was establishment of uniform, clear and comprehensive legislation on privilege of participants of mediation process[36] and preservation of confidentiality.

It shall be mentioned that modification were introduced in Uniform Act in 2003, the main purpose of which was harmonization with the Model Law on "International Trade Transactions" adopted by UN International Trade Law Commission in 2002.[37] As it is extremely for proper direction of mediation process to enable the parties speak openly, the main concern of the Uniform Act was preservation of confidentiality of the communication during the process. Besides, for the purpose of preservation of the right of autonomy of the parties, the act provides possibility to the parties to mediation to have other agreement on privilege, as well as confidentiality issues. Uniform legislation was developed by the National Commission in cooperation with the Section of Alternative Dispute Resolution of the Bar Association. In addition to confidentiality of the process, the mentioned Act establishes the rules of privilege (of freedom from giving evidence) for the involved persons. "Uniform Mediation Act" establishes minimum standard in regard to confidentiality; for this reason the Supreme Court of California State rejected it and established higher standard. In particular, instead of broad definition of condifentiality, which also includes the use of evidences, created in the process of mediation, the authors of the "Uniform Mediation Act" preferred to grant the authority of prohibition of use of evidences to the parties, and in certain cases, to mediator. Court will acknowledge and accept such kind of evidences only if the parties agree and voluntarily refuse to preserve confidentiality of evidences, created in mediation process and limitation of their use in other legal processes. In the opinion of the authors of the Unified Act, the privilege of preservation of evidence does not exclude the possibility to analyze the agreement. On the contrary, it helps the courts to determine balance between procedural requirements of mediation and norms of material law.[38] Consequently, in the process of formation of mediation program, the Unified Mediation Act entrusted the development of resolution of specific problems to the courts. In particular, the courts of the states will decide themselves whether or not to introduce mandatory mediation throughout the state, develop mediators' standards of conduct (if yes, what kind of standards) and what minimum standard will be satisfied by the person to get the mediator's accreditation in judicial mediation programs. The "Unified Mediation Act" does not deny that alternative dispute resolution means shall be accommodated within the frameworks, determined by legislation; but it tries to facilitate regulation of disputes according to the rules, agreed by the parties in advance, observance of integrity of

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34 National Conference of Commissioners on Uniform State Law, see <http://uniformlaws.org/Act.aspx?title=Mediation%20Act>, [24/12/2014].

35 Uniform Mediation Act, see <http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf>, [11/05/2013].

36 What the privilege of mediator implies, see $43,

37 See information, <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act>, [11/05/2013].

38 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1287.

the process, public awareness and homogeneity of legislation.[39] It shall be mentioned that the states use Uniform Mediation Act only in regard to judicial mediation. Besides, in relation to participation in mediation process, the Act provides for elective mechanism.

According to "Uniform Mediation Act", the state, in addition to other issues, shall determine how broadly privilege is spread to the information, obtained in mediation process on its territory, based on its own practice. If the parties, involved in mediation and the mediator express the desire to protect the communication among them with privilege, "Uniform Mediation Act" applies equally to all of them. Negotiation process shall, in any case, be protected by privilege, but other documents and privileges, used by the parties in mediation process, are not apriori protected by privilege. Privilege of mediation may not be used, if the mentioned information facilitates committing or concealing of criminal offence.[40]

The Article 6 of the Act reflect how the authors of the "Uniform Mediation Act" managed to observe the balance between the public interest, inherent to the transparency of dispute resolution mechanisms and the purpose of ensuring of confidentiality of mediation process, underlying granting of privilege to mediators.[41] The institution of privilege in mediation process is powerless, when the parties come to an agreement or local statutes demand to disclose the evidences, created and presented in the course of mediation process, or when mediation process is held publicly. Besides, the communication, held in the process of mediation, is not covered by the privilege either in the case when it comes to violation of professional ethics by the mediator or defense of child or adolescent. The Article 7 of the Act prevents mediators from submitting any report, statement, recommendation or assessment to the authorities (or persons), which/who can decide the outcome of the dispute. If a statute, as an exclusion, doesn't oblige the mediator to reject it own privilege, any type of information exchange between the mediator and dispute resolving authority (court, arbitrage, etc.) shall be limited by issuing information only o conducting, completing of mediation between the disputing parties om disputable issues, participation of parties in it and achievement of resolution.[42] Besides, in accordance with the "Uniform Mediation Act", sanction against dishonest participation of a party in mediation process may be applied only in one case – failure to appear on mediation process without prior notification.[43]

For the purpose of preservation of confidentiality and other privileges of mediation process, the "Uniform Mediation Act" is based on the blend of rules, established by the law and private agreements. Consequently, the parties can, beyond the limit, established by normative rules, provide for additional mechanisms of preservation of confidentiality by the agreement. It is explained in the comments to the

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39 Prefatory Note Introduction, <http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf>, [11/05/2013].

40 Uniform Mediation Act, Reporter's Note Senction 5(c), see <http://www.uniformlaws.org/shared/docs/-mediation/uma_final_03.pdf>, [11/05/2013].

41 Uniform Mediation Act, comments to the Article 4, see <http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf>, [11/05/2013].

42 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1290.

43 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1290.

Act why the authors preferred such dynamics of regulation.[44] Thus, they expressed their respect towards local rues of courts, which are the main support of mediation process. Meanwhile, the regulated the mentioned issue in details, so that the courts could not establish new limitations on the basis of explanation of the legislation. Therefore, the Article 8 of the Uniform Act, on the one hand, allows the courts to provide definition of confidentiality within the framework of their own statutes and agreement of the parties, and, on the other hand, does not support establishment of exceptional cases from it even in the cases when its purpose is improvement of obviously unfair mediation agreement.[45]

Judicial mediation programs in the USA are not regulated by the Uniform act in all states. By mediation statutes, federal and state legislation, the courts are authorized to develop the scheme of introduction and development of mediation institution. Furthermore, only 12 states have adopted the Uniform Mediation Act.[46] For example, it is not adopted in New York State yet, and, consequently, in accordance with the rules of "negotiation without damage", traditional for Anglo-American law,[47] the judges themselves resolve the issue of admission of evidences, created in the course of mediation process, to the court hearing. As a rule, the legislation of the state is preferred, if its norms on preservation of confidentiality and dishonest participation in mediation process contradict the federal legislation, but it shall be mentioned that the state courts are mostly guided by the Uniform Mediation Act in preservation of confidentiality of the process.[48]

3.2 Regulation of Mediation in the State of California

Implementation of the ideas of *Frank Sanders* was first started by the courts of California for the purpose of offering of the most favorable mechanism of dispute management to the disputing parties in each specific case – were it court hearing of the dispute, mediation, or other form of dispute regulation.[49] Mediation program in San Mateo (state of California) first instance court of the state was introduced step by step. In partisular, on the first stage, pilot program was developed in cooperation with the local (county) representation of the Bar Association and Peninsula Alternative Conflict Resolution Center,[50] according to which a judge could appoint informational meeting between the representative of Mediation Center and the parties on civil legal disputes. The purpose of the mentioned meeting was provision of informarion to the parties on advantages and disadvantages of alternative means of dispute resolution, on

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44 The Article 8 of the Uniform Mediation Act and comments, see <http://www.uniformlaws.org/shared/-docs/mediation/uma_final_03.pdf>, [11/05/2013].

45 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1290.

46 In regard to the above mentioned, see <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=-Mediation%20Act>, [03/09/2015].

47 Without-Prejudice Negotiation.

48 *Hopt J. K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1255.

49 *Martinez J., Purcell S., Shaked-Gvili H., Mehta M.,* Dispute System Design: a Comparative Study of India, Israel and California, Cardozo Journal of Conflict Resolution, Vol.14, Issue 3, 2013, 811.

50 Peninsula Conflict Resolution Center, see <http://www.pcrcweb.org/>, [11/02/2014].

which the informed parties themselves made decision to agree or refuse to participate in mediation proces. Consequently, if judge considered it necessary, the parties were obliged ti participate in informational meeting, for consent was required for arrangement of mediation process. Thus, on the first stage, voluntary model of mediation was introduced in San Mateo State Court. The parties, who agreed to participate in mediation program, were allowed to select the mediator thermselves oraask the program administrator for help in selection of one of the mediators from the list.[51]

In the case of participation in the above- mentioned mediation program of the first instance court of *San Mateo,* the parties equally shared mediator's fee and othe expenses of mediation process. If the parties were able to prove the necessity of financial assistance, the Court cfould forward them to pro-bono mediator.[52]

As a result of successful implementation of pilot program of alternative means of dispute resolution in *San Mateo*, the cases of use of alternative means of dispute resolution increased throughout California State.[53] In particular, the institutions of case assessment by neutral person[54] and judicial arbitrage[55] were added to the program of alternative means of dispute resolution, and the mediation program was extended towards minors and domestic law.[56]

From practical viewpoint, important step for further development of judicial mediation in California State[57] was adoption of the Articles 1775 and 1775.2 of the Civil Procedural Code of California[58], granting the authority of introduction of mediation program in judicial system to district courts, and Rule 3.891 of "California Rules of Court"[59] it was accurately specified, that based on the court decision, suit could be mandatorily forwarded to Mediation Center if the value of the subject of dispute does not exceed 50000 USD, however, in such cases the court decision should be based on the views, expressed by the parties and the case should be suitable for mediation. If, in the process of legal proceedings the parties conclude mediation agreement disregarding the size of the subject of mediation, judge is obliged to pass any case to the Mediation Center. In practice, alternative mechanisms of dispute resolution are more often used during pre-trail preparation procedures, as specified in California Rules of

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51 *Martinez J., Purcell S., Shaked-Gvili H., Mehta M.,* Dispute System Design: a Comparative Study of India, Israel and California, Cardozo Journal of Conflict Resolution, Vol.14, Issue 3, 2013, 812.

52 *Martinez J., Purcell S., Shaked-Gvili H., Mehta M.,* Dispute System Design: a Comparative Study of India, Israel and California, Cardozo Journal of Conflict Resolution, Vol.14, Issue 3, 2013, 812.

53 In the process of development of alternative mechanisms of dispute resolution, the officials of judicial sphere in California refused to abolish the program of Public Justice Program. Mediation process for smalldisputes in California State are still arranged by public organizations (including religious organizations), getting partial funding from Federal Government.

54 Neutral Evaluation.

55 Judicial Arbitration.

56 *Martinez J., Purcell S., Shaked-Gvili H., Mehta M.,* Dispute System Design: a Comparative Study of India, Israel and California, Cardozo Journal of Conflict Resolution, Vol.14, Issue 3, 2013, 812.

57 Court Annexed Mediation.

58 California Code of Civil Procedure, see <http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=ccp>, [11/05/2013].

59 California Rules of Court, see <http://www.courts.ca.gov/rules.htm>, [11/05/2013].

Court.[60] According to the policy, developed by *Sacramento* District Court,[61] "honest attempt of resolution of civil legal cases with reconciliation makes significant contribution in administration of justice, so it shall be made".[62] In 120 days after submission of suit on civil legal cases, electronic case management system sends to the parties the notification on the appointed meeting. When appearing to the meeting, the parties should bring their application on conflict resolution by alternative dispute resolution means,[63] where the disputable issues and possible ways of resolution, based on the views of the party, shall be specified. In the case of requesting of mediation, mediation process is appointed, by participation in which the parties avoid participation in *Sacramento* judicial reconciliation program, which is mandatory for the parties even if they don't have desire to participate in it, however, in this case, direct participation in mediation process becomes mandatory for the parties.

The following rule was developed for the purpose of encouraging the use of mediation by the first instance courts: according to the Rule 12.23(a)(2) of the "Local Rules of Sacramento", during the mediation process, appointed by the court, mediator can demand remuneration for the mediation process for the first three hours in the amount of maximum 200 USD, which will be paid by the court. If the parties decide to continue the mediation process longer than 2 hours, they will have to pay the fee to the mediator for additional hours personally, the amount of which will be determined by the mediator himself. The mentioned rule, on the one hand, makes the mediation process faster, and, on the other hand, allows the parties to try mediation without any financial losses.

Besides, *Sacramento* Court offers the clients to conduct balancing test, the purpose of which is to help the parties to make proper choice between judicial mediation and private institute- provider of alternative means of dispute resolution. As each of them has its advantages and disadvantages,[64] one may be more efficient than the other in each specific case. Consequently, this initiative is one more attempt to make the parties undertake responsibility for their dispute and determine which forum is more suitable for resolution of the problem faced by them.

According to the norm №3.894(a) (1) of the "California Rules of Court", the parties and their representatives shall participate in mediation process, if there is no reasonable excuse, however, parties

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60 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013,1258.

61 Sacramento Country Supreme Court, see <http://saccourt.ca.gov./local-rules/docs/chapter-04.pdf>, [11/05/-2013].

62 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1258.

63 Regarding mediation application see California Rules of Court, Rule # 3.894(b)(2), California Rules of Court, <http://www.courts.ca.gov/documents/title_3.pdf>, [25/12/2014].

64 Dispute Resolution Programs of the courts of California allows court clients to choose not only the best mechanism for resolution of their disagreement out of alternative means (arbitrage, early dispute assessment by neutral person, mediation, etc.) but also enables to chose participation in one of the two programs, either court mediation program, where relatively less famous and recognized mediators are involved, or private mediation organization, where, as a rule, mediators with higher authority abd recognition are involved. From the viewpoint of professionalism, the mediators of private companies may stand on higher level, but, as a rule, their services are much more expensive; besidesm court doesn't approve the reconciliation, reached with private mediator; consequently, execution sheet is not issued, in the case of need of such.

have the right to terminate mediation at any time. Regarding the case: "*Woodside Homes of California v. The Superior Court of Riverside*",[65] the Appeal Court explained that if mediation process is unacceptable for the parties, the mediation agreement can be abolished.[66] In particular, when participation in mediation process is unacceptable for any party to family dispute, judge has to consider the right of rejection of mediation.[67]

Different judicial circles and instance courts within judicial system of California State[68] had different approaches and rules related to judicial mediation process, however, the factors, which generally conditioned successful introduction and development of mediation, were:[69]

- Starting with pilot program and consistent introduction of the institution of mandatory mediation in the most demanded spheres;
- Public awareness raising regarding mediation and financial encouragement of the parties, participating in mediation program;
- Employment of staff with high professional skills, able to establish contacts and cooperation with the persons and organizations, interested in mediation;
- Participation of all stakeholders in development of mediation program;
- Involvement of important role players in judicial sphere – banks, insurance companies and governmental departments in judicial reform process and consideration of their remarks;
- Ensuring and control of high quality of mediators' training and certification issue;
- Annual and quarterly analysis of the achieved results on the basis of reports, assessments and statements of the persons, participating and involved in the process.

3.3 Regulation of Mediation in Florida State

For the formation of mediation institution, the legislators of Florida State applied the same legal regulation techniques, as the legislator of California State.[70] In particular, mediation statute is extended in civil procedural rules, published by the Supreme Court of the State and local courts. Unlike the other states, homogeneity of programs of alternative means is characteristic for mediation institution on Florida State. The above mentioned circumstance was conditioned, on the one hand, by the decision of the Supreme Court of Florida State,[71] which requires equal accessibility of justice, including alternative

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65 *Woodside Homes of California v. The Superior Court of Riverside, 107 Cal. APP. 4th Dist., 2003. 723, 731.*

66 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1259.

67 *Woodside Homes of California v. The Superior Court of Riverside, 107 Cal. APP. 4th Dist., 2003. 723, 731.*

68 See <http://www.courts.ca.gov/>, [25/12/2014].

69 *Martinez J., Purcell S., Shaked-Gvili H., Mehta M.,* Dispute System Design: a Comparative Study of India, Israel and California, Cardozo Journal of Conflict Resolution, Vol.14, Issue 3, 2013, 825.

70 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1262.

71 Supreme Court of Florida, № SC 00-429, 31 August 2000, see <http://www.flcourts.org.gen_public/-funding/bin/tcbc/admin%20orders/AOSC00-429AuthorityEstabishTcbc.pdf>, [04/01/2015].

mechanisms of dispute resolution, for all citizens, and, on the other hand, by significant reduction of court budget during financial crisis.

The peculiarity of Florida State is that it was institutionalized without consideration of informal nature if mediation. In particular, according to the Section 44.201 of "Florida Statute",[72] the chairpersons of the courts are authorized to create "Citizens' Dispute Resolution Centers". The mentioned centers have councils, in the composition of which are the representatives of local-level law enforcement authorities, including Chief Prosecutor, Chief of Police, Judge, county representative.[73] The mentioned commission establishes operational rules of the center. For the funding of the center, the commission obtains funding from the public as well as private sectors.[74] Participation in mediation process, organized on the basis of "Citizens' Dispute Resolution Centers" is free, and mediation process – informal. Mediator cannot use any sanction or fine in regard to the parties.[75] Citizens often apply to the mentioned Center before submitting suit to the court. Mostly, the parties participate in mediation process without lawyers. Citizens do not pay fee for mediation process, and average duration of mediation process does not exceed two hours.[76] Unlike the rules of California State, Florida statutes instruct judges when to use discretion on passing the case to mediation.[77] If the dispute relates to the compensation of financial damage, even in the case of petition of one party, the case shall be passed for mediation immediately. The mentioned rule does not apply to the disputes, arising on the basis of leasing contract, loan contract and improper treatment.[78] Besides, the party, requesting application for mediation, shall be willing and able to pay mediation process fee or the other party shall agree to share the cost. According to the Rule 1.1710 (a) of Florida Rules of Civil Procedure,[79] mediation process shall be completed in 45 days from the date of the first session. Extension is admissible on the basis of the court's permission, or, is both parties application to the mediator with similar request. Mediation process ends with achievement of partial or final agreement. The agreement is made in written and is passed to the court. If it is provided by the rules of the local court, in the case of failure to achieve agreement, mediator orally informs the court about unsuccessful completion of mediation process without any assessment or recommendations regarding the case.[80] The party, if notification has been properly handed to it, is obliged to appear on

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72 Florida Statutes section 44.201, see <http://www.flsenate.gov/Laws/Statutes/2012/44.201>, [04/01/2015].

73 Florida Statutes section 44.201(1), see <http://www.flsenate.gov/Laws/Statutes/2012/44.201>, [04/01/2015].

74 Florida Statutes section 44.201(2)(c), see <http://www.flsenate.gov/Laws/Statutes/2012/44.201>, [04/01/2015].

75 Florida Statutes section 44.201(4) (a), see <http://www.flsenate.gov/Laws/Statutes/2012/44.201>, [04/01/-2015].

76 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1263.

77 Florida Statutes Section 44. 102, see <http://www.flsenate.gov/Laws/Statutes/2013/44.102>, [04/01/2015].

78 Florida Statutes Section 44. 102 (2), see <http://www.flsenate.gov/Laws/Statutes/2013/44.102>, [04/01/-2015].

79 Florida Rules of Civil Procedure, Rule 1.710 (a), see <http://www.floridabar.org/TFB/TFBResources.-nsf/0/10c69df6ff15185085256b29004bf823/$FILE/Civil.-pdf>, [04/01/2015].

