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PUNISHMENTS PROVIDED FOR BRIBERY ACCORDING TO OLD GEORGIAN LAW BOOKS

1. Introduction

"Whatever the offender had to face according to the court decision for the commited crime or offence, was known as "punishment".[1] Punishment is a special measure, established by the state against offenders. Thus, since early period of development of law, any action, regarded as violation of the existed law or directed against morals, i.e. crime, would be subject to punishment. The further the social relations developed, the more the number of offenders and crimes grew. Types of punishment were changing in accordance with it.

Criminal and property-related punishments were known not only for the law created by the state, but for customary law, existing earlier, regulating social relations. In the period of domination of customary law, "administration" of justice was considered divine deed and imposition of "punishment" upon offenders was performed in the name of God. "Romans, Celts, East Indians considered justice divine deed and the same applied to many other areas. But in the course of time justice moved from heaven to earth and finally Themis' temple was being established on sinful earth."[2] But even after adoption of laws developed and ruled by the state, during long time, justice still had connection with "heaven". So law books B.C. and in the first centuries A.D. were created in the name of God. Collections of laws, with consideration of the period of their creation, appear in more or less perfect form before contemporaries.

From present-day point of view high legal level of legislative collections, beginning from early slave-owning system manifests at least in clearly showing what was considered inadmissible action for society in far past and how and in which way the violators of public order had to be punished.

In accordance with law books and legislation existing in any country, bribery, i.e. taking bribe by administrative and judicial officials was known among the actions considered crime. Generally, bribery is the result of moral grubbiness. Just moral depravity formed the basis for bribery in ancient Athens and Rome, where judges evidently took bribe.[3] And bribe-taken judges were subject to punishment. According to the history of criminal law, bribe-takers and bribery were subject to very strict punishment as early as on initial stage of development of society. E.g. according to the information of ancient Greek historian *Herodotus,* the King of Persia *Kambiz* sentenced corrupted judge to death, then skinned him and ordered to cover the judge's armchair with that skin so that any person willing to sit in the judge's armchair

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1 *Javakhishvlili I.*, History of Georgian Law, Book 2, section 2, Tb., 1929, 503 (In Georgian).

2 *Urbneli N.,* Atabags Beka and Agbuga and their Law, Tb., 1890, 269 (In Georgian).

3 *Veko M.A.,* Organization of Criminal Justuce in the Most Important Historic Period, M., 1671, 77 (In Russian).

could remember what kind of punishment they would face in the case of bribe-taking[4]. And the King *Darius* used to crucify judges caught in bribe-taking and making improper decision on the case.[5]

The more the bureaucratic machinery developed and the circle of officials widened, the more this bureaucratic machinery was formed in its sense, as governmental authority, standing above society. And implementation of its, as governmental authority's function was carried out through the same bureaucratic machinery. The mentioned moment was most clearly observed in Rome. Development of bureaucratic machinery was accompanied with development of bribe-taking, which is proven by criminal sanctions of the oldest law of Roman legislation – XII Tabula – towards bribe-takers. In addition to property-related punishments, death penalty was provided for bribe-taking judges according to the laws of XII Tabula as stringent punishment. Punishment was provided for bribe-taking in other laws of Rome of following period. More or less perfect law, covering all possible crimes of magistrates, is considered to be the law developed in 59 B.C."Pex julia åaåtundarumÍ" (Digest.L.48,11; Cod.L.9,27) including general prohibition of magistrates' becoming rich in illegal way, prohibiting bribe-taking. As for sanctions, it provided for returning of illegally obtained property, expulsion from province, deprivation of senator's title together or without expulsion, as well as confiscation of property as addition to basic punishment, etc.[6]

Despite numerous laws and existence of strict sanctions against bribe-taking officials, bribe-taking and extortion still flourished in Rome. In his famous speech against *Verres, Cicero* showed various methods of stealing and named bribe-taking as the gravest and the most shameful crime.[7] In spite of this, bribe-taking officials were still remaining unpunished, so the saying was widely spread in Rome: "nobody can blame a rich person, even if he is guilty".[8] In regard to this saying, the opinion of French scientist *Labulle* about *Julius Caesar* is interesting. *Labulle* wrote: "I don't know why the historians are dazzled with his genius and don't seal this dishonest embezzler with the stamp of shame".[9]

The period of Roman Republic and Empire knows legal proceedings, where high officials were prosecuted for bribe-taking, but very often these processes ended up with acquittal of bribe-taker magistrates and officials for the simple reason that they bribed judges. E.g. *Lucian,* Gillian viceroy, who oppressed the population of the province with heavy charges and who was prosecuted by *Augustus*, saved himself from punishment only because the ceded major part of his property to *Augustus.*[10]

French legislation also provided for strict punishments. But it should be mentioned that serious fight against bribery was impossible in France, in the country, where all positions, including judges' positions, were sold. Nevertheless, French history of law knows the cases of prosecution of bribe-taker officials. E.g. on May 29, 1582, parliamentary advisor *Jean Paulia*, who was a speaker on *Gastena's* case, took house, as a bribe from *Gastena*, dismantled it, moved to Clicha and built it for himself. *Jean Paulia,* accused in bribe-taking, was dismissed from his position, he was prohibited to occupy any judicial position, he was exiled

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4 *Kaukhchishvili T.,* Herodotus, History, vol. II, Tb., 1976, 383 (In Georgian).
5 *Brokauz F.A., Efron A.I.,* Encyclopedic Dictionary, vol. II, book II, Petersburg, 1982, 214 (In Russian).
6 *Utewsky B.S.,* General Studies on Official Crimes, M., 1948, 46-47 (In Russian).
7 Ibid, 45.
8 Ibid, 45.
9 *Utewsky B.S.,* General Studies on Official Crimes, M., 1948, 178 (In Russian).
10 *Utewsky B.S.,* General Studies on Official Crimes, M., 1948, 47 (In Russian).

from Paris district for the period of 5 years. Besides, he was fined with 500 ecus in favor of the King and 600 livres in favor of the poor.[11]

Later French law provided civil demotion, deprivation of the rights of honorable citizen, cash fine, and, considering the gravity of the case, 5 years of imprisonment for everyone, who took bribes, gifts, obtain profit, whether the law was violated or not. Bribery, as a grave crime, obtained particularly strict form during the period of French revolution. Bribe-taker judges were sentenced to death penalty for the mentioned crime.[12]

Dismissal from position and payment of fines were basic types of punishment for bribe-taker officials in English Law too. In XIII c. King *Edward I* had to dismiss the judge of supreme Court *Gengham* and charge him with fine in the amount of 700 marks[13]. As for German law, since early centuries it considered bribe-taking as violation of private persons and the punishment was always imposed in favor of victims. This kind of lack of legal development survived in Germany since XIII c. E.g. in 1235 Mainzkom public [court] was punishing customs officials for charging with illegal customs fees like street burglary. This, Germans didn't manage to come out of the frames of primitive understanding in regard to official crime either before or after "Carolina".[14] But it should also be mentioned that in the law of Salian Franks, Ribuars, Langobards and other tribes exile is specified as the punishment for bribery.

Russian law stood far higher in assessment of bribery as official crime. Bribe-taking was considered one of the grave crimes here, and the following punishments were provided for the persons caught in this offence: fine, expulsion, dismissal from position; also body-related and humiliating punishments: flagellation, damnation and/or cursing, recovery of damage in favor of the victim, and later – even death penalty. With the lawmaker *Ivan III* bribe-taking by judges is confirmed, for punishment of which King's orders were issued to anathemize the bribe-taker, or to take him with cursing and swearing around public gathering places, especially around the markets Moscow and Novgorod and cities, located on adjacent lands, to make the dishonest behavior of the bribe-taker judge known to everybody. Taking around the streets and markets, cursing and anathema and imprisonment was envisaged for bribe-taker officials by legislation of the times of *Ivan IV*. The number of punishments even increased in the period of the King *Alex the Son of Mikhail.* "Law Book" of 1649 provided the following punishments for bribe-taker officials – flagellation, charging fine in triple amount of the bribe taken in favor of state treasury as well as exile, damnation, cursing, deprivation of title and honors. Persons, caught in extortion were punished by humiliating punishments as well. E.g. a purse or various trash, or salt fish – the thing taken as bribe by the person was hung on bribe-taker's neck. Legislators applied extraordinary measures towards bribe-givers and bribe-takers and as mentioned above, they issued orders to anathemize bribe-takers, take them around the market and informs all cities and communities so that plaintiffs and defendants didn't give bribe to judges and police officers.[15]

Russian legislation contains information about boyars and voevodes being punished at King's discretion without consideration of punishment established by law. E.g. Articles 11-12 of the "Law Book"

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11 *Jousse D.,* Traité de la justice criminelle de françe t III., MDCCL XXI, №16, 1889, 774.
12 See: "Magazine of Civil and Criminal Law", №4, M., 1884, 149 (In Russian).
13 *Gneist R.,* History of Public Institutions of England, M., 1885, 346 (In Russian).
14 *Utewsky B.S.,* General Studies on Official Crimes, M., 1948, 148 (In Russian).
15 *Vladimirsky-Budanov M. F.,* Review of History of Russian Law, Kiev, SPB, 1900, 334 (In Russian).

of the King *Alex the Son of Mikhail* specify: "Charging by bribe and/or funeral repast by boyars and voevodes for the purpose of letting soldiers go on leave is considered a crime. Thus the offender, disregarding the existing laws, shall be punished at King's discretion… also, boyars or voevodes which have sworn to the King, if make false accusations as a result of taking a bribe, will be subject to "strict" punishment at the King's discretion".[16] Strict punishments were provided in Russia for bribe-taker officials During the reign of *Peter I*. The person, who committed crime for the motive of friendship, enmity or bribe or other motive, would be subject to death penalty, or life-long expulsion and deprivation all titles.[17]

During elections of public mayors in Russia bribe-takers were punished with special strictness. Those falsifying elections as a result of bribe-taking were punished by bodily punishments and life-long exile to Azov area, and when collecting state fees, bribe-takers were put to death and their property was subject to confiscation.[18]

2. Punishments Provided for Bribe-taking according to Ancient Georgian Law

National and foreign law monuments existing in Georgia provided for strict punishment for bribe-taker officials, in particular, bribe-taker judges. "Law Book of Beka- Bugha" of XIV c., which "appeared spontaneously by God's will" required from judges to follow the principle "don't be complaisant to anybody". Taking bribe, especually by judges, was considered great immorality by the compiler of the "Law Book of Beka- Bugha". So he imposed strict trial – taking out red-hot metal from boiling water - upon the person, suspected in bribe-taking. Trail by boiling water was one of the types of ordeal, which was imposed upon offender in special cases. The "Law Book of Beka- Bugha" referred bribe-taking to just such special cases.Thus the legislator severely disapproved consideration of case and making decisions by judges with greediness in the Article 90 of the legislative Law Book. But, despite the warning "don't take bribe", if still somebody appeared, who couldn't overcome greediness and would take a bribe and decide the case in favor of the bribe-giver, firstly, the case dealt with on the basis of bribe would be calcelled, and secondly, the bribe-taker judge would face a strict trial. The legislator's requirement is categoric – "he would put his hands into copper pot ("sia")". "Sia i" was a big copper pot with boiling water. The judge, sispected in bribe-taking, would take out a red-hot metal from boiling water and thus prove his innocence.

As mentioned above, trail with boiling water was one of the stringent types of ordeals and it was used in Georgia even in the XIX century. During his trip to Guria, in 1873, *D. Bakradze* met local priest *Giorgi Dumbadze*, who told him that "red-hot iron and boiling water represented widely used means only for revelation of particularly grave crimes".[19] Testing by ordeal wasn't the final type of punishment. If, after removal from boiling water, the judge's hands were burnt, his guilt, i.e. bribe-taking would be proven and he would be passed to the court for imposition of punishment. Possible punishment for bribe-taker judge is not seen in the "Law Book of Beka- Bugha", but obviously the punishment would be

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16 Monuments of Russian Law, Constitution of the King Alex the Son of Mikhail, M., 1649, 1957, 60 (In Russian).

17 *Voskresensky N.A.,*Legislative Acts, Peter I, M., 1960, 131 (In Russian).

18 *Brockhouse F.A., Efon I.A.,* Encyclopedic Dictionary, vol. VI. book 11, 1892, 215 (In Russian).

19 *Bakradze D.Z.,* Archeological trip to Guria and Adjara, SPB, 1878, 159 (In Russian).

strict; and the types of punishment could be learnt from the "Collection of Law Books of Vakhtang VI" which consists of 7 sections, i.e. 7 legislative monuments. In the "Law Book of Vakhtang VI" itself, called the "Law of Prince Vakhtang", "bribe" is a criminal law notion. The legislator considered it shameful and reprehensible that in Kartli of his period "some people for reltionship, some – for friendship, some – for modesty, some for absence of trust in God and some – for bribe-taking – punish people at their own discretion" [20].

The purpose of King *Vakhtang VI* was not to diverse the scale of justice "by bribe, or relationship, or otherwise, by any attitude". The legislator considered god-fearing and not taking bribe as the main positive feature of a judge, who had to keep unbiased towards both parties "there is no bribe for either liar or righteous".

The legislator King required fair actions from any person, be it a judge or any other official, or a witness, called "narrator" by Vakhtang VI. Being a narrator, he mentions, "is a sin in practice and being a liar narrator equals to making a person avenger for blood".[21] So the law doesn't spare liar "narrator", i.e. false witness and provides physical torture and payment of fine for him. And the judge shall impose upon him a fine in the amount, which would be imposed upon an innocent man due to his lying: "if a man narrates lies and his narrations proves to be false, he shall be charged by judge in the amount provided for the innocent man… and if the judge proves to be a liar, he shall be beaten, charged with fine and fired".[22] It should be mentioned that punishments for offenses are not often specified in the "Law Book of Vakhtang VI", nevertheless, just the "Law Book of Vakhtang VI" was one of the primary book for judges to be guided by. But, as the King mentioned at the end of the Law Book, If the relevant answer to the dispute under consideration wasn't found in the Law Book of King Vakhtang, judges had the right to use other law books of the collection, as the legislator "considered non-Georgian sections of collection as arsenal of old weapons, where one could pick the relevant weapon in required".[23]

As mentioned in the previous chapter, out of non-Georgian law books, judges most often applied to Greek law to "pick the relevant weapon". Greek law provided strict punishments for bribe-taker judges. According to the Law Book, self-interested judges were fired from position, their hair was cut, face painted in black; sheep's stomach was put on his head and, for humiliation, seated on a donkey, he was taken around streets, markets, in crowded places, and a man going in front of him shouted: come, see the bribe-taken "judge of lie". It wasn't considered enough for bribe-taker judge, he was exiled and settled far away, where he was made to carry rocks and lime, his property was handed over to the state treasury and children were given to rich people as slaves and servants. "If he proves to be his undoing and does something unjust, and the King and the nobles learn that he punishes people unfairly, first of all, he shall be dismissed and other person shall be appointed on his place; he shall have his hair cut and his face shall be painted in black; sheep's stomach shall be put on his head and he shall be taken around the market and streets; and the man, leading him, shall shout: come, see the

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[20] *Dolidze Is.,* Monuments of Georgian Law, vol. I, Tb., 1963, 174 (In Georgian).
[21] Ibid, 255 (In Georgian).
[22] Ibid.
[23] *Nadareishvili G.,* Do not Take Bribe, newspaper "Sakartvelos Respublika" (Republic of Georgia), №213, 08.08.2000 (In Georgian).

judge of lie; then he shall be exiled and sent to remote area and when he arrives there, he shall made to carry rocks and lime. His property shall be divided among people and his children shall be given to princes"[24]. The above mentioned punishments were characteristic for old Georgian criminal law and it's possible that they would be used in the case of punishment of bribe-taken judge, if, after trying by boiling water and red-hot metal, he proved to be guilty. As for the extreme penalty – death penalty through decapitation – it was provided by the Article 380 of Greek Law and only in the case of the chief warden of royal prison took bribe from prisoners and release them stealthily. Such bribe-taker chief warden would be put to death or exiled from the country: "whoever is a chief warden of royal prison and whoever have prisoners there and takes bribe from them, and doesn't put chains and shackles on them and release them, or opens shackles and breaks chain, such chief warden shall be decapitated or exiled".[25]

Like Russian law, where disregarding existence of norms the King had the right to punish the offender at his own disretion, Greek Law existing in Georgia entitled King to avoid the requirement of the law and stricly punish bribe-taker offender if he either sold or exempt from taxes monastery's estate without the owner's permission: "if somebody does it to monastery's estate, he will suffer strong tortures from the King"[26].

Dismissal, beating, expulsion from royal court and humiliation was provided by Armenian law for a bribe-taker judge, who betrayed God's preaching and king's trust and mutiplied evil for self-interest: "such judge shall be removed from administration of justice by the King and disgraced and beaten and removed from the court because he hasn't learned the Holy writ, given to Moses by the God: "don't dostort law and don't take bribe".[27]

Negative attitude to bribe-taking, as one of the gravest crimes, was manifested by Moses' law existing in Georgia. Although the instructions are didactic – "don't divert punishment, and don't punish rashly, don't take bribe, because gifts and bribe distort wise men's eyesight and deform the words of justice"[28], in the same place, law sent anathema and cursing to bribe-taker judge, who neglected God's warning: "be damned whoever take brobe for killing of a true spirit and let people say: be so"[29].

Thus, foreign law monuments existing in Georgia provided for strict punishments for bribe-taker officials, but criminal law documents, which survived up to present, provide less information on how well these punishments were realized in real life. Still, absence of documents doesn't mean that bribe-taking by officials didn't exist in Georgia. It's important that during feudal system the whole state machine was protecting the interests of the ruling layer and, naturally, the law, built upon the basis of private ownership and privileges wouldn't strictly "reprimand" its own "children". So the consideration of case related to bribe-taking and punishment of bribe-takers might occur when both the bribe-takers and victims were the holders of high titles.

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24 *Dolidze Is.,* Monuments of Georgian Law, vol. I, Tb., 1963, 134 (In Georgian).
25 Ibid, 182.
26 Ibid, 182.
27 Ibid, 293 (In Georgian).
28 Ibid, 109.
29 Ibid, 125.

As mentioned above, King, as supreme judge, had the right to apply not only the punishments, established by the law, but he could punish offenders at his own discretion. Its proof is the "Protocol of Order of the King *Erekle II*" dated July 18, 1775. The mentioned Protokol clarifies: official yesauls, *Gogia Omanisshvili* and *Iakob Aleksishvili,* sent by Erekle's son Parnavaz, were greatly oppressing Gori population. Oppression expressed in extoirtion of bribes in big amount from people. King *Erekle II* was indignant at such behavior of officials, which is well expressed in the order of punishment of bribe-taker officials issued by him: "then *Gogia Omanisshvili* and *Iakob Aleksishvili,* were sent as yesauls by their master, by son Parnavaz; one is demanding sixty roubles and the other – thirty roubles. Catch them both, or catch all people accompanying them, whether they are theirs or other's, arrest everybody and I publicly hand over the horses and weapon to you and break their heads, bat them four hundred times each, with big bats, and do this way".[30] King *Erekle II* is merciless to bribe-taker yesauls and categorically demands to exactly execute his order. Furthermore, in the same document the King curses everybody, who restrains from punishing the bribe-taker yesauls: "you shall execute by orer this way, otherwise the holy religion and God will damn you and you will be cursed, and if you execure in the way I wrote to you, God will get you rid of all spiritual and fleshly evils, and direct all your spiritual and fleshly deeds in good way and use their loot for your welfare"[31]. In addition to property, fleshly and humiliating punishment, *Erekle II* doesn't restrain from physical elimination of bribe-takers and their assistants. He permits Gori authorities, the whole population, everybody: masters, governmental officials and peasants "not to give anything" to bribe-taker officials. If bribe-takers used force and applied to others for help, the King permitted to beat their assistancts and use weapon against them: "if they use force, beat their men and turn them out; if they intend to use or do use weapon against you, you shall you two and three weapons against each"[32].

The following fact is also interesting: according to the same protocol, for execution of his order and settling scores with extortioner officials, King *Erekle II* demanded from population to swear an oath on icon and cross, and those who refused to taken an oath would be imposed cash fine: "Priests and church servants, both Georgian and Armenian, gather in the yard outside archbishop's church, take out with due respect the Gospel and life-giving Cross, take an oath in regard to this matter and include devotion towards me... and whoever doesn't take oath on the Cross and Gospel, take thirty roubles from the first man, twenty roubles from the second and ten roubles from the thirdm and use for your benefit and spend for you"[33].

Bribery is inavitable condition of not only moral degradation of society, but weakening of ots military and political strength. Besides, it's disrespect towards the King's trust, and great personal offence. That explains such strict tone of *Erekle II* and his son prince *Giorgi* towards bribe-takers, who oppressed peasants, workers – who supported the main artery of Georgia and load of the country – by charging them with excessive amounts.

Mchedlishvili from Lamiskana sent a "written complaint" to Prince *Giorgi*, where he informed the Prince about his misfortune: "I delivered six kodis (old Georgian measurement of amount) of bread personally and now Pitskhelauri again sent yesauls. Now he demands twenty one kodi of bread

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30 *Takaishvili E.,* Georgian Antiquities, vol. I, book II, Tb., 1920, 198 (In Georgian).
31 Ibid,198.
32 Ibid, 199 (In Georgian).
33 Ibid, 199.

and Yesaul won't go away from my home"[34]. Angry *Giorgi the Son of Erekle* sent the following protokol to *Arjevan Pitskhelauri*: "the very second you receive this protocol, leave for here. If you don't arrive till tomorrow night, I will send yesauls and they will drag you here"[35]. The document doesn't show whether *Arjevan Pirskhelauri* managed to justify himself or not, or, if he failed, how Prince *Giorgi* punished him, but if we take into account the wording of the protocol, demanding to come to the palace, it's easy to believe that *Pitskhelauri* wouldn't be able to avoid punishment.

Although the mentioned facts prove that the Royal household didn't endure bribe-taking, but individuals, even the King, couldn't stop the unlimited desire of governmental officials and masters to take bribe, couldn't eliminate bribery, this greatest vicious feature of society, which was so deeply rooted in public relations built on serfdom rules.

3. Punishments for Bribery according to Canon Law

As is well known, together with public courts, canon courts existed in Georgia, where the persons, appointed from religious servants, performed consideration of disputes related to ecclesiastical activities and priests. According to the information, got to nowadays, it wasn't unusual for Georgia to consider the disputes based on bribe-taking by priests and judges, while "administation of law by truth", i.e. the principle of adhering to fairness should be a starting point not only for canon judges but for all clergymen. By that period churches and monasteries should be the leaders of moral purity of society. In reality, clergymen were so immoral that not only bribe-taking, but even the dreadful desease – sodomic sin was spread in churches and monasteries.

Only strict and merciless fight could eliminate satanic sins for salvation of a nation and country. So in the documents of canon law and regulations of some monasteries strict punishments were provided for bribe-taker and dishonest persons dressed in cassocks: anathema, cursing, demotion of the held ecclesiastic position, depreciation of authority in society's opinion, humiliation and expulsion from church.

It's the list of punishments applied by canon law towards bribe-taker "believers". Application of the mentioned punishments was great humiliation for clergymen.

Greek law deprived bribe-taker clergymen of the right of performance of religious service and expelled from church: "as we administer justice towards people, the God will administer justice towards us in this life and century… and he will become damned and unforgiven".[36].

Armenian law provided for dismissal of canon judges caught in bribe-taking and their, as evil men's demotion.

Law Book of Ruis-Urbnisi church meeting not only dismissed bribe-taker slergymen and punished by expelling from church for good, but also anathemized and cursed them. Anathemization and cursing by church was the stringent punishment, the more so for clergymen: "and regarding bribe and fee received by clergymen from parishioners, we will decide, in conformity with the teaching of

[34] *Takaishvili E.,* Georgian Antiquities, vol. II, Tb., 1909, 460 (In Georgian).
[35] Ibid, 461.
[36] *Dolidze Is.,* Monuments of Georgian Law, vol. I, Tb., 1963, 131 (In Georgian).

Holy Apostres and fathers, to eliminate such from church and axpell from priesthood by his ordainer, and let nobody do it again, be such person damned like Simon the Magi by Apostle Peter"[37].

Expulsion from monastery and demotion from position was provided in "Regulations of Vahan's Monastery". The Regulations of Vahan's Monastery required that those who commit improper action for bribe shall be expelled from monastery and demoted from position. "And if a priest or archpriest is catch, either secretly or obviously, in taking bribe due to unconctrolled love of money, he shall be demoted"[38]. Out of Holy collections, anathmization and expulsion from church was provided in "Small Canon Law" and "Catholicons' Law" of XVI c. "Bishop, ordaining unworthy priest or deacon, knowing their unorthiness and entitle them to conduct religious service, or taking bribe, shall be anathemized like Simon the Magi"[39]. The clergyman, who "does evil and uses his position and good name for committing sinful action"[40], "deserves double torment" – specified "Small Canon Law". And if anybody obtains the honor of bieng Bishop, or priest or archpriest in return to bribe-giving, both the ordainer and the ordained shall be banned from communion like Simon the Magi by Apostle Peter"[41].

As mentioned above, cursing, anathemisation, damning of clergymen and deprivation of the right of conducting religious service were stringent canon punishments and it could be said that they equalized with putting to death provided by public law. And if the bribe-taker, damned priest was banned from communion – it meant being dead alive for clergymen.

An important document for ancient Georgian Canon Law is the "Book of Donation of Kakha Toreli to Rkoni's Mother of God of 1259", where dreadful cursing for provided for the person, would want to modify the "Book of Donation" for self-interest, for bribe: "Rkoni's Mother of God… nobody shall modify whatever I have written, neither I nor those who will come after me, and whoever of whatever family name – mine or other, big or little, modifies whatever I have learned for proving his power or for self-interest or bribe-taking, or for demotion, shall be cut out of Christian religion and deserve wrath of the Father and Son and Holy Spirit, damned by the word of the God in both life and death and his body shall be punished by Nistor and Origen, and eliminated like Datan and Abron, and he shall have the Cain's trepidation, Gez's leprosy, Judas' rope for hanging, he shall be burn in fire and tar, and he shall suffer from God's wrath"[42].

In addition to cursing, according to "Kakha Toreli's Book of Donation to Rkoni's Mother of God" Monastery's Collection provided for "humiliation" or "making unhappy" towards the church leader, wanting to modify the "Book of Donation" in return to bribe: "and if other estate manager changes vineyard or field or service made by me, in return to bribe, he will be damned by the God like Samasars, and if council members learn about it, they shall oppose him and punish him by humiliating"[43], and the tax-collector priest, taking bribe and providing insufficient service to the monastery, would be punished by expulsion from the monastery: "if a monk- tax collector, provided insufficient service in return to bribe, he shall be turned out by the monastery"[44].

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37 *Dolidze Is.,* Monuments of Georgian Law, vol. III, Tb., 1970, 116 (In Georgian).
38 Ibid, 146.
39 *Dolidze Is.,* Monuments of Georgian Law, vol. I, Tb., 1963, 396 (In Georgian).
40 *Giunashvili E. (ed.),* Small Religious Law, Tb., 1972, 42 (In Georgian).
41 Ibid, 41.
42 *Zhordania T.,* Chronicles, book 2, Tb., 1897, 138 (In Georgian).
43 Ibid, 136.
44 Ibid, 137.

Bribe intruded in family marriage relations too, which was facilitated by religious servants themselves. Representative marriage was performed in churches and monasteries and priests, craving for bribe, didn't avoid performance of wedding between relatives. And it led to incest, whilst Christian religion prohibits marriage between relatives till the seventh generation. As mentioned above, this rule was often infringed by priests ant not only by priests, which caused moral degradation of the nation. By "Law Book" of 1103 *David Agmashenebeli (David the Builder)* announced merciless fight against bribe-taker clergymen – by the document "On Marriage" he provided for maintenance of moral purity and punishment of bribe-taker priests facilitating incest.

The document specifies: whoever, blinded with the desire of taking bribe, on his own will, opposes "Religious Rules" and facilitates incest, the God. who sees everything, will send them all terrible torture – to those who were married and to those who was directly responsible for protection of moral purity and blessed such marriage, i.e. incest: "and whoever, on their own will, contradict religion by taking bribe, or talent, or giving bribe, they, as well as the spouses, who committed incest, and got married, and mediators who blessed them, shall be subject to torture, because shepherds fall to particularly deep cleft, as the infallible eye of the God sees everything and knows everything"[45].

Thus, canon law regarded infringement of justice through bribe-taking as blasphemy and grave crime and provided for no mercy towards bribe-taker priests, regardless their position. The purpose of canon punishments established against bribe-takers was to maintain the purity of Christianity, prevent Georgian spirit from corruption and religious values from elimination. For adhering to the above mentioned, true believers showed no mercy not only towards dishonest clergymen, but even towards public rulers, which is proven by disclosure of the King *Bagrat IV* by *Giorgi Mtatsmindeli* in sale and purchase of ecclesiastical positions and facilitation of bribe-taking.

4. Punishment for Bribe-taking according to the Bill of David Batonishvili

Grave condition of Georgian Kingdom in the last quarter if the XVIII c. didn't allow *David Batonishvili* to realize his god intentions and make his Bill on governmental arrangements and regulation of the branches of government the law of the Kingdom of Kartli and Kakheti. Although the Bill remained the Bill, its historic value is great as it provides clear picture of the situation, existing in Georgia by the end of the XVIII century, which made *D. Batonishvili* develop Bill on new governmental arrangements. On the basis of this Bill it's possible to study law development, attitude towards crimes and punishments in Georgia of that period.

D. Batonishvili had well studied Russian and European Law on Governmental Arrangements, which could be easily traced in his works. He understood that the strength of the state depended upon each of its officials, fulfillment of their obligations in honest way. He regarded judicial authorities as a lever which could easily lead to destruction of the state if its officials were sinking in the vortex of bribery and self-interest, as the disease of bribe-taking would be easily communicable from bribe-taker judicial officials to the officials working in other spheres, and, at the same time, judicial servants would easily assimilate negative features of officials of other departments. So in his Bill *D. Batonishvili* didn't leave state officials without attention and control and, on the one hand, warned

[45] *Dolidze Is.,* Monuments of Georgian Law, vol. II, Tb., 1965, 155 (In Georgian).

them not to commit any kind of abomination, including bribery, and on the other hand, specified punishments applicable to them in the case of abuse of their duties.

Thus the author of the Bill referred bribery to grave crimes. It didn't matter for Batonishvili who was the bribe-taker – judge or manager, military servant or policeman, inspector or auditor, collectors of fines or bribe-taker fake witnesses, who, by giving false evidence, can cause serious damage to private person as well as to society. Each person, caught in bribe-taking would be punished strictly, in accordance with the gravity of the committed action. The Bill provided strict punishments for bribe-takers, in particular: dismissal, removal or honor and titles, imposition of fines with consideration of the victim's social status, fines in favor of treasury, making his name to people as an evil man, official demotion, imprisonment, decapitation and hanging.

It's interesting to mention that while defining punishment, *D. Batonishvili* took the forms of crime – intention and carelessness – into consideration. The judges who demonstrated evident bias during consideration and decision-making regarding the case, would be strictly punished then the judges who infringed law requirement due to carelessness: "Judges, who demonstrate bias during consideration of the cases they conduct, will be dismissed from their position forever, all honors and titles will be removed, they will be tried and big cash fine will be imposed upon them, but where it happens due to their carelessness, they will be dismissed from their position, also, they shall satisfy the person who was arrested due to their lack of understanding and pay the price of blood in the amount, specified in *Vakhtang's* Laws; fine in the same amount per person shall be paid by them in favor of Treasury."[46]

The Bill provided for strict punishments, but a judge for legislators was a common man, who could face temptation. So the author of the Bill was warning officials and call them to prudence. Warning was expressed in the fact that he wouldn't dismiss the judge from his position in the first case of bribe-taking, but impose fine and make him return the bribe, thus instructing him not to repeat similar action. If the judge failed to learn a lesson and dared to take bribe repeatedly, he would lose the judge's chair for good: "when any of judges is caught in bribe-taking, in the first instant he shall pay cash fine and return the bribe, and in the second instant he shall be fired forever".[47]

Policemen were also subject to dismissal and strict punishment, so they would be "very strict not to take bribe from officials, who are prosecuted"[48]. Alternative punishment or payment of fine or arrest, or demotion from position was provided for officials, who, having being granted judge's rights by the King personally, would be sent for settlement of estate-related disputes between citizens and would settle the dispute in favor of bribe-giver. Taking of bribe be official would be proven by specially conducted investigation: "whoever, sent by the King to settle estate-related dispute, unfairly settle the case, shall be punished by fine or imprisonment or demotion after investigation of the case".[49]

Dismissal and announcing of permanent vote of no confidence by the state for appointing on public position was also provided for inspectors, who, having special authorities from the state, as people, performing control, would misuse the government's trust, take bribe and make incorrect record and prepare false reports: "consistent attention shall be paid to making of records and compilation of

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46 *David Batonishvili,* Review of Georgian Law and Jurisprudence, Tb., 1959, 247 (In Georgian).
47 *Purtseladze D.*, Law of David Batonishvili, Tb., 1964, 384 (In Georgian).
48 Ibid, 181.
49 Ibid, 63.

reports by inspectors honestly and without bias. Those caught in oppression as well as bribe-taking, shall be dismissed and lose the confidence of the government for public position".[50]

More stringent punishments: dismissal, "exposure in from of the whole nation", "making him known as evil person", expulsion with entreaty and decapitation was provided for bribe for traitor commanders. Military commanders "who lose flag and canon, if it's done as betrayal, shall be exposed to nation for betrayal and decapitated and if he does it for bribe, shall be dismissed and condemned by the nation, exiled with entreaty, as this is the "prize for traitors".[51]

David Batonishvili regarded crimes, committed by military officials for self-interest as more grave and dangerous action then the same crime committed by other government officials. It was natural, because further existence of Georgia, surrounded by enemies was possible only based on strong, devoted army and well-disciplined commanders. Discipline was primarily required from army commanders. Non-disciplined commanders, according to the Bill, were subject to dismissal, and those releasing soldiers from army in return to bribe would be punished "in the first instance, by make their action known to the whole nation, and in the second instance – by fine in the amount taken and in the third instance – by dismissal".[52]

Strict punishment – imprisonment was provided for fine-collectors and callers to army. For fighting and viability army needs new replenishment, but if fine-collectors and callers to army hide, i.e. release persons subject to calling to army, such action would be equalized to betrayal of the country, so "both the collectors and callers should be strict and not release people as a result of bribe-taking from those used to law violation, and in the case if it happens, the offender shall be imposed fine twice as much as bribe, and sent to jail for the same number of months, as the number of men released".[53]

In addition to decapitation, *David Batonishvili* mentions hanging in his Bill: "everyone, caught in burglary and robbery of population, shall be sentenced to hanging, without exception, regardless the person"[54].

Obviously, application of grave punishments like decapitation and hanging would not be easy. If the Bill was adopted as Law, it would be practically applied in the case of existence of the relevant cases. The main thing in the Bill is that in Georgia of the period of *D. Batonishvili,* bribe-taking, subornation and robbery were quite well-known crimes leading the society to swamp, and the country – to destruction. Consequently, such strict attitude towards bribery was natural for the person who dreamt to create strong monarchical state.

5. Conclusion

As a conclusion it could be said that since acnient times, according to law books and laws existing in any country, bribe was known among the actions, regarded as crime. Supreme authorities announced strict fight to bribe-taking, as the crime, which turned into moral depreciation of high circles of society of that period, leading country to destruction.

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50 Ibid, 111.
51 *Purtseladze D.*, Law of David Batonishvili, Tb., 1964, 33 (In Georgian).
52 Ibid, 85.
53 Ibid.
54 *Davit Batonishvili,* Review of Georgian Law and Jurisprudence, Tb., 1959, 365 (In Georgian).

Since early period, existence of bribery is confirmed in Georgian reality as well. "Law Book of Beka- Aghbuga" imposed strict trial to the suspect in bribe-taking for proving his innocence – taking out red-hot iron from boiling water.

Bribe-taking, as one of the grave crimes, became particularly noticeable during the reign of King *Vakhtang VI.* So the legilator King established stringent property-related and physical punishments towards bribe-takers in his Code of Law. Judges and public officials were subject to particularly strict punishments. Kingm as the supreme judge, could punish bribe –takers at his own discretion as well, which is proven by the "Protokol of Order of the King Erekle the Second" dated july 18, 1775 discussed in the article.

Property-related, bodily and humiliating punishments were applied to bribe-takers, death penalty also existed. Not only public authorities, but church fought against bribe-taking. Canon law, considering bribe-taking a blasphemy and greatest crime, had no mercy to bribe-taker clergymen disregarding their position.

Cursing, anathemization, damning, deprivation of the right of being a priest were stringent canon punishments for bribe-taker clergymen. And if the bribe-taker priest was banned to have a communion, it meant death alive for clergyman.

It should be mentioned that for the purpose of better arrangement of society and state and better governancem well-educated people were developing new bills, where, alongside with other issues, great attnetion was paid to bribery.

D. Batonishvili referred bribery to grave crimes. According to the Bill, compiled by him, the following punishments were provided for bribe-taking: dismissal from position, deprivation of honors and titles, imposition of fine with consideration of the price of blood of the victim, fines in favor of Treasure, making person known as an evil man, official demotion, impriconment, decapitation and hanging.

It's also interesint that according to *D. Batonishvili's* Bill, guilt should be taken into consideration during determination of punishment for bribe-takers.

DAVIT CHIKVAIDZE[*]

THE RULE OF EXECUTION OF SENTENCES OF CANON COURT ACCORDING TO PUNISHMENTS

1. General Provisions on Execution of Sentence

According to Canon Law, together with coming of the sentence passed by Canon Court, from spiritual-mystical point of view, the punishment, specified in it is often regarded as it execution and it doesn't need expression in external form. E.g. excommunication of an ecclesiastic may externally be expressed by deprivation of this person of breast cross, taking off the dress. It will be external expression. Although, as for deprivation of the blessing of priesthood, it, according to Christianity, is executed upon a person mystically, spiritually and invisibly, and the sentence is to be considered executed from this very moment and not from its external execution. Thus, spiritual aspect of punishment is an interesting institution in Canon Law and it makes a distinction from public Canon. One of the differences also is that ecclesiastic punishment is closely related with human spirit, his spiritual life, as, as its well known, according to Christianity, church has the right of either forgiving sins of damning, granted to it through the Apostles: "And he told them: whom you forgive sins, they will be forgiven, and whom you seize, they will be seized" (In. 21:22-23). So, the decision, made by Ecclesiastic Court, in the case of the above example, shall be confirmed by Divine Will, which is invisible and concealed for us. For Canon Law, not the external execution of the sentence is important, but the authenticity of its execution from spiritual point of view. According to church teaching, clergyman is selected for serving the God by the God itself, who grants him, as his servant, the blessing, required for priesthood, thus divine service is performed by the God itself.[1] Following the above mentioned, utmost significance is attached to ecclesiastic sentence, as its coming into legal effect results into removal off divine blessing from a person.

As it is well known, ecclesiastic proceedings established the rule of appeal as well, meaning that the sentence, passed by the Court could be revised and thus, changed by the higher instance. Naturally, here the question arises: is a clergyman considered excommunicated, when such sentence exists against him? In other words, can such person perform divine's sacraments, provide religious service, wedding, christening, etc.? This issue is settled the following way: the person, towards whom the verdict of guilty is passed, shall be banned from communion till passing the final sentence.

Execution of the verdict of guilty will be reviewed in the article. It's obvious that verdict of not guilty doesn't require special execution, as the latter justifies the accused persons, all accusations will be removed from his and his rights will be restored.

In the opinion of Bishop Nicodym, punishment is divided into two types: due and curing punishments. These two punishments differ from the point of view of their execution. "In the case of sentencing to due punishment, the offender shall completely endure the punishment, determined for him by the court for the crime committed by him, whether he regrets or not, improves or not; and in

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[1] *Pomazansky M.* (Protopr.), Dogmatic Theology, the 2nd corrected edition, Tb., 2006, 180-181 (In Georgian).

the case of sentencing to curing punishment, determined for improvement, its execution shall be stopped at the moment, where the punishment achieves its goal, i.e. when the remorseful offender improved".[2] And in the opinion of Prof. Berdnikov, "the utmost goal of Canon Court is not punishment of the offender, but facilitation of improvement of the sinner. Ecclesiastic punishment will not be imposed finally, and might be changed in accordance with improvement of the sinner. Only excommunication of clergymen is final and thus is has punishing nature."[3]

Different opinion was shared in regard to this issue, according to which execution of sentence, like performance of any other action, in church is based only on human will and compulsion or forcing is excluded in principle: "penance shall not be performed by compulsion or forcing, as Orthodox Church doesn't know such methods. Only and only after the decanonized expresses remorse, execution of penance is possible. Otherwise, if even twenty years pass from the date of passing the sentence, the decanonized shall not be entitled to communion if he has not fully performed the punishment, applied to him."[4].

As for the forms of punishment, as mentioned above, the church knows only punishment of people by expulsion from church union. Consequently, determination of specific form and period of expulsion is important in order to execute them in proper and adequate manner.

As know, specific form of punishment for individual sin is determined by canon norms. The type of punishment is implied: banning of communion, banning, excommunication etc. as for the period of punishment, it is determined by canon court either by absolute authority or by limited authority, according to the right provided by Canon Law.[5]

Besides, the form of execution shall also be taken into account, in particular, in the case of banning from communion, as the analysis of both Canons and court practice proves that the period of punishment shall be passed with the relevant actions. These actions are often directly specified in the Canons and the procedures of their execution will be discussed below.