80 Florida Rules of Civil Procedure, Rule 1.730 (a), see <http://www.floridabar.org/TFB/TFBResources.nsf/-0/10c69df6ff15185085256b29004bf823/$FILE/Civil.-pdf>, [04/01/2015].

mediation process. In the case of violation of the mentioned requirement for unreasonable excuse, it can be fined by the court,[81] however, the party can refuse to participate in mediation process, if:

- Mediation or arbitrage process has already been held between the parties in regard to the mentioned issue;
- The issue of legal explanation between the parties is disputable;
- There is some proper reason for it.

The reason of consideration of the mentioned exclusions in the case of mandatory mediation is preservation of the principles of autonomous nature of the will of the parties and independent decision making by the parties.[82], [83] Besides, the incentives, developed for the purpose of application for certain mediation, provided by #44.108 "Florida Statute" also deserve attention, which, considering economic abilities of the disputing party and financial value of the subject of dispute, offers different models of funding of mediation process.[84] According to the Rule 12.740(b) of "Florida Family Law Procedural Rules",[85] any family dispute can be passed for mediation. Consequently, family mediation programs are introduced in all Florida courts.

The ruled of mediator's remuneration in Florida is determined on the basis of annual income of the parties. Besides, if annual income of both parties exceed 100 000 USD, the court refers the parties to private mediators, costs of which are not paid from budget allocations.[86] If a judge issues mediation resolution, the parties can select any (private) mediator by themselves during 10 days. If the parties fail to come to an agreement related to mediator during 10 days, the judge will choose it from the list of certified judges.[87] In any case, concluding of the written agreement is mandatory between the parties and the mediator, which will determine the rule and conditions of mediator's remuneration. If the parties and mediator fail to agree on mediator's fee, the judge will determine the rule of hourly remuneration of the mediator.[88]

According to Florida legislation, mediation process can be appointed prior to appeal consideration of the case in Appeal Court, during idle - waiting period of the case. Besides, if the judge of the Appeal Court considers, that passing of the case for mediation is necessary, the parties shall be obliged to obey his/her decision, however, on the other hand, mediation process doesn't hinder the progress of legal proceedings.

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81 Florida Rules of Civil Procedure, Rule 1.720 (b), see http://www.floridabar.org/TFB/TFB Resources.nsf/0/10c69df6ff15185085256b29004bf823/$FILE/Civil.pdf>, [04/01/2015].

82 Eng. Party Self - Determination.

83 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1263.

84 Florida Statutes Section 44. 108 see <http://www.flsenate.gov/Laws/Statutes/2011/44.108>, [04/01/2015].

85 Florida Family Law Rules of Procedure, see <http://www.floridabar.org/TFB/TFBResources.nsf/0/ 416879-C4A88CBF0485256B29004BFAF8/$FILE/311%20Family%20Law.pdf?OpenElement>, [04/01/2015].

86 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1264.

87 Rule 1.720(f)(1), Florida Rules of Civil Procedure, see <http://www.floridabar.org/TFB/TFBResources.-nsf/0/10c69df6ff15185085256b29004bf823/$FILE/Civil.-pdf>, [03/01/2015].

88 Rule 1.720(g), Florida Rules of Civil Procedure, see <http://www.floridabar.org/TFB/TFBResources.nsf/-0/10c69df6ff15185085256b29004bf823/$FILE/Civil.-pdf>, [03/01/2015].

For the purpose of simplification of making similar decision by judges, appeal courts developed special questionnaire related to the factual circumstances of the case, which shall be filled in by the parties. The rule of selection and remuneration of mediator in this case is the same as in the first instance court. Beside, each certified mediator is obliged to conduct two mediation processes – pro bono – during the year,[89] which enables judges, with consideration of financial abilities of the parties, to exempt them from payment of mediator's fees and pass the case the mediator, as pro bono.

Following the above stated, the rules of federal, state and local courts of civil procedural law altogether create significant encouraging mechanism for discharging courts from the cases, waiting for hearing.

4. The Specificity of Regulation of the Basic Issues

4.1 The Notion of Mediation

"Federal Alternative Dispute Resolution Act" grants power to federal courts to establish alternative mechanisms of dispute resolution (including mediation), but the Act itself does not define the process of mediation.[90] Instead, all states of the USA[91] have their own rules for mediation process, where, certainly, the notion of mediation is defined in different ways. American Bar Association and Arbiters' Association define mediation as the "process, during which mediator facilitates conducting of communication and negotiations between the parties to help them in reaching voluntary agreement on disputable issue",[92] and Model Standards of Conduct for Mediators[93] describes it as the "process, during which independent third party facilitates, communication, negotiation and voluntary decision making by the involved parties". These definitions cannot be regarded as exhaustive definitions of the term "mediation in the USA, as different forms of mediation also exist in practice.

"California Code of Civil Law" defines mediation as the "process, where neutral person (or persons) facilitates communication between the disputing parties, so that they reach an agreement, acceptable for the both parties."[94] Legislative acts of Texas and Florida define mediation the same way. "Texas Civil Practice and Remedies Act"[95] draws additional attention to the fact, that mediator does not

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89 *Hopt J. K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1264.

90 Section 651 (a) Federal Alternative Dispute Resolution Act, see <http://www.epa.gov/adr/adra_1998.pdf >, [12/12/2014].

91 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013,1250.

92 *Ingen-Housz A.,* ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011, 423.

93 Model Standards of Conduct for Mediators, 2005, see <https://adr.org/aaa/ShowPDF?doc=ADRSTG-_010409>, [02/01/2015].

94 Section 1775(1), The California Code of Civil Procedure, see <http://www.leginfo.ca.gov/.html/ccp_table_of_contents.html>, [03/01/2015].

95 Section 154.023, Texas Civil Practice and Remedies Code, see <http://law.justia.com/codes/texas/-2005/cp.html>, [02/01/2015].

extend his decision to the parties, and Florida Statutes stresses focusing on new reconciliation variants by mediator;[96] and, finally, according to the "Uniform Mediation Act",[97] mediation "is the process, where mediator facilitates conducting of communication and negotiations between the parties in order to help them reach voluntary reconciliation in regard to the dispute."[98]

In spite of absence of uniform definition of the notion of mediation in the States, almost all acts, defining this process in the USA, stress the role of mediator, confidentiality of the process, importance of communication, negotiations and voluntary decision-making by the parties.

The purpose of drawing attention to strategic communication and negotiation, is demonstration of difference of conducting mediation process from conducting court and arbitrage processes (competitiveness, decision-making by the third person, etc.). Besides, the comments to the "Uniform Mediation Act" clarify that "facilitation of reconciliation" mentioned in the definition of the notion of mediation doesn't imply mediator's "facilitating" style,[99] as it was well known to its authors, that several styles of mediation was established in practice. Facilitating mediation style (fitted to the interests of the parties) is still dominating, although nobody knows how it changes in the future. In spite of the fact, that judicial mediation is quite institutionalized, the term "mediation" and "mediator" is still in the process of formation in the USA.

4.2 Confidentiality of Process

Preservation of confidentiality in mediation process was regarded as very important in the USA since the beginning. As the importance of existence of trust between the mediator and the parties was properly understood. Consequently, for the purpose of maximum preservation of confidentiality, evidences, created and submitted in the process of mediation[100], according to the federal and states' statutes, as a rule were protected from publicity, inter alia, from their use during legal proceedings.

In the "Uniform Mediation Act" we read that free information exchange and openness of data will be achieved in the case, if the parties know that the information, disclosed by them, will not be used during court hearing against them. Thus, we can suppose that creation of guarantees of preservation of confidentiality is directly linked to conducting of full-value mediation process and its successful completion. Just for this reason, as a rule, it is implied that mediation process, disregarding the place where it is conducted, is confidential. The Article 8 of the Unified Mediation Act states that unless otherwise stipulated, mediation process is confidential on the basis of agreement of the parties or legislation of the state. Consequently, the parties choose regulation of conflict by means of mediation for its confidential nature. The party to mediation has the expectation that everything, disclosed during mediation process, will remain confidential; however, the above mentioned often forms the basis for misunderstanding; due

96 Chapter 44 Florida Statutes, see <http://law.onecle.com/florida/judicial-branch/44.1011.html>, [02/01/2015].
97 By 2012, 10 states had adopted Uniform Mediation Act.
98 Uniform Mediation Act, Section 2(1), see <http://www.mediate.com/articles/umafinalstyled.cfm>, [02/01/-2015].
99 See <http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf>, [02/01/2015].
100 See <http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf>, [02/01/2015].

to this circumstance, "California Evidence Code" regulates the topic of issuance of the information, disclosed in the process of mediation - privilege, in details. Namely, according to the Article 1121 of the Act,[101] the mediator, as well as any other person, cannot provide information to the court or any other authority, considering the case, and, in their turn, the court or any other authority, considering the case cannot review any report, assessment, recommendation or observation, made by the mediator in mediation process, with the exception of the requirement of informing the judge on achievement of reconciliation on dispute or other ending of the case, defined by official rules of the court.

The mentioned limitation is valid, if the parties do not specifically agree on the right of its disclosure.[102] For ensuring of preservation confidentiality of evidences, submitted in mediation process, their reflection in reconciliation act or mediation meeting protocol is a good protecting mechanism.[103] For this reason, the parties, for the purpose of creation of additional guarantees, often conclude separate agreement on confidentiality of mediation, by which they regulate information protection and disclosure conditions in details.

It shall be mentioned that the attitude of legislators of different states towards information, subject to preservation of confidentiality, and exclusions, is not homogeneous.[104] Washington mediation program, in regard to the values, established by the Uniform Mediation Act, gives preference to the obligations, determined by the parties through the agreement, and several states choose the way, established by California State and does not regard the information, disclosed during mediation process, as an evidence on court hearing. As we can see, from the viewpoint of regulation policy, the legislator of the state has to determine whether it gives the right to the courts to share the evidences, obtained by the parties as a result of mediation process. Iowa, Wyoming and Oregon States codified the exclusions from the obligation of preservation of confidentiality. They admitted the right of publication on court hearing of the evidences, which help the court in definition of the reconciliation act, adopted in mediation process.[105] Legislation of Wisconsin gives the court of holding closed, private (*in camera*) meetings in the case, if preservation of confidentiality of the information, disclosed during mediation process is obvious illegality.[106] And according to Louisiana rules, it is possible for the mediator to give testimony on the case, if it will make it possible to avoid injustice and fraud, established by reconciliation act, adopted during mediation process. It shall also be mentioned that the courts of Ohio and other states require honest participation in mediation process from the parties, but in the case of examination of me-

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101 Sanction 1121 (mediator's Reports and Finding) California Evidence Code, see <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=01001-02000&file=1115-1128>, [03/01/2015].

102 Section 1118, California Evidence Code, see <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=01001-02000&file=1115-1128>, [03/01/2015].

103 Section 1123, California Evidence Code, see <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=01001-02000&file=1115-1128>, [03/01/2015].

104 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford Univerisity Press, Oxford, 2013, 1286.

105 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1287.

106 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1287.

diation process, the courts don't have the authority to assess, how much the issue of honest participation was observed. Consequently, when regulating the issue of preservation of confidentiality, the courts and legislators mostly try to strike the happy medium between the two important principles of mediation process - preservation of confidentiality and honest participation in the process, which is not easy.

4.3 The Mediator's Privilege

Following the importance of preservation of the information, disclosed during mediation process, mediator in the USA enjoys the institution of "privilege, characteristic for Anglo-Saxon law, which gives him the power to refuse to testify on the information, disclosed to him during mediation process and enjoy other benefits, granted by the privilege between the client and the mediator. The mentioned principle works in 41 states, and in other state, the legislation relieves mediators of the obligation of testifying in the court.[107] The Uniform Mediation Act clearly regulates the privilege of mediation. The Articles 4, 5 and 6 refer to the most complex aspect of mediation – mediation privilege, determined its limits and exclusions. Any verbal and written evidence, created on the preparatory stage of mediation process, during the process itself and after its completion, has privilege. Consequently, it cannot be disclosed, used as evidence in the court, unless there is an exceptional case.[108] It is mentioned in the Preamble to the Act that the mediator's privilege is the most reliable way for achieving the goals of the process.[109]

Judicial practice created the rules of confidentiality and evidentiary privileges based on the institution of privilege of preservation of information, characteristic for judicial system.[110] Fierce dispute was held in California on the limits of coverage of preservation of confidentiality and, consequently, the issue of evidentiary privilege.[111] Regulatory norms for mediation privilege are particularly stringent in California State,[112] namely, according to California Evidence Code",[113] it is forbidden to disclose the evidence related to any verbal or written communication, created during the mediation process. The mentioned restriction applies to civil as well as administrative legal proceedings (including administrative authority proceedings); the only exclusion is criminal proceedings.

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107 *Rogers H.N., McEwen A.C.,* Mediation: Law, Policy, Practice, The Lawyers Co-operative Publishing Company, Rochester, 1989, 145.

108 *Ingen-Housz A.,* ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011, 192.

109 *Ingen-Housz A.,* ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011,192.

110 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford Univeristy Press, Oxford, 2013,1282.

111 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford Univeristy Press, Oxford, 2013, 1282.

112 *Ingen-Housz A.,* ADR in Business: Practice and Issues Across Countries and Cultures, Vol. II, Kluwer Law International, Alphen aan den Rijn, 2011, 192.

113 California Evidence Code, Section 1119, see <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=01001-02000&file=1115-1128>, [03/01/2015].

In the case "Olan v. Congress Mortgage Company",[114] North California County Court made exclusion from the rules of preservation of mediation evidences after one of the parties, after pressure on it during mediation process, submitted a claim to the court. After analyzing the legislation related to preservation of confidentiality, the court arrived to the conclusion that the mediator had to testify on private (in camera) court meeting. Similar problems arise in other courts as well; due to this circumstance, the Supreme Court of California State, in the case "Foxgate Homeowners' Association v. Bramela California, Inc.",[115] did not agree to the opinion that the mentioned precedent, for the purpose of honest, open information exchange and from the viewpoint of preservation of confidentiality of mediation process, was causing disappointment. On the contrary, in the opinion of the Supreme Court, admission of legally justified exclusion from the rules of evidential privilege is justified, if accurate observation of statutes will lead to inadequate outcomes.[116] Summarizing the general practice, it is obvious that the Supreme Court of California State makes exclusion from preservation of confidentiality of mediation process only in the cases, where the right of proper legal proceedings is fundamentally violated.[117]

Preservation of confidentiality and privilege of the parties to mediation are conditioned by one and the same motive and serve one and the same purpose. At certain extent, they are the rights, following from each other. The difference between confidentiality and privilege is that confidentiality obliged the mediator and the parties not to disclose the information, obtained during the mediation process, outside the mediation process, not to make the information available to the third persons, and privilege releases the mediator and the parties from the obligation of testifying in regard to the mediation process, in the court (or any other institution) on the next stages of progress of the process.

The existing rules of alternative mechanisms of dispute resolution in the USA, like the rules of preservation of evidences, of course, have critics. In particular, in the case of existing of legal interest, it is vague how much the rights of the party are preserved in using the evidences, disclosed in mediation process. The right of the privilege of refusal to testify requires gentle approach in order to avoid violation of fairness, on the one hand, and violation of the rights of the parties to mediation. Thus, it is necessary to find proper balance between the needs of justice and the need of preservation of confidentiality, required for the parties and the institution of mediation.

4.4 Mediator's Professional Duties

The person, willing to be a mediator in California State, shall undergo 25 hr theoretical and practical training and sign the Mediator's Code of Ethics, which also provides for consideration of minimum one pro bono case per year. For the purpose of facilitation of peaceful conflict resolution,

114 *Olan v. Congres Moratgage Company, 68 FS 2d 1110,1122 et seq. (N.D. Cal.,1999).*

115 *Foxgate Homeowners' Association v. Bramela California, Inc.,* 92 Cal. Rptr. 2d 916, 926 et seq. (Cal.,App 2nd Dist., 2000).

116 *Foxgate Homeowners' Association v. Bramela California, Inc.,* 108 Cal. Rptr. 2d 642, 654 et seq. (Cal., 2001).

117 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1286.

California courts, local Bar Association and alternative resolution organizations jointly developed the list of mediators, from which the parties can select mediators in the case of judicial mediation.[118] The court undertakes responsibility for continuous education and qualification of the mediators, entered into the mentioned list. Besides, the court periodically carries out assessment of mediators, inter alia, in regard to preservation of confidentiality of the persons, participating in the process. Attention is also paid to the indicator of successful completion of mediation processes, conducted by the mediator.[119]

Besides, in the case of the conflict of interests, mediator is obliged to refuse to participate in the case, and if the mediator does not use self-disqualification, the court is also authorized to withdraw the mediator from the case on the request of the parties.[120] Besides, it shall be mentioned, that on the case "*Texas Parks and Wildlife Department vs Davis*"[121] the Court ruled that Texas courts and mediators do not have authority to make the party to use any specific negotiation strategy in mediation process. Consequently, it depends on the choice of the parties and not that of mediator – whether the mediation process is conducted using assessment, facilitation or transformation style or not.

5. Specificity of Regulation of Procedural Issues

5.1 Initiation of Mediation

Regulation of legal conflict by alternative means instead of court is facilitated by encouraging or binding norms. Developed by the legislator, as well as the agreement, concluded by the parties on attempt of resolution of dispute through mediation. Consequently, it is important to consider them separately. In England, the "handbooks", issued by the court, oblige lawyers to provide client with consultation on which alternative method of dispute regulation will be the most favorable for him and which is better to apply to in specific case.[122] In the USA, this issue gave rise to different opinions.[123] In particular, professional obligation of informing the client on alternative dispute resolution methods is specified in Model Professional Rules of Conduct of American Bar Association;[124] however, legislators of some states chose to specify this issue additionally in their legislation for bringing more clarity.[125]

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118 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1292.

119 The mentioned researches help courts in perfection of judicial mediation program and improvement of process.

120 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1293.

121 Texas Parks and Wildlife Department v Davis, 988 S.W 2d 370, 375et seq. (Tex. App.-Austin 1999).

122 A Guide to ADR in England and Wales, 5 July 2006, see <http://www.hg.org/articles/article_1336.html.>, [03/01/2014].

123 *Rogers H.N., McEwen A.C.*, Mediation Law, Policy and Practice, Clark Boardman Callaghan, Eagen, 1995, 403.

124 ABA Model Rules of Professional Conduct, see <http://www.americanbar.org/groups/professional_ responsibility/ publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html>, [03/01/2015].

125 *Abramson I.H.,* Mediation Representaion, Second Edition, Oxford University Press, New York, 2011, 124.