2. The Rule of Execution of Penances according to their Types

Penance (Greek - epythemy) means standing above respect. It implies that due to having sinned, a person shall regain the rights he had by abasement of respect.

Person could be sentenced to penance in the form of basic as well as additional punishment.[6]

2.1 Bemoaning

Bemoaning could be prescribed to a civilian. It is often prescribed as the first part of punishment for grave sin.

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2 *Pomazansky M.* (Protopr.), Dogmatic Theology, the 2nd corrected edition, Tb., 2006, 35-36 (In Georgian).

3 Brief Course of Church Canon, comp. *Prof. Berdnikov,* Kazan, 1888, 180 (In Russian).

4 *Chikvaidze D.,* Ecclesiastic Law (course of lectures), Tb., 2008, 137 (In Georgian).

5 Here the cases are implied where, on the one hand, Canon Law determined the term of punishment, (e.g. banning from communion for 10 years), and on the other hand, Canon Law says nothing about the term of punishment. In the first instance there is limited authority, in the second instance – absolute authority.

6 Law of Orthodox Church with Explanations of Bishop *Nicodimos* (Milash), vol. I, Tb., 2007, 37 (In Georgian).

Bemoaning shall be executed according to the following rule: the decanonized is obliged, through the whole period determined for bemoaning, to stand in the door of the church and admit his sin, ask for pardon for the above mentioned and ask everybody to pray for him so that the God excuses his sin.

The rule of bemoaning is described by *St. Ekvtime of Athos*in the comments to the 85th Canon of VI Ecumenical Council: "it means to stand in the door of a church and begging the believers to pray for him and admitting his sin".[7]

The rule like bemoaning is established by "Setting of Canons for Sinners", in accordance to the Canon 2 of which the sinner "shall not enter the church until three years pass, but instead, stand in the front door of church and beg those coming in and going out and with his head hang, say: "forgive me, the sinner"[8].

As for the practice in this regard, the decision of Dositeus from Nekresi dated November 9, 1791 on criminal cases[9] of Priest Peter establishes graver punishment for the sinner. According to the sentence, Priest Peter, who intentionally caused serious injury to Priest Nicolaos ("treated like real enemy" – according to the text, and injuries follow), was sentenced to the following penance: "his feet shall be put in stocks, he shall stand in the door of the church and ask entering and going out people for forgiveness"[10]. It's interesting that unlike the above described rule, Priest Peter, in addition to standing in the door of the church, actually, had to be tied and ask for forgiveness in such humiliating condition.

2.2 Genuflection and Metanoia

According to *Sulkhan - Saba's* "Sitkvis Kona" (Bunch of Words), "Shevrdoma" (genuflection) means "kneeing on both knees". In Canon Law, genuflection shall be executed as follows: the decanonized is obliged to perform certain number of metanoias (e.g. 40 or 50 times per day) and attend religious service on knees.

The rule of genuflection, prayer and metanoia is defined by *St Ekvtime of Athos* in details: "the Canon of prayer is as follows: "when sentenced, one shall pray the prayer of remorse three times: in the morning, in the afternoon and in the evening, and during each prayer, say: "God, have mercy on me" once, "Holy God" three times, "Our Father" once, Kyrie eleison - 100 times, "God, forgive me, the sinner" 50 times and genuflection"[11].

In accordance with the Canon 6 of the above mentioned Regulations of Bishop Anton II, "each day, one shall make one hundred metanoias: forty big and six hundred small metanoias and say each time: "God, forgive me, the sinner and have mercy on me"[12].

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7 Minor Nomocanon, edited by *E. Giunashvili,* Tb., 1972, 78 (In Georgian).

8 Monuments of Georgian Canon, vol. III (Ecclesiastic Legislative Monuments), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1970, 1019 (In Georgian).

9 Monuments of Georgian Canon, vol. V (Court Rulings), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1974, 549 (In Georgian).

10 Ibid.

11 Minor Nomocanon, edited by *E. Giunashvili,* Tb., 1972, 112 (In Georgian).

12 Monuments of Georgian Canon, vol. III (Ecclesiastic Legislative Monuments), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1970, 1020 (In Georgian).

2.3 Attaching to Listeners

Listeners are the people who have the desire to study Christianity and get christened in the name of Holy Trinity. In another way, they are called catechumens. Christian, attached to listeners, can't be present at the service to the end like them and attend the sacrament bloodless sacrifice. They are obliged to leave the temple together with the listeners (i.e. catechumens) after the priest says: "whoever is a catechumen, leave the church".

According to St. Ekvtime of Athos explanation: "whoever is standing in the door of the church, shall leave the church together with those praying in genuflection as soon as the deacon says: catechumens shall leave"[13].

It's interesting that Anton's Regulations doesn't provide for such penance.

2.4 Prayer with Believers without Communion

This is the last and the easiest way of execution of the Canon of banning from communion. It implies attendance of the believer throughout the service, but with the difference that he won't have the right to receive communion. Even the priest, without Bishop and Church Council, can impose such punishment for relatively less serious sin or all sins, which, due to their small importance, are not considered sins. It's obvious that the period of such banning from communion can't last long (but Canon Law doesn't specify exact period). Anyway, the believer has the right to appeal this decision of the priest with Bishop.

Canon 3 of Bishop Anton's Regulations briefly describe this penance: "after three years one shall enter the church and receive prosphora"[14].

In Great Religious Canon penance is referred to as communion to "the sacred" (see Canons 4,[15] 8[16] and 16 of Ancyra)[17]. In this case "communion" might mean participation in church union, including religious service. And as for "the sacred objects", it implies receiving of directly Christ's flash and blood, which, as a rule, is referred to as communion.

2.5 Prohibition of Prayer with Believers

The person, decanonized by canon court could be sentenced to banning of prayer side by side with the church members, i.e. believers. In this case he has the right to pray separately or together with the category of people, unity of whom doesn't create church. E.g. in accordance with the Canon 17 of Ancyra Council, "the Holy Council orders brutes and lepers to pray together with Satan's followers".[18] In this case the church not only prohibits to pray side by side with believers, but whom to pray with too.

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13 Minor Nomocanon, edited by *E. Giunashvili,* Tb., 1972, 78 (In Georgian).

14 Monuments of Georgian Canon, vol. III (Ecclesiastic Legislative Monuments), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1970, 1019 (In Georgian).

15 Greater Nomocanon, edited by *E. Gabidzashvili,* Tb., 1072, 237 (In Georgian).

16 Ibid, 238.

17 Ibid, 239.

18 Greater Nomocanon, edited by *Gabidzashvili E.,* Tb., 1072, 239 (In Georgian).

This Penance shall be performed not only by the decanonized, but everybody who lives with him, as, in accordance with the Canon 10 of the Apostles, whoever violates Canon Law and pray together with the decanonized, shall be punished with the same punishment.[19]

2.6 Additional Fast

Additional fast in the period of breaking of fast or performance of common form fast in heavy form during the period of fast can be determined as penance for Christian. In his comments to John the Faster's "Canons for Sinners"*, St. Ekvtime of Athos* describes the rule of performance of additional fast in details[20]. He divides additional fast into three groups. The first one is the longest and heaviest. The second group has the following comment: "if the above prescribed rule is impossible to follow due to sickness and not due to grace, this fast shall be performed".[21] And the third group is intended for those who, due to weakness or for other reason, fail to follow the first as well as the second rule of fasting: "and the third type is for those who, due to many reasons, can't follow the above prescribed rules"[22].

Canon 5 of Regulations of Bishop Anton II specified the rule of execution of such penance: "during the holy 40-day fast and Mother Mary's fast they shall not drink wine with the exception of Saturdays and Sundays, and during Christmas fast and Apostles' fast they shall not drink either and they shall not eat meat on Mondays and fish on Wednesdays and Fridays in the fast breaking week during three years, with the exception of God's holiday and typikon"[23].

This Canon can conditionally be divided into two parts: additional limitations in the fast period and limitations in the period of breaking of fast.

Limitation in the period of fast, in its turn, is divided into two parts: heavy fast and easy fast periods.

As a rule, taking small portion of wine is admissible during great fast and dormition fast with the exception of Wednesdays and Fridays. And in this case the sinner is forbidden to take wine with the exception of Saturdays and Sundays. Other limitations for this period are not defined.

And during relatively easy, Christmas and Peter's and Paul's fast if taking wine is usually admissible throughout the fast, it's forbidden for sinners on Wednesdays and Fridays according to these Regulations.

As for the (b) period of breaking of fast, two limitations are determined: taking meat is forbidden on Mondays additionally and taking fish is forbidden of Wednesdays and Fridays, which, usually, is admitted.

As for practice, additional fast was prescribed, e.g. to Priest Peter by decision of Dositeos Nekreseli: "during two forty-day periods, including Saturdays and Sundays, he shall not take meat; let him take fish, cheese and other non-meat products. He shall be fasting on Wednesdays and Fridays till evening during these two forty-day periods and shall not drink wine either"[24].

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19 Greater Nomocanon, edited by *Gabidzashvili E.,* Tb., 1072, 217 (In Georgian).
20 Minor Nomocanon, edited by *Giunashvili E.,* Tb., 1972, 110-113.
21 Ibid, 111.
22 Ibid, 112.
23 Monuments of Georgian Canon, vol. III (Ecclesiastic Legislative Monuments), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1970, 1020 (In Georgian).
24 Monuments of Georgian Canon, vol. V (Court Rulings), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1974, 549 (In Georgian).

It is mentioned in the decision of Teimuraz II and Anton I in regard to Giorgi's and Tamar's misalliance that the sinners "were banned from taking meat like monks and were fasting and during the week they took wine only once – on Sunday"[25].

2.7 Financial Obligation

Financial obligation might also be imposed upon the believer as penance. It can have various forms: fee for church, giving out alms, supporting the poor, etc.[26]

Canon 72 of the Apostles directly specifies the amount of financial obligation. In accordance with the above mentioned, "If any friend or civilian takes wax or oil from the church, he will be banned from communion and obliged to bring five as much as he has taken"[27]. Similarly, Canon 6 of the VII Ecumenical Council specifies the cash amount, where fourfold charge is determined.[28]

Execution of this penance might form the basis for cancellation of punishment specified in the decision. E.g. it is mentioned in Catholicos Zachariah's book of mercy (1623 – 1630) to Tsitsishvilis[29] that he was involved in the crime against his cousin and was not subject to mercy from Catholicos. His crime is not specified here; neither the punishment he was sentenced to by the Catholicos is known. Catholicos writes: "pay fee for the church and grow good vineyard for the church"[30]. It should be supposed that Tsitsishvilis paid fee to the cathedral (church) as well as grew good vineyard. It's not known whether Tsitsishvilis were imposed this financial obligation based on court decisions or they did it on their own will. After that Catholicos orders: "from now damnation is removed from you, you are blessed and forgiven by the Bishop of our parish and Svetitskhoveli"[31].

As for the regulation of Anton II regarding sinners, his Canon refers to the fulfillment of financial obligation: "whatever is due to archpriest according to the regulations, shall be delivered to him immediately and thus fulfill these obligations".[32] Three regulations are interesting in this Canon: the Canon establishes dues (a) to the archpriest and not to the victim or his/her relative; besides, (b) regarding the amount of dues it is specified that it should be relevant, adequate and conformant to "ability" and it's also important that (c) thus the penance of decanonization is executed – "and thus the decided regulations shall be executed".

Other cases also exist in Georgian ecclesiastic practice, where financial obligations are mentioned, in particular, Iese Eristavi's appeal on payment for sin to Catholicos John[33]. Iese addresses Catholicos: "due to Satan's threat our cousins were killed and we apply for penance to you, Sveti

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25 Monuments of Georgian Canon, vol. IV (Court Decisions and Rulings), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1972, 446 (In Georgian).

26 Law of Orthodox Church with Explanations of Bishop *Nicodimos* (Milash), vol. I, Tb., 2007, 37 (In Georgian).

27 Greater Nomocanon, edited by *Gabidzashvili E.,* Tb., 1072, 224 (In Georgian).

28 Ibid, 423.

29 Monuments of Georgian Canon, vol. III (Ecclesiastic Legislative Monuments), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1970, 490 (In Georgian).

30 Ibid.

31 Ibid.

32 Ibid,1020.

33 Ibid, 482-483.

Tskhoveli and Christ's Robe and divine myrrh and their ruler, Catholicos John, patron of Georgia…"[34]. Based on this letter it becomes clear that Iese donated estates of six households to Mtskheta, and at the end of the letter he mentions that "it will not be the end"[35].

It's interesting that in the decision of Dositeos Nekreseli in regard to Priest Peter's criminal case it is mentioned that certain amount was due to Priest Nicolaos, but we didn't give it to him: firstly – because he is a priest, and secondly – because sentencing to two punishments is not relevant[36]. The fact of not imposing financial obligation by this decision is explained by two reasons: (a) because he is the representative of clergy, (b) this decision simplifies the principle of inadmissibility of being punished twice for one crime so that even imposition of additional punishment is inadmissible. Nicodimus judges otherwise: "by canon meaning, penance represents independent punishment, but it is often used together with other punishments"[37]. Apparently, Dositeos Nekreseli considers financial obligation as main punishment and not additional punishment, as he, by the same decision, has sentences Priest Peter to other additional punishments, but in regard to the above mentioned he doesn't refer to the Article of the Holy Writ related to inadmissibility of being punished twice.

It's also important that according to the Canon 6 of Gregory of Nissa, if the decanonized can't afford financially, he has to fulfill such obligation by physical labor.

2.8 Clothing and Appearance

The Regulations of Anton II specifies the rule according to which the sinner shall dress ad appear during the period of decanonization. In particular, Canon 7 specifies that "during three years before entering the church he shall not cut hair or shave and wear robe and pants"[38]. Little before excommunication of Anton II, Teimuraz II and Anton I determined by the decision in regard to Giorgi's and Tamar's misalliance that "during six months both the young man Giorgi and girl Tamar shall wear black clothes outside and white clothes inside"[39].

2.9 Other Obligations

As a penance, other obligations, which weren't discussed above, can be imposed upon the offender. E.g. Bishop Nicodimus mentions that the decanonized can be sentenced to visiting the diseased as penance.[40]

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34 Monuments of Georgian Canon, vol. III (Ecclesiastic Legislative Monuments), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1970, 482 (In Georgian).

35 Ibid, 483.

36 Monuments of Georgian Canon, vol. V (Court Rulings), texts were published, notes and references were attached by Prof. *Dolidze I.,* Tb., 1974, 550 (In Georgian).

37 Law of Orthodox Church with Explanations of Bishop *Nicodimos* (Milash), vol. I, Tb., 2007, 37 (In Georgian).

38 Monuments of Georgian Canon, vol. III (Ecclesiastic Legislative Monuments), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1970, 1019 (In Georgian).

39 Monuments of Georgian Canon, vol. IV (Court Decisions and Ruling), notes and references were attached by *Prof. Dolidze I.,* Tb., 1972, 446 (In Georgian).

40 Law of Orthodox Church with Explanations of Bishop *Nicodimos* (Milash), vol. I, Tb., 2007, 37 (In Georgian).

According to Regulations of Anton II, following historic reality, paying ransom or other's assistance in it is specified as such obligation (Canon 8)[41].

In the case of murder Anton II determines the following penance for the offender: "during one year, he shall ask his spiritual father to serve fifty services for forgiveness of his sins and for the peace of the soul of the person, killed by him" (Canon 9)[42]. Thus, this Canon rules that the offender shall have the service performed for his, as well as the killed person's soul fifty times per year.

In regard to Giorgi's and Tamar's misalliance one more interesting case of penance occurs in the decision – sending to monastery for certain period for remorse and improvement (and not forcedly as monk or nun)[43].

It follows from the opinion of Bishop *Nicodimus* that one of the seven deeds of fleshly mercy can be imposed upon the sinner for execution as penance: feeding of the starving, giving water to the thirsty, providing clothes to the naked, providing shelter to traveler, visiting the diseased, visiting the prisoner and burying the dead.[44]

3. The Rule of Execution of Banning from Communion

Communion, i.e. the sacrament of Eucharist, according to Christians' belief, is invisible conversion of bread and wine into Christ's flash and blood. It's the greatest sacrament of Christianity.[45] The greatest significance of Eucharist for Canon Law is that it "unifies all righteous people in Christ as one body".[46] The right of communion is complete capability in Christ's church, and banning g from it – deprivation of capability and thus, reduction of rights for a Christian.

Number of penances is imposed in parallel with banning from communion, like praying with believers without communion, bemoaning, genuflection, etc. The rule of execution of banning from communion, as penance, will be reviewed in the following sections.

3.1 Canonic Explanation

Banning from communion implies deprivation of a Christian of the right to receive communion for certain period or till death. This punishment, as a rule, is imposed upon a Christian civilian.

Communion, as a rule, is performed during religious service, in its final part. Performance of communion is admissible at home and other emergence conditions due to illness or other disability of the person to be given communion to. As communion is performed during service, it's important for Canon Law to determine whether the person, who hasn't received communion, has the right to attend

41 Monuments of Georgian Canon, vol. III (Ecclesiastic Legislative Monuments), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1972, 446 (In Georgian).

42 Ibid, 1020.

43 Monuments of Georgian Canon, vol. IV (Court Decisions and Ruling), notes and references were attached by *Prof. Dolidze I.,* Tb., 1972, 446 (In Georgian).

44 Prayers, 8th completed edition, Rust. 2006, 230.

45 *Pomazansky M.* (Protopr.), Dogmatic Theology, the 2nd corrected edition, Tb., 2006, 244 (In Georgian).

46 Ibid, 253.

the service, as, in accordance with the Canon 9 of the Apostles, "those who enter church together with believers and listeners to the reading of book, but not waiting for prayer and holy communion, as offender, shall not receive communion"[47] .

According to the tradition of Canon Law, banning from communion doesn't include banning from attending the service. As it was mentioned while discussing penances, banning from attending the service is an additional punishment and it is imposed for particularly grave sins. E.g. Canons 2 and 4 of the above mentioned Regulations of Anton II, banning of the sinner from communion, as well as attending the service is determined for the first three years, and after passing of these three years the right of attending the service will be restored, whilst the period of banning from communion will be extended.

As for the issue of the right of participation in ecclesiastic sacraments or liturgical prayers, none of Canon Laws speak about it. On the basis of opinions of the canonists, the following conclusions can be drawn:

(a) The decanonized can not participate in the sacrament of christening. Performance of the function of Christian parent, i.e. Godfather or Godmother is implied. The person, who is banned from church community due to his sin, obviously, can't be the guarantor of Christian life and upbringing of other person by him. "Christian parent is prohibited to be the representative of other religion, or heretic, expelled by schism, or suspended ."[48] As for the sacrament of anointing, only clergyman and the person, who is anoint, participate in it. So, outsiders can't participate in it.

(b) As for confession, as it's intended just for sinners, their remorse and spiritual treatment[49], actually, participation is desired primarily for the decanonized. Furthermore, according to the Canon 4 of Regulations for sinner by Anton II, the sinner shall systematically confess to his spiritual father and purge himself: "during all the four fasts… he shall confess and admit his sins openly and remorse in tears with broken spirit and broken heart".[50]

(c) The sacrament of blessing of oil is established in church for treatment of spiritual and fleshly disabilities of the diseased.[51] P. Boumis specifies that one of the necessary preconditions of blessing the oil is that the diseased shall belong to Orthodox Church.[52] The question – whether the decanonized can participate in blessing of oil, is answered by the Pope Innocent I, who lived in the V c., who mentions that "the person, who is in ecclesiastic remorse, can not be allowed to get anointing, as it's a sacrament and how can a person, who is banned from other sacraments, be allowed to participate in only one?[53]

(d) As for marriage, there is not clear definition in participation in it, like other sacraments. But it should be taken into consideration, that P. Boumis specifies "Bishop's permission" among positive pre-conditions of marriage[54]. This record has to include a lot of things, as just Bishop shall determine whether the person, banned from communion will participate in the sacrament of marriage in specific case, following the gravity of sin, punishment imposed and its execution.

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47 Greater Nomocanon, edited by *Gabidzashvili E.,* Tb., 1072, 217 (In Georgian).

48 *Boumis P.,* Canon Law, Tb., 2004, 78 (In Georgian).

49 *Pomazansky M.* (Protopr.), Dogmatic Theology, 2nd corrected edition, Tb., 2006, 256 (In Georgian).

50 Monuments of Georgian Canon, vol. V (Court Rulings), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1974, 1019 (In Georgian).

51 *Pomazansky M.* (Protopr.), Dogmatic Theology, 2nd corrected edition, Tb., 2006, 272 (In Georgian).

52 *Boumis P.,* Canon Law, Tb., 2004, 94 (In Georgian).

53 *Pomazansky M.* (Protopr.), Dogmatic Theology, 2nd corrected edition, Tb., 2006, 274 (In Georgian).

54 *Boumis P.,* Canon Law, Tb., 2004, 103 (In Georgian).

(e)Naturally, the decanonized can't participate in the sacrament of priesthood, as it's prohibited to ordain into priesthood not only decanonized or otherwise suspended, but neophytes as well, so that a new Christian neither is hindered himself nor hinders others by his being a priest.

3.2 Period and its Flow

Determination of the period of banning from communion and the court authorized for it was discussed above. Supervising by managing archpriest is required throughout of the whole period of banning from communion so that he assesses how the imposed punishment is executed and what achievements the decanonized have in spiritual activities. Canonic significance is attached to it in the aspect that if he notices that spiritual treatment of the offender proceeds much faster than it was assumed at the moment of determination of the period of banning from communion, he will have the right to discuss the possibility of reduction of the period of banning from communion. It's important, that in accordance with the Canon 12 of the Ecumenical Council I, "the aspiration and remorse of [sinners] needs to be studied in details to make sure that they demonstrate their improvement with fear and tears, patience and good deeds and not only externally."[55]

In its turn, Canon 74 of Basil the Great defined that "whoever is remorseful and aspires for confession, can be pardoned by those who is granted the authority of binding and releasing from the God, seeing his aspiration to confession and remorse, the period of his decanonization shall be shortened, and he shall be pardoned".[56] The content, similar to this Canon, but regarding one specific sin, exists in the Canon 16 of the Ecumenical Council IV: "hereby we define that Bishops of all locations shall have the authority of showing mercy"[57].

It's interesting that Canon 5 of Ancyra Council extends the Bishop's competence and entitles him not only to shortening, but increasing of punishment, following the behavior demonstrated in the process of its execution: "Bishops have the right to take into account their change and graciously shorten, or increase the period of banning from communion, and first of all, past life shall be taken into consideration and his case shall be reviewed and grace granted after that."[58].

Following the above mentioned Canons, the following conclusions could be drawn in regard to the flow of the period of banning from communion and execution of the Canon of banning from communion:

(a) supervision of the managing archpriest shall be established over the decanonized in order to have the understanding on remorse of the decanonized, especially for the purpose of comparing his actions before and after having sinned;

(b) following the decanonized person's behavior, reduction of the period of banning from communion is possible;

(c) it is the authority of managing archpriest;

(d) it is only the right and not the obligation or necessity;

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55 Greater Nomocanon, edited by *Gabidzashvili E.,* Tb., 1072, 234 (In Georgian).
56 Ibid, 495.
57 Greater Nomocanon, edited by *Gabidzashvili E.,* Tb., 1072, 272 (In Georgian).
58 Ibid, 237.

(e)the basis for the reduction of period is graciousness and not the doubt in regard to the valid punishment or possible assumption about its unCanonfulness.

3.3 Cases of Life-long Banning from Communion

The cases of execution of the Canon of banning from communion are regulated otherwise when the person is sentenced to life-long banning from communion.[59]

In this case, as well as when the person dies in the course of period of banning from communion, church admits the right of communion disregarding the elapsed period of banning from communion in order not to deprive the Christian of the pledge of eternal blissful life.[60] Two cases are to be reviewed in regard to the above mentioned: the issue of continuation of serving the sentence if dying Christian survives by miracle in the case of fixed-term of life-long banning from communion.

When banning from communion is (a) fixed-term and the Christian survives after communion he is obliged to complete the Canon of banning from communion, as well as the accompanying penance imposed for his sin. Canon 1 of Regulation for Sinners by Anton II regulates the mentioned issue: "they shall not receive communion to sacraments for seven years and if they die during the period of these seven years for some reason, spiritual father shall give them communion… and if one survives, he shall not receive communion to sacraments before expiration of seven years again".[61]

As for the case where the imposed punishment was (b) life-long banning from communion, in that case, in accordance with the Canon 1 of Gregory of Nissa, "if a person returns back to life, he shall further live under the punishment of being banned from communion till final death."[62]

It should be taken into consideration that anathema i.e. great suspension doesn't provide for right to receive communion even before death, as the anathemized person is no longer the member of church.

As for the case when the decanonized person died without communion regardless of fixed-term or life-long banning from communion, he regains church rights after death and he could be buried according to Christian rules as well as mentioned in prayers and services established for Christians.[63]

4. The Rule of Execution of Suspension

As mentioned above, suspension is a punishment for clergyman. In other words it is called prohibition of priest's activities. It is specified in old Georgian translation of Great Canon Law that clergymen were "suspended" for certain sins.

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59 E.g. for wilful murder, in accordance with the Canon 22 of Ankviria, see: Greater Nomocanon, edited by *Gabidzashvili E.,* Tb., 1072, 240.

60 *Pomazansky M.* (Protopr.), Dogmatic Theology, the 2nd corrected edition, Tb., 2006, 255 (In Georgian).

61 Monuments of Georgian Canon, vol. III (Ecclesiastic Legislative Monuments), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1970, 1018 (In Georgian).

62 Greater Nomocanon, edited by *E. Gabidzashvili,* Tb., 1072, 513 (In Georgian).

63 Compare 'Bumisi P.' Canon Law, Tb., 2004, 170; also Canon 1 of the Regulations of Anton II (monuments of Georgian Canon, vol.III (Ecclesiastic Legislative Monuments), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1970, 1018 (In Georgian).

According to *P. Boumis*, there are three forms of suspension: "a) suspension from only certain services; b) suspension from all types of services for certain period… and c) life-long suspension".[64] *Bishop Nicodimus* has the similar position[65]. Consequently, the rule of execution of each of them is different.

4.1. Suspension from Priest's Certain Activities

This punishment implies that the clergyman is banned from performance of certain services. The mentioned punishment could be fixed term, as well as life-long. The main thing in execution of banning from priest's certain activities is that the clergyman's title is preserved and he has the right to perform only the services, specified in the decisions, and after having served the sentence completely and honestly, if it was a fixed-term punishment, not only priest's honor will be restored but the right of performance of all activities permitted for the relevant title.

In the ruling of *Dositeos Nekreseli* in regard to the case of Priest Peter*,* mentioned above several times, it is specified that due to the committed sin *Priest Peter* shall be banned from priest's complete activities for 80 days, and shall perform only the function of the book reader: "during two times forty days he shall be suspended from religious service and any other activities of priest but reading of the Psalm-book".[66] This ruling applies to the next sub-section – temporary banning from priest's activities.

4.2 Temporary Banning from Priest's Activities

This punishment is imposed upon a clergyman when he is accused "in the crime, which shall be followed by excommunication from the title".[67] Its example is the Canon 5 of the Apostles, which imposes upon clergyman banning from priest's activities, and in the case of repeating or continuation – excommunication for divorce with the wife without reason[68], as well as Canon 58 or the Apostles, which obliges clergymen to teach good service[69] and also Canon 59 of the Apostles, which obliges clergymen to support the friend.[70]

As for the practice, VII decision on Banning of archpriest Kobakhidze from priest's activities was adopted on the Council of Holy Synod of Georgian Church on December 14, 2004.[71] The protocol entry has small preface and canonic justification. The preface specifies that disregarding the warning, archpriest Basil Kobakhidze continues anti-ecclesiastic activities and spreads anti-orthodox teaching. As for the section of banning from priest's activities, it specifies violation of only the first one, in particular, that priests and deacons shall not do anything without Bishop (Canon 39 of the Apostles and Canon 57 of Laodicea). Besides, Canon 55 of the Apostles is also referred to, which prohibits to a

64 *Bumisi P.,* Canon Law, Tb., 2004, 167 (In Georgian).
65 Law of Orthodox Church with Explanations of Bishop *Nicodimos* (Milash), vol. I, Tb., 2007, 40 (In Georgian).
66 Monuments of Georgian Canon, vol. V (Court Rulings), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1974, 549 (In Georgian).
67 Law of Orthodox Church with Explanations of Bishop *Nicodimos* (Milash), vol. I, Tb., 2007, 40 (In Georgian).
68 Greater Nomocanon, edited by *Gabidzashvili E.,* Tb., 1072, 216 (In Georgian).
69 Ibid, 222.
70 Ibid.
71 See: <http://patriarchate.ge/?action=text/oqmi_14-12-04>.

clergyman to offend his hierarchy. The Holy Synod has no reference to the above mentioned Canon 58 or the Apostles in regard to spreading of anti-orthodox teaching.

It should be taken into consideration that the sanction for the violation of all the three Canons is excommunication, but, as mentioned, ecclesiastic authority, imposing the punishment, has the right to apply first banning from priest's activities as warning measure and then - excommunication.

4.3 Life-long Suspension

This punishment is also called "datskhroma" (deprivation) in old Georgian. This punishment is imposed for relatively serious sins, especially those which rise temptation in the nation, but is committed due to either ignorance or gridlock situation, and besides, the sinner is remorseful and abandons the sin[72].

Suspension, if it's a fixed-term one, necessarily implies a chance for a clergyman to understand the graveness of his sin in this testing period and take this change of restoration in the honor of priest. If, on the contrary, he goes through this period negatively and not in Christian manner, not only the priest's honor and the right of priest's activities will not be restored, but he might even be excommunicated from spiritual community.

5. The Rule of Execution of Excommunication

Excommunication is the most serious punishment for a clergyman. After execution of excommunication clergyman loses all honor, the right of conducting priest's activities and demoted to a civilian. "A clergyman, punished by excommunication, primarily, shall lose all honor and privileges granted to him…besides, he shall lose all honor which he had as a priest… his name shall be erased from the list of spiritual community, where it was entered when blessing his as a priest, and, finally, he will become common civilian and enjoy only the rights of perish."[73]

5.1 The Issue of Blessing

In regard to excommunication the issue of blessing, characteristic for Canon Law and differing from civil Canon, is very interesting and important, as the issue of authority of clergyman is determined not only by the existing document on excommunication, but the issue of validity of blessing granted to him by performance of the sacrament of priesthood. Consequently, the issue of execution of this punishment is closely related to it. Prof. Panayiotis Boumis forms his opinion about the above mentioned: "the issue of "removal", i.e. being or not being a priest is related to the punishment by excommunication. Many Canon experts consider that priesthood is not irremovable, and, consequently, excommunication removes the talent (blessing) of priesthood. In other's opinion, as the blessing of priesthood is granted by the God, humans can't remove it, thus, it is irremovable. Orthodox Church hasn't declared its official opinion in regard to this issue.

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72 Law of Orthodox Church with Explanations of Bishop *Nicodimos* (Milash), vol. I, Tb., 2007, 41 (In Georgian).

73 Ibid.

But here we can quote the God's words: "whoever is bound in this world, shall be damned in the heaven" (Matthew 18,18). I.e. if church bans certain clergyman from performance of religious service, it "binds" him in the face of the members of church and in the face of the God and the priest is deprived of the talent and ability to communicate the divine blessing to the believers".[74]. Following the above quoted judgment, P. Boumis concludes that "excommunication… is removal of the blessing of priesthood, i.e. excommunication invalidated divine blessing".[75]

Excommunication "is executed as follows: since coming of the sentence into force the person isn't called a clergyman, is banned from wearing the relevant clothes and performing priest's activities. As soon as the sentence comes into force the persons has the right to receive communion based on civil rule, so that two punishments are not imposed on the person at the same time".[76]

5.2 The Issue of Restoration of the Excommunicated in the Rank of Priest

In regard to execution of excommunication the issue of restoration of the rank of clergyman is interesting. In the opinion of Archpriest *Vl. Tsipin,* excommunication from rank is determined once and forever. In accordance with the Canon 3 of Basil the Great, ecclesiastic rank, once removed, can't be returned".[77] It should be mentioned that in the Canon 3 St. Basil speaks about the deacon's sins, but concludes that "deacon shall be excommunicated once and he shall never be restored in the rank of deacon".[78] It should be considered that while commenting on this Canon, Bishop Nicodimus doesn't consider is as general establisher of the rule according to which the excommunication of clergyman is permanent and isn't subject to restoration. Nicodimos makes parallels only with this Canon and the Canon 25 of the Apostles[79], which like it, provides for one punishment for one sin[80]. But in other place Bishop Nicodimus not only shares the opinion that excommunication of clergyman is permanent and shall not be restored, but refers to the Canon 3 of Basil the Great as its basis: "for clergyman, excommunication is permanent and he shall never be able to receive any hierarchic rank (Trul. 21; Basil the Great 3, et al.), even if he repents and promises to fulfill his obligations in conformity with the Canon".[81] The same opinion is developed by *Prof. Berdnikov*: "only the excommunication of clergymen is valid and thus it has punitive nature".[82]

In regard to the above mentioned it should be taken into consideration that *P. Boumis* assumes the issue of restoration of rank for clergyman and links his judgment (cited above) on permanent nature of the blessing of priesthood and removal of only validity of blessing: "as excommunication is just the removal of

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74 *Bumisi P.,* Canon Law, Tb., 2004, 168 (In Georgian).
75 Ibid.
76 *Chikvaidze D.,* Ecclesiastic Law (course of lectures), Tb., 2008, 139 (In Georgian).
77 *Protopope Vladislav Tsipin,* Course in Ecclesiastic Law, Klin, 2002, 531 (In Russian).
78 Greater Nomocanon, edited by *Gabidzashvili E.,* Tb., 1072, 475 (In Georgian).
79 Ibid, 218.
80 Rules of Orthodox Church with Explanations of *Nicodimus, Bishop Dolmatino-Istriisky,* translation from Serbian, vol. II, publication of Sergiev Lavra of Holy Trinity, 1996, 378 (In Russian).
81 Law of Orthodox Church with Explanations of Bishop *Nicodimos* (Milash), vol. I, Tb., 2007, 41 (In Georgian).
82 Brief Course of Ecclesiastic Law, comp. *Prof. Berdnikov*, Kazan, 1888, 180 (In Russian).

the blessing of priesthood and not its suspension, reduction, thus, if new court justifies the excommunicated clergyman, he will return to his rank of priest without repeated blessing".[83]

The case, when the rank and title can be restored for the excommunicated clergyman is extended by the decision of local church Council of Russian Orthodox Church of 1917-1918 "On Possibility of Restoration of Ecclesiastic Ranks for the Persons, from whom the Ranks were Removed", which ruled, that "the persons, who were deprived of ecclesiastic ranks based on ruling of canon court, which was inherently and formally correct, cannot regain the rank. Ruling of courts in regard to deprivation of ecclesiastic ranks, which were recognized inherently and formally incorrect by Supreme Canon Court, is subject to reconsideration and can be cancelled through their announcement invalid"[84]. Following the above mentioned, Archpriest Vl. Tsipin concludes that the punishment of excommunication of a person from ecclesiastic rank can be abolished only in two cases: (a) due to making mistake by the court and (b) due to violation of the established rules of legal proceedings, i.e. procedural norms of Canon Law.[85]

Thus, if canon court of the last instance considered the case in objective manner, with full observance of substantive as well as procedural norms, fully investigated evidences and passed sentence on deprivation of clergyman of the rank, this decision shall not be changed and the validity of excommunication will be permanent.

6. The Rule of Execution of Anathema

Anathema, the same as great excommunication, damning, and overall removal is the heaviest ecclesiastic punishment.

6.1 Canonic Definition

In the opinion of *P. Boumis,* anathema "is considered a seal of leaving the struggling church by one of its member on his own will, and it equals to spiritual death".[86] Bishop Nicodimus explains in regard to anathema, that it leads to loss of community with church, all the rights and opportunities granted to the Christian as a result of christening. Interesting comparison of banning from communion and anathema is provided in Russian "Spiritual Regulations": "by anathema a human is like a dead, and by banning from communion or excommunication he is like a prisoner".[87]

6.2 Peculiarities of Execution of Anathema

As due to anathema Christian loses the honor of being the member of church, the right of religious relations with civilians and personal relations with clergymen,[88] the decision on anathema shall be announced publicly. Furthermore, tradition existed in the church, where anathemas were specially

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83 *Bumisi P.,* Canon Law, Tb., 2004, 168 (In Georgian).
84 Definition and Resolutions of Holy Cathedral of Russian Orthodox Church. 1917-1918, M., 1994, 370 (In Russian).
85 Arch pope Vladislav Tsipin, Course in Ecclesiastic Law, Klin, 2002, 531 (In Russian).
86 *Bumisi P.,* Canon Law, Tb., 2004, 205 (In Georgian).
87 See: Archpope Vladislav Tsipin, Course in Ecclesiastic Law, Klin, 2002, 526 (In Russian).
88 Law of Orthodox Church with Explanations of Bishop *Nicodimos* (Milash), vol. I, Tb., 2007, 39 (In Georgian).

announced. At present it is performed on the first Sunday of Great Fast, when the "Fiest of Orthodoxy" is celebrated. But at present the anathemas to historical-dogmatic errors and their supporters are announced at the end of religious service. The final part of Ruisi- Urbnisi Canon Book – Sinodikoni – is similar.[89] During discussion on accompanying procedures of ruling it was specified that the accompanying procedure following Nestor's anathema is the announcement of the sentence to the people.[90]

Considerable and distinctive feature of anathema is it validity after death. As it is known, in Christianity, "in its life and teaching system the understanding of immortality of spirit occupies central location".[91] This postulate of dogmatism differs Canon Law from civil Canon, as it determines and defines Canon Laws in regard to the deceased like it does in regard to the alive. Thus, in regard to anathemization it could be said that it's so termless and eternally valid, that if validity of all other punishments is terminated by the death of a person[92], by anathema the Christian loses "the right of having funeral service and being buried on orthodox graveyard"[93]. And according to *P. Boumis,* "the church doesn't have the right to perform funeral service to the deceased (anathemized), mention him of serve this or that kind of commemoration rule".[94]

Thus, in the case of execution of anathema the Christian (a) shall be expelled from the church, (b) shall lose all rights and privileges, (c) the period of damning is termless, i.e. it continues even after death, and (d) after that (as he is no longer the member of the church) Canon Law ceases to act towards him,[95] as the subjects of Canon Law are only the members of the church.[96]

As for the issue of divine execution, "we can't explain the spiritual status of the anathemized for sure. He will be passed into God's hands."[97]

7. The Rule of Execution of other Punishments

In addition to the above reviewed punishments, Canon Laws provide for other punishments, the rule of execution of which will be discussed in the present section. Their specification individually wasn't expedient, as the norms of Great Canon Law and the reviewed practices provide scarce picture for full understanding of the mentioned punishments.

7.1 Transfer to other Place

This punishment can be imposed on the Christian if the authorized court considers that his being in the conditions where he usually lives/ works will not contribute to the improvement and spiritual

89 Monuments of Georgian Canon, vol. III (Ecclesiastic Legislative Monuments), texts were published, notes and references were attached by *Prof. Dolidze I.,* Tb., 1970, 117 (In Georgian).
90 Deeds of the World Cathedrals, Publication in Russian, Kazan Theological Academy, vol. II, 1892, 266.
91 *Pomazansky M.* (Protopr.), Dogmatic Theology, the 2nd corrected edition, Tb., 2006, 107 (In Georgian).
92 *Bumisi P.,* Canon Law, Tb., 2004, 170 (In Georgian).
93 Law of Orthodox Church with Explanations of Bishop *Nicodimos* (Milash), vol. I, Tb., 2007, 39 (In Georgian).
94 *Bumisi P.,* Canon Law, Tb., 2004, 205 (In Georgian).
95 *Chikvaidze D.,* Ecclesiastic Law (course of lectures), Tb., 2008, 139 (In Georgian).
96 Ibid, 64.
97 *Bumisi P.,* Canon Law, Tb., 2004, 206 (In Georgian).

treatment of the sinner. Besides, it has to be mentioned that this punishment can't be imposed upon the sinner in the case of remorse or pardon, which will be discussed in the next chapter.

The punishment of transfer to other place, as a rule, shall be executed in the same eparchy where the decanonized belongs. At the beginning the offender, sentenced to this punishment, would stay during the whole period of punishment at the residence of Bishop, under his supervision. Afterwards, when monastery was considered more appropriate place for this purpose, they began sending offenders to monasteries."[98]

In this regard it's interesting that Christephore Tsamalaidze and Ambrosi Katamadze, who were banned from priest's activities, were sentenced to execution of the rule of remorse in Shiomgvime Monastery according to the protocol ruling X and XI dated December 21, 2006 of Hoy Synod of Georgian Church.[99]

Regardless the fact that transfer to other place was often applied by church, *P. Boumis* mentions in regard to this punishment that its nature contradicts general aspiration of Christianity: "this punishment, as seen, doesn't comply with holy Canons, as transfer depresses the fullness of church."[100]

7.2 Prohibition of Books of the Decanonized

This punishment is applied when ecclesiastic accusation is related to preaching by the accused of dogmatic errors in written form.