For the purpose of facilitation of participation of the parties in mediation process different states chose different ways of regulation, however none of the statutes of any other rules provide for mandatory agreement on the proposed conditions of reconciliation. For example, the parties in California can select mediator themselves on the basis of mutual agreement. If they fail to select the mediator within 15 days, the court will select him according to the standards, determined by High Council of Justice of California State.[126]

While mediation is the pre-condition of holding the court hearing, its procedural significance is even more important in the chain of conflict regulation. Similar pre-condition was introduced by in the majority of the USA states in regard to the disputes, related to family, insurance and immovable property. In addition, similar barrier is created by Florida legislation in regard to the disputes following from improper medical treatment.[127]

According to Californian legislation, applying for mediation is obligatory for family and insurance disputes. In this case, the parties have no choice; in particular, the judge will forward the dispute to Mediation Center after submission of the suit. During participation in mediation, the progress of time bar of legal proceedings is stopped till the end of mediation.[128] It shall be mentioned, that voluntary mediation does not stop the progress of time bar of legal proceedings in California State. The court warrant on forwarding of the dispute for mediation is mandatory for the parties and the parties have no mechanism to appeal it. In the case of mandatory mediation in family cases, the parties are exempt from the fee. Legally, the court warrant on mediation equals to agreement of the parties at certain extent, as both give rise to the obligation of applying to the Mediation Center. Practice shows that judges try to avoid conflict between autonomy of the will of the parties and mandatory mediation, due to which, as a rule, local court rules give priority to the agreements of the parties. Consequently, if the parties refused, in written, to participate in mediation process in advance, even if participation in mediation is the pre-condition of initiation of the court hearing, the court is obliged to obey the will of the parties and initiate court hearing itself.[129] For the category of disputes, which does not occur in the state-funded mediation programs, the parties, as a rule, apply to private mediation centers. Mostly, in practice, the mediation style, the rules of selection of mediator and preservation of confidentiality are determined by mediation reservation; however, mediators with experience in mediation process conclude much more complex and comprehensive mediation agreement, which regulate the duration of consideration as well as the rule of distribution of costs, also the issues of execution of reconciliation. Efficient reservation on alternative dispute resolution is considered to be the one, where the party (or its representative) foresees the

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126 See <http://www.sanmateocourt.org/court_divisions/>, [03/09/2015].

127 According to Florida legislation, necessary pre-condition for applying to the court in regard to the dispute, originating as a result of medical treatment, is reasonable investigation, conducted by the defender of the victim in order to make sure that the case related to the negligence of doctor. After submission of suit by the victim judge shall verify the compliance of the investigation with normative requirements and appoint mandatory mediation meetings, in which the parties are obliged to participate personally. Section 766.104(1) Florida Statutes; see <http://floridamalpractice.com/stat766.104.htm>, [29/12/2014].

128 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1268.

129 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1273.

disputable circumstances, which could follow from the basic agreement,[130] and, consequently, determine the best form and method for dispute regulation. As consensual issues are much easier to be resolved when negotiation on mediation reservation (or agreement) is in progress, than after origination of dispute, it's better to determine the following issues beforehand: how to select (appoint) the mediator; who shall pay the costs related to mediation service; what will follow from application for mediation and the fact of violation of the obligation of preservation of confidentiality.

According to the "Rules of the Supreme Court of Texas"[131], legally valid mediation agreement shall cover the rule of mediator's remuneration and maximum length of duration of mediation process. According to the same Rules, mediation agreement is optimal when the sanction (and its scope) to be used in the case of refusal to fulfill the obligation of application to the mediator by the party in the case of origination of dispute is specified in it. It is disputable how mandatory the mediation agreement is and whether the reservation, made in mediation agreement, deprives the party of application to the court. On the one hand, if the parties do not have the desire to participate in mediation process any more, following the legal nature and the content of the process (achieving voluntary agreement, granting decision-making authority to the parties) it is illogical to force it to apply to mediator. In the case of such forced mediation, it is doubtful that any of the parties participate in it honestly. On the other hand, it, disregarding the agreement, the party will have the possibility to reject mediation, it will violate contractual obligation, which shall involve the relevant responsibility. In the cases of refusal to participate in mediation process, failure to use sanction towards the parties may involve negative reaction instead of encouragement of mediation institution.

As fairness is the "issue of definition", mediation agreements, which require honest participation of the parties in mediation process, were explained by court in different ways. Besides, it is obvious that determination of honest participation requires detailed analysis of mediation sessions, which, as a rule, is difficult for judges. Consequently, the courts pay more attention to the fulfillment of formal procedural criteria.[132]

When developing Californian model of judicial mediation, they tried to keep the balance between the autonomy of the parties and the policy of encouragement of alternative dispute resolution methods, developed by the state, so the courts make decision on forwarding of the case to the Mediation Center only after the parties are given the opportunity to fully express and explain their views.

5.2 Cost and Timelines of Mediation Service

As a rule, the norm, regulating mediation, do not define the cost of mediation program. In the case of absence of such statute, the rules of Civil Procedural Law of the Supreme Court authorize court to

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130 *Goldberg B.S., Sander E.A.F., Rogers H.N., Cole Rudolph S.,* Dispute Resoplution-Negotiation, Mediation, Arbitration and other Processes, Sixth Edition, Wolters Kluwer Law & Business, New York, 2012, 283.

131 Supreme Court of Texas, Ordes Approving Local Rules for the Civil Distric Courts of Bexar County of 21 May 2002, Rule 9 (B), see <http://www.supreme.courts.state.tx.us/MiscDocket/02/02909300.PDF>, [03/01/2015].

132 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1279.

determine it themselves.[133] As a rule, the parties with low income are exempt from the fee. It will be good if such rule applies to conflict regulation using alternative methods of dispute resolution. E.g. according to the "Rules of Minnesota Court",[134] the parties are exempt from court charge if the mediator's fee is 25 USD per hour. Besides, it shall be mentioned that the plaintiff cannot request exemption from the costs of mediation process, if the agreement, concluded between the parties provided for application to private mediation institute in the case of dispute.[135] "National Standard of Judicial Mediation Program"[136] differentiates the process of judicial mediation and "private" mediation. If, in the first case, the costs of mediation process are covered by the state, with few exceptions, in the second case – vice versa – the state supports the parties to mediation process only in exceptional cases (in this case the court tries to enable citizens use pro bono service of mediators).[137] It should be supposed that[138] reduction of budget funding in the USA would immediately affect mediation programs, introduced by courts that, we could say, happened. In particular, in California State, termination of funding of judicial mediation program in district courts led to closure of mediation centers, as they did not turn out to be sustainable and able to exist independently based on their own finds.

Interesting precedent was recorded in the case "*Texas Department of Transportation v. Pirtle"*[139], where the court, due to unfair participation in mediation process, imposed the fee, charged for dispute resolution on one party completely, as it did not appeal the court warrant on participation in mediation process. It appeared on mediation process, but refused to participate in it. According to Florida legislation, the costs, related to mediator, party representative and other process-related costs could be imposed on the party, which does not obey the court warrant and refuses to personally participate in mediation process.[140] According to California legislation, the party, which refuses to participate in family mediation process, may be disallowed to present its own explanations on court hearing. Besides, the lawyer, who intentionally sabotages the process of mandatory mediation, may be subjected to sanctions in accordance with the Code of Processional Ethics of Lawyers.[141] In number of cases, California and Texas courts completely imposed the costs of mediation process on the party, which refused to accept the

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133 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1271.

134 See <http://www.mncourts.gov/SupremeCourt/Court-Rules.aspx>,[03/01/2015].

135 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1271.

136 Center for Dispute Settlement, The Institute of Judicial Administration, National Standards for Court-Connected Meditation Programs, see <http://courtadr.org/files/nationalstandardsADR.pdf>, [03/01/2015].

137 Section 13, Founding of Programs and Compensation of Mediators, see <http://courtadr.org/files/nationalstandardsADR.pdf>, [03/01/2015].

138 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1272.

139 *Texas Department of Transportaion v. Pirtle, 977S.W.2d 657, 658 (Tex. App.-Fort Worth 1998).*

140 Rule 1.720(b) Florida Rules of Civil Procedure. See <http://phonl.com/fl_law/rules/frcp/frcp1720.htm>, [03/01/2015].

141 *Kimberlee K.K.,* On Chaging Role of Models for Attorneys in Mediation, 28S. Tex. L. Rev. 1997, 575.

offered bargain in mediation process, and ultimately the dispute, as considered by the court, had even less favorable outcomes for them.[142]

5.3 Enforcemnt of the Agreement

Upon completion of judicial mediation process, mediator is obliged to report to the judge, engaged in the case hearing, about completion of the case and its outcomes. When the parties fail to achieve full reconciliation on the dispute, the case continues as usual. If the parties completely reconcile, the court advices to sign the Reconciliation Act (Memorandum). We can see different levels of formalization of judicial reconciliation in the US courts. In some states, after notification of the court by the mediator about completion of dispute with reconciliation, the judge issues reconciliation order himself. Likewise, there is no mandatory form for all states for turning the reconciliation act into the act subject to compulsory execution;[143] however, the state's legislation authorizes courts to turn the reconciliation, adopted on mediation process, into the court order subject to compulsory execution. In other cases, the party is given the opportunity, according to the norms of contractual law, to demand fulfillment of the concluded agreement (bargain) from the other party.[144] If the parties applied for mediation after commencement of legal proceedings, the parties can execute the achieved bargain through simplified proceedings as well. With consideration of American practice, the main facilitating motive of execution of bargain is preservation of low cost of alternative dispute resolution means. Besides, according to the Rules of California State Courts, the court endorses the confidential, as well as final reconciliation act, concluded in mediation process. In this case, it takes into account, that the persons, participating in mediation process are binded by the obligation of preservation of confidentiality, and the mediator has no right to testify in regard to the mediation process. For the purpose of efficient execution, the mediation agreement shall clearly express the will of the parties and the terms of bargain. Vague agreement is the primary enemy of mediation we could say, as it contains the risk of continuation of the problem, allegedly timely and efficiently resolved through mediation, its return to the court and further deepening and complication of the conflict, following from the interpretation of the terms of new bargain, in addition to the terms of the main agreement.

6. Conclusion

Mediation was not the first alternative method of dispute resolution, introduced in the Courts of US, however, it gradually obtained leading place amongst other alternatives. Which was caused by optimal fitting of the features, characteristic for mediation, to the interests and needs of the parties.

142 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1279.

143 *Hopt J.K., Steffek F.,* Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013, 1280.

144 *Menkel-Meadow J.C., Love Porter L., Schneider Kupfe A., Sternlight R.J.,* Dispute Resolution: Beyond the Adversarial Model, Aspen Publishers, New York, 2005, 326.

Besides, several historical and legal developments facilitated introduction and development of mediation in the USA. Among them, special attention should be paid to the enthusiasm of judges and other representatives of judicial system and their openness to innovations. The role of the Bar Association in the process of formation of dispute regulation, based not on confrontation and competition, but peaceful and cooperative methods, shall also be mentioned. As a result of the amendments introduced in the Lawyers' Code of Ethics by American Bar Association and number of projects, implemented for the purpose of awareness raising, the paradigm of perception of legal proceedings as the only means of resolution of legal conflicts was soon changed in the USA.

The fact, that the major part of legal conflicts is now resolved by means of mediation, was conditioned by the joint aspiration of lawyers. The opportunity of finding mutually beneficial outcome by themselves and making decision on what would be the best outcome for them and their clients, turned out to be attractive for everyone.

The fact, that the connection of mediation centers and courts in the USA, as well as the definition of mediation and other terms, important for the process vary, is caused, on the one hand, by the peculiarities of legal system, namely the peculiarities of judicial authorities (existence of federal and state courts) in the USA, and, on the other hand, by the existence of governance form – strong local self-governance, the example of which is the "Act of Reformation of Civil Law", adopted by the Congress in 1990, which obliged all local courts to facilitate introduction of mediation, however, it didn't determine the terms and forms; and, most importantly, procedural norms, existing almost in all US states, significantly facilitated development of mediation; namely, these were the following two factors: a) the existence of the rule of covering the expenses, born by the winner party in civil legal disputes, by himself, *inter alia,* the lawyer's fee and the expenses, related to the collection of evidences which shall be mentioned specifically; b) participation of jury in civil legal proceedings, from the viewpoint of complexity and duration of the process. The above mentioned rules, on the one hand, often make winning the legal dispute nominal, and, on the other hand, encourages both parties to try to complete the case with reconciliation.

Application of "soft law" (Unified Act) was one more instrument for homogeneous direction of the process, which was successfully used in the USA for establishment of mediation in majority of states, due to which American legislator managed organic unification of voluntary element of mediation and regulatory legal norms, required for institutional establishment of judicial mediation. Although judicial mediation established itself, through alternative dispute resolution program, in the US system of justice, as an integral part of justice and one of its main supports, termination of support of this institute by the state affected it. In particular, it significantly reflected on the number of the cases, completed by reconciliation by the first instance courts. Besides, in the country of "silicon valley" the interest towards electronic (on-line) dispute resolution means grow every day. Consequently, nowhere but in the USA, they make huge efforts to create the platform for online dispute resolution means (ODR[145]). In parallel, American mediators and private mediation centers work a lot for establishment of the culture of

[145] Engl. Online Dispute Resolution.

mediation globally, as the programs, work meetings and training courses indicate.[146] Thus, it could be stated that the dynamics of development enters new stage in the USA. If earlier the courts had to use mandatory mediation for the purpose of promotion of this institute and formation of the culture of legal dispute resolution through mediation, nowadays mediation centers are sustainable and independently viable institutions, which help the workers of justice in promotion of mediation and formation of the culture of peaceful dispute regulation globally.

146 See <http://www.jamsadr.com/jamsfoundation/xpqGC.aspx?xpST=JAMSFoundation>, or <http://cndr.uchastings.edu/professionals/ii.php>, [25.09.2015].

Goga Kikilashvili*

Purpose as the Criterion for Distinction of Administrative and Civil Contracts

I. Introduction

Contract is one of the most spread forms of relationship between the subjects of the law,[1] which ensures existence of legal relationships between the parties on the basis of freedom of will. Besides civil contracts, there are contracts, which are subject of public legal regulation, but however, with their form and contents, they are very similar to the deals under the civil law. Such contract is an administrative contract.

According to the section one, article 65 of the General Administrative Code of Georgia (hereinafter referred to as GACG),[2] if not otherwise defined by the law, it is possible to establish, change or terminate administrative legal relationship via the conclusion of administrative contract. Administrative body is authorized to regulate the specific administrative legal relationship, authority for regulation of which is its right, via issuing of individual administrative legal act or by means of administrative contract.[3] In this case both, norms of the GACG and Civil Code of Georgia (hereinafter referred to as CCG) are used. In private legal relationships administrative body acts, as the entity under the civil law and uses norms of CCG.[4]

GACG establishes requirements, which must be met by the administrative contract;[5] however it does not determine criterias for distinction of administrative and civil law contracts. Administrative

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1 The deal is expression of unilateral, bilateral or multilateral will, which is directed towards the creation, change or termination of legal relationship – Civil Code of Georgia (hereinafter referred to as CCG), 1997, 26 June, № 786-IIS, Article 50 (in Georgian).

2 General Administrative Code of Georgia (hereinafter referred to as CACG), №2181, 25 June, 1999 (in Georgian).

3 "We are dealing with the administrative contract, when: it serves for the fulfillment of norms of administrative law; it contains the liability to issue administrative act or implementation of other administrative measures; it defines public authority or liability of citizen", see *Schulze Sh., Scmitz-Ustenin N., Turava P., Zodelava T., Kapanadze A.,* General Administrative Law, Manual for teachers, second edited publication, Tbilisi, 2012, 63 (in Georgian).

4 Conclusion of private law contract by the administrative body is the classical case of *oblication ex contrctus,* when in case of administrative contract, in addition to the liability-legal elements other public legal elements are added (in Georgian).

5 Administrative contract – a civil-legal contract by the administrative body with physical or legal entity, as well as with other administrative bodies concluded with the purpose of implementation of public authority, cited in: *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P.,* Manual, Administrative Procedural Law, Tbilisi, 2008, 287 (in Georgian).

contract based on formal legal as well as contextual terms is very similar to the civil contract.[6] Similarity is so big that in certain cases it is quite difficult to separate them. Depending on whether the deal is considered as administrative contract or civil law contract, it becomes subject to the regulation from the private or public laws.[7]

Based on the legal definition of administrative body, the purpose of the contract plays one of the crutual roles in the separation of contracts. This criterion of distinction is also mentioned in the legislative definition. Implementation of administrative contract should have a purpose of executing public authority. In this regard, it can be stated that administrative contract is a mean for the implementation of public authority by means private law form.[8]

The topic for discussion of the present work is the issue related to the distinction of administrative and civil contracts on the basis of contract objectives, effectiveness of contract objective as the separation criterion and practical aspects in relation to the above.

II. Purpose and Legal Basis for Application of Administrative Contract as the Mean of Executing Public Authority

Each institution of the law has its characteristic features, defined by the legislator. The above-mentioned characteristics create legal means for their identification and differentiation. These criterions have normative nature and exist for each specific case. Moreover, in addition to the provisions determined by the legislator, there is a court practice and law science in place, in order to complete, define and clarify the areas left open by the legislator, by means of providing different interpretations of the law norms.

There is an analogous situation regarding administrative and civil contracts. CCG and GACG contain legal definitions for these contracts. According to the definition provided in the sub-paragraph "g", section one, article 2 of GACG: Administrative contract is a civil legal contract concluded with physical person or legal entity or other administrative body for the purpose implemening public authority.[9]

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6 Unlike the German Administrative Law, Georgian Administrative Law does not know the comprehensive list for types of administrative contracts; moreover, georgian administrative law does not categorize administrative contracts based on certain signs, see *Kardava E.,* Types of administrative deals according to the German law; Journal Law, № 3-4, 2004, 68 (in Georigan).

7 Division into private and public law demonstrates the function, implemented by the law in the society. This is achievement of harmony between the private and public interests, see *Chanturia L.,* Introduction to General Section of Civil Law, Tbilisi, 2000, 36 (in Georgian).

8 In relation to the separation based on the criterion of objective, see *Kopaleishvili M., Skhirtladze N., Kardava E., Turava E.,* Manual, Administrative Procedural Law, Tbilisi, 2008, 288, also Problem of Separation of Administrative-Legal and Civil Legal Contracts, 2011, 25-26 (in Georgian).

9 If the administrative contract is a mean for the implementation of public authority, Civil Law Contract is the important instrument for the distribution of material wealth and social benefits. Human beings as early as the immemorial times were establishing relationships with the purpose to exchange various items. One can state that, it exists at the level of life instict and parties involve in them, when each of them expects some benefits, See *SwannV.B.,* Principles of European Law, Oxford, 2010, 95, cited in: *Dzlierishvili Z.,*

Discussions regarding the purpose of concluding administrative contract doesn't represent the novelty for Georgian researchers. For example, in relation to the goal of administrative deal, professor *Maia Kopaleishvili* writes the following: "in the process of discussing problem of separating administrative and civil law contracts it is expedient, first of all, to understand, what the objective of an administrative deal is. If we look at the issue in a simple manner, in the process of identifying the objective of administrative deal, we shall consider as the primary function of administrative body as defined under the GACG. All subjects that could be considered within the boundaries of definition of administrative body have the public legal authority. For considering any other person as administrative body, the legislator considers the implementation of public authority by such entities as the only condition (GACG, sub-paragraph "g", section one, article 2). It is logical that administrative body acting only within the authorities granted by the law, in the process of concluding administrative deal implements public legal authority and has an objective to satisfy public interests".[10]

Moreover, the same author remarks that the issue is not as simple and it is still disputable, whether all contracts concluded by the administrative body have a purpose to satisfy public interests.[11] However, prior to the definition of objective it is logical, to determine, what is implied in the notion "public authority" and whether the administrative contract is the appropriate form for the implementation of such authority.