The Canon 60 of the Apostles prohibits public reading and using of heretic and false books (by common term – non-orthodox books): "if any priest uses heretic books, written in false manner, for corruption of nation and priests, he shall be excommunicated."[101]

The Canon 63 of the VI Ecumenical Council ruled: "nobody shall bring into church the books, composed by the enemies of the truth." Similarly, according to the Canon of VII Ecumenical Council, "nobody shall hide heretic books. All kind of childish stupidities and ravings, descriptions of lies, which were obtained and described for throwing down of icons, shall be sent to Bishop in Constantinople to be numbered among other heretic books. And if anybody shall be found to be hiding those, either bishop or priest, or archpriest, they shall be excommunicated, and if either civilian or monk – they shall be banned from communion."[102]

All the above mentioned Canons determine general prohibitions of all those books, which refer to the opinions contradicting Christianity. As for the punishment, according to which a person is punished by prohibition of his books, it is referred to in the protocols of III Ecumenical Council. In particular, the Emperor's list related to Nestor's decanonization it's specially mentioned: "nobody has the right to teach, read or rewrite the books of useless and blasphemer Nestor."

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98 Law of Orthodox Church with Explanations of Bishop *Nicodimos* (Milash), vol. I, Tb., 2007, 40 (In Georgian).
99 See: <http://patriarchate.ge/?action=text/oqmi_21-12-06>.
100 *Bumisi P.,* Canon Law, Tb., 2004, 167 (In Georgian).
101 Greater Nomocanon, editor *Gabidzashvili E.*, Tb., 1972, 222 (In Georgian).
102 Ibid, 424.

MARIAM KHOPERIA*

THE ROLE OF MEDIATOR IN FAMILY SEPARATION ACCORDING TO GEORGIAN CUSTOMARY LAW

1. Introduction

In the history of mankind process of transition from multi-member family based communities to individual family implies took a long period. In all civilized world, including Georgia, the institute of family separation actually started with weakening of extended family. Originally, family separation process was regulated with customary law rules, which later were relevantly reflected in legislative provisions of written documents of Georgian law. Similarly to other social institutions, institution of family separation was also developed concurrently with society evolution; therefore, concept of family, relations of its member entities and their rights in relation to property in their possession was also changed. The present document studies family separation rules – with and without participation of third party – according to customary law.

2. Family Separation Concept

The process of disintegration of extended families became more and more intense and rapid along with the evolution of the society. Frequency of separation of an extended family actually indicates to degradation of such type of a family. Though, it should also be mentioned that an extended family as such has not been an integral unit, therefore, its separation, regardless of reasons (disagreement with the patriarch, disobedience of family members towards the patriarch, excessive size of the family, incompatibility of member females etc.) was considered an appropriate and natural phenomenon. "Decisive role of any one particular factor in this process is denied in special literature".[1]

According to Sh. Montesquieu, "Family is a certain form of property".[2] First signs of private property were reflected in the family. Therefore, the main concept of separation was asset sharing, identification of private property of each separated segment of the family and its allocation from common family possessions. In all cases family separation set one single purpose and was named "family separation"; sometimes this process was also called "family allocation".

According to ethnographic materials, term "Deal" was frequently applied to the process of separation in Guria. "Brothers had a deal", "family deal was carried out with the will of the father",

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1 *Kharadze R.L.,* Georgian Family Community, v. II, Tb., Publishing House - Soviet Writer of Georgia, Zarya Vostoka, 1961, 43 (In Russian); *Itonishvili V.,* A Family Life of Central Caucasus Mountaineers, A Family Life of Nakhebi and Ossetians, Tb., 1969, 274 (In Georgian).

2 *Montesquieu C.L.,* The Spirit of Laws, Translated from French *by D. Labouchidze-Khoperia*, Tb., 1994, 495 (In Georgian).

"the deal was witnessed by…" etc. According to G. Tsetskhladze, term "deal" has the same implication in Adjara.[3]

The term "deal" had two meanings. I noted "separation" as well as "sharing". Therefore it was used with the meaning of family separation, as well as property sharing. Sometimes people would say "family had a deal"; "brothers had a deal", i.e. family separation took place. In other cases people would say "property was dealt with", "they had a deal on the property" – which meant that property was shared. The term "gafardeba" was also applied in Guria with the meaning of property sharing rather than family separation, and implies sharing, distribution, it is derived from the word "farda".[4] This word is also used in David Batonishvili law. He was for "fair distribution and sharing of common assets" of an extended family during family separation, so that "there is no disagreement and fighting in case of unfair dealings" (article 29).[5]

Family separation was a phenomenon characteristic for both low and high class society. As a result of sharing of property accumulated in the family over years the structure of family was changed, which was related to a number of social-economic reasons in legal context. Therefore, "family life is altered according to how big a family is, to how intensely it is closed in itself".[6]

Regardless of the reason of separation, in all regions of Georgia, in mountains and lowlands, there were two rules for family separation: 1. Separation with third party participation; 2. Separation without third party participation.

3. Family Separation Without Third Party Participation

Originally family separation was "unacceptable not only until the father was alive, but until all the members (shareholders) were married".[7] Gradually the concept of the family was altered and as a result, separation was permitted during the life of the parents. "Parents would share the property among their children".[8]

B. Zoidze confirms the above circumstance: "family separation can be expected even when the father is still alive; it is true, that originally legal life could not accept the above circumstance, but finally this type of separation was also recognized".[9]

Separation and property sharing was considered to be one of the most essential event for the family. That is why this day was specially celebrated. Sometimes a religious festival was

selected for family separation. After property was shared usually a party was organized, the patriarch would give his blessing and would wish "brothers, concluding a deal to live amiably".[10]

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3 *Tsetskhladze G.,* A Family Life of the Population of Guria, Tb., 1991, 84 (In Georgian).

4 Ibid.

5 *Furtseladze D.,* (ed.), Law of David Batonishvili, Tb., 1964, 23 (In Georgian).

6 *Durkheim E.,* Rules of Sociological Method, Translated from French by *D. Labuchidze-Khoferia,* Tb., 2001, 149 (In Georgian).

7 *Itonishvili V.,* A Family Life of Central Caucasus Mountaineers, Tb., 1969, 114 (In Georgian).

8 *Javakhishvili Iv.,* History of Georgian Law, Book II, Work in XII volumes, Vol. VI, Tb., 1982, 272 (In Georgian).

9 *Zoidze B.,* The Old Georgian Inheritance Law, Tb., 2000, 41 (In Georgian).

According to the ancient tradition, separation should have been carried out and regulated by the family itself. In most cases property sharing was carried out without any conflict. If domestic issues of a family were independently organized by older members of the family, they normally did not need interference of outsiders. In such a case, separation was carried out in such peaceful situation that sometimes neighbors and relatives would find out about this rather important event after some time.

According to ethnographic materials, families which did not need interference of outsiders for property sharing during family and considered property sharing with others' help to be a disgrace, enjoyed approval and respect. "Family separation, like solving various vital domestic or social issues was based on traditional peoples' law".[11]

State would not interfere in the domestic issues of a family. A state authority, like Roman "Paterfamilias"[12] was represented by the patriarch within the family. This person was called "Tsendi"[13] in Adjara, "Kora Makhvshi/Makhvshi"[14] in Svaneti and head of household[15] in Letchkhumi. According to the traditions, this person was in charge of family separation issues. According to B Nijaradze, "Makhvshi had same influence on any private and family issues as on social affairs".[16]

Usually "everyone had their own property in the family, but until the family was separated, the assets of the family were common".[17] During separation of a family, and therefore during sharing of property pecuniary rights of particular members of the family were fully revealed. Actually each shareholder became an owner of separate property from this very moment. Until then they were only formally entitled to the property. Actually property of the family was considered common property of the family regardless of the source of the property and how a person was entitled to it (if we do not take into consideration "satavno" which was from the very beginning under the ownership of its proprietor).

According to informers, property sharing during family separation was organized and regulated directly within the confines of the family by the patriarch of the family (father or elder brother). "If separation of an extended family during life of parents was only characteristic for the moment of collapse of clan community system, separation of large individual families mainly took place during life of parents, mostly father, which was only characteristic for an individual family, where older male was authorized to share private property of the family".[18] Though it is true that family evolution was rather a long process, it still retained the principle of clan-communal relations which was confirmed by the fact that family property was inherited by male line.[19] During separation family

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10 *Tsetskhladze G.,* A Family Life of the Population of Guria, Tb., 1991, 104 (In Georgian).

11 *Achugba T.,* Family and Family Life in Adzharia, Tb., 1990, 99 (In Georgian).

12 Head of the Family, Foreman in Roman Law.

13 *Itonishvili V.,* A Family Life of Central Caucasus Mountaineers, Tb., 1969, 62 (In Georgian).

14 *Nizharadze B.,* Historical- monographic Writings, Vol. I, Tb., 1962, 93, Specified in the work: Georgian Custom Law, (Chief editor *M. Kekelia*), Book I, Tb., 1988, 66 (In Georgian).

15 *MamardaSvili G.,* Family Life and Faith and Thoughts in population of Lechkhum, Tb., 2006, 5 (In Georgian).

16 Georgian Custom Law (Chief editor *M. Kekelia*), Book I, Tb., 1988, 66 (In Georgian).

17 *Jalabadze D.,* Materials about the Custom Law of Fshavi, Tb., 1987, RV., 12, Specified in the work: Georgian Custom Law(Chief editor *M. Kekelia*), Book I, Tb., 1988, 162 (In Georgian).

18 *Tsetskhladze G.,* A Family Life of the Population of Guria, Tb., 1991, 86 (In Georgian).

19 *Kharadze R.L.,* Georgian Family Community, v. II, Tb., Publishing house - Soviet Writer of Georgia, Zarya Vostoka, 1961, 43 (In Russian).

property should be divided in a number of shares corresponding to the number of male members of the family entitled to the property. A person with such right was called a shareholder. Therefore only males were family asset shareholders.

According to the line of relative ties, brothers, and sometimes parents were shareholders of a large family.[20] On the basis of materials studied *D. Bostoghanashvili* wrote that "in Kiziki, blood relation principle only implied ancestors' property, whereas acquired property was shared among family members according to their participation in common labor".[21]

According to data communicated by modern Pshavi informers, during property alienation the patriarch of a family should have considered opinion of adult male members of the family. G. Davitashvili considers this quite appropriate since " we are talking about property of the family and only men were owners of such property in Pshavi, though it is possible that for alienation of property, needed and used by women in household activities, consent of a hostess could also be required" as it is mentioned by one of the informers.[22]

For later period it was characteristic, that during family separation all persons, who had contributed to creating common family welfare, received a share from family property. While sharing family real estate and movable property, age and family status of shareholders members

were inessential. Property was equally distributed between shareholders. "Property was distributed by father, elder brother or mediator". Property sharing, similarly to governing system in Guria was based on democratic principle. Father had no right to leave a son without his portion of assets.[23]

The same rule was applied in Adjara. "If family was separated during a father's life the property was shared by father, who evenly distributed assets. He had no right to give larger or smaller share to any of sons. At the same time he had no right to leave anyone without his share; i.e. traditional equality principle was applied in family property sharing".[24]

During family separation for property sharing in Guria the following rule was applied: If family was separated during parents' life, then parents were also entitled to a share. Sometimes, elder brother received a special share, if there was no male heir, a women could have been an heir. The family patriarch had final say, though senior female could also be present and they could have jointly made a decision. Generally, we can say that family property sharing was carried out on the basis of democratic principle.

According to customary law "family property was shared among the family members according to their number (per capita). A woman with a child would receive two shares. Family property was shared on the basis of agreement of family members; though sometimes members of council could have also got involved".[25] According to information of the same author, "During separation of brothers,[26] parents would

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20 *Tsetskhladze G.,* A Family Life of the Population of Guria, Tb., 1991, 86 (In Georgian).

21 *Bostoghanashvili D.,* Family Divorce Rules in Eastern Georgia, Journal "Samartali", 1-2, 1998, 77 (In Georgian).

22 *Davitashvili G.,* Law Organization and Process in Georgian Custom Law, Tb., 2004, 122, (In Georgian).

23 *Tsetskhladze G.,* A Family Life of the Population of Guria, Tb., 1991, 89 (In Georgian).

24 *Achugba T.,* Family and Family Life in Adzharia, Tb., 1990, 102-103 (In Georgian).

25 *Jalabadze D.,* Materials about Fshavian and Kist Custom Law, RV., Tb., 1987, 108, Specified in the work: Georgian Custom Law, (Chief editor *M. Kekelia*), Vol. IV, Tb., 1993, 161 (In Georgian).

26 *Jalabadze D.,* Materials about Fshavian and Kist Custom Law, RV., Tb., 1987, 30, Specified in the work: Georgian Custom Law, (Chief editor *M. Kekelia*), Vol. IV, Tb., 1993, 161 (In Georgian).

receive "burial" share, a female would receive "satavno" (principle) and only after that brothers would share the remaining property". During family separation parents would get "burial". Then the eldest brother would take special "senior" portion (a bit more compared with others), the remaining property would be evenly distributed, in most cases parents would stay with the youngest child. According to *J. Merabishvili* "everything would be evenly distributed, parents would get "burial". As far as I know, "burial" was an additional portion. The eldest brother would get "senior" share".[27]

Ethnographic materials and family separation documents of Guria show, that separation of individual family and family property sharing with the will of parents, and particularly father was acceptable during his life. One of the examples of this is extract from one of "farda" papers. Particularly "On February 17 of 1904, I, undersigned of the present document, Almaskhan Ramishvili, son of George, living in Surebi society in Ozurgeti district, with my own will rather than under pressure, in the presence of my sons – Grigol, Rafiel and Archil Ramishvili, sons of Almaskhan, with their consent have divided all my real estate and movable property among my sons in following parts…"[28]

Informers provide extremely interesting facts regarding family separation rule. Namely we should mention an informer's reference to property sharing through "portion" (draw), or "ruling". When criminal and civil cases were considered on the basis of customary law, cases were normally heard by verbal arrangement. Whereas inn case of property sharing by "ruling" implied a written document (decision). "In case of brothers' separation, brothers would write a "ruling", this "ruling" reflected allocation of different pieces of property to various members and everyone would sign it. This document would be kept by each of participants of a deal and in case of a dispute the reference would be made to it. If brothers could not have agreed with each other during separation, they would invite selected men (three men) and ask them to deal the property. First of all, they would agree, whether the property would be shared through drawing or "ruling".[29]

The same principle was applied in indigenous peoples of the Caucasus. Regardless of the fact whether property was shared with or without participation of community "heads", the property should have been divided in so many shares, as many male family members were eligible to receiving a share (kha) at the moment of family separation. Such an eligible person was called a shareholder (Khaijan), who, after family separation became a head of a newly created family.[30]

4. Mediator

Family separation during the life of the head of the family usually took place in peaceful circumstances, any kind of disagreement and misunderstanding regarding the shares was rare, since the "family property was evenly divided by the head of the family and everybody obeyed his decision".[31]

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27 *Merabishvili J.,* Materials about Fshavian and Kist Custom Law, RV., Tb., 1987, 108, Specified in the work: Georgian Custom Law, (Chief editor *M. Kekelia*), Vol. IV, Tb., 1993, 161 (In Georgian).

28 Fardis Paper, 1904, ChMM Manuscript Fund, 1566 (In Georgian).

29 *Jalabadze D.,* Materials about the Custom Law of Fshavi, RV., Tb., 1987, 12, Specified in the work: Georgian Custom Law, (Chief editor *M. Kekelia*), Book I, Tb., 1988, 162 (In Georgian).

30 *Itonishvili V.,* A Family Life of Central Caucasus Mountaineers, Tb., 1969, 274-275 (In Georgian).

31 *MamardaSvili G.,* Family Life and Faith and Thoughts in population of Lechkhum, Tb., 2006, 38 (In Georgian).

Originally discontent regarding shares was rare, but later, during property sharing disagreement between stakeholders – between father and sons, or between brothers increased; An outsider would be invited to settle problematic issues, this person was called "a dealer", "intermediary" "Nemsgamezali" (in Svaneti); though under the influence of Roman originated law, Latin word – Mediator – was used as a term in Georgian language.

Frequency of property sharing with the presence of third party is proved by the presence of the institute of mediator in all regions of Georgia. Numerous written documents, which have reached present times indicate to popularity of this institute. E.g. G. Tsetskhladze refers to a document regarding the fact, that during separation a family could not agree on certain issues and they decided to invite outsiders as mediators:" Since we were not able to reach an agreement (…), we chose .. as a mediator with our own will".[32] It seems that in such cases mediator's decision was a final say.

According to G. Tsetskhaldze in Guria father or the eldest brother would name three persons as mediators. One of them, who would be selected as senior, was called *Ober-Mediator.*[33] According to *G. Davitashvili "*in the process of family separation number of mediators corresponded to the number of persons who got separated and these mediators would choose one senior mediator on the basis of mutual agreement. During family separation, in majority of cases, close relatives of the family would act as mediators".[34]

In conflicting situations family separation with the help of mediators turned out to be very fair form of resolution of problems for the parties, so that even in the last century it was considered to be acceptable. Acording to *G. Davitashvili "Selection* of mediators during family separation was a normal phenomenon even in XX century".[35]

4.1. Rule for Mediator selection

There was no special group of mediators; every family chose a different person according to their own wish: a mediator could have been an outsider, who had no kinship ties with the family, who he helped in the process of separation, or a close relative of the family, sometimes a neighbor. In exceptional cases shareholders' mothers' brothers could be invited as mediators. The above fact confirms, that "role of mother's brother in the fate and future affairs of nieces and nephews was so ancient, that only this fact is sufficient for considering common family property to be an old form of ownership". [36]

In any case, while making a decision, a mediator would take into consideration interests of each family member and acted in accordance with rules established by customary law. Main requirement was a rational and experienced man to be chosen as a mediator for family separation, this person should have had good knowledge of local rules, customs, be literate and skilled in land measuring. People trusted the mediator to be fair to such an extent, that sometimes he was even called "a just person".[37] "One person might have been involved in separation process of a number of families. It

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32 *Tsetskhladze G.,* A Family Life of the Population of Guria, Tb., 1991, 88 (In Georgian).

33 Ibid.

34 *Davitashvili G.,* Law Organization and Process in Georgian Custom Law, Tb., 2004, 222 (In Georgian).

35 Ibid, 209.

36 *Achugba T.,* Family and Family Life in Adzharia, Tb., 1990, 101-102 (In Georgian).

37 *Tsetskhladze G.,* A Family Life of the Population of Guria, Tb., 1991, 88 (In Georgian).

depended on his image and authority".[38] For example, mediators from Martkophi had such a good reputation, that they were even invited in the neighboring villages. In Kiziki family separations were always carried out in the presence of mediators and community leaders.

In case one of the parties had certain doubts in relation of integrity and honesty of a mediator invited by the other party, the issue regarding challenging the mediator would be raised and the party was obliged to invite another mediator.[39]

Traditionally women were not invited as mediators. "Women were deprived of the right to participate in mediation or court processes, though sometimes their involvement in such activities was also possible".[40] A tradition to choose a women as a mediator emerged in later period and it indicates to the fact of women emancipation, and respect towards women. Female mediators should have been distinguished by their wisdom, experience, reputation, fairness and common sense. We can find identity of female mediators in ethnographic materials. Namely, in Guria female mediators were Anita Mgaloblishvili, Kato Asatiani (Ozurgeti district, village Bakhvi). For a woman it was big honor to be chosen for property sharing. We think, that originally women were chosen for mediation during divorces, only later women would be named among mediators, dealing with sharing of family property.[41]

There is one more exception noted in Imereti. According to *M. Kekelia,* if brothers agreed about property sharing in Imereti, mediators, as persons, present at the process, would legally certify the fact of sharing.[42]

4.2. Functions of a Mediator

First of all, mediators had to divide a house, "house, which could not accommodate all new families, derived as a result of extention. For this reason, one part of households would stay in the basic house, and other "part of households would receive cattle, domestic belongings and a land plot as compensation for living space. In this case an advantage was given to the oldest shareholder, who was responsible for preserving ties between newly formed families and main household".[43]

Sharing of residential building and supplementary installations, domestic belongings and cattle was also based on the principle of fairness and equality. According to informers, "if five out of six shareholders received 1 ox per household, the sixth one would get 2 cows, or a horse, or several sheep and goats, sometimes price of cattle in cash".[44]

Mediators had to be very careful while dividing family property, especially arable lands and hayfields, since land plots differed according to their quality, as well as distance. Besides, it was

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38 Ibid.

39 *Kekelia M.,* Materials of Custom Law of Guria, Ethnographical RV., Tb., 1989, 12, Specified in the book: *Davitashvili G.,* Law Organization and Process in Georgian Custom Law, Tb., 2004, 113 (In Georgian).

40 *Barkadze D.,* Svaneti – Notes of Imperial Russian Geographical Society of Caucasian Department, Tbilisi, №6, 1864, Specified in the work: Georgian Custom Law,(Chief editor *M. Kekelia*), Book I, Tb., 1988, 60 (In Russian).

41 *Tsetskhladze G.,* A Family Life of the Population of Guria, Tb., 1991, 88-89 (In Georgian).

42 *Kekelia M.,* Materials of Custom Law of Guria, Ethnographical RV., Tb., 1989, 11, Specified in the book: *Davitashvili G.,* Law Organization and Process in Georgian Custom Law, Tb., 2004, 61, (In Georgian).

43 *Itonishvili V.,* A Family Life of Central Caucasus Mountaineers, Tb., 1969, 100-101 (In Georgian).

44 *Achugba T.,* Family and Family life in Adzharia, Tb., 1990, 102-103 (In Georgian).

difficult to segregate small land lots. Sometimes, when land parcel could not be further segregated, the problem was solved by "Correlation",[45] when both land location and its fertility were taken into consideration.

According to *B. Zoidze* "Rules of property sharing were established by old customs and mediators just had to honestly and fairly evaluate the property".[46] It was mediators' duty to carry out inventory of family belongings, both movable and immovable property and compile family separation and property sharing document, as a result of which, according to the customary law, each shareholder was given a "separation" document.[47] After that brothers had "nothing to do with each other".[48] Property sharing rule is described in one of the documents of 1801: "The land should be divided as given above and vineyard, which belongs to one of the family members have not be confiscated from him, we have given to other brothers the same size of land situated in other place. We have distributed senior, middle and junior portions from the building and domestic belongings; everyone has their own documents, where the size of the house with its courtyard is given and also it is described where other three brothers shall delineate their plots in common land".[49]

In documents of XIX and beginning of XX preserved in ethnographic materials and archives distribution papers are mentioned in the following way: "Farda paper", "Farda document", "Farding deed", "List of property sharing", "Decision on property sharing", "Document", "Property sharing warrant", etc. This document was written in so many copies, as many shareholders there were and one copy would stay with the mediator. The paper was kept carefully for long period of time; In several families ethnographs have discovered several "Farda Papers" compiled in last century. These documents are very important for studying both family separation and property sharing rules, as well as economic standing of families".[50]

Prior to family separation, all parties involved would give warrant to mediators, that their decision would be unconventionally obeyed by the latters. During separation process mediators determined contribution of each of the family members in creating common wealth, which was taken into consideration during property sharing. Mediators also considered which family member was an owner of particular parts of common property. Obviously mediators thoroughly studied the issue and only after this they took the decision.[51]

In Adjara mediators divided the common property in equal parts and held a draw for distributing them among family members. *Draw* was named *Phisheck (Turkish for bullet case).* The old people would put marked sticks corresponding to the number of shareholders in to the hat. The sticks had different number of scratches - one scratch, two, three, etc. Each marked stick represented one predetermined part of the property, which only mediators were aware of and kept in secret. They would toss sticks in the hat, each shareholder would withdraw one stick and according to it would get ownership over the property".[52]

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45 Ibid.
46 *Zoidze B.,* The Old Georgian Inheritance Law, Tb., 2000, 171 (In Georgian).
47 Divorcing Book, CSSA, 1448, 8109 (In Georgian).
48 *Zoidze B.,* The Old Georgian Inheritance Law, Tb., 2000, 172 (In Georgian).
49 Divorcing Book, CSSA, 1448, 8109 (In Georgian).
50 *Tsetskhladze G.,* A Family Life of the Population of Guria, Tb., 1991, 88-89 (In Georgian).
51 *Davitashvili G.,* Law Organization and Process in Georgian Custom Law, Tb., 2004, 61 (In Georgian).
52 *Achugba T.,* Family and Family life in Adzharia, Tb., 1990, 102-103 (In Georgian).

According to the majority of informers, mediators did not take any fee for their help. According to *M. Kekelia,* one of the informers had been invited as a mediator for family separation twice, "but had not taken a fee".[53] But in some regions (e.g. in Imereti), though mediators would not ask for any compensation, if they had to make lots of efforts and spend much time, "parties would thank them with money or cattle". [54]

As a rule, mediators were given a present for their efforts during family separation. *D. Bostoghanashvili* writes, that "mediators and community heads received a fee during family separation. In some villages there was a fixed fee, one Manat per capita per day, in other places they were given some present – a cow, an ox or a sheep, according to what the family could afford".[55]

Mediation institute was rather popular among indigenous peoples of the Caucuses. If family members could not agree upon the separation issues, the process was dealt with old mediators, known for their wisdom, they also were involved in solving some of urgent issues, abiding with customs and traditions.

Family separation was carried out by "heads" of villages and "counsellors". "Family separation could take place with the participation of council members (council implied clan-communal structure of management), as well as by mutual agreement, without involvement of outsiders".[56] *Merabishvili* also confirms this kind of rule of family separation" Family separation would be attended by selected men".[57] According to the information of Keshikashvili, inhabitant of Pshavi village Dedisferuli of Pankisi gorge, "property sharing in the family took place with the agreement of family members, though sometimes counsellors might also have been involved; I have participated myself in a couple of cases of family separation, as a counsellor".[58]

At the final stage of evolution of extended family sometimes there happened rare occasions of violence, expressed "in unfair property distribution".[59] Such cases, though they cannot be considered as specific events, have certain importance for studying peculiarities of evolution of an extended family.

5. Conclusion

Thus, as a result of survey of ethnographic materials the paper reflects forms of the institute of family separation in Georgian customary law. In relation to the above the following conclusions can be made:

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53 *Kekelia M.,* Materials of Custom Law of Guria, Ethnographical Tb., 1976-77, 42, Specified in the book: *Davitashvili G.,* Law Organization and Process in Georgian Custom Law, Tb., 2004, 120 (In Georgian).

54 *Kekelia M.,* Materials of Custom Law of Guria, Ethnographical Tb., 1976-77, 42, Specified in the book: *Davitashvili G.,* Law Organization and Process in Georgian Custom Law, Tb., 2004, 120 (In Georgian).

55 *Bostoghanashvili D.,* Family Divorce Rules in Eastern Georgia, Journal "SamarTali", №1-2, 1998, 77 (In Georgian).

56 *Kekelia M.,* Materials about Fshavian and Kist Custom Law, RV., Tb., 1967, 15 (In Georgian).

57 *Merabishvili J.,* Materials about Fshavian and Kist Custom Law, RV., Tb., 1987, 28, Specified in the work: Georgian Custom Law, (Chief editor M. Kekelia), Vol. IV, Tb., 1993, 159 (In Georgian).

58 *Jalabadze D.,* Materials about the Custom Law of Fshavi, RV., Tb., 1987, 87, Specified in the work: Georgian Custom Law,(Chief editor M. Kekelia), Vol. IV, Tb., 1993, 159 (In Georgian).

59 *Achugba T.,* Family and Family Life in Adzharia, Tb., 1990, 109 (In Georgian).

- During family separation – both with and without participation of outsiders – Georgian customary law clearly prescribed family separation rule, family property shareholder entities and their share in common family assets, which indicates to high level of Georgian legal thinking;
- In Georgian customary law family separation was mentioned by the following terms: "Separation", "Division", "Deal", "Farding", which implied creation of new, independent families and strictly determined individual property of each of them; In Georgian language "Intermediary" and "Dealer" were used with the meaning of a mediator.

- Customary law provided for individual features of a person to be selected as a mediator and his/her functions were clearly defined. Gradually the role of the head of the family deteriorated, private interests of family members increased. Therefore, collective interests were weakened. Despite this circumstance, property sharing during family separation with the involvement of mediators was regulated with due justice and fairness, which is confirmed by frequency of their involvement in family separation and long history of existence of this institution. Family separation with the participation of mediators was used till the end of the last century.
- After legal written documents were developed, the legislator, while making a decision regarding family separation, along with studying actual circumstances, also took into consideration customary law rules.

GVANTSA GUGESHASHVILI[*]

PROTECTION OF GOODWILL BY COMPETITION LAW

1. Introduction

In present period special attention is paid to protection of objects of intellectual property. The above mentioned is no wonder, because the objects of intellectual property, as a rule, are the most valuable assets of enterprises. It particularly applies to the object like goodwill.

Following the circumstance that goodwill exists where competition occurs (monopolistic goodwill is the exception), its protection, basically, is performed through the norms, regulating competitive relations.

Proper regulation of competitive relations and taking measures against unfair actions is the major task for each country. Special legislation concerning unfair competition exists in certain part of countries (e.g. Germany, Belgium, Austria, Switzerland, etc.). In some countries the norms, protecting from unfair competition are provided in provisions of civil code, or protection is performed through proceedings on behalf of other persons, i.e. the so-called *passing-off* suits (e.g. United Kingdom, France, Netherlands, etc.). There is the third category of countries, where the principles, characteristic for common law system, as well as special legislation is applied; in these countries hybrid forms of the principles of common law and civil law are used (e.g. Canada, South Africa, Israel, etc.). Georgian legislation actually doesn't provide for the possibility of protection against unfair competition. This issue will further be considered in more details.

2. General Characteristic of the Notions of Goodwill and Competition

Goodwill is the most valuable object of intellectual property. Its universal notion doesn't exist, though, following the peculiarities of this object, it could be characterized as follows: goodwill is the advantage or profit, obtained by an Enterprise above the existing capital, shares, cash amounts or the value of property owned by the enterprise on the whole. The above mentioned is the result of support of permanent clients.

Good name, reputation, experience, talent, reasonability of prices, stable and influential position on market facilitates integrated formation of positive characteristics of an Enterprise. These very characteristics are considered to be the components of goodwill, without existence of which we can't speak about existence of goodwill.

Goodwill includes everything, facilitating increase of value of an Enterprise.

Goodwill is the object of intellectual property, which facilitates economic profitability of other objects of intellectual property in the process of competitive relations.

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Finally it could be concluded that goodwill is the unity of positive characteristics, obtained as a result of long-term activities of an Enterprise, through which the owner of goodwill attracts clients and which represents the pre-condition of successful implementation of future activities.

In order to clarify whether goodwill is properly protected by competitive legislation or not, firstly the notion and the characteristics of competition itself are to be clarified.

Competition is quite multiple-meaning notion, and its manifestation is diverse. First of all, it's a competition among entrepreneurs for obtaining maximum profit. At the same time, competition is the most significant factor, facilitating market organization; it's the mechanism, required for realization of the laws, regulating market relations.

Free competition is the fundament, from which capitalistic methods of production were arising. Free trade established on the market, state didn't interfere with economy.

As the time passed, the freedom of entrepreneurship caused unfavorable results. First of all, freedom of competition badly affected entrepreneurs' state. Certain circle of entrepreneurs used ways and methods, which were inadmissible in competitive relations and contradicted the principles of free competition. Obviously it wasn't astonishing as where competition exists, anti- fair competition manifestations occur.

Encroachment on free manifestation got the name of unfair competition. Consequently, the right of protection against unfair competition, which is the result of state regulation of competitive relations, originated on certain historical stage of development of society. It's obvious that regulation of the given relations aimed at regulation of market relations and finally, at maintenance of effectiveness of industrial relations.[1]

Regardless written or unwritten laws, fair habits, established on the market, manifestations of unfair competition exist. These very actions cause direct damage to goodwill; and their elimination ensures possibility of protection of goodwill.

3. Prevention of Unfair Competition, as the Object of Intellectual Property

Prevention of unfair competition, as the part of protection of industrial property, was recognized as early as in 1900, on Diplomatic Conference in Brussels. On this very Conference the Article 10^{bis} was introduced in Paris Convention for the Protection on Industrial Property, in accordance to which:

Countries shall perform effective protection of citizens from unfair competition;

Any specific action, contradicting fair activities in industrial or commercial sphere, represents unfair competitive action.

The following is prohibited:

Any action, performed in any way, leading to confusion of competitor's enterprise, goods, industrial or commercial activities;

Making deceptive announcements in the process of performance of commercial activities for the purpose of discrediting of competitor's Enterprise, goods, entrepreneurial or commercial activities;

Making deceptive indications and announcements on the nature, process of production, characteristics of goods, their compliance with quality or their quantity.[2]

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1 See: Eremenko V.I., Competition Law of Russian Federation, Moscow, 2001, 9 (In Russian).

2 See: Paris Convention for the Protection of Industrial Property, Paris, 1883, <http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html>.

There is a difference between protection and protection against unfair competition of the objects of industrial property like patents, registered industrial samples, trademarks, etc. While granting of special (material) rights for the mentioned objects is performed by a department functioning in the sphere of industrial property, protection against unfair competition isn't based on such granting of rights, but on the opinion, which is either supported by legislative provisions or recognized as general principle of law and according to which the actions, contradicting fair business practice, are prohibited. Regardless of this fact, the difference between the mentioned types of protection is erased, when certain manifestations of unfair competition occur. As an example, unauthorized use of non-registered trade mark is considered illegal just in conformity with general principles of protection against unfair competition. Second example can be quoted in regard to inventions: if the invention is not publicly announced and is considered to be industrial secret, its unpermitted use by third parties is considered illegal. Furthermore, performance of certain actions in regard to the invention, which is disclosed to public and is not patented or for which the date of validity of patent has expired, might be considered illegal in certain circumstances.[3]

The above examples clearly show that protection against unfair competition facilitates protection of the objects of intellectual property like patent for invention, non-registered trade marks in the case when their protection in impossible from the aspect of protection of special rights.[4]

Protection of the mentioned objects result into protection of goodwill, as when the object of industrial property in not registered, it can be referred to as a valuable object only when it has goodwill.

World Intellectual Property Organization considers that unfair competitive action is any action, performed by competitor or other market participant with the intention of direct use of other person's industrial or commercial achievement for its own activities without substantial separation from its own achievements. Utilization of other person's reputation is considered one of such actions.[5]

Utilization of other person's reputation, certainly, damages goodwill, if, of course, the enterprise possesses it at all. Consequently it could be concluded that one of the main purposes of protection against unfair competition is protection of goodwill.

4. Model Provisions Concerning Protection against Unfair Competition

International Bureau of World Intellectual Property Organization developed Model Provisions on protection against unfair competition.[6] It is mentioned there that the articles of Model Provisions can be used independently or in addition to any legislative provisions, protecting industrial samples, trade marks, literary and artistic compositions and other objects of intellectual property law.

In accordance with the Article 2 of the Provisions, any action, performed during entrepreneurial or commercial activities, leading or able to lead to confusing with other person's enterprise or activities, in particular, in regard to goods and services, offered by this enterprise to clients, represents unfair competitive action.

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3 See: Protection Against Unfair Competition, Intellectual Property Reading Materials, WIPO, Geneva, 1998, 124.

4 Ibid.

5 See: *Minkov A.M.*, International Protection of Intellectual Property, Moscow- Kharkov- Minsk, 2001, 34 (In Russian).

6 See: Model Provisions on Protection Against Unfair Competition, WIPO Pub. №725 (E), Geneva, WIPO, 1994.

Confusion might be caused:

in regard to trade marks, whether they are registered or not;

in regard to the name of brand (firm);

in regard to the means of identification of enterprise other than trade mark and brand name;

in regard to appearance of goods;

in regard to description of goods or services;

in regard to famous or universally known literary personages.

The Article 3 of the mentioned document which refers to causing damage to other's goodwill or reputation is of particular interest. In accordance with the mentioned Article, any action or activity, performed in the course of entrepreneurial or commercial activities, causing damage or able to cause damage to other person's goodwill or reputation, represents unfair competitive action, whether or not this act or activity causes confusion.

Damnification of other's goodwill or reputation might be caused, mainly, by encroachment on goodwill or reputation, which refers to:

trade marks, whether or not they are registered;

name of brand (firm);

means of identification of enterprise other than trade mark and brand name;

appearance of goods;

means of delivery of goods and services;

famous literary personages[7]

Model Provisions on Protection against Unfair Competition contain the notion of weakening of goodwill and reputation.

For the given purpose, weakening of goodwill or reputation means losing distinctive feature or advertising value by the trade mark, brand name or other means of identification of an enterprise, appearance of goods or means of delivery of goods and services, famous or universally known literary personages.[8]

Analysis of the above provisions makes it obvious that World Intellectual Property Organization attaches special importance to protection of goodwill. This document once again proves that the existence of competitive environment is necessary for existence of goodwill, although, in order not to damage goodwill, the competitors shall act honestly. Performance of unfair actions by the competitors automatically leads to causing damage to other's goodwill. The mentioned law violation implies imposition of responsibility in accordance with the norms regulating competition.

The above mentioned document doesn't equate the notions of reputation and goodwill, and it has great practical significance, as the issue of delimitation of goodwill and reputation is one of the most problematic among the issues related to protection of goodwill.

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[7] See: <Model Provisions on Protection against Unfair Competition, WIPO Pub.№725 (E), Geneva, WIPO, 1994.>

[8] See: the same as above

5. Analysis of Competitive Legislation and Practices of Developed Countries

While speaking about competitive relations and the place and role of goodwill in them it's appropriate to review legislation of foreign countries. In all countries, basically, legislation on unfair competition repeats the Article 10^{bis} of Paris Convention.

Out of the countries of Continental Europe law system, Germany is particularly worth mentioning for the achievements in the sphere of competition law. As early as in 1909 Law on Unfair Competition was adopted in Germany. Since then many amendments were made to the mentioned law.[9]

According to the mentioned law, prohibition of actions and bringing of suit is admissible in the cases, where a person acts against good habits in the course of activities. German courts used this provision for development of perfect norms of competition law. By analyzing judicial practice, court can differentiate 5 categories of unfair actions:

attraction of clients;
interfering activities;
using of reputation and achievement;
law violation;
violation of order existing on the market.[10]

Any person, who, for the purposes of competition, commits an actions contradicting fair practice, shall be prohibited to implements these activities and shall be responsible for compensation of damages. Number of significant provisions is provided in the law, but the following shall be particularly mentioned: any person, who, in the course of activities, for the purposes of competition, makes misleading announcement concerning the subject of activities, in particular, methods of production, origin of products, prices of goods or services, sources of obtaining goods, possession of rewards and other issues, shall be prohibited to make such announcements.

German courts often deal with cases where other's reputation is used. The problem of protection of goodwill becomes more prominent in the cases when slave copies are made, as slave copies could be made by reproduction of goods, confusion of its origin, advertising and using of this or that achievement of goodwill or enterprise.[11]

In the case of using other's goodwill the following sanctions might be used: prohibition of action, imposition of payment of compensation or damage.

Additional protection of this or that objects of intellectual property is characteristic for all spheres of intellectual property, whether it is related with inventions, industrial models, artistic or literary pieces of work or any other object. Like other countries, illegal using of reputation of other trade mark is prohibited in Germany.

The so-called latent and open types of appropriation of trade marks are known. "Latent appropriation" is expressed in using by a person of elements characteristic for competitor's trade mark with good reputation for his trade mark. His purpose is to obtain competitor's goodwill for his goods.

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9 See: *Kampermann Sanders S.A.*, Unfair Competition Law, Oxford, 1997, 56.
10 Ibid.
11 Ibid, 57.

"Open appropriation" occurs, when a person uses competitor's trade mark with good reputation while advertising his goods. It is obvious that such action represents appropriation of other's goodwill. Assertion of the risk of deception is not required in the case of either latent or open appropriation.[12]

Based on the analysis of German judicial practice it becomes clear that famous trade mark is considered to be a valuable asset of its owner, consequently, p. 823 (1) of the Civil Code of Germany applies to it, in accordance with which the person, who, intentionally or by carelessness, encroaches upon other person's life, body, health, freedom, property or other rights, shall be obliged to compensate the damage.[13] Following this Article, the persons who violates the rights of the owner of a trade mark, shall be responsible for payment of damage.

As an example of misappropriation of other's trade mark the cases related to the famous trade marks like *Rolls Royce* and *Dimple* could be mentioned.

The facts related to *Rolls Royce* could shortly be narrated as follows: colored advertisement of American whisky *Jim Beam* was placed in one of the weekly magazines. The advertisement was showing Rolls Royce car with its three distinctive features: decorative design of headlights, mark *RR* and iron bar of palladium style. These marks were registered in Germany as trade marks. The advertising picture depicted two Texas guys, standing in front of the car and playing cards, and three other persons were looking at them. In the foreground of the advertisement the bottle of advertised whisky and two glasses, full of drink were standing.

German Federal Court refused to protect the trade mark in accordance with the Law "On Trade Marks". The stated reason was that using of *Rolls Royce* for advertising of whisky didn't represent infringement with consideration of requirements of this Law. In the opinion of the court, the advertisement couldn't be perceived by consumers like *Rolls Royce* was producing or distributing whisky. Besides, based on the given advertisement, nobody could consider that economic or organizational links existed between *Rolls Royce* and the enterprise, producing whisky. The court considered that the trade marks weren't used in the form of the means of identification of origin, as their using in the form of trade mark requires the following: public shall consider that they are used for differentiation of goods, marked with trade mark from other analogous or similar goods, in particular, in regard to the source of the origin of goods.