III. Relation of Administrative Contract with Other Forms of Implementation of Public Authority

There are two main types of public legal form of activities implemented by the administrative body: regulation and simple management activities (real act). On the other hand, regulation includes two types: unilateral (administrative legal act with its two forms) and multi-lateral, in other words administrative contract.[12]

Issuing the administrative act and conclusion of administrative contract is the act of will of the administrative body, which is directed towards the establishment or termination of specific legal relationship.[13]

GACG considers the notion of the administrative agreement as the aggregation of several subjective and objective factors. Namely, GACG defines that administrative agreement is the civil legal contract concluded by administrative body with physical or legal entity or other administrative body with the purpose to implement public authority.

Tservtsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashvili L., Contractual Law, Tbilisi, 2014, 50 (in Georgian).

10 *See Kopaleishvili M.,* Administrative Deal, Tbilisi, 2003, 20 (in Georgian).

11 See *Kopaleishvili M.,* Administrative Deal, Tbilisi, 2003, 21(in Georgian).

12 See *Gabaidze D.,* Change and Annulation of Administrative Contract, Tbilisi, 2012, 12, Electronic Library of Law (in Georgian), <www.library.court.ge>.

13 *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* Manual, General Administrative Law, Tbilisi, 2005, 99 (in Georgian).

Legislator does not impose over the administrative body the obligation to implement activities via the conclusion of agreement. Choice of this form depends on the will of the administrative body and decision is made within the discrete authority.[14]

Legislator grants the discrete authority to the administrative body. The following term could be used in the norm: "discrete authority". However, the mentioned term is rarely encountered in the norm. In general, discrete authority is demonstrated via the words: "is authorized", "can".[15][16]

Legislator lacks the ability to define legal outcome for each case. This very position is the basis for granting the discrete authority to the administrative body. Moreover, in the process of implementation of discrete authority administrative body has possibility, to take into account the special nature of circumstances of specific case and make relevant decision.

Within the discrete authority, the activities of administrative body are flexible and efficient; however, at the same time in the process of implementation of discrete authority it is assigned with the special responsibility.[17] Discrete authority does not imply that in the process of decision making, administrative body acts only with the consideration of its circumstances, "Administrative body is responsible, to consider basic rights and interests of citizen in the process of implementation of discrete authority, as each person must not be perceived as the "subordinate" to the administrative body, but as the "citizen with full rights".[18]

Moreover, making decision on the basis of discrete authority does not mean that conclusion of administrative agreement depends only on the will of the administrative body; for example, "in case of termination of legal labor relationship, manifestation of the will of administrative body is not based on

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14 Law of Germany in the administrative process (§40) does not define the notion of discrete authority. The law only defines the rules for its implementation. The generalization of material legal norm is provided in the procedural law – Administrative procedural code of Germany (§114). However, procedural norm also does not contain definition for the notion of discrete authority, Besistexte Offentliches Recht, Verwaltungsverfahrensgesetz, Vervaltungsgerichtsordnung, 2007, 352, cited in: *Khoperia R.,* Discrete Authority of Administrative Body and Effective Procedural Mechanism of Rights Protection, Constitutional and International Mechanisms of Human Rights Protection, 2010, 221 (in Georgian).

15 *Maurer H*., Allgemeines Verwaltungsrecht, München, 2009, 136-137, cited in: *Khoperia R.,* Discrete Authority of Administrative Body and Effective Procedural Mechanism of Rights Protection, Constitutional and International Mechanisms of Human Rights Protection, 2010, 221 -222 (in Georgian).

16 In Germany attempt for the definition of discrete authority is provided in the scientific literature. According to the popular position, discrete authority is in place, if the law grants to the administrative body the authority to independently define the legal outcome. In this case administrative body is authorized, to choose one from two or more legal outcomes, see *Maurer H*., Allgemeines Verwaltungsrecht, Munchen, 2009, 136-137, cited in: *Khoperia R.,* Discrete Authority of Administrative Body and Effective Procedural Mechanism of Rights Protection, Constitutional and International Mechanisms of Human Rights Protection, 221 (in Georgian).

17 *Rode L.*, § 40, VwVfG und die Deutschu Ermessenslehre, 2003, 10, cited in: *Khoperia R.,* Discrete Authority of Administrative Body and Effective Procedural Mechanism of Rights Protection, Constitutional and International Mechanisms of Human Rights Protection, 222 (in Georgian).

18 *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* Manual, General Administrative Law, Tbilisi, 2005, 38, cited in: *Khoperia R.,* Discrete Authority of Administrative Body and Effective Procedural Mechanism of Rights Protection, Constitutional and International Mechanisms of Human Rights Protection, 223 (in Georgian).

the desire to conclude the deal or terminate the agreement, it depends on the regulations envisaged under the law, to carry out public business relationship and in the process of implementing the management function, the administrative body does not manifest the will in the form of agreement, it manifests the will via the adoption of administrative act, which is mandatory for fulfillment. In the process of evaluating measures of administrative body attention must not be directed towards its legal nature, but to the administrative form of its activities and the nature of the legal norm, which equips the administrative body with the authority to act and not to the fact, in which legal area is the legal outcome manifested; in other words, it must be decided, where the activity comes from and not where the activity is directed to."[19] To appertain the agreement to public or private law, the decisive factor is to understand the objective attaining of which such activity is designed for. In relation to the same issue the Supreme Court of Georgia defines the following: "Valid legislation does not consider the expression of unilateral deal via the order; moreover, it is not justified to establish the notion of unilateral deal in the administrative law, it is not capable to be effective instrument in the hands of administrative body, as in general, the administrative and procedural law does not contain mechanisms, which would make such establishment effective. Unilateral deal in the administrative law contravenes the principles of administrative law and goals and is not relevant to the doctrine on the legal form of activities of the administrative body, as with the establishment of legal forms for the activities of the administrative body the administrative law introduces the order in the activities of the administrative body, which is chaotic in many ways, subordinates such activities to the legal norms and makes the relationship between the administrative body and citizens transparent."[20]

It must be noted that term "administrative contract" was introduced to the Georgian legislation relatively recently and the term "administrative deal" was effective prior to the introduction of above term. The term "administrative deal" established in the Georgian administrative law, based on the authority of General courts of Georgia to interpret the norms, is subject to the understanding of the deal as bilateral and multilateral deal, as the contract is the classical form of bilateral deal. In the process of characterization of contract as the bilateral deal, it is necessary to have in place inter-exchange in contextual terms or expression of concurring will between two or more persons, representing the parties to the contract. In other words, GACG's term (2000 year edition) "administrative deal" must be defined with the meaning of "administrative contract", as administrative contract is characterized with the fact that the direct legal outcome does not result from the unilateral will of the administrative body, but its comes through only as a result of concurrence of the desires of parties to the agreement.[21]

"According to the definition of lar grand chamber, administrative act or real act represents the form of manifestation of administrative body's unilateral will. As a result of development of

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19 Decision of the Supreme Court of Georgia (DSCG) № BS-713-300 (k-05), 07 October, 2005 year, see Definitions for the Norms Applied by the Grand Chamber of Supreme Court of Georgia in its Decisions, Anniversary publication, 2009, 38 (in Georgian).

20 DSCG № BS-713-300 (k-05), 07 October, 2005 year, see Definitions for the Norms Applied by the Grand Chamber of Supreme Court of Georgia in its Decisions, Anniversary publication, 2009, 38 (in Georgian).

21 DSCG №[1]BS-713-300 (k-05), 07 October, 2005 year, see Definitions for the Norms Applied by the Grand Chamber of Supreme Court of Georgia in its Decisions, Anniversary publication, 2009, 37 (in Georgian).

administrative law, at the current stage, administrative contract is recognized as the legal and necessary instrument of the administrative body".[22] "The above activity of administrative body (the following element is implied: defines, decides or confirms) is directed towards the change in the legal condition; in other words, establishes, changes, decides or confirms the legal status of the person. The above element of the notion necessarily implies that according to the will of the public institution, activity is directed towards the generation of legal outcome as a result of measures, which are mandatory for unilateral implementation. The grand chamber defines that unilateral nature and mandatory implementation of regulation are the elements of administrative act, which is characterized with fact that legal outcome is generated as a result of expression of the will of public institution. The above elements differentiate it from other forms of administrative body activities, namely from the administrative agreement."[23]

The grand chamber is of the view that notion of "administrative deal" in Georgian Administrative Law (chapter V, GCAG) based on the authority of Georgian general courts to interpret the norms, is subject to the understanding of the bilateral and multi-lateral deals, as the agreement is the classical for of bilateral deal. In the process of characterization of contract as the bilateral deal, it is necessary to have in place inter-exchange in contextual terms or expression of concurring will between two or more persons, representing the parties to the contract.[24]

As a result of changes and amendments made to the legislation, the notion of administrative contract was introduced, which represents the civil legal contract concluded by the administrative body with the physical or legal entity as well as other administrative body for the purpose to implement public authority.[25] Moreover, according to the Administrative Procedural Code of Georgia (hereinafter referred to as APCG)[26] it is defined that disputes in relation to the conclusion, implementation and termination of administrative contracts are reviewed by the general courts based on the administrative law procedures (GACG, article 251); hence, in the process of making decisions of disputable issues, the legislator gave preference to the nature of disputable legal relationship and not to the parties participating in the dispute. For the definition of public nature of the dispute it is not sufficient to have subject of public law as one of the parties to the dispute, as there is a possibility to have entity under the public law participating in the private law relationships.[27][28]

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22 DSCG №[1] BS-713-300 (k-05), 07 October, 2005 year, see Definitions for the Norms Applied by the Grand Chamber of Supreme Court of Georgia in its Decisions, Anniversary publication, 2009, 37 (in Georgian).

23 DSCG №[1] BS-713-300 (k-05), 07 October, 2005 year (in Georgian).

24 DSCG №[1] BS-713-300 (k-05), 07 October, 2005 year (in Georgian).

25 Research of comparative law and existing practice in the United States of America show that contract is one of the most proper means for the involvement of private law subjects in the process of solution of various public law issues, see *Frezen D.,* The Administrative Contract in the United States, Administrative Contracts, The George Washington Law Review, Vol. 32, 1968-1969, 274.

26 Administrative Procedural Code of Georgia (hereinafter referred to as APCG), 23 July 1999, № 2352.

27 *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P.,* Manual, Administrative Procedural Code, Tbilisi, 2008, 184 (in Georgian).

28 However, it must be noted that in the United States of America, despite the frequent use of administrative contracts, their regulation at the legislative level is quite limited. "Despite the fact that Federal Court of US acknowledged existence of public law contract via some decisions, it does not mean that the courts have been developed in the areas of public law or administrative contracts. Still there is no consistent, well

Administrative body is authorized to use public law as well as private law forms of activities; based on the above, the following question is raised – in which cases do the contracts concluded by the administrative bodies acquire the administrative law nature? Answering the above question has a huge procedural law importance: disputes in relation to the conclusion, implementation and termination of administrative contracts are reviewed by the general courts based on the administrative law procedures.

The feature of administrative contract is that as a result of achieving agreement between the parties participating in the contract the specific legal relationship is generated. The characteristic of such contract is that at least one party shall be carrying the power of public government and its personal autonomy unlike the private individuals, is restricted by the public law norms.[29] Administrative contract, which includes promise for the implementation of certain action, similar to the administrative-legal act, can become the basis for lawful trust for the party[30] and based on such trust the actions of legal importance could be implemented.

Based on the formulation provided in GACG, the trust of the interested party to the act, in other words, the hope that the act will not be annulled is not sufficient.[31] Trusts to acts lawfulness deserves defense, but not belief thar an act wouldn not be annuled. It is impossible to trust the lawfulness of the act, if it is based on the unlawful action of the interested party, which could be manifested via deceiving the administrative body, threatening or bribing, presenting false documents to such body.[32] Similar principle is effective in case of administrative contracts. The lawful trust is generated by the contract concluded in line with the law by the parties in a faithful manner.

In any case, independent from the fact, whether the administrative contract is concluded in accordance with the desire of the administrative body, or such contract is concluded due to the need of implementation of certain activities or need for the implementation of authorities defined under the law, the necessary element of such contract is that administrative bodys action ise driven with purpose to

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elaborated theories concerning such contracts in the US reports on the law (reports), See *Frezen D.,* The Administrative Contract in the United States, Administrative Contracts – The George Washington Law Review, Vol. 32, 1968-1969, 282.

29 *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.,* Manual, General Administrative Law, Tbilisi, 2005, 100 (in Georgian).

30 Promise from the administrative body is the written document issued by the administrative body, which confirms that indicated action will be implemented, which could become the basis for the trust from the interested party, see GACG, article 9, section one (in Georgian).

31 In German law for the denomination of lawful trust there is a term - "*Vertraunsschutz*". In the German law above term is recognized as the notion which makes employees of administrative body responsible to respect decisions made. This principle forces administrative body not to change decisions made in the way having negative effect over the interests of parties having such lawful trust See Forsyth, supra note 16, at 242, Seerden & Stroinl, supra note 16 at 119, Schonberg, supra note 16 at 71-72. See also Joined Cases 7/56 and 3-7/57, Algera v Common Assembly, 1957 E.C.R. 39 and Cases 205 to 215/82, Deutche Milchkontor GmbH et al. v Germany, 1983 E.C.R. 2633, Cited in: Geo Quinot, Substantive Legitimate Expectations in South African and European Administrative Law", cited in: *Uriadmkofeli K.,* Basis for the generation of lawful trust in the administrative law, Tbilisi, 2011, 7 (in Georgian).

32 *Turava P.,* Principal of Lawful Trust (Comparative Legal Analysis), Journal Review of the Georgian Law, № 10/2007-2/3, 234 (in Georgian).

implement public authority. On the other hand, in the legal literature the term "public objective" which relates to the implementation of public authority causes some misunderstandings. "Public goals" are considered as identical to the "public objectives". However, it must be noted that "goals, for implementation of which there are public interests, are the public goals".[33] Prior to defining the implications of the notion "purpose for the implementation of public authority", it is necessary, first of all, to define "public authority", as there is no legal definition for the above notion.

1. Definition of Public Authority

There is no legal definition for public authority. It is possible to define the above establishment via the systemic definition of the will of legislator and law principles. Moreover, it is not possible to perceive the public authority as separate, independent notion and its "existence", external manifestation is only admissible in conjunction with the carrier of such authority. In other words, public authority is integrated with the institution of administrative body and its definition shall be made in conjunction with the latter.

On the other hand, notion of administrative body also requires certain definition. According to the legal definition, administrative body represents all such state or local self-governance institutions, legal entities of public law (with the exception of political and religious associations), as well as any other entities, which based on Georgian legislation, implements public law authoritie.[34] This legal definition is of a general nature and defines the administrative body in terms of its functionality. Accordingly, administrative bodies include all subjects of law, which under the conditions defined by the law, implement public authority. Formulation of definition in the above form is favorable as it provides the legislator with the possibility to define the circle of entities, which are within the area of validity of defined legal norms via the issue of law-subordinated administrative legal acts without introduction of additional criteria and regulations.

Based on the definition of administrative body, functioning of subjects considered under the notion of administrative bodies does not always imply implementation of public authority by them; the legislation deems it admissible for them to implement activities direct outcome of which is not the implementation of public authority.

Difference between the two cases mentioned above is based on how well the specific form of activity correspondents with the direct functions of administrative body. "Moreover, we must consider the fact that administrative body, in the most cases, has competences as well as legal forms for their implementation under the law."[35] However, definition, in majority cases, refers to the form of implementation and not to the competence. Administrative body, as the subject equipped with the special

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33 *Turava P.,* Basic Rights and Freedoms of Human Being as the Boundaries of Privatization Process, Collection of Articles, International Standards of Protection of Human Rights and Georgia, 2011, 233 (in Georgian).

34 GACG, sub-paragraph "a", section one, Article 2 (in Georgian).

35 *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P.*, Manual, Administrative Procedural Law, Tbilisi, 2008, 289 (in Georgian).

rights and capabilities, implements only the authorities directly considered under the legislation; and in cases, when form for the implementation of specific activity is not defined, the administrative body, within the discrete authority, decides on the form of implementation its functions.

In relation to the implementation of public authority the Supreme Court of Georgia defines that administrative body implements the functions based on the administrative legislation; in this process the rights of the person guaranteed under the Georgian legislation generate public liability of the person implementing the public functions – to fully ensure creation of conditions supporting the realization of individual's rights.[36]

Based on the fact that boundaries of competences of administrative body are precisely defined by the legislation, and moreover, competences of different administrative bodies must not overlap each other, definition of public authority could be formulated as follows: public authority is the area of activities of the administrative body defined by the legislation; the right to implement such activities is granted to the administrative body and at the same time, the administrative body is responsible to implement its functions in cases defined under the legislation.

IV. Distiction of Administrative and Civil Contracts Based on the Purpose of Deal

1. Problem of Defining the Purpose of the Implementation Public Authority

For distinction of public law and private law contracts the essential importance must be drawn to the objective of the contract and not to the status of contract participants. The key elements for defining administrative contract (sub-paragraph "g", article 2.1, GACG) relate to the conclusion of contract with the purpose to implement the public authority. The objective of contract is defined based on the contents of such contract. Therefore, the liabilities undertaken, contents of rights and duties generated as a result of contract conclusion has crucual importance. As a result of conclusion of administrative contract, relevant person is equipped with the public law rights and duties; and in case of conclusion of private law contract, the parties carry civil law rights and duties.[37] Despite the fact that one of the parties to the contract is the administrative body, the contract does not always equip person with the public law rights and duties. For the separation of administrative contract from the civil law contracts, in addition to the analysis of contract subject and purpose, it is also important to consider the conclusion of contract on the basis of administrative legislation, generation of liability for the administrative body to issue administrative act or implement activity (real act), equipment of party to the contract with the public law rights and duties as a result of contract conclusion.[38]

Identification of purpose for the implementation of public authority is related to quite a big practical complexity. Complexity of definition of the above issue is caused by two factors: 1) Based on the legal definition, administrative contract is civil law contract concluded with the purpose to implement

36 DSCG №BS- 455-443 (k-13), 25 March, 2014 (in Georgian).
37 DSCG №BS -670-645 (g-13), 23 January, 2014 (in Georgian).
38 DSCG №BS-31-27 (k-13), 26 December, 2013 (in Georgian).

public authority; due to the above, administrative and civil contracts are very similar. 2) Identification of objective of contract conclusion is complicated with the fact that activities of administrative body are, in general, related to the implementation of public authority and each action of administrative body at some level is connected with the support to the creation of conditions favorable for the implementation of above authority.