But the court satisfied the suit with consideration of the requirements of competition law. It was decided that using of the car, famous for its singularity, for advertising whisky represents using of reputation of other's mark. Such action contradicts the norms of fair commercial practice. It manifests in using of reputation, which provides basis for conclusion that we have to deal with unfair competition. As it is obvious based in the above mentioned, the court indicated just to goodwill.[14]

Review of legal procedure related to the mark *Dimple* is also quite interesting.[15]

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12 See: *Fezer K.H.*, Trademark Protection under Unfair Competition Law, IIC, Heft 02, 1988, 192.

13 See: Bürgerliches Gesetzbuch (BGB), *Schönfelder H.*, Deutsche Gesetze, Textsammlung, München, 2006.

14 See: Gewerblicher Rechtsschutz und Urheberrecht, (GRUR)1983, 247, 15, International Review of Intellectual Property and Competition Law, 1984, 240 – Rolls-Royce.

15 See: Gewerblicher Rechtsschutz und Urheberrecht (GRUR)1985, 550, 17 International Review of Intellectual Property and Competition Law, 1986, 271 – Dimple, With comment by *Mann.*

The plaintiff, i.e. the owner of the trade mark *Dimple* registered the mark for using on spirit drinks, alongside with other goods. It sold quite famous whisky with the mentioned mark. The defendant, who produced cosmetics, requested registration of the similar mark. He was going to use this mark for cosmetics intended for men. Registration was rejected, which caused the plaintiff's dissatisfaction and he requested cancellation of registration of the defendant's mark.

German Federal Court didn't satisfy the suit in accordance with the Law "On Trade Marks" in this case either, as it was impossible to speak about similarity of spirit drinks and cosmetics. German Court imposed prohibition again in conformity with the Law "On Unfair Competition". In particular, it was considered that the plaintiff's goodwill was damaged. Consequently, registration of the mark *Dimple* was cancelled for the defendant and he was prohibited to further use the trade mark. In the court's opinion, unfairness of the defendant showed in his attempt to create an association that there was certain connection between the quality of his goods and other's goods. The defendant intended to use other's goodwill for advertising of his own goods.[16]

The Law of Austria "On Unfair Competition" is build upon the structure similar to that of Germany on unfair competition. In accordance with the mentioned law, it's prohibited to perform an action contradicting morals. Besides, prohibition is imposed only if the probability of its repeated occurrence exists.

According to Austrian legislation, this or that object may not enjoy formal protection, but it doesn't exclude its protection with application of norms preventing from unfair competition.[17]

Although Netherland's legislation includes special provisions related to competition law, the doctrine of unfair competition is based upon general principles of civil law. E.g. obligatory law section of the Civil Code of 1992 includes norms, according to which a person's action or attempt of action, contradicting obligations, provided by the Law, are considered law violation; also, action (or attempt of action) contradicting unwritten laws and norms of behavior in society. According to Netherland's legislation, trade and consumers' law in unified in obligatory law.

All specific actions in general, which are not prohibited by the law, are admitted. Based on this principle, unfair competitive actions shall be fully regulated by the law.

Netherland's legislation knows three ways of obtaining profit from other's achievements (goodwill could be implied here), in particular:

through direct use, where other's achievement is merged with the product;

through indirect use, where substantial element of other's achievement is embodied in the product, marked by him;

through the use of the means, by which the owner of goodwill obtains profit. In this case profit follows just from using of methods, well approved by the owner of goodwill by the competitor in order to obtain goodwill.

For ensuring of protecting ability of identifiable object it's necessary to use it, as the meaning of commercial markings is just in their use in the form of distinctive marking or expression of the related goodwill.[18]

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16 See: *Kampermann S. A.*, Unfair Competition Law, Oxford, 1997, 58.

17 See: *Walter M.*, *Hallas P.*, Wipo Guidbook, Federal Republic of Germany, Austria, Switzerland, New York, 1991, 10.

Article 2598 of the Civil Code of Italy refers to protection against unfair competition. Section 1 of this Article provides for imposition of responsibility in the case if the competitor's action may cause misleading of consumer. It protects consumer in the case of occurrence of slave copy. Section 2 of the mentioned Article refers to slanderous and defamatory actions. As for Section 3, it has more general nature and prohibits all kinds of action which can cause damage to other's goodwill.

Existence of damage in the cases provided by section one and two is assumed based the results following these actions.

As for the case of causing damage to goodwill, in such case the load of proving of existence of damage is imposed on a plaintiff.

It should also be mentioned that application of the mentioned Article is admissible only if the plaintiff and the defendant are direct competitors.[19]

The Law "On Unfair Competition" was adopted in Switzerland not long ago. It prohibits illegal use of other's achievements. Besides, causing of confusion is prohibited. Swiss courts attach great importance to the case of systematic use of other's goodwill. In the case of such very action court imposes responsibility. Otherwise plaintiff will not be able to prove that the confusion, made in regard to his goods, was illegal.[20]

As for Swedish Law "On Unfair Competition", it refers to industrial secret and confidential information. At the same time, the Law "On Market Activities" exists. It aims at prevention of illegitimate actions and their results. The law includes notions like commercial reputation.

Sweden courts pay special attention to commercial reputation. Just due to absence of commercial reputation, courts often don't satisfy plaintiffs' demands even if the defendant's illegitimate action is obvious. E.g. one construction company, which built a building called *The Globe* (the mentioned building was very famous in Sweden, which basically, was the result of strong advertising campaign), brought a suit against *Petrol Company Statoil* for using of the picture of the building by the latter. The court didn't satisfy the suit for the motive that the building had not obtained commercial reputation; the title – *The Globe* – had not obtained recognition as a brand name in commercial sense.[21]

Based on the above mentioned it's seen that the court didn't satisfy the suit due to absence of goodwill. It even better reveals how important the role of goodwill is in commercial relations.

Unfair competition law in Israel is still on the stage of development. But the courts extensively use the norms of Paris Convention. Just for the purpose of fulfillment of the norms of this Convention, although such action didn't provide basis for bringing of suit, the court considered using of mark – *Boeng* – by tourist agency as an attempt of evaluation of universally known trade mark.

When making decisions on cases related to actions of unfair competition, Israeli courts often base on the norms related to becoming rich groundlessly. As an example, we'll mention the case, where Tel Aviv District court considered the imitation of trade decoration as unfair competitive

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[18] See: *Hoyng W.*, *Roelvink J.*, *Shlingman F.*, The Netherlands Practical Commercial Law, London, Longman, 1992, 171.

[19] See: *Barbalich R.*, Italy, Practical Commercial Law, London, 1992, 30.

[20] See: *Walter M.*, *Hallas P.*, Wipo Guidbook, Federal Republic of Germany, Austria, Switzerland, New York, 1991, 15.

[21] See: *Bernitz U.*, Swedish Intellectual Property and Market Legislation, Stockholm, 1984,156.

action, although breach of copyright didn't occur and this action didn't represent the basis for bringing the so-called *passing off* suit either.[22]

Elements of hybrid become prominent in the sphere of unfair competition in South Africa. Here the norms protecting against illegal use of other's reputation, characteristic for the countries of general law system, as well as general principles of unfair competition are applied. Bringing of suit is possible, whether the similar case law exists or not. The suit will be satisfied in the case of existence of violation, which could be expressed in intended or careless action.[23] E.g. the court satisfied the suit related to careless action of the defendant. It was stated in the decision that the defendant could demonstrate farsight and guess that his action could cause misleading or confusion, which would finally result into causing damage to the plaintiff's goodwill.[24]

6. Analysis of Competitive Legislation of Georgia

Considering what big role goodwill plays in competition and what great attention is paid to protection of this object in legislation on competition, it's expedient to clarify what the situation is in Georgia in this regard.

Georgian legislation mentioned the term "goodwill" only in the Tax Code of Georgia. In particular, according to p.27 of the Article 12, goodwill is considered intangible asset.[25] But the notion of goodwill is not provided either in the Tax Code or other legislative act.

Protection of goodwill in Georgia is expedient to be ensured by legislation on competition. But it should be mentioned that Georgian legislation on competition not only fails to mention goodwill but is so imperfect that requires introduction of changes.

Presently the Law "On Free Trade and Competition", adopted on June 3, 2005 exists in Georgia. The Law "On Monopolistic activities and Competition" was abolished by the mentioned Law.

The Law "On Free Trade and Competition" defined the responsibility of governmental authorities and economic agents for abuse of dominating status by the latter, unfair competition and other actions, which result or can result into limitation or elimination of competition.[26]

Unfortunately, the Law "On Free Trade and Competition" doesn't regulate relations with many objects of intellectual property, including goodwill, at all. It limits itself with very general provisions. In this regard, competitive relations were far better regulated by the above mentioned Law "On Monopolistic Activities and Competition". It specifically indicated what types of actions were considered the manifestation of unfair competition.

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22 See: *Kampermann S. A.,* Unfair Competition Law, Oxford, 1997, 58.

23 See: *Webster G*., *Page N*., South African Law of Trade Marks, Unlawful Competition, Company Names and Trading Styles 3rd ed., Durban, Butterworth, 1986, 405.

24 Link Estates (Pty) Ltd. v. Rink Estates (Pty) Ltd. (1979 2SA 276); *Webster G*., *Page N*., South African Law of Trade Marks, Unlawful Competition, Company Names and Trading Styles 3rd ed., Durban, Butterworth, 1986, 406.

25 See: p. 27 of the Article 12 of the Tax Code of Georgia. December 22, 2004, Legislative Bulletin, section I, №31, 2004, registration № 692 (In Georgian).

26 See: The Law of Georgia "On Free Trade and Competition", June 3, 2005, Georgian Legislative Bulletin №31, 27.06.2005, registration № 1550-10 (In Georgian).

Although review of invalid law might be considered senseless at present, but p.p. "c", "e", "f" of the Article 9 of the mentioned Law deserves attention for analyzing future protects of protection of goodwill and identification of legislative norms, expedient for its protection. In accordance with p. "c", encroachment on competitor's reputation (enterprise's product or entrepreneurial or commercial activities), creation of improper opinion, its groundless criticism and discrediting by economic agent was considered the manifestation of unfair competition. P. "e" was prohibiting unauthorized use of trade mark and brand name of the third person. As for p. "f", the mentioned paragraph was prohibiting appropriation of the form, packaging or appearance of goods of competitor or the third person.[27]

As it becomes clear on the basis of the above mentioned, although the Law "On Monopolistic Activities and Competition" didn't directly contain the term "goodwill", but provided for the possibility of its protection. E.g. it could be said that p. "c" of the Article 9 was granting a possibility to the owner of goodwill to protect his goodwill. Although the accent in the Law was made on reputation and only existence of reputation is not a true evidence of existence of goodwill, but it doesn't mean that if the competitor obtained goodwill, he wouldn't be able to protect it only because it wasn't mentioned in the Law. Actions, prohibited only because they result into encroachment on competitor's reputation and his discredit, at the same time, cause damage to goodwill. In the case of occurrence of such activities the owner of goodwill could protect goodwill.

It could be said that p.p. "e" and "f" of the Law provided for protection of goodwill through protection of commercial markings. As everybody knows, the means of identification of an enterprise, like appearance of goods, is integrally related with goodwill and symbolizes it. Consequently, it turns out that, containing the above mentioned prohibitions, the Law, at the same time, provided for protection of goodwill of trade marks, brand names and appearance of goods, having goodwill.

Following the above mentioned, it's expedient to prohibit the following actions by legislation on competition:

encroachment on competitor's reputation or goodwill;

unauthorized use of identification means (brand name, trade mark, service mark, etc.) of an enterprise;

misappropriation of commercial decoration, packaging, appearance of goods;

unauthorized use of goodwill of non-registered trade mark or other means of identification of an enterprise;

unauthorized use of goodwill of competitor's industrial models;

receiving, obtaining, use or dissemination of scientific- technical, industrial information and commercial secret without the consent of its owner;

any other manifestation of unfair competition.

Besides, it's expedient to define the notion of competitor by the Law. It's obvious that the entrepreneurs, performing similar activities, will be considered competitors. But it should also be clarified how to define common sphere of activities. E.g. in the opinion of Supreme Federal Court of

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[27] See: The Law of Georgia "On Monopolistic Activities and Competition", July 25, 1996. The Parliament's Bulletin № 22- 23, 17.10.1996, registration №288-10 (In Georgian).

Germany, common sphere of activities exist where the reputation of the mark can become the object of independent commercialization, e.g. issuing of license for its use for different type of products. The competitor, trying to use the goodwill of other's mark for advertising his own goods, wants to commercialize this goodwill independently, i.e. obtain profit. And this he enters competitive relations with the owner of the trade mark.[28]

It's remarkable that if an enterprise has obtained goodwill, its sphere of activities is far wider. It is acknowledged by the Directive № (89/104EEC)[29] on "Harmonization of Legislation on Trade Marks" of European Council. It's impossible for the enterprise, trade mark of which has obtained reputation in the sense, required by the Directive, not to have goodwill. So p.3 of the Article 4 of the Directive is important, according to which it's inadmissible to register the goods' trade mark, or, if it's already registered, the registration shall be cancelled, if the trade mark is identical or similar to the trade mark of union having earlier priority specified in p.2 of this Directive, which has obtained reputation in union and the use of this trade mark creates undeserved favorable conditions to the applicant or encroached upon distinctive ability of trade mark of the union having earlier priority and damages its reputation. The mentioned prohibition is envisaged for the cases where the goods and services, for which the applicant requests registration, or the mark is already registered, is not similar to the goods and services, in regard to which the trade mark of union having earlier priority is registered. As it becomes obvious on the basis of the above mentioned, the competitors for the enterprise owning trade mark having reputation are considered to be the enterprises, which offer the same goods and services of different kind to the consumer.

The Law shall also provide for responsibility for violation of the norms of competition. The following measures could be applied to the offender: prohibition of use of commercial signs having goodwill, public apology, prohibition of activities, and compensation of damage.

7. Conclusion

First of all, perfection of legislation on competition is necessary for proper protection of goodwill.

The Law of Georgia "On Free Trade and Competition" can't ensure proper protection of competitors' rights. Following the above mentioned, it's expedient to introduce additions to the Law, where the rights and obligations of participants of competitive relations will be specified, model list of unfair competitive acts will be provided and specific measures of responsibility shall be envisaged. Certainly, the list of unfair actions can't be exhaustive, but it will facilitate regulation of relations among competitors and will make it easier for the court to make specific decisions.

Besides, adoption of a new special law on prevention of unfair competition will ensure the possibility of detailed regulation of the issues related to competitive relations.

The purpose of this kind of legislative news is proper regulation of competitive relations. As the examples of practice, developed in the world, show, existence of perfect legislation on competition

[28] See: GRUR, 1985, 876 _ Tchibo-Rolex, with comments by *Klette.*

[29] See: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0104:en:HTML>.

properly ensures protection of competitors' rights, including protection of intellectual property rights. Even when specific rights existing in regard to the objects of industrial property can't ensure protection of rights of the owners of these objects, legislation on competition gives them the possibility to protect the objects of industrial property, owned by them. The above mentioned follows from the circumstance that any action, contradicting the rules of behavior characteristic for honest commercial practice, is regarded as unfair competitive action. Consequently, even if the infringement of the right refers to the objects, towards which the special rights don't originate through registration, e.g. unregistered trade mark, or this or that object is not envisaged by legislation, like goodwill, protection of rights of their owner is still possible. Finally, it facilitates regulation of market-economic relations and protection of intellectual property rights.

Legislation of any country, disregarding legal system to which is belongs, prohibits actions, through which discredit of the competitor, appropriation of his achievements, misleading of consumer occurs. Following the interests of protection of goodwill, it doesn't matter whether the competitor is protected by the so-called *passing off* suit, i.e. suit on proceedings on other's behalf, or special legislation on competition. The main thing is that the legislation shall provide for the norms, which will enable the owner of goodwill to protect goodwill. For this purpose Georgian legislation requires perfection in order to provide the entrepreneurs working in Georgia with the possibility of proper protection of goodwill.

MICHAEL BICHIA[*]

SCOPES OF THE PRIVATE LIFE CONCEPT ACCORDING TO GEORGIAN LEGISLATION AND JUDICIAL PRACTICE

1. Introduction

Identification of the private life concept scopes within the civil law is of significance from both, theoretical and practical point of view. Private life is subject of research of various disciplines. Regarding the goals of this work, it is of interest to identify the degree of reflecting of the social requirements related to private life in the norms of private law and what aspects of private life are protected in legal provisions. Significance of this issue is particularly conditioned by correlation between private and personal life. To clarify the above it would be reasonable to identify the substance of public life, as well as the limits of public and private spheres.

Georgian legislation does not distinguish private and personal life; neither provides it the definitions of these concepts. Georgian Civil Code (hereinafter referred to as CCG) provides the provisions on protection of human dignity, business reputation, personal life secrecy, images and in 2008 the provision on personal data was added, as these comprise one of the parts of private life. Therefore, the basis for inclusion of this provision into the CCG should be found out. In addition, the legal system of tools for protection of private life corresponding to the international experience should be formed. This system implies protection of private life, by Constitution, sector laws and judicial practice, as these three components jointly determine the degree of legal protection. As for the judicial practice in Georgia, here, in certain decisions the private life is neglected, or, basically, it is of identical contents and there is apparent that in respect of some provisions the court was guided by the practice of European Court. Thus, Georgian legislation dealing with private life, against the background of international law is of interest. In addition, confusion in the theory and practice between the private and personal spheres creates danger of ambiguity and actually, danger of leaving a person without any protection. Reason of lack of protection may be unclear scopes of private life, low level of study of certain theoretical issues, existence of legislative gaps, latency of inviolability of private sphere. In addition, to protect private (personal) life, it is necessary to establish, whether Georgian legislation provide for general personal right or there are some hints on existence of personal right. Certainly, this requires substantial study of general personal right.

Goal of the research is identification of the spheres (aspects) of private life protected by the legislation. In addition, the scopes of private life protected by the legislation should be identified, as conditioned by social, cultural, technical and other conditions in the society. Aspects of private life spheres should be classified by certain signs. Study of Georgian legislation and judicial practice dealing with private and personal life is of significance as well to clarify how adequately the private

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life is understood. The bases of general personal right should be identified as well. It would b reasonable to overview the European judicial practice as in Georgian judicial practice the references are made on the cases of European Court and international agreements should be taken info consideration as well. Thus, the above issues will be considered on the basis of comparative legal, normative-dogmatic analysis and synthesis, sociological methods, thus providing preconditions for thorough study of the problem. This work is the attempt to study, together with Georgian legislation and judicial practice, as well as overview European judicial practice, to identify the ways for elimination of gaps.

2. Private Life and Personal Life

To define the substance of private life the concept of public life should be identified as defining of the public sphere is the precondition for clarification of the private life substance.[1] Public life, with its substance, is close to social life, which, in sociological sense, is the set of events created through interaction of the individuals and communities in certain limited area[2]. In addition, the term "public" is used to denote the people's, public, wide known events and public persons. It is the antonym of private.[3] Thus, in wide sense, the public life and social life have identical meaning and they are unified by common public function. Though, in narrow sense, public life, supposedly, should mean activities for the governmental and nongovernmental interests.

As for private life, according to the Georgian thesaurus, term "private" means something belonging to a person, something not having state or public nature, related to the individual person's actions, something, associated with the person as such, personal.[4] Personal is something connected with a single person only, something corresponding to one person's interests, personal, private, individual.[5] According to Oxford Dictionary, private life is: (1) life isolated from the public interests; (2) private or hidden place; (3) non-public;[6]; (4) private issue, secret; personal affair or relations; genitals; (5) intimacy; (6) choice of place by oneself.[7]. Intimacy has supplementary meaning for open expression of trust and emotions.[8] For definition of personal life the following issues should be clarified: whether person lives for satisfaction of his own requirements? Does he accept his dissatisfaction with his own life? Has he the prospects in his life? How does he correlate in his own life what he desires, what he is able and what he has to do? Presentation of the life style is of

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1 Public life is mostly defined in opposition of private life. See: *Lesch W.*, Medienethik zwischen öffentlichem und Privatem, Im Zoom K&M Nr. 11, Juli 1998, 40. http://www.medienheft.ch/uploads/media/11_ZOOM_KM_08_Walter_Lesch_Medienethik.pdf

2 See: *Shchepanski I.,* Basic Concepts of Sociology (translated *by O. Gratiashvili*), Tb., 1997, 14-16 (In Georgian).

3 See: Oxford, Advanced Learner's Dictionary, 2002, 1022-1023.

4 See: Georgian Thesaurus, v. IV, Tb., 1955, 1149.

5 See: Georgian Thesaurus, v. VI, Tb., 1962, 192.

6 See: Oxford, Advanced Learner's Dictionary, 2002, 1006.

7 See: Oxford English Dictionary, 1989, 515. See: *Siegetsleitner A.*, Forschungsinstitut für Angewandte Ethik, Forschungsberichte und Mitteilungen (herausgegeben von *A. Siegetsleitner* und *O. Neumaier*), Heft 29, Salzburg, 2002, 22; also: <http://www.uni-salzburg.at/pls/portal/docs/1/467581.PDF>.