In the first instance, contract represents the means for the achievement of public law goals by the administrative body and its conclusion has the very objective to implement such authority. In the second instance, contract is concluded for the receipt of certain goods or services; however, the latter has direct or indirect impact over the process of implementation of the authorities by the administrative body and serves the function of facilitation of such process. For example, according to the contract concluded between the legal entity under the public law National Agency of Public Registry and LLC "Borjomi", 300 bottles of mineral water were purchased. With its nature above mentioned contract represents the legal relationship envisaged under the article 50 of the Civil Code of Georgia, as a result of which the public authority is not realized; on the contrary rights and liabilities based on the civil contract are generated for the parties. Subject of the contract (delivery of goods) is not connected with the implementation of functions-responsibilities by the administrative body; it is evident that in certain cases there must be additional condition for the facilitation of functioning of the administrative body. Such overlapping of relationships regulated under the contract and competence of administrative body make it even more complicated to identify the objective for the conclusion of contract and process of separation of contract based on the identified objectives.

For identifiing purpose of contract concluded by the administrative body it is possible to apply the method of contract definition. *Catalin Silviu Stratu* is of the view that definition of contract is a process, which includes the following elements: precise definition of contract conditions and identification of will expressed by the parties in accordance with their true will.[39] In General, the need for definition is created in cases, when it is not possible to detect difference between the true will of the party and will expressed by such party, when the conditions of the contract are ambiguous, confusing, controversial, or incomplete;[40] however, it is possible to use them for all cases.[41]

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39 *Straru C.S.*, Interpretation of Administrative Contracts, Judicial Tribune, Vol. 4, Issue 1, 2014, 152.

40 *Stdtescu C., Birsan C.,*Drept Civil Teoria Generala a Obligatilor*,* All Beck Publishing House, Bucharest, 2000, 55.

41 Based on the fact that objective for the conclusion of contract could raise differences in the positions of the parties, in case of dispute, court may have to define the objective of the contract. Court practice, precedents, so called court justice represent the best means for the definition of norms, as in the process of discussing the issue on the full or partial satisfaction of claim of the party initiating the court process, the court reviews factual circumstances and defines and interprets norms. See *Gatserelia A*., Analysis of norms regulating relationships generated at the stage of contract preparation in relation to the issues defined in the court practice, Student Law Journal, 2012, 6. Precedents are created by court at all instances; on the other hand, court of each instance is bound with the precedents of the same instance court as well as higher instance court. In other words, there is actually hierarchy system of precedents for court instances. Of course, court practice, first of all, is the act on the specific decision, however in the process of deciding on the similar facts, the identity of parties to the relationship, specific circumstances of the case determined under such decision is not important for the court; only the similarity of contents and conclusions made by the court are

Definition is required as "contractual relationships consist of expression of number of wills, which are referred to as the deals. At the end, only after the definition of deal it is possible to decide what is a result of certain manifestation of some will, is such will in place or not?"[42] There are number of definition methods, however we can distinguish two the most widely used and spread theories; these theories are: Theory of wil and theory of expression (*Erklarungstheorie*). Theory of wil is based on the principle of will autonomy and considers that in the process of contracts' definition the true will manifested by the party in a free way shall be granted the binding power. According to the expression theory, the internal will of the party is not decisive; decisive is the form for the expression of such will. So called "Theory of Trust" (*Vertrauenstheorie*) was developed on the basis of the above discussed expression theory; according to the Theory of Trust, expressed or implied will is not considered as binding, the binding is the perceived will.[43] It has to be also noted, that methods for the definition of contracts are directly related to the identification of the wills of parties and for the above, the objective, for which the contract is concluded, does not have a decisive power; therefore, application of definition methods is possible for the definition of objective for the implementation of public authority; however, such methods are less effective. Regarding the above issue, the foreign researchers also note that in the public law definition of public interests and public authority shall be implemented with the consideration of special authorities of the state in relation to the second party.[44] Therefore, definition methods in administrative and civil laws differ.[45]

It is more expedient to define at what level the conclusion of specific contract has the objective to implement the public authority with the consideration of several factors in a complex manner. Namely, first of all, it must be defined, whether the subject of contract corresponds with the competence of administrative body and whether the fulfillment of liabilities by the second party (non-administrative body) is connected with the implementation of public authority. These are the two conceptual issues, under the simultaneous existence of which the public authorities are implemented by the administrative body via the conclusion of contract. Accordingly, we have in place administrative contract. It must be also noted that in the process of definition of administrative contract it is essentially important to

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important for the court. See *Jorbenadze O.,* Problem of Court Law, Journal Justice and Law" #2/3(14/15)'07, 104 (in Georgian).
It is especially necessary to have definition of certain issues by the court, when relevant provisions of the regulatory norms have general and or abstract nature. On the other hand, the above requires big attention, so that the subjective evaluation made by the judge does not violate interests of parties, see *Vashakidze G.,* Good Faith According to the Civil Code of Georgia – Abstraction or Effective Law, journal "Review of Georgian Law, #10/2007-1, 18 (in Georgian).

42 Standinger-Roth, §157, Rn. 8, cited in: *Vashakidze G.,* Definitive theoretical aspects of contracts and importance of objective interpretation in the process of identification of the parties' will, journal Justice and Law, #1'07, 2013, 29 (Georgian).

43 Regarding the definition theories, see *Vashakidze G.,* Definitive theoretical aspects of contracts and importance of objective interpretation in the process of identification of the parties' will, journal Justice and Law, #1'07, 2013, 30 (in Georgian).

44 *Richer L.,* Droits des Contrats Administratifs, 3rd ed., L.G.D.J, Paris, 2002, 204.

45 *Auby J.M.,* Droit administratif, Universite Bordeaux, Librairie Montaigne, 1975-1976, 184.

understand relevance of contract subject and implementation outcome with the functions of administrative body considered under the law and not the elements of the will (desire of parties).

According to the definition provided by the Supreme Court of Georgia, objective for the implementation of public authority implies resolution of any issues belonging to the authorities of the public body, as well as conclusion of contracts for the implementation of basic, direct functions. Otherwise status of administrative contract would be assigned to any contract signed by the administrative body, as the administrative body, in accordance with the article 5 of GACG, is authorized to implement the authority granted under the law.[46]

2. Effectiveness of Distiction Administrative and Civil Contracts Based on the Purpose of Contract

Effectiveness of distinction criterion is defined based on how comprehensively and correctly it ensures distinction of administrative and civil contracts.[47]

distinction of private and administrative contracts has theoretical as well as practical purpose; however, at the level of contracts the complexity of separation is caused, first of all, by the problematic aspects of separation of private and public laws,[48] as private and public, more so the administrative laws are so close to each other, especially at the level of practice, that they have many cross section points. The above makes it difficult to differentiate private and public law notions; the clear example of the above is the issue related to the separation of private and administrative contracts.[49]

Distinction of administrative and civil contracts has practical purpose at the discussion as well as contractual relationship phases. The legal rights of the parties depend on the legal nature of the contract. In the administrative contractual law the party defending the public interests (administrative body) is authorized to violate the principle "*bona fides exigit ut, quod convenit fiat*" (based on the principle of faithfulness, the party shall implement undertaken liability). Avoiding the above principle is conditioned by the administrative law norms, which grant to the administrative body the right to change contract conditions and provide it with the exclusive right to control execution and to terminate contract based on the public interests.[50]

Court practice stresses the importance of correct solution of case assignment (to certain court) issues. In one of the court decisions supremme court deems it important to defend the above principle

46 DSCG №BS-41-36(g-13), 07 March, 2013 (in Georgian).

47 Difficulties in separation are caused by the fact that private and public laws are not isolated from each other, see *Chanturia L.,* General Section of the Civil Law, Tbilisi, 2011, 7 (in Georgian).

48 Issue on the separation of private and public law relationships, at the first glance, is not relevant problem theoretically. Scientists have clearly separated law into private and public laws; however, in practice separation faces quite a number of complications, see *Khubua G.,* Law Theory, Tbilisi, 2004, 207 (in Georgian).

49 *Giorgadze L.,* Problem of Separating the Private and Public Laws on the Example of Tender, journal Review of the Modern Law, № 1, 2013, 52 (in Georgian).

50 See *Straru C.S.,* Interpretation of Administrative Contracts, Judicial Tribune, Vol. 4, Issue 1, 2014, 153.

and is of the view that confusion of case assignment principles condition the review of case according the rules, which are based on the different principles, which, on the other hand, is reflected on the rights of parties. Moreover, by the violation of rules for the subject matter distribution of cases, due to the fact of making decision via the violation of case assignment rules, confirms the review of case with the rough violation of procedures and as a result causes resolution of dispute with the violation of case processing rules.[51]

It has to be also noted that disputes proceeding form the administrative contract, in general, are related to the request for the reimbursement of losses by one of the parties. "It is possible to reimburse the losses by the state incurred due to the violation of liabilities via the application of civil law analogue. In this case the notion of public law liability[52] is introduced, which regulates relationships according to the civil legislation".[53]

"Responsibility of administrative body represents the responsibility of administrative body in relation to the incurred losses, which are related to the implementation of public authorities by the above body".[54]

Civil law definition of loss – "Reduction or destruction of right or well being of physical or legal entity"; in the German law the loss is defined in the following way: "Loss, damage can be demonstrated in the proprietary damage, when there is a loss incurred in the form of property".[55]

In order to qualify civil law contract as administrative contract, it is necessary to have administrative body as one of the parties to the contract; however the above is not sufficient and together with the existence of law subject, the indicated norm from GACG cumulatively requests achievement of objective of implementation of public authority via the conclusion of contract. According to the decision of the Supreme Court of Georgia, it is also important and represents one of the initial points for the discussion of case based on administrative rules, that disputable legal relationship is based on the administrative law legislation; in other words, it must have administrative law contents.[56] However, according to the same decision, the legal nature of contract concluded by the administrative body is defined by the objective of the contract. Objective of contract is defined based on its contents. In this

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51 See DSCG NoBS-31-27(k-13), 26 December, 2013 (in Georgian).

52 Liability relationship is referred to as the relative and unlike benefit law (absolute right), where the person can protect himself from any infringement, the first is limited with the debtor, see DSCG №AS-1147-1394-05, 18April, 2006 (in Georgian).

53 *Detterbeck S., Windhorst K., Sproll H.,* Staatshaftungsrecht, Munchen, 2000, 388, cited in: *Makaridze D., Khazaradze G.,* Responsibility of Administrative Body, Tbilisi, 2014, 25 (in Georgian).

54 *Detterbeck S., Windhorst K., Sproll H.,* Staatshaftungsrecht, Munchen, 1999, 5, cited in: *Makaridze D., Khazaradze G.,* Responsibility of Administrative Body, Tbilisi, 2014, 27 (in Georgian).

55 Comments to the Civil Code of Georgia, Book IV, Vol. II, Tbilisi, 2001, 378, cited in: *Makaridze D., Khazaradze G.,* Responsibility of Administrative Body, Tbilisi, 2014, 27 (in Georgian).

56 If the disputable legal relationship is not based on the administrative legislation (CCG, article 2.3), Disputable legal relationship existing between the parties is related to the contract, which belongs to the civil law contract concluded by the administrative body, accordingly, disputes related to the implementation of such contract belong to the disputes to be reviewed under the civil law procedures based on the Article 11, CCG, as well as Articles 251, 65 (II), 651 – CCG. See DSCG №BS-31-27 (k-13), 26 December, 2013 (in Georgian).

case, the liability undertaken by the parties to the contract, contents of the rights and liabilities generated as a result of contract conclusion play the critical role.[57]

In the process of distribution of administrative cases, correct qualification of legal form applied for the regulation of specific legal relationship by the administrative body is very important. The procedural legal importance of correct qualification of the form of activities carried out by the administrative body is demonstrated in the fact that it is the necessary precondition for the definition of the correct form of the claim.[58] In the specific case, it is possible to separate administrative and civil contracts via the identification of their objectives.

The legal status of contract parties is not essentially significant. The fact that one of the parties of the contract is administrative body is not the essential for the existence of administrative contract, as it is possible to have civil law contract between two administrative bodies and vice versa, in certain cases, under the relevant conditions, it is possible to conclude administrative contract between the subjects of private law.[59]

Cassation court defines that key element of administrative contract is the objective for the implementation of public authority. Objective is defined by the contract contents. Therefore, the contents of rights and liabilities, responsibilities generated as a result of contract conclusion is critical.[60]

The efficiency of objective as the criterion for the separation is also stressed by the fact that in relation to the administrative contract, unlike the administrative legal act, the objective for which the contract was concluded is critical. In the process of termination of labor law relationship, the demonstration of will of the administrative body is not based on the desire to conclude or terminate deal, but is based on the legal authority to carry out public official relationship and in the process of implementation of managerial functions the administrative body demonstrates its will not in the form of contract, but in the form of administrative act, which is mandatory for execution. In the process of assessing the administrative body activity the attention must be drawn not to its legal nature, but to the administrative form of activity and to the nature of the law norm, which equips the administrative body with the authority to act and not to which area of law is the legal outcome demonstrated. It is decisive, where is the activity coming from and it is not important where it is directed.[61] Contrary to the above, for the definition of contract belonging, it is important to understand what is the objective towards the achievement of which it is directed. It has to be also noted that the valid legislation does not consider the expression of unilateral deal in the form of order; moreover, it is not expedient to establish the notion of unilateral deal in the administrative law; it is not capable to be the effective instrument in the hands of the administrative body, as, in general, there are no mechanisms, which could enact this establishment, included in the administrative and procedural laws. The grand chamber is of the view that

57 DSCG №BS -41-36(g-13), 07 March, 2013 (in Georgian).
58 DSCG №BS -713-300(k-05), 07 October, 2005 (in Georgian).
59 *Turava P.,* Administrative Jurisdiction, Journal of the Association of Georgian Lawyers, № 1, 2013, 52 (in Georgian).
60 DSCG №BS 31-27 (k-13), 26 December, 2013 (in Georgian).
61 DSCG №BS 713-300 (k-05), 07 October, 2005 (in Georgian).

acknowledgement of unilateral deal in the administrative law contravenes the principles of administrative law and goals and is not relevant to the doctrine on the legal form of activities of the administrative body, as with the establishment of legal forms for the activities of the administrative body the administrative law introduces the order in the activities of the administrative body, which is chaotic in many ways, subordinates such activities to the legal norms and makes the relationship between the administrative body and citizens transparent.[62]

In comparison with the use of other criteria for separation, separation on the basis of objective is more effective due to two factors: 1) In case of orientation based on other criteria there is a possibility that civil contract satisfies the formal-legal characteristics of administrative contract. There is a possibility to have contract concluded by the administrative body, [63] having impact over the interests of the wide circle of the persons and there could be subordinate relationship between the parties; however such contract may not be considered as an administrative contract due to the fact that its conclusion does not aim at the implementation of public authority. 2) At first glance, civil contract can be considered as the administrative contract, if it serves the objective to implement the public authority. According to the indication made by the cassation court, deed of gift concluded by the administrative body represents the administrative contract, if the relevant body acted within the public authority, with the objective to implement the above authority; cassation court also defines that fact of conclusion of the deal by the administrative body and registration of achieved results defined under the deal, represent presumption for actions implemented by the administrative body within the boundaries of public authorities.[64]

V. Conclusion

As a result of generalization of issues discussed in the work, we can state that "for the consideration of dispute as administrative, disputable relationship must be based on the administrative legislation."[65] In particular "according to the general principles defined by the legislator, the courts review the cases related to the legal relationships, which are based on the administrative law legislation, based on the administrative justice rules".[66]

At the same time "issue of case assignment to the courts does not depend on the position of parties. Dispute on the case assignment to the courts is generated between the courts and not between the court and the parties. For the cases of administrative category, the distribution, with the fact of its

62 DSCG №BS 713-300(k-05), 07 October, 2005 and DSCG №3G/AD-3-g-03, 14 March, 2003 (in Georgian).

63 General approach, according to which when both parties participating in the legal relationship are subjects of private law, then their relationship is also of private law nature, and if one of the parties is state body, then the relationship has public nature is less effective in relation to the administrative contracts, see *Mitchel A.A.,* Public Law and Private Law, Vol. 17 Jurical Review, 1905, 30.

64 DSCG №BS 41-36(g-13), 07 March, 2013 (in Georgian).

65 DSCG №BS 350-316(g-14), 11 September, 2014 (in Georgian).

66 *Turava P.,* Administrative Jurisdiction, Journal of the Association of Georgian Lawyers, № 1, 2013, 55 (in Georgian).

existence determines the possibility for generation of disputes between the courts regarding the case distribution issues, such cases are decided by the cassation court."[67]

"The dispute is considered as administrative not because the addressee of claimant's request is the administrative body, but because of the immanent nature of legal relationship, in this case the nature of legal relationship is critical. Paragraph one, article 2 of GACG contains the list of subjects for the administrative dispute (taxation). Hence, the legislation defines the subject of the dispute, generated from the legal relationship, which is regulated under the administrative law legislation (enumeration) as the key element for the review of case under the administrative law procedures. The provision of paragraph 3, article 2 of GACG concerning the review of disputes related to the legal relationships proceeding from the administrative legislation via the administrative court processing rules, reflects the external signs of case assigning to certain court. The external sign of belonging of legal relationship concerns the place of norms regulating disputable legal relationships in the legislation".[68]

In relation to the contract, the issues related to the assigned case to certain court depend on whether the specific contract belongs to the administrative or civil laws. Criteria for the separation of contracts are of two types – definite and estimated. One should consider under the definite criteria those criteria, which are straightforwardly defined under the legislation and objectively perceivable (for example, legal status of the party); at the same time, such estimated criteria, as contract conclusion objective is subject for multifaceted discussions and it must be defined with the consideration of objective and subjective circumstances. There is also position in the law science that the issue of separation of administrative and civil contracts shall not be the subject for discussion, as administrative contract is artificially created establishment, existence of which does not have practical purpose and it is possible to achieve the same objective via the civil law contract. Supporters of mentioned position are mainly based on the argument, that any contract concluded by the administrative body is directly or indirectly connected with the implementation of public authority and any legal outcome generated on the basis of contract responds to the requirements created in the process of implementation of activities by the administrative body.

It would not be correct to fully neglect the presented position, as any contract is at some level related to the process of implementation of public authority; however, via the introduction of notion of administrative contract, the legislator was striving to separate the contracts, which have an objective to implement public authority and contracts supporting implementation of public authority. Based on the above, difference between the administrative and civil contracts is essential and quite important in terms of contents as well as legal outcomes.

Administrative contract is concluded with the purpose to implement specific public authority belonging to the administrative competence and is a form of activity of administrative body, as well as

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67 See DSCG №BS350-316 (g-14), 11 September, 2014. In the same decision the court indicates that based on the principle of equality of parties to the dispute, in case of submitting the dispute to non-jurisdiction court the rules defined for the administrative court procedures (article 26, CACG) refers not only to the judges reviewing the administrative cases but also the judges working on the civil cases. Subject matter distribution of dispute cases among the courts is possible only under such assumptions (in Georgian).

68 DSCG №BS 350-316 (g-14), 11 September, 2014 (in Georgian).

the administrative legal act or real act and therefore it is subject to the public law regulation. Civil contract concluded with the participation of administrative body on the other hand, serves the interests of improvement of functioning of the administrative body and does not represent the means for the implementation of public authority, Therefore, in the process of definition of objective for the implementation of public authority assessment must be conducted based on two criteria: 1) Whether the subject of contract belongs to the area of rights and liabilities of the administrative body; 2) Whether the specific contract is the direct mean for the implementation of public authority. If under the existence of both components, the administrative body expresses the will to conclude the contract, then it has a purpose to implement public authority and we have administrative contract in place; accordingly the dispute shall be reviewed by the administrative court.

Revaz Khoperia*

Mistake in the Implementation of Discretionary Power

1. Introduction

The reason of granting of discretionary power to administrative body is the disability of the legislator to define legal outcome of each case. Within the discretionary power, administrative body is granted the possibility to take special nature of circumstances related to specific case into account and chose the best solution. In such case, the activities of the administrative body are flexible and efficient. However, in the case of decision-making within discretionary power, the administrative body has special responsibility.[1]

As the reason of granting of discretionary power is making just decision on each case, the administrative body shall understand the reason why it was granted discretionary power,[2] as granting of discretionary power does not mean permitting of willfulness of the administrative body.[3]

One hundred-year scientific dispute on discretionary power is still going on. Many issues were covered, but one significant aspect of implementation of discretionary power is still not properly studied. This issue is the types of mistakes, made in the course of implementation of discretionary power.[4]

In Georgia administrative law, created basically under the influence of German administrative law, the problematic issue of the mistake, made within discretionary power is obscure too. It is also reflected in judicial practice.

The purpose of the article is to determine the types of mistakes made in the course of implementation of discretionary power using the method of legal analysis. The article first discusses the legal bases of types of the mistakes, made in the implementation of discretionary power, then various types of approaches and theories on the types of mistakes, and finally – legal results of the types of mistakes made within discretionary power.

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1 *Rode L.,* §40 VwVfG und die deutsche Ermessenslehre, Frankfurt am Main, 2003, 10.

2 *Vachadze M., Todria I., Turava P., Tskepladze N.,* Comments to Administrative Procedural Code of Georgia, Tbilisi, 2005, 194.

3 *Merkl A.,* Allgemeines Verwaltungsrecht, Darmstadt 1969 (Unvärenderter reprografischer Nachdruck der Ausgabe Wien und Berlin 1927), 152.

4 *Alexy R.,* Ermessensfehler, JZ, Tübingen, 1986, 701.

2. The Types of Mistakes Made in the Course of Implementation of Discretionary Power

2.1 Legal Bases of the Types of Mistakes Made in the Course of Implementation of Discretionary Power

2.1.1 Material Legal Bases

According to the Article 6 of the Common Administrative Code of Georgia (CACG), administrative body is responsible for observation of boundaries, established by the law, in the course of implementation of discretionary powers. Besides, discretionary power shall be implemented for the purpose, for which is granted to the administrative body.

The regulation, provided in the CACG is similar to p. 40 of the Law of Germany on Administrative Proceedings. In accordance with p. 4- of the Law of Germany on Administrative Proceedings, in the course of implementation of discretionary power, the administrative body is obliged to consider the purpose of the norm and observe the boundaries, established by the legislation.[5] CACG also contains similar regulation – in accordance with p. 1 of the Article 6, the administrative body is obliged to implement discretionary power within the boundaries, established by the law.

However, it shall be mentioned that unlike German material law, Georgia Law establishes the rule of implementation of discretionary power more specifically. In particular, in accordance with the Article 7 of the Common Administrative Code of Georgia (hereinafter - CACG), the administrative body is responsible for observance of proportionality of public and private interests in the course of implementation of discretionary power. Mistake is made in implementation of discretionary power, if, according to the administrative-legal act, issued by the administrative body, the damage, caused to the legal rights and interests of a person substantially exceeds the benefit, for which it was issued. Besides, the measures, provided by the administrative-legal act, issued in the framework of discretionary power, shall not result into unjustified limitation of person's legal rights and interests.

2.1.2 Procedural Legal Bases

Common Administrative Code of Georgia (hereinafter - CACG) does not establish the rule of verification of the administrative-legal act, issued by the administrative body within the discretionary power, and, consequently, does not define the types of mistakes, made in the implementation of discretionary power.

German Administrative Procedural Code contains p. 114, which identifies the types of mistakes. In accordance with the mentioned paragraph, the administrative act, issued in the framework of discretionary power is illegal, if the administrative body violated the boundaries, established by legis-

5 Basistexte Öffentliches Recht, 8. Auflage, 2007, 352.

lation or did not implement discretionary power in accordance with the purpose of the norm.[6]

The type of mistakes, identified by German material and procedural legislation are similar. Thus, the absence of similar norm is Georgia procedural legislation does not create legal problems in this regard.

2.2 The Doctrine on Types of Mistakes Made during the Implementation of Discretionary Powers

2.2.1 The Attempt of Systemization of the Types of Mistakes

When discussing the types of mistakes, made in the course of implementation of discretionary powers, it's important to know that neither uniform terminology related to the types of mistakes, nor uniform classification of the types of mistakes exist. The presence of the paragraph 40 of the Law on Administrative Proceedings and paragraph 114 of the Administrative Procedural Code in German Administrative Law does not ease this situation. Although the above-mentioned article of the Procedural Code forms the legal basis for verification of the decision, made in the framework of discretionary power, this norm is not regarded as the basis for comprehensive classification of the types of mistakes.[7]

After familiarization with the paragraph 40 of the Law of Germany on Administrative Proceedings and paragraph 114 of the Administrative Procedural Code one may think that the mentioned norms contain the formula for verification of the decision made in the framework of discretionary power – discretionary power shall be implemented within the boundaries, established by the norm and in conformity with the purpose of granting of discretionary power. Nevertheless, as a result of familiarization with scientific literature it becomes obvious that this opinion is mistaken,[8] as the list, specified in p. 114 of German Administrative Procedural Code is not exhaustive. According to the established opinion, the purpose of the mentioned paragraph is not comprehensive regulation of the types of mistakes in the implementation of discretionary power. The purpose of the norm is creation of the relevant legal basis for implementation of judicial control over the decision, made in the framework of discretionary power.[9]

Numerous attempts of systemization of the types of mistakes, made during implementation of discretionaty power, existing in scientific literature, can be divided into four groups:

1. Three types of mistakes, made during implementation of discretionary power;
2. Two types of mistakes, made during implementation of discretionary power;

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6 *Kopp F., Ramsauer U.,* Kommentar zum Verwaltungsverfahrensgesetz, 10., vollständig überarbeitete Auflage, München 2008, 1416-1417.

7 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg, 1998, 105-106.

8 *Alexy R.,* Ermessensfehler, JZ, Tübingen 1986, 701.

9 *Wolff H.* in *Sodan H., Ziekow J.,* Großkommentar zur Verwaltungsgerichtsordnung, 2. Auflage, Baden-Baden 2006, §114, Rn 82.

3. One type of mistakes, made during implementation of discretionary power;
4. Specific list of mistakes, made during implementation of discretionary power.

In the opinion of some scientists, the approach, related to the assumption of the three types of mistakes is proper. Other think that there are only two types of mistakes. In the opinion of still another part of scientists, only one type of mistakes can exist; and small group of scientists support the idea of comprehensive classification of mistakes.[10]

Each approach will be discussed in the following chapters of the paper:

2.2.1.1 The Three Types of Mistakes, Made During Implementation of Discretionary Power

There is a widely spread opinion in scientific community that the mistakes, made during implementation of discretionary power, can be divided into three groups.[11]

These types of mistakes go beyond the formulation of p. 114 of German Administrative Procedural Code and extends the types of mistakes, identified by Procedural Code and p. 40 of the material law.

The three types of mistakes are as follows:

1. Improper implementation of discretionary power, or, in other words, abuse of discretionary power;
2. Violation of boundaries of discretionary power, on, in other words, excessive use;
3. Failure to fulfill the obligation of use of discretionary power.[12]

The doctrine on the existence of the three types of mistakes was developed on the basis of the decision, made by German Federal Administrative Court in 1960. According to the explanation of the court, the principle of the legal state does not limit the legislator to grant discretionary power to the administrative body for the purpose of resolution of specific issue. Discretionary power of administrative body is a legitimate part of legal order; but discretionary power of the administrative body is limited. Discretional power does not give the administrative body the freedom of willfulness. The administrative body is obliged to make decision during implementation of discretionary power on the basis of the purpose of the law. Otherwise the decision is as illegal (abuse of discretionary power), as violation of boundaries of discretionary power (excessive use of discretionary power or failure to fulfill the obligation of discretionary power).[13]

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10 *Alexy R.,* Ermessensfehler, JZ, Tübingen, 1986, 701.
11 *Rode L.,* §40 Vw VfG und die deutsche Ermessenslehre, Frankfurt am Main, 2003, 87.
12 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg, 1998, 106.
13 BVerwGE 11, 95 ff.

a) Improper Use (Abuse) of Discretionary Power

This type of mistake is closely related to the essence of power. The decision of the administrative body is mistaken, if it does not provide for the goal of the law. This type of mistake include the cases, where the administrative body, in the course of decision making, insufficiently considers the circumstances, required for the implementation of discretionary powers. E.g. mistake is made in implementation of discretionary power, if the administrative body taken into account personal or political views in the course of decision-making.[14]

In the case of mistaken implementation of discretionary power, consideration of limitation, established by the law, doesn't occur by the administrative body intentionally or without intention.[15]

Mistaken use of discretionary power is obvious in the case of violation of the princip0les, established by the law, including constitutional principles. Among constitutional principles, the principle of equality, the principle of proportionality, human rights and freedoms, the principle of legal and social state, as well as other principles, established by the Constitution, shall be taken into consideration.[16]

Mistaken use of discretionary power also occurs in the case when the administrative body, during decision-making, considers inadmissible factual circumstances or the circumstances, which are not related to the case.[17]

This type of mistake is divided into the following three sub-groups:

a.a) Deficit of Assessment of Circumstances

Freedom of the administrative body in the course of implementation of discretionary power is not unlimited.[18] The decision is mistaken if the administrative body takes into account improper circumstance – the circumstance that actually does not exist or considers incomplete circumstances, as well as incorrect factual and legal circumstances. The administrative body, the course of decision-making, is not authorized to take into account the circumstances, which, according to the purpose of the law, have no significance. The deficit of assessment of circumstances is obvious, when the administrative body does not take into account the circumstances, which are necessary, relevant for decision-making.[19]

It shall also be mentioned that in order to be regarded as a mistake, the deficit of assessment of circumstances shall have substantial nature.[20]

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14 *Maurer H.,* Allgemeines Verwaltungsrecht, 17. Auflage, München 2009, 141-142.

15 *Wolff H., Bachoff O., Stober R.,* Verwaltungsrecht, Band 1, 11, neubearbeitete Auflage, München 1999, 464.

16 *Varadinek B.,* Ermessen und gerichtliche Nachprüfbarkeit im französischen und deutschen Verwaltungsrecht und im Recht der Europäischen Gemeinschaft, Aachen 1995, 145.

17 *Fachinger J.,* Überschreitung und Fehlgebrauch des Verwaltungsermessens, NJW, München und Berlin 1949, 244-247.

18 *Wolff H.* in *Sodan H., Ziekow J.,* Großkommentar zur Verwaltungsgerichtsordnung, 2. Auflage, Baden-Baden 2006, § 114, Rn 178.

19 *Kopp F., Schenke W.,* Kommentar zur Verwaltungsgerichtsordnung, 15, neubearbeitete Auflage, München 2007, §114, Rn 12.

20 *Wolff H., Sodan H., Ziekow J.,* Großkommentar zur Verwaltungsgerichtsordnung, 2. Auflage, Baden-Baden 2006, § 114, Rn 178 f.

a. b) Consideration of Circumstances, Having no Significance for the Case

The administrative body makes mistake in the course of implementation of discretionary power, if, during decision-making, it takes into account the circumstance, which is not related to the case. In this case the court verifies, whether this circumstance has affected the implementation of discretionary power and decision-making.[21]

The circumstances and the assessments shall be related to the purpose of granting of discretionary power. Otherwise, consideration of circumstances in implementation of discretionary power is a mistake.[22]

Which circumstance is regarded as not relevant for the case, shall be determined by means of analysis of specific case. E.g., Economic situation is significant for the case, when governmental allowances are issued. However, this circumstance is not related to the case, when it comes to the rescue of human life. Sympathy and antipathy are regarded as the circumstances, not related to the case. Mistake in the course of implementation of discretionary power is obvious, when the administrative body investigates the circumstances of the case incompletely or improperly investigates the circumstances of the case.[23]

Article 3 of the basic Law of Germany is the constitutional-legal basis of party-free, unbiased decision, oriented towards the purpose of the law and common well-being.[24] Willfulness, malicious intent, party membership or other similar circumstance, regarded by legal system as subjective motive, excludes the opinion, that the administrative body, in the course of implementation of discretionary power, has considered, weighted all arguments and circumstances.[25] Such cases can also be referred to as "inadmissible motivation".[26]

In accordance with the decision, made by German Federal Court in 1967, in Bremen, people, protecting against renewed atomic policy of the United States, assembled on the public square. Police dispersed the assembled people using force and took away the posters. The basis of making such decision was failure to fulfill the obligation of preliminary notification. Besides, the assembled people had not organizer. Administrative claim and suit proved to be unsuccessful in every instance. According to the explanation of German Federal Court, the decision, made by the police is legal, as the police is authorized to disperse every public assembly in the open air without preliminary notification. The

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21 *Wolff H.* in *Sodan H., Ziekow J.,* Großkommentar zur Verwaltungsgerichtsordnung, 2. Auflage, Baden-Baden 2006, § 114, Rn 177.

22 *Rode L.,* § 40 VwVfG und die deutsche Ermessenslehre, Frankfurt am Main 2003, 90.

23 *Driehaus H., Pietzner R.,* Einführung in das Allgemeine Verwaltungsrecht, 3. überarbeitete und erweiterte Auflage, München 1996, §9, Rn 28.

24 *Henneke H.*, *Knack H.,* Kommentar zum Verwaltungsverfahrensgesetz, 8., neu bearbeitete Auflage, Köln, Berlin, Bonn, München 2004, § 40, Rn 47.

25 *Kopp F., Schenke W.,* Kommentar zur Verwaltungsgerichtsordnung, 15., neubearbeitete Auflage, München 2007, § 114, Rn 15.

26 *Rode L.,* § 40 VwVfG und die deutsche Ermessenslehre, Frankfurt am Main 2003, 92.

decision on dispersal of assembly would be illegal, if the administrative body violated discretionary power. The decision of the police would be violation of discretionary power, if the decision of the police were affected by political views and ideology of the participants of the assembly.[27]

According to the decision of German Federal Court of 1977, the President of German Federal Republic removed several public servants from diplomatic service. Refusal to satisfaction of administrative claim of the stakeholders was based on the circumstance, that the President's authority in disputable issue was not limited by any basis, time-related circumstance or decision limitations. According to the justification of the administrative body, the President is authorized to make a decision on removal of a servant from the position, e.g. based on the age of the servant, also sue to structural or other changes in the organization. According to the explanation of German Federal Administrative Court, the decision, made by the administrative body is illegal, as for legality of administrative act, specific circumstance, influencing decision-making, shall be stated. The purpose of discretionary power, granted to the President of German Federal Republic is ensuring of official duties by "political servants" in conformity with the policy of the government. However, the decision shall be based on the assessment of the circumstance whether the public servant has skills and preparedness for fulfillment of official duties or not. Therefore, removal of servant from the position based on any reason is inadmissible.[28]

a. c) Self-Limitation of Administrative Body

The administrative body is authorized to determine internal regulations for the purpose of uniform implementation of discretionary power. In such case, the administrative body establishes self-limitation – it makes decision to limit the implementation of discretionary power by its own, internal regulations; and the principle of equality obliges the administrative body to have similar approach to every case, consider the internal regulations, established by it.[29]

Limitation of implementation of discretionary power by the administrative body based on the principle of equality implies making the decision of similar content in the case of existence of similar factual circumstances. The principle of legal state prohibits to the administrative body to change the established administrative practice. Nevertheless, the administrative body is authorized to change administrative practice, if sufficient basis exists for it.[30]

The principle of equality does not give anybody the right to demand incorrect decision-making from the administrative body, if the established administrative practice is incorrect. Improper, illegal practice does not cause self-limitation of the administrative body, as there is no equality in illegality.[31]

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27 BVerwGE 26, 135-140.

28 BVerwGE, 52, 33 ff.

29 *Rennert K., Eyermann E., Fröhler L.,* Kommentar zur Verwaltungsgerichtsordnung, 12., überarbeitete Auflage, München 2006, § 114, Rn. 28.

30 *Rennert K., Eyermann E., Fröhler L.,* Kommentar zur Verwaltungsgerichtsordnung, 12., überarbeitete Auflage, München 2006, § 114, Rn. 27.

31 *Ossenbühl F.* in *Erichsen H., Ehlers D.,* Allgemeines Verwaltungsrecht, 12., neu bearbeitete Auflage, Berlin 2002, 214, Rn 20.

If the administrative body changes administrative practice, new approach shall be applied to all stakeholders equally.[32]

b) Violation of the Boundaries of Discretionary Power

According to the opinion, established in scientific literature, violation of the boundaries of discretionary power is obvious, when the administrative body makes the decision, which is not within the limits, established by the norm. Such cases are, for example, application of measures, which is specific case are not regarded as "necessary" measures in police law.[33]

It does not matter what is the basis of violation of boundaries of discretionary power.[34] And identification of such cases is related to great complexities.[35]

Classical example of violation of boundaries of discretionary power is penalization of a person by the administrative body by 60 EUR while, according to the norm, it is authorized to define the fine from 20 to 50 EUR.[36] Such type of mistake may exist not only in the administrative acts, issued within discretionary power, but also in the administrative acts, issued without discretionary power. [37]

c) Failure to Fulfill the Obligation of Use of Discretionary Power

The obligation of use of discretionary power is violated, if the administrative body doesn't use discretionary power. Although it's the discretion of the administrative body whether or not it takes specific action, takes specific measure, it is obliged to verify whether is is obliged or not to use the measure, provided by discretionaru power.[38]

The cases of failure to fulfill the obligation of discretionary power in practice is frequent. In the case of violation of the obligation of use of discretionary power, it does not matter much whether it happened to the administrative body out of negligence or explained this norm incorrectly.[39]

It's classical example of violation of obligation of use of discretionary power when a citizen, living near a church, applies to police and demands to take appropriate action against disturbing "untimely" bell noise, but police does not make any decision, as it mistakenly considers that has no power to issue administrative act in regard to a church.[40]

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32 *Rennert K., Eyermann E., Fröhler L.,* Kommentar zur Verwaltungsgerichtsordnung, 12., überarbeitete Auflage, München 2006, § 114, Rn. 27.

33 *Wolff H., Bachoff O., Stobe, R.,* Verwaltungsrecht, Band 1, 11. neubearbeitete Auflage, München 1999, 463.

34 *Kopp F., Schenke W.,* Kommentar zur Verwaltungsgerichtsordnung, 15, neubearbeitete Auflage, München 2007, § 114, Rn 7.

35 *Fachinger J.,* Überschreitung und Fehlgebrauch des Verwaltungsermessens, NJW, München und Berlin 1949, 244.

36 *Maurer H.,* Allgemeines Verwaltungsrecht, 16. Auflage, München 2006, 141.

37 *Alexy R.,* Ermessensfehler, JZ, Tübingen 1986, 702.

38 *Maurer H.,* Allgemeines Verwaltungsrecht, 16. Auflage, München 2006, 141.

39 *Mutius A.,* Unbestimmter Rechtsbegriff und Ermessen im Verwaltungsrecht, Jura 1987, 99.

40 *Maurer H.,* Allgemeines Verwaltungsrecht, 16. Auflage, München 2006, 141.

2.2.1.2 Two Types of Mistakes Made in Implementation of Discretionary Power

The arguments of supporters of existence of only two mistakes in implementation of discretionary power rely on the explanation of p. 114 of German Administrative Procedural Code and p. 40 of the Law of Germany on Administrative Proceedings. The two types of mistakes are (1) failure to take into account the purpose of discretionary power and (2) violation of limits of discretionary power.[41]

Such approach is very narrow and the above-mentioned norms shall be explained broadly. Nevertheless, many scientists follow this doctrine in scientific literature.[42]

a) Violation of Boundaries of Discretionary Power

This type of mistake implies violation of the boundaries, established by legislation, by the administrative body. The administrative body makes mistake in the course of implementation of discretionary power, if it goes beyond the boundaries of discretionary power. Violation of boundaries of discretionary power is obvious, when the administrative body violates the principles, guarantees by the Constitution and the Law of Administrative Proceedings. The principles of equality and proportionality are of special importance. The cases of reduction of discretionary power to 0 – when only one decision can be made according to the norm, granting discretionary power, but the administrative body makes other decision - is also regarded as violation of the boundaries of discretionary power.[43] In this case, the administrative body is obliged to "choose" only one decision. These cases are referred to as the cases of reduction of discretionary power to zero.[44] There is a lot of criticism related to reduction of discretionary power to zero in scientific literature. According to critical opinion, the courts, due to reduction of discretionary power to zero, found the method of one-sided and final resolution of dispute.[45] Consequently, there is a question – who makes final decision – the court of the administrative body. With the argument of education of discretionary power to zero, the court implements discretionary power instead of the administrative body.[46]

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41 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 108.

42 *Alexy R.,* Ermessensfehler, JZ, Tübingen 1986, 702.

43 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 109

44 *Maurer H.,* Allgemeines Verwaltungsrecht, 16. Auflage, München 2006, 143.

45 *Kopp F., Götz V., Klein H. H., Starck Chr.,* Die Öffentliche Verwaltung zwischen Gesetzgebung und richterlicher Kontrolle: Göttinger Symposion, München 1985, 146.

46 *Püttner G., Götz V., Klein H. H., Starck Chr.,* Die Öffentliche Verwaltung zwischen Gesetzgebung und richterlicher Kontrolle: Göttinger Symposion, München 1985, 132.

b) Improper Use (Abuse) of Discretionary Power

This type of mistake implies failure of consideration of the purpose of discretionary power by the administrative body. This subjective mistake, made in discretionary power, is also referred to as the abuse of discretionary power. In the opinion of the followers of this doctrine, improper use of discretionary power also includes the cases when the administrative body does not or incompletely implements discretionary power.[47]

2.2.1.3 One Type of Mistake Made in Implementation of Discretionary Power

The followers of the mentioned doctrine consider that the administrative body may make only one mistake in implementation of discretionary power.[48] The followers of this doctrine are divided into two groups: some consider that the only type of mistake, made in the course of implementation of discretionary power is violation of the boundaries of discretionary power, and other scientists think that the only type of mistake, made in the implementation of discretionary power is failure to consider the purpose of discretionary power.[49]

Both approaches are discussed in the following chapters:

a) Reduction of Mistake on Violation of the Boundaries of Discretionary Power

The thesis of assumption of only one mistake in implementation of discretionary power is based on the argument, that the mandatory nature of implementation of discretionary power and consideration of material circumstances of the case is nothing else than observance of the boundaries, established by legislation. If this requirement is not observed in the course of implementation of discretionary power, the boundaries of discretionary power are violated. And abuse of discretionary power is nothing else than violation of boundaries of discretionary power.[50]

b) Reduction of Mistake of Abuse of Dicretionary Power

There is a thesis, according to which the type of mistakes, made in implementation of discretionary power is abuse of discretionary power. This is the case when the administrative body does not take into account ratio legis. This type of mistake also includes violation of the boundaries of discretionary power.[51]

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47 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 109-110.

48 *Alexy R.,* Ermessensfehler, JZ, Tübingen 1986, 704.

49 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 112.

50 *Alexy R.,* Ermessensfehler, JZ, Tübingen 1986, 704.

51 Ibid,, 705.

The doctrine related to the one type of mistake, made in the implementation of discretionary power is not spread in scientific literature. According to critical opinion, this approach is too simple and leaves the complex nature of mistakes, made in the course of implementation of discretionary power, beyond the attention.[52]

2.2.1.4 Specific List of Mistakes Made in Implementation of Discretionary Power

The above discussed approaches represent the attempt of accommodation of the typesof mistakes, made in the course of implementation of discretionary power in uniform legal notions. Such approaches are related to difficulties. That is why certain scientists refused to refer the mistakes, made in the course of implementation of discretionary power to certain legal category and tried to make as complete list of mistakes as possible.[53] Classification of such cases is mainly based on the analysis of judicial practice.[54] Nevertheless, the problem of the mentioned approach is in denial of the very first task of dogmatics of the law science to systemize the materials of administrative law and express them in proper notions.[55]

2.3 Alternative Classification of the Types of Mistakes, Made in Implementation of Discretionary Power

Is we collate the above-discussed theories, the mistakes, made in the implementation of discretionary power can be divided into two parts: (1) the mistakes, made in the decision-making process in the framework of discretionary power and (2) incorrect decision, made as a result of implementation of discretionary power. Thus, one part of mistakes is related to the internal, subjective side of implementation of discretionary power, and the other – to the external, objective side of implementation of discretionary power.[56]

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52 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 113.

53 *Alexy R.,* Ermessensfehler, JZ, Tübingen 1986, 705.

54 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 113.

55 *Alexy R.,* Ermessensfehler, JZ, Tübingen 1986, 705.

56 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 115.

2.3.1 Mistakes, Related to the Internal, Subjective Side of Implementation of Discretionary Power

Internal, subjective mistakes of implementation of discretionary power are the mistakes, made in the course of formation of opinion and will, as well as those made during argumentation process.[57]

This type of mistakes can be divided into the following groups:

a) Failure to Fulfill the Power of Implementation of Discretionary Power

Typical, internal, subjective mistake, made in implementation of discretionary power is full neglecting of the relevant circumstances, failure to consider proportionality of public and private interests, or, in other words, failure to fulfill the obligation of implementation of discretionary power. Cases, where administrative authority considers that it has not been granted discretionary power according to norm and thus is does not fulfill discretionary power, are widely spread in practice. These cases might also be caused by insufficient knowledge of legal bases as well.[58]

The cases, where the administrative authority properly understands the content of the norm and knows that it has been granted discretionary power, are also spread in judicial practice. Yet, due to incorrect views, is considers that there is only one way of resolution of specific case. These are the cases, where, e.g. the administrative authority acknowledges the granted discretionary power but makes one specific decision, as it considers that it has to obey the instruction of otter administrative authority. Besides, administrative authority may make this mistake due to the influence of incorrect, illegal administrative practice. In particular, it makes only one decision in the course of implementation of discretionary power, as this is the administrative practice. Besides, there are cases in judicial practice, where the administrative authority makes only one decision because it considers that discretionary power is reduced to zero.[59]

There are cases of failure to fulfill the obligation of use of discretionary power, where the administrative authority acknowledges that it has been granted discretionary power, but doesn't want to implement it in principle. Besides, this type of mistake may be made in the case of automation of decision-making process.[60]

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57 *Alexy R.,* Ermessensfehler, JZ, Tübingen 1986, 707.

58 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 116-117.

59 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 117.

60 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 117- 118.

b) Consideration of Irrelevant Circumstances and Neglection of Relevant Circumstances

Such mistakes are made, when the administrative authority, in the course of implementation of discretionary power, doesn't consider relevant factual or legal circumstances. Relevant and irrelevant circumstances shall be established on the basis of analysis of specific norm. Difficulty may arise during this process, if determination of the purpose of the norm is impossible or obscure, also, if the norm does not define necessary, relevant views for implementation of discretionary power.[61]

c) Implementation of Discretionary Power for Inadmissible Motive or Purpose

Implementation of discretionary power includes mistake, when administrative authority contradicts the purpose of granting discretionary power for inadmissible basis. This type of incompliance between the content of the norm and internal motive of the administrative authority might be based on the mood of an official, unplanned approach or negligence.

The level of deviation from the norm increases when the administrative authority violate the purpose of granting discretionary power on purpose. It can be expressed not only in biased or mean action, caused by antipathy or with the intention of causing damage, but also in giving preference, caused by sympathy, compassion or political views.[62]

2.3.2 Mistakes, Related to the External, Objective Side of Discretionary Power

The limits of discretionary power are violated, if resolution part of the administrative act contradicts legislation. Contradiction with legislation implies content-related contradiction with the norm, standing on higher hierarchic stage.[63]

This type of mistake is divided into the following sub-groups:

a) Selection of Decision, not Provided by the Norm

The case, where the administrative authority makes decision, not provided by norm, as a result of implementation of discretionary power, is popular in scientific literature, yet rare in judicial practice.[64]

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61 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 118.

62 Ibed, 121-123.

63 *Alexy R.,* Ermessensfehler, JZ, Tübingen 1986, 707.

64 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 124.

b) Violation of Equality Principle

Violation of equality principle, guaranteed by the Constitution, is external side of mistake, made in implementation of discretionary power.[65]

c) Violation of Proportionality Principle

Administrative authority may make mistake in the course of implementation of discretionary power, if it doesn't consider the principle of proportionality. On the basis of judicial practice of German Federal Constitutional Court and fundamental human rights and frredoms, the level of the principle of proportionality is equaled to the level of constitutional principles.[66]

3. Legal Consequences of the Mistakes, Made during Implementation of Discretionary Power

3.1 Checking of the Mistakes, Made During Implementation of Discretionary Power by the Higher Administrative Authority

According to p. 1 of 68th paragraph of German Administrative Procedural Code, in the case of submission of administrative claim, the higher administrative authority shall check the expediency and legality of the decision subject to claim.[67]

In accordance with p. 1 of the Article 177 of the Common Administrative Code of Georgia, the interested party is authorized to contest the administrative- legal act issued by the administrative authority.

The Article 193 of the Code determined the volume of administrative proceedings related to administrative claim. The administrative authority, considering the claim, shall consider the administrative claim within the limits of the request, specified in it; but it can go beyond them in the cases, provided by the law.

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65 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 124.

66 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998,129-130.

67 Basistexte Öffentliches Recht, 8. Auflage 2007, 405.

3.2 Checking of the Mistakes, Made During Implementation of Discretionary Power by the Court

According to the paragraph 114 of German Administrative Procedural Code, court shall check whether the legal limits are observed and whether discretionary power was implemented in accordance with the purpose of the law.[68]

The court shall establish whether the administrative authority was granted discretionary authority at the time of decision making and whether mistake was made in the course of implementation of discretionary power.[69]

The court is obliged to investigate the circumstances, which formed the basis for the decision. The decision shall be justified. Failure to comply with the requirement of justification shall be assessed by the court as illegal implementation of discretionary power.[70] The obligation og justification of decision is imposed on administrative authority, as judicial control is limited in the case of checking of legality of the decision, made within the limits of discretionary power. The obligation of justification serves the purpose of control of activities of the administrative authority.[71]

The justification of the administrative authority shall specify the views, opinions and circumstances, on the basis of which it made the decision. It shall be possible to identify on the basis of the decision, how the administrative authority assessed the factual and legal circumstances. The justification shall be detailed. Court identifies the mistake in implementation of discretionary power and abolished the decision, if the administrative authority violates the obligation of justification.[72]

Based on Administrative Procedural Code (APC) of Georgia, the court shall check the legality of administrative-normative act, issued by the administrative authority; but, unlike German legislation, Georgian APC does not contain specific rule for checking of decision, made within the limits of discretionary power. Thus, it's expedient to conduct systemic analysis of the norms, provided by the Code, on the basis of which it will be established which norms shall be used by judge for checking of legality of the decision, made within the limits of discretionary power.

The term "discretionary power" is used in APC of Georgia only in the Article 33. This Article defines the rule of decision-making on issuing of administrative- legal act and not in regard to the suit on abolition of the decision, made by the administrative authority. According to the norm, if the administrative authority has not investigated factual and legal bases of the decision completely or at all, additional investigation of the circumstances of the case is required, which can be carried out only by the

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68 Basistexte Öffentliches Recht, 8. Auflage 2007, 417.

69 *Nagel W.,* Die Rechtskonkretisierungsbefugnis der Exekutive: Ermessenskategorien und verwaltungsgerichtliche Kontrolldichte, Konstanz 1993, 2.

70 *Faber H.,* Verwaltungsrecht, 4. überarbeitete Auflage, Tübingen 1995, 209.

71 *Hufen F.,* Fehler im Verwaltungsverfahren, 4., überarbeitete und aktualisierte Auflage, Baden-Baden 2002, 192.

72 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 136-137.

administrative authority. Consequently, the court obliges the administrative authority to issue administrative- legal act.[73] Thus, judge cannot establish the legality of the decision, made within the limits of discretionary power on the basis of the above-mentioned Article, as the Article only defined the rule of making court decision on issuing of administrative- legal act.

The Article 32 of the APC of Georgia established the rule of decision-making by the court in regard to the suit on declaring the administrative- legal act invalid or null and void. The court checks the compliance of the administrative- legal act with the law. If the administrative- legal act is illegal and it directly infringes the legal right, or interest of the suer, or illegally limits his/ her right, the court shall make decision on declaring the administrative- legal act null and void.[74]

According to p. 4 of the Article 32 of the APC of Georgia, if the court considers that the individual administrative- legal act was issued without investigation and assessment of circumstances of substantial importance for the case, it shall be authorized to declare the individual administrative- legal act null and void without resolution of disputable issue and oblige the administrative authority to issue a new one after investigation and assessment of these circumstances.

Legal bases for declaring the administrative- legal act null and void are provided in the Article 60(1) of the Common Administrative Code of Georgia. According to the norm, the administrative- legal act shall be null and void, if it contradicts the law or other requirements of its preparation or issuance, established by legislation, are substantially violated. The following shall be regarded as substantial violation of the rule of preparation and issuance: issuance of administrative- legal act during the meeting, held with violation of the rule, provided by the Article 32 (publicity of meetings) or the Article 34 (meeting of collegial public establishment) of the Common Administrative Code of Georgia or with violation of the type of administrative proceedings, provided by the law, and/ or law violation, without which other decision would be made in regard to the given issue.

On the basis of analysis of the norm of the Administrative Procedural Code of Georgia and the Common Administrative Code of Georgia, the following conclusion can be made: specific procedural rule of checking of legality of implementation of discretional power does not exist. When checking the decision, made within the limits of discretional power, judge can be guided by the Article 32 (Declaring of Administrative- Legal Act Invalid or Null and Void) of the Administrative Procedural Code of Georgia, Article 96 (Investigation of Circumstances of the Case), Article 53 (Justification of Administrative- Legal Act) as well as Articles 6 (The Rule of Implementation of Discretionary Power) and 7 (Proportionality of Public and Private Interests) of the Common Administrative Code of Georgia. Nevertheless, the cases, when judge checks the implementation of discretionary power against the Articles 6 and 7 of the Common Administrative Code of Georgia, seldom occur in judicial practice.

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73 *Vachadze M., Todria I., Turava P., Tskepladze N.,* Comments to the Administrative Procedural Code of Georgia, Tbilisi, 2005, 198.

74 *Vachadze M., Todria I., Turava P., Tskepladze N.,* Comments to the Administrative Procedural Code of Georgia, Tbilisi, 2005, 182.

3.3 Problems with Investigation of Mistakes, Made During Implementation of Discretionary Power

The obligation of investigation of mistake, made during implementation of discretionary power by the administrative authority creates many problems to the court. It particularly related to the mistakes like mistake in motive, as the internal mistake, made in implementation of discretionary power cannot be read in the contested administrative act. Thus, this issue is not known to the court; but, following the justification of the act, the court shall obtain certain idea on what was the motive of the administrative authority when making decision. Thus, following which judgement, important role is attached to the obligation of justification, provided by the paragraph 39 of the Law on Administrative Proceedings. The purpose of the obligation of justification is documenting, as well as ensuring the effectiveness of judicial control. A citizen shall be able to define the possibility of success of the suit in advance, following the justification of the act. The decision, made within the limits of discretionary power, requires written justification, which includes description and assessment of factual circumstances and legal bases. The administrative authority shall provide such justification of the decision, which will clearly show the views and opinions of the administrative authority on why it made this specific decision. The justification shall show whether or not the administrative authority has used discretionary power at all. Besides, it shall be clear, following the justification, why the interests of the addressee of the act were or were not considered; besides, the "weights" of the opinions and interests shall be seen. The justification shall be detailed and enforcement of the decision shall be possible.[75]

If justification of administrative act is insufficient or the justification part is not specified in the act at all, the following question shall be asked: how the absence of justification of the decision, made within the limits of discretionary power shall be assessed and how it materially affects the decision, made within the limits of discretionary power. Two cases are differentiated in judicial practice and scientific literature: when the justification is formally incorrect and when the justification is formally correct, by erroneous by content. According to the widely spread opinion, inobservance of minimum requirements of administrative act implies mistake in implementation of discretionary power. This case implies that the administrative authority has violated the obligation of weighting the interests, required for the implementation of discretionary power. Nevertheless, till the end of administrative process, the administrative authority has the possibility to improve this defect and justify the act, issued within the limits of discretionary power during the process.[76]

Problematic is the case, when the justification of the contested administrative act is formally correct, but it is incomplete or improper from the viewpoint of content. In this case, the following question shall be asked: is it possible for the administrative authority to improve the content-related mistake, made in the course of justification, during the administrative proceedings? Although such case

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75 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998,135-136.

76 Ibid, 136-137.

indicates to the incorrect implementation of discretionary power, certain portion of scientific literature provides opinion, that the administrative authority can justify the administrative act even during legal procedure; but in this case, demonstration of the motive and bases of the decision, made within the limits of discretionary power, shall be possible at the very beginning of legal procedure. The justification shall not just "appear" during legal procedure; and other scientists consider that justification of the decision, made within the limits of discretionary power during legal procedure is inadmissible, as it contradicts p.2 of the Article 20 of the Basic Law of Germany. In this case, the court makes decision instead of the administrative authority.[77]

4. Georgian H\Judicial Practice on Checking Mistakes, Made in Implementation of Discretionary Power

Judicial control of decisions, made by the administrative authority within the limits of discretionary power, is inhomogeneous. As an example of the above stated, we could refer to the decision # bc-87-87 dated May 20, of the Appeal Court. Lord Mayor of Kutaisi dismissed Leading Specialist by administrative- legal act, based on reduction of stuff. The dismissed person applied to the court. In his opinion, the decision contradicted the law, as he had the relevant qualification and many years of experience. So, as compared with other persons. He enjoyed privileged right of staying in the position. The City Court satisfied the suer's request, as, in the Court's opinion, the Mayor of Kutaisi, when making decision, should be guided by the principles, set forth in the Law of Georgia "On Public Service". In the case of dismissal of servants, violation of the principles, established by the law, leads to losing the sense of existence of these principles. The suer had big practical experience, he was professional and, following the principles of the law, had privileged right of keeping his position. In the opinion of the Cassational Court, the first instance court incorrectly intruded in discretionary power of the administrative authority. Thus, the Cassational Court considered, that decision of the issue of keeping and dismissing individual employees relates to the sphere of discretionary power of the administrative authority and interference is inadmissible. The Cassational Court abolished the appealed decision and returned the case for repeated hearing to the Appeal Court. In the opinion of the Cassational Court, the decision was so unjustified that checking of its legality is impossible. In the Court's opinion, discretionary power does not mean neglecting of proportionality and the principles of legality. The scope of free activities of the administrative authority is limited by the law. If the Cassational Court shares the motivation of the Appeal Court on administrative power, as indefinite right, in this case the person's right to protect himself obtains fictitious content and goes out of the scope of judicial control. The main function of the court is to determine whether the administrative authority, when implementing discretionary power, observed the limits of the law and the principle of equality of persons in the face of law, also, whether the limitation of labor rights in the given circumstances was admissible, necessary and

[77] *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 137-138.

proportional. Different opinion was expressed by one judge, according to whom the Cassational Court had to made new decision, declare the disputable act null and void and for the resolution of the disputable issue Kutaisi City Hall had to be ordered to issue new act as a result of investigation of the circumstances of the case. It would contribute to introduction of homogeneous practice, as radically different decisions of the City Court and Appeal Court are evident. On the one hand, the City Court fully satisfied the suit and intruded in the discretionary power of the administrative authority; on the other hand, the Appeal Court did not satisfy the suit at all, arguing that the administrative authority was acting within the limits of discretionary power, where it shall not be limited. Both conclusions are mistaken, which is re result of superficial understanding of discretionary power. The Law of Georgia "On Public Service" gives the administrative authority discretionary power to adequately assess professional skills, qualification, labor discipline of the employees in the case of reduction of staff and make motivated decision. These principles determine the purpose, aim, specificity of the normative act, standard of preservation of human rights and public interests. Their neglecting means neglecting of the content of legal relations. Formalistic understanding of discretionary power enables administrative authorities to make unjustified decision, incompliant with the law. It is direct obligation of judicial authorities to implement full judicial control over the activities of governmental bodies, which is the constitutional function of the judicial authorities, serving to the realization of the key constitutional principles – the principles of distribution of governance and mutual balance. Establishment of such practice excludes the responsibility of the administrative authority in the case of making unjustified decision, incompliant with the law. It ultimately greatly endangers the process of formation of Georgia, as a rule-of-law state.[78]

The Supreme Court of Georgia made important explanation on the case #1655-1627(k-11). In particular, small goods vehicle, driven by the suer, entered the territory of "Sadakhlo" border crossing point. When examining the vehicle, undeclared goods – 400 kg grapes were discovered. As sanction, the vehicle was taken away from the suer. According to the suer's explanation, the vehicle was not his property, but was given to him with the right of driving. The suer specified that he was 60 years old, unemployed, and, due to difficult economic situation, cannot buy another vehicle for the owner. The suer requested modification of the sanction and imposition of fine in the amount of 100% of customs value of the goods instead of vehicle seizure. The Cassational Court considered that in the given case, when imposing sanction for customs law violation, the balance of public and private interests was violated by the administrative authority in regard to the suer. In particular, it was not defined, why the purpose of consideration of law violation issues could not be achieved by imposition of other sanction rather than seizure of vehicle, in regard to the appellant. The existence of alternative of the sanction, established by specific norm, required this kind of justification. In the opinion of the Supreme Court, in the given case, with consideration of the amount (values) of undeclared goods, seizure of vehicle had punitive, repressive character and was contradicting the requirements of fairness. Taking into account, that the penalty sanction was related to the restriction of the constitutional right of ownership, the applied sanction shall comply with the principle of proportionality. Equality should have been observed when applying sanction for the committed law violation. And the applied sanction shall consider the nature of

78 *Turava P., Tskepladze H.,* Manual of Common Administrative Law, Tbilisi, 2010, 241-247.

the committed action and be proportional to the goals, achievement of which is set by the norm, granting discretionary power. Failure to consider the above mentioned could lead to the willfulness of the administrative authority. The administrative authority did not discuss the appropriateness of application of seizure of vehicle as the type of sanction. In the opinion of the Cassational Court, when imposing the fine, the administrative authority shall take into account the extenuating circumstances, graveness of law violation personality of law violator. In the case, the applied sanction would be adequate. Making decision within the limits of discretionary power obliges the administrative authority to select the most admissible decision out of several decisions on the basis of preservation of public and private interests. The Cassational Chamber also mentioned that when considering the administrative claim, the administrative authority checked not only the issue of legality, but the issue of appropriateness as well. Thus, the discretion of the administrative authority of lower instance might be replaced by the discretion of the higher administrative authority. When checking the appropriateness of application of discretional power, the higher administrative authority was using discretionary power itself. The damage, resulting from the issuance of administrative act by the administrative authority, caused to the person's rights and interests, protected by the law, shall not substantially exceed the good, for the achievement of which it was issued; the measures, provided by the administrative- legal act, issued within the limits of discretionary power, shall not result into unjustified restriction of the person's legal rights and interests. The obligation of justification is conditioned by the purpose of implementation of control over the activities of the administrative authority. The views, opinions and circumstances, on the basis of which the administrative authority made the decision, should be stated in the justification; neglecting, by the administrative authority, of justification, as the measure of protection against willfulness, formed the basis for identification of the mistake in the implementation of discretionary power and abolition of the act.[79]

5. Conclusion

In similar with paragraph 40 of the Law of Germany on Adinistrative Proceesings, Common Administrative Code of Georgia imposes obligation on the administrative authority to implement discretionary power within the limits, established by legislation. The administrative authority is obliged to implement discretionary power only for the purpose, for the achievement of which this power was granted to it.

In accordance with the established opinion in scientific literature, exhaustive list of mistakes, made in the course of implementation of discretionary power does not exist.[80]

According to the opinion, widely spread in scientific literature, there are the following types of mistakes, made in the implementation of discretionary power:

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79 Explanation of the Chamber of Administrative Cases of the Supreme Court of Georgia in Regard to Discretionary Power, <http://www.supremecourt.ge/files/upload-file/pdf/ganmarteba25.pdf>.

80 *Brinktrine R.,* Verwaltungsermessen in Deutschland und England: Eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998, 105.

a) Mistaken implementation of discretionary power, or, in other words, abuse of discretionary power;

b) Violation of the limits of discretionary power;

c) Failure to fulfill the obligation of use of discretionary power.

Based on alternative view, the types of mistakes could be divided into two groups: internal, subjective mistakes and external, objective mistakes of implementation of discretionary power.

The first group include mistakes like failure to fulfill the obligation of implementation of discretionary power, consideration of irrelevant circumstances and omission of relevant circumstances, implementation of discretionary power for inadmissible motive or purpose. The second group covers selection of decision, not provided by the norm; violation of the principle of equality; violation of the principle of proportionality.

Identification of the mistakes, made during implementation of discretionary power is possible during consideration of administrative claim in the higher administrative authority, as well as consideration of suit in the court. Nevertheless, identification of the mistake, made during implementation of discretionary power, in the court is related to more complexities, especially is the mistake relates to the internal, subjective side of implementation of discretionary power.

Natalia Burduli*

Critical Comparison of the Decisions of the United States' Courts in *Boumediene v. Bush* 553 US 723 (2008) and *Al Maqaleh v Gates* No.09-5265 (2010) From the Perspective of International Law

I. Introduction

One of the challenging and fundamental rights of a human being under the detention is the habeas corpus right.[1] The International Covenant on Civil and Political Rights (further, ICCPR)[2] in its Article 9(4) provides explicit protection stating that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that such court may decide on the lawfulness of his detention and order his release if the detention is not lawful."[3] Thus, every state has the obligation to provide each of its detainees with the adequate right.

After terrorist attacks in September 11, 2001 the question, whether the authority of the US courts is enough to evaluate decisions made by the head of the state with regard to individuals detained as part of the so called "war on terror,"[4] for indefinite time, became extremely debatable. Although US constitution does not provide obvious right to writ of habeas corpus, its frames still do not fail to assess its importance and preserves the privilege nature of the right, what is known as "Suspension Clause."[5] Suspension is only possible in such cases as "rebellion or invasion" as "public safety may require it."[6] In *Boumediene v. Bush,*[7] the government claims that, under its Constitution, "Few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."[8]

Abovementioned Suspension Clause is truly the main reason of existing debate on its scopes of applicability. Under the *Boumediene* judgment, for the first time about 300 prisoners at the Guantanamo[9] possess constitutional right to trial their detention in habeas corpus proceedings in the US courts.[10]

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1 *Preiser v. Rodriguez,* 411 U.S. 475 (1973)

2 *International Covenant on Civil and Political Rights,* 16 December 1966.

3 *Ibid,* Art. 9(4).

4 Term first used by the Bush administration.

5 U.S. Constitution, Art. I, § 9, cl. 2.

6 *Ibid.*

7 *Boumediene v. Bush*, 128 S.Ct. 2229, 2277 (2008).

8 *Ibid.*

9 Guantánamo Bay, Cuba, Naval Facility, (further Guantanamo).

10 *Supra n3.*

However, this decision is only applicable and limited to the Guantanamo.[11] Further decisions on the extraterritoriality of the Suspension Clause of the US Constitution are to be made according the set three-part balancing test for determining if other non-citizen detainees would also be in a position to appeal the protections of habeas corpus[12] when detained by the US in other parts of the world. The D.C. District Court in the case of *Al Maqaleh v. Gates* held one of such decisions.[13] In this case, prisoners seized in Bagram Air Base in Afghanistan,[14] requested the writ of habeas corpus on the basis of *Boumediene.* Although the District Court ruled that Suspension Clause was applicable to non-Afghans brought to Bagram,[15] after the US appeal, D.C. Circuit contrary to the first decision held that Suspension Clause could not be extended to Bagram.[16]

Aforesaid two decisions will be critically compared and relevant international law questions regarding the habeas corpus right will be accordingly analysed.

2. Boumediene v. Bush

Unprecedented judgment was held by the Supreme Court of the US with regard to the reach of the Suspension Clause.[17] The petitioners in this case, captured in Afghanistan or elsewhere abroad, were aliens imprisoned at Guantanamo. Detainees were labelled as enemy combatants by the special Combatant Status Review Tribunals established by the Defence Department. They challenged the legality of their detention but, in time, when appeals on their cases were pending, the US Congress passed the Military Commission Act[18] (MCA), Section 7(a) of which modified Section 2241 of the US Code, so that it blocked jurisdiction regarding the habeas corpus writs of "detained aliens determined to be enemy combatants."[19] It also denied jurisdiction as to "any other action against the United States...relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement."[20]

Unique significance of *Boumediene* is clear, as it approved constitutional rights to non-US citizens that had never been to America and were declared "enemy combatants."[21] Based on the Court's analysis of *Johnson v. Eisentrager*[22] and its other extraterritoriality opinions[23], the Court found a more functional

11 *Ibid, at* 2262.
12 *Supra n3.* the three factors as discussed below.
13 *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009).
14 The US military detention facility, (further Bagram), which houses about 600 detainees.
15 *Maqaleh,* 604 F. Supp. 2d at 235.
16 *Maqaleh v. Gates*, No. 09-5265 (D.C. Cir. May 21, 2010).
17 *Boumediene,* 128 S.Ct. 2229.
18 Military Commissions Act (MCA) of 2006.
19 *Ibid.*
20 *Ibid.*
21 *Boumediene,* 128 S.Ct. 2229.
22 *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
23 For example, *Rasul v. Bush*, 215 F. Supp. 2d 55, 72–73 (D.D.C. 2002); *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2763–69 (2006).

approach to not only Suspension Clause inquiry, but also to the fact that the provision of MCA §7(a) was unconstitutional.[24]

Deeming in mind the abovementioned case of *Eisentrager*, three factors, related to determination of the Suspension Clause's reach, were underlined by the Court: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[25] These factors will be examined in details below, as a basis for the decision of the US District Court in another famous case of the *Al Maqaleh v. Gate.*[26]

3. Al Maqaleh v. Gate

The US took control of Bagram Air Base, located about forty miles from north of Kabul. In 2006 the US entered into a lease with Afghanistan that stated that the US "shall have exclusive, peaceable, undisturbed, and uninterrupted possession" of the facility. The US has the sole power to terminate the lease and pays no rent.

Al Maqaleh v. Gates involved three of those detainees. Each is a foreign national, who claims to have been captured outside Afghanistan and brought to Bagram, and each sought to challenge his detention via a petition of habeas corpus. According to their petitions, Fadi al Maqaleh, a citizen of Yemen, was captured near the Afghan border; Amin al Bakri, another Yemeni, in Thailand; and Redha al-Najar, a citizen of Tunisia, in Pakistan. In April 2009, the District Court for the District of Columbia, analogizing Bagram to Guantanamo, ruled that the habeas pleas of these three detainees could go forward. (A fourth petition, by an Afghan national, was dismissed).

After the US appeal, the decision of the D.C. Circuit was different and somewhat debatable. After the long examination, the Supreme Court ruled that habeas corpus was not available to those, who were called "enemy aliens" captured and detained outside the territory of the US.[27]

While in *Boumediene* the Court unified *Eisentrager* and *Insular Cases*[28] with common threat, stating that "the idea…questions of extraterritoriality turn on objective factors and practical concerns, not formalism,"[29] in *Maqaleh*, on the contrary, the Court highlights that it had not overruled *Eisentrager.*[30] It

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24 *Supra n23*, at 2258. *see also Reid v. Covert*, 354 U.S. 1 (1958);*"The Insular Cases":Delima v.Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v.Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904).

25 *Boumediene,* 128 S. Ct. at at 2259.

26 *Supra n15.*

27 *Supra n24.*

28 According to which, some aspects of the Constitution could apply in territories which were not states.

29 *Maqaleh v. Gates*, No. 09-5265, slip op. at 15 (D.C. Cir. May 21, 2010) (quoting *Boumediene v. Bush,* 128 S. Ct. at 2258).

30 Faiza Patel, *The Writ Stops Here: No Habeas for Prisoners Held by U.S. Forces in Afghanistan,* The American Society of International Law, Volume 14, Issue 13, June 3, 2010 .

then turns to the said three factors and practical concerns for reaching of the Suspension Clause.[31]

Not similar to the *Boumediene's* approach, The Court rejected the government's opinion, which believed that the only place, where the Suspension Clause could be applied was a territory, like Guantanamo, where the *de facto* control of the US existed.[32] However, petitioners failed to identify any "limiting principle that would distinguish Bagram from any other military installation."[33] 3 factors, envisaged in *Boumediene,* should be examined.

3.1. Citizenship

As the D.C. Circuit reasonably established, there were quite many similarities regarding the citizenship of petitioners with the ones detained in Guantanamo. For example, they all were foreigners and were imprisoned as enemy combatants. However, the process determining the statuses of the detainees was not as problematic as it was in *Boumediene case.* Therefore, petitioners in *Maqaleh case* were able to have "a strong argument that the right to habeas relief and the Suspension Clause apply in Bagram as in Guantánamo."[34] However, it has to be mentioned that the citizenship alone is not a main determinative factor for the extraterritorial reach of the Constitution. Hence, being a non-US citizen does not help prisoners in their petitions.[35] Thus, the Court in *Al Maqaleh* concluded that all abovementioned "weigh[ed] against a finding that [the petitioners] may invoke the protections of the Suspension Clause.[36]

3.2. Sites of Detention

The second factor for the consideration is the nature of the detention sites. With this regard, more "heavily" arguments were on the side of the government, than in either *Boumediene* or *Eisentrager.* "The D.C. Circuit's analysis here did not address the lower court's concern that petitioners' rendition to the Afghan war theater from elsewhere resurrected *Boumediene's* concern with the limitless power of the Executive to move detainees physically beyond the reach of the Constitution.[37]

Only *de facto* sovereignty was not regarded necessary for the extension of the writ, but was nonetheless a relevant factor. Although, it may seem that in Guantanamo, as well as in Bagram, there is a similar situation regarding the fact that both held under leaseholds, the Court could differ that the US coordinated with Guantánamo for over a century, with antagonistic government presented, which enjoyed *de jure* sovereignty. In comparison, there was "no indication of an intention to occupy the [Bagram] base with permanence, nor is there hostility on the part of the 'host' country."[38]

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31 *Supra n27.*
32 *Maqaleh,* slip op. at 15.
33 *Ibid.*
34 *Supra n34*, at 21.
35 *Boumediene,* at 2256-57.
36 *Al Maqaleh,* at 219.
37 *Supra n32.*
38 *Maqaleh,* slip op. at 22.

3.3. Practical Obstacles

This third factor, taken together with the factor, describing sites of detention, was crucial in deciding the destiny of the case, which was obviously in favour with the government. Essential was the fact that Afghanistan, and thus, Bagram as well, "was a theater of war,"[39] meaning that prisoners in Bagram were more similar to *Eisentrager* detainees than to Guantánamo ones.[40]

According to all circumstances, the Court made a decision that "under both *Eisentrager* and *Boumediene,* the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor the *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign."[41]

In conclusion, the Court noted that, habeas corpus right should not include the situation, when the judicial proceedings "would hamper the war effort and bring aid and comfort to the enemy."[42]

4. Conclusion

To summarize, the first application of the extraterritorial test was examined. Test, which in *Boumediene v. Bush* articulated the reach of the Suspension Clause by the detainees at the Bagram detention facility in Afghanistan.

With regards to the extraterritorial rights for non-US prisoners it should be mentioned that no matter, that the jurisprudence has only just started its development, still the Constitution and its frameworks play fundamental role in abovementioned question.

One more thing to be mentioned as a conclusion is that the court's more supported *Eisentrager* that lead to the circumvent the practical effect of extending the writ to a conflict zone, such as Afghanistan. Instead of assessing the concrete problems and difficulties, stated by the government, the Court just preferred to rely more on *Eisentrager* and thus, broadly conclude that the extension of the right of habeas corpus to Bagram was less important than dangers theoretically existing in a war zone.

39 *Supra n32.*
40 *Supra n40.*
41 *Ibid, at 24.*
42 *Ibid.* citing *Johnson v. Eisentrager,* 339 U.S. 763, 779, 1950.

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