8 See: *Sennet R.,* The fall of Public Person. Translation from English *by Isaev O., Rudnitskaya E., Sofronov Vl., Chukhrukidze K.,* M., 2002, 11 (In Russian).

significance as well.[9] Thus, private and personal spheres should be regarded as concepts correlated as general and specific, as there is type and form correlation.[10] In addition, synthesis of several private aspects and personal sphere creates a new event, in a form of private sphere,[11] which does not coincide with the contents of personal life. All personal is private, but not vice versa, though, regarding this, in some times private may replace personal.

Problem of the limits between private and public spheres, actually, is about identification of interdependence between individual and society, what is related to identification of balance between "I" and "we".[12] Publicity creates necessity of private life. Limits between public and private spheres is always changing and therefore, this issue requires careful approach. Public and private lives are opposing, though they can not exist without one another, their correlation is similar to that between right and left hands or positive and opposite positions.[13] Today the balance between public and private spheres is often broken, as, normally, "involuntary" action is considered so that the persons share their feelings with the others and in this form they show their emotions.[14]

Thus, private and public are mutually excluding though closely linked categories. Public sphere is what implies the issues related to fulfillment of the governmental or nongovernmental (public) function, something, what is not public,[15] and is expressed in freedom of relations between people built on non-public bases[16], where intervention from the side of the other persons or social institutes is inadmissible[17] and individual may act at his own discretion[18] and person's development in the sphere of economics[19] is the private sphere. i.e. the scopes of private life are quite wide.[20] Private sphere includes the family life, regulated by family law, protection of the secret information in the franchise

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9 *Kolominski Ya., Belanovskaia O.,* Life and Fate in the Context of Sociological Research, Significant Problems of Psychology v. 7, issue 20, part I, 199 (In Russian).

10 See: *Bakradze K.,* Logics, Tb., 1946, 49-50 (In Georgian).

11 For synthesis See: *Avaliani S.,* Theoretical Philosophy, Tb., 2007, 40-41 (In Georgian).

12 See: *Elias,* about Civilization Process, Socio-genetic and Psycho-genetic studies, v. I (translated by *Tsereteli I.*), Tb., 2005, 14-40 (In Georgian).

13 See:*Demirovic A.*, Hegemonie und das Paradox von privat und öffentlich, Dienstag, 02. März 2004 um 00:00 Uhr – Aktualisierts Montag, 01. März 2010 um 22:22 Uhr, 10, <http://www.pumuck.de/projekte-a-veranstaltungsreihen/2010-veranstaltungsreihe-zu-neoliberaler-hegemonie-und-aneignungsformen/147-hegemonie-und-das-paradox-von-privat-und-oeffentlich-.pdf> [06.04.2011].

14 See: *Sennet R.,* Collapse of Public Person. Translation from English by *Isaev O., Rudnitskaya E., Sofronov Vl., Chukhrukidze K.,* M., 2002, 33 (In Russian).

15 Private may become public, public and private spheres intersect in many cases. This takes place in media as well and from this it is difficult to find out, whether one or another issue belongs to public or to private sphere. See: *Lesch W.*, Medienethik zwischen öffentlichem und Privatem, Im Zoom K&M Nr. 11, Juli 1998, 45, http://www.medienheft.ch/uploads/media/11_ZOOM_KM_08_Walter_Lesch_Medienethik.pdf, [06.04.2011].

16 See: *Petrukhin L.,* Personal life: limits of intervention, "Legal Literature", M. 1989, 7-8

17 See: *Pauer-Studer H.*, Privatheit: Ein ambivalenter, aber unverzichtbarer Wert 3, <http://www.oeaw.ac.at/ita/privconf/pauer-studer.pdf>, [10.09.10].

18 See: <http://www.dkmotion.at/these/privatheit_oeffentlichkeit_david_koehlmeier.pdf>, [25.01.2010].

19 Substance of non-material rights includes the property elements. See: *Wasserburg K.*, Der Schutz der Persönlichkeit im Recht der Medien, Heidelberg, 1988, 53.

20 *Bakradze K.,* Logics, Publishing House of Georgian Pedagogical Institute, Tb., 1946, 45.

and warrants' agreements. Personal information includes family status of a person, tangible and intangible property situation.[21] In addition, inviolability of private life is considered in close relation with the property as well.[22] It is significant that for the private law restoration of justice is of great importance[23] and in case of prejudice of private life the reparation of moral damages is of compensative nature as well.[24] In this respect, the private sphere includes the property element as well and this confirms application of the private law regulation to private life. According to Article 7 of CCG, objects of relations within private law include tangible and intangible assets of property or non-property value, not removed from the turnover in accordance with the rules established by the law. In this respect, the objects of legal relations include material and social welfare by using of which the participant of legal relations satisfies his legal interests.[25] Welfare should be characterized with the legal objectiveness, i.e. it shall be legally recognized the object of law. In addition, certain welfares may be non-transferable, as the property rights are transferable, while personal non-property rights are non-transferable.[26] And on this basis the protection of private life within private law shall be regarded in this respect.

3. System of Legal Means for Protection of Private Life

3.1 Constitution as a Basic Law on protection

Private life is the object of complex legal protection. With respect of protection of the private sphere it is reasonable to regard Constitution as a basic law in Georgian legislation as it provides entire system of private life protection, goals and structure of the national system for private sphere protection, offers the mechanism for interaction of each component of the system. [27] The sector laws imply the laws of public and private law. Of public life laws, private life is protected by civil, copyright and patent, as well as health and notary laws. The judicial practice should be taken into consideration as well[28], including as European, also Georgian judicial practice. Place of the international conventions in Georgian legal sphere should be discussed separately.

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21 See: *Dznelashvili Z.,* Some Legal Aspects of Tax Secrets, "Martlmsajuleba", №2, Tb., 2008, 116 (In Georgian).

22 See: Prince Albert v. Strange, 1 McN. & G. 25 (1849), Abernethy v. Hutchinson 3 L.J. Ch. 209 (1825); *Ruashvili M.,* Inviolability of Private Life, Institute of Freedom, Tb., 2008, 17-18.

23 See: *Lapach V.,* System of the Objects of Civil Rights: Theory and Judicial Practice, St. Petersburg, Legal Center Press, 2002, 68 (In Russian).

24 See: *Ninidze T.,* Moral Damages in Civil Law, "Soviet Law", №2, Tb., 1978, 54 (In Georgian).

25 See: *Senchishev V.,* Object of Civil Legal Relations, general Concept, Collection of works Significant Issues of Civil law (editor: *Braginski M.*), Statute, M., 1998, 118 (In Russian).

26 See: *Lapach V.,* System of the Objects of Civil Rights: Theory and Judicial Practice, St. Petersburg, Legal Center Press, 2002, 164, 165, 278 (In Russian).

27 See: *Ivanski V.,* Legal Protection of Information on Personal Life of the citizens. Publishing House of Russian University of Peoples' Friendship, M., 1999, 38 (In Russian).

28 For characteristic features of legal system of means for protection of personal data See: *Ivanski V.,* Legal Protection of Information on Personal Life of the citizens. Publishing House of Russian University of Peoples' Friendship, M., 1999, 37, 57-109 (In Russian); *Tsatsanashvili M.,* Informational Law, Tb., 2004, 110 (In Georgian).

In this respect, attention should be paid to the constitutional-legal bases of private sphere protection. Article 16 of the Constitution of Georgia protects free development of a person, while inviolability of private life is protected by Article 20 thereof. Though here is used the term "personal life", though it embeds certain elements of private sphere: personal life of each person, place of personal activities, personal records, correspondence, conversation and notifications received via telephone and other technical means are inviolable (Article 20 of Constitution). Probably this provision should be interpreted widely and should include negative and positive obligations.[29] In addition, private life is reflected in equality of people against the law, irrespective of their sex (Article 14 of the Constitution), moral and physical inviolability (Article 17 of the Constitution), family (marriage) life (Article 36 of the Constitution). Legal basis is provided to self-determination, as one of the forms of private life, as Section 2 of Article 41 of the Constitution protects information in the official records related to person's health ("particularly sensitive" personal data), finances and other private issues ("sensitive personal data")[30]. In addition, to the cases provided for by the law, when disclosure is necessary for legitimate purposes. Protection of a person is secured effectively only where together with the special personal rights, there is the general personal life in its general form[31]. This system of person protection is shared by the Constitution of Georgia as well.

3.2 Sector Laws on Protection of Private Sphere

3.2.1 Other Aspects of Private Life Regulation within the Public Law

Sector laws are the provisions supplementary to the basic laws protecting private life, intended for protection of private sphere and for supplementing of the basic laws. In regulation of private life it is reasonable to follow classification of personal data on the basis of "sensitivity" criterion, relying on the laws of foreign countries (with few exceptions). Here the personal data are classified by "sensitivity" as "normal", "sensitive" and "special" personal data[32]. "Sensitivity" is related to subjectivism and therefore, on the basis of the experience of countries with common law the following principle was developed: disclosure of any fact about personal data shall be regarded as intervention into the private life, if publication of such facts would be embarrassing for any normal sensitive person[33].

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29 In case of narrow (only in the context of negative obligations) understanding it would not corrspond to the standards of Convention. See: *Korjkelia K., Mchedlidze N., Nalbandov A.,* Compliance of Georgian Legislation with the Standards of European Convention of Human Rights and Relevant Protocols, Tb., 2005, 217-218 (In Georgian).

30 For personal data See: *Ivanski V.,* Legal Protection of Information on Personal Life of the Citizens. Publishing House of Russian University of Peoples' Friendship, M., 1999, 14 (In Russian),

31 *Frick M. Th.,* Persönlichkeitsrechte, Beiträge, Liechtenstein-Institut, Forschung und Lehre, Nr. 5, Liechtenstein, Fürstentum Liechtenstein, 1996, 6-7, <http://www.liechtenstein-institut.li/Portals/11/pdf/lib/LIB_5.pdf> [27.04.09].

32 See: *Ivanski V.,* Legal Protection of Information on Personal Life of the Citizens. Publishing House of Russian University of Peoples' Friendship, M., 1999, 40-41, 13-14 (In Russian). *Tsatsanashvili M.,* Informational Law, Tb., 2004, 141 (In Georgian).

33 See: *Freedmann W.*, Right of Privacy in Age of Computer, London, N.Y., 1986, 53.

Private life is protected in a form of moral and physical inviolability, personal and family life, private conversations' inviolability, sexual (intimate) freedom, personal secrets, in various articles of Criminal Code. In addition, by protection of racial or ethnical origin, religious or political beliefs, sexual freedom, within criminal law, Georgian criminal law protects "especially sensitive" personal data[34]. "Data protection" is the close equivalent of informational private life concept[35]. EU Convention 108[36] should spread special mode of protection with respect of these personal data and harmonization with the principles of this Convention should be ensured. Though these principles deal with automatic processing with the electronic means, but in Georgia the non-automatic processing is practiced more frequently. Therefore, it would be better that the provisions of Convention were interpreted at wider extent and applied to non-automated information processing[37]. Though in Georgia no such types of laws existed in Georgia, today the situation is improved and Georgian legislation was internationally harmonized[38]. Personal data are also protected by the provisions of law on National Archive Fund and National Archive, various articles of General Administrative Code. Secrecy of the personal data not always depends upon the will of relevant person. The law may prevent secrecy of personal data (e.g. personal data of a person at official position), or, it is possible that personal data were secret from the outset (e.g. executive privilege of the public servants) and these are protected by the law[39]. Thus, personal life and private life are not legally distinguished. As for the specialized national body for protection of personal data[40], in Georgia such body is the legal entity of public law – Data Protection Agency[41].

One of the components of private life is entrusting of information on the basis of fiduciary relations, what, in the procedural legislation, is provided with the emphasis on protection of the professional secrecy. In given case the lawyer's obligation of secrecy should be applicable, by the similarity principle, to the persons who are representatives in the court of the first instance[42]; other lawyers and his/her assistant, as well as the lawyer's interne, as the relations emerge based on trust of the client and representative. Each piece of client's information is secret and the lawyer becomes the

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34 *Tsatsanashvili M.,* Informational Law, Tb., 2004, 107 (In Georgian).

35 See: *Fink S.*, Datenschutz zwischen Staat und Markt, Die "Safe Harbor"_Lösung als Ergebnis einer strategischen Interaktion zwischen der Eu, den USA und der IT-Industrie, Konstanz, 2002, 9, <http://kops.ub.uni-konstanz.de/volltexte/2003/1012/pdf/magarbsfink.pdf>, [02.09.10].

36 See: European Council. Convention on Protection of a Person in Relation with Automatic Processing of Personal Data of January 1981, Manuscript, 1995, 110 (In Russian).

37 *Tsatsanashvili M.,* Informational Law, Tb., 2004, 110 (In Georgian).

38 Laws On the State Registry of Information and On Legal Entity of Public Law – Data Protection Agency were adopted. Here the Convention of Shengen signed by France, Germany, Belgium, Luxemburg and the Netherlands is of interest, though, later all EU member countries joined this act (with the exception of Denmark and Great Britain). See: *Ivanski V.,* Legal Protection of Information on Personal Life of the citizens. Publishing House of Russian University of Peoples' Friendship, M., 1999, 131-132 (In Russian).

39 See: *Dznelashvili Z.,* Some Legal Aspects of Tax Secrecy, "Martlmsajuleba", №2, Tb., 2008, 115 (In Georgian).

40 In Germany and Canada the Commissioner serves for data protection and in Australia – the ombudsman *Ivanski V.,* Legal Protection of Information on Personal Life of the citizens. Publishing House of Russian University of Peoples' Friendship, M., 1999, 40-42 (In Russian).

41 *Tsatsanashvili M.,* Informational Law, Tb., 2004, 110 (In Georgian).

42 See: *Liluashvili T.,* Comment to the Civil Procedural Code of Georgia, 2004, Tb., 176-177 (In Georgian).

bearer of secrecy of such information[43]. In addition, it would be better that lawyer's secret was understood widely, to embrace data given by the client to lawyer, disclosure of which would be undesirable for the client. Lawyer's obligation to keep professional secrecy should be regarded as moral basis of lawyer's activities[44]. Procedural legislation protects the secrecy of confession as well. Thus, in lawyer's activities, the "sensitive personal data" like those obtained in result of collection and processing of the documentation, or in general, the judicial data protection is recognized[45]. In addition, the specific spheres of private life are protected by Georgian Criminal Procedure Law. Here the close linkage between dignity and personal life is prominent, containing certain signs on general personal right. In given case the private life and personal life are confused as well.

It is clear that the above aspects are connected by a common concept – secrecy. Therefore, it would be reasonable to divide the following aspects of private life by secrecy sign: professional, office and personal secrets. In the sense of public law, professional secrets include the communication, lawyer's, adoption, confession secrets. Tax secrecy is regarded as a type of office secrecy[46].

3.2.2 Legislation of Private Law on Protection of Private Life

Constitutional-legal basis for protection of private life was defined exactly from the sectoral laws, by the legislation of private law as well. It is apparent that the private sphere implies the property elements as well. The mentioned is related to unauthorized use of the names and images. Thus, in such cases the property interests of a person may be prejudiced[47]. Consideration of the name is of significance as well, as impairment of a name may result in violation of private life. Name is a social phenomenon and the society dictates a person necessity of its choice[48]. The name, on its side, includes name and surname (CCG, Article 17). In Article 18 of the same code moral inviolability, as one of the components of private life is protected. Similarly is protected the image, the element of private life, According to Section 3 of the same article, if the information about impairment of these welfares is disseminated by mass media, a person may publish data in response by the same mass media. According to Section 6 of the same article, protection of personal sphere is provided irrespective of guilt of the violator.

Article 18^1 of the same code provides for possibility of obtaining of the personal data, by which the guarantees within private law were established[49]. For example, of the lender demands immediate repayment of the debt, as he has records about material worsening of his financial situation and this endangers repayment of debt, the lender may, by virtue of Article 18^1 of CCG, get familiar with these

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43 See: *Meis R.,* Die persönliche Geheimsphäre und deren Schutz im prozessuallen Verfahren, Diesenhofen, Büger Verlag, 1975, 106-109.

44 See: *Krasavchikova L.,* Personal Life of the Citizens Protected by Law, M., 54, 152.

45 *Ivanski V.,* Legal Protection of Information on Personal Life of the Citizens. Publishing House of Russian University of Peoples' Friendship, M., 1999, 14-15 (In Russian).

46 *Tsatsanashvili M.,* Informational Law, Tb., 2004, 118-120 (In Georgian).

47 See: *Ninidze T.,* Personal Non-Property rights, Tb. 2002, 59 (in Gerorgian)

48 See: *Ninidze T.,* Contents of the Right on Name, „Soviet Law, №1, 1976, 29 (In Georgian).

49 By this, Georgian legislation was subordinated to the international harmonization. See: explanatory note „On Addenda to the Civil Code of Georgia" on Law № 5919-I of 14th March 2008 (In Georgian).

records and receive their copies[50]. In addition, the contents of the same article should correspond to the relevant provision of EU Convention 108. Goal of European Union is protection of private life inviolability within the territories of member countries, in relation with automatic data processing. Thus, inviolability of personal life plus automated processing of personal data equals to data protection[51]. So, these issues are related to the substance of general personal right, as it includes the rights of self-determination, personal life and self-expression[52]. In addition, protection of dignity is the key objective of general personal right. For this, it ensures possibility, for each person, to form the sphere of personal life at his own discretion and maintain its key conditions[53]. Dignity is protected by the civil law, pointing to the link between general personal right and protection of dignity. In this respect, existing gaps should be filed with the recognition of general personal rights.

CCG protects the private sphere, in a form of moral and physical inviolability. In addition, private life may be revealed in protection of secrecy. In accordance with Subsection "n", Article 1 of Georgian Law on Freedom of Speech and Expression, personal secret is the information of personal value, keeping secrecy of which is required by the law, information and circumstance, in relation of which an individual has reasonable expectation of inviolability of private life. According to Section II of Article 12 of the same Law, based on the motivation of inviolability of private life and keeping of personal secrets no freedom of expression could be restricted, if knowledge is necessary for individual in democratic state, for execution of public self-government. Similarly, the medical (doctor's) secrecy and personal rights of the patients in Georgian Law on health Protection, secrecy of notary's actions is protected in Georgian Law on Notary System. Private life is also reflected in obligation of keeping secrecy of the disclosed information, which exists in relation with the assignment agreements, what can continue even after completion of the contractual relations (Sections I and II of Article 724, CCG). Private sphere is revealed also in the obligation related to reporting, to be maintained by the credit institution after termination of the agreement (Sections I and II, Article 863, CCG). In addition, it is provided that a person, who intentionally or by carelessness spreads or discloses the facts causing damages to the other person shall compensate the relevant losses, if such facts are apparently incorrect (Section I, Article 993, CCG). This clearly emphasizes the property elements in the private life. By this the given aspects of private life were included into the sphere of regulation within private law.

Similar attention should be paid to the family relations, in which the private life is reflected. Note that the marriage is voluntary permanent relations between man and woman, for the purpose of creation of the family, registered with the territorial service of Civil Registry, thus creating between the spouses the rights and obligations[54]. Thus, the case is with the intimate relations in family life, what clearly emphasizes existence of expectations related to inviolability of private life.

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50 See: *Moniava P.(T.),* Right of Obtaining Personal Data in Civil Law „Life and Law" №2 (6), Tb., 2009, 17 (In Georgian).

51 Informaiton of this type belongs to the set of „especially sensitive data", See: *Tsatsanashvili M.,* Informational Law, Tb., 2004, 107 (In Georgian).

52 See:*Wasserburg K.*, Der Schutz der Persönlichkeit im Recht der Medien, Heidelberg, 1988, 95-96.

53 See: *Kublashvili K.,* Fundamental Rights, 2nd ed., Tb., 2010, 104 (In Georgian).

54 See: *Shengelia R., Shengelia E.,* Family Law, 2nd edition, Tb., 2011, 66-71 (In Georgian).

Thus, the private law includes certain elements of private sphere, including property, family, personal elements. Therefore, great part of private life is regulated by private law. Though, private law protects certain type personal sphere. Personal sphere is what a person does not want to spread. It is expressed in the elements closely related to the person (honor, dignity, personal data, personal secret, name, image ...) and is within the sphere of autonomy of an individual's will. In addition, personal life should be protected from unreasonable interventions, what can cause moral torture to an individual or humiliation of the common feelings[55]. And here again, it would be reasonable to distinguish the elements of private sphere by the criterion of "secrecy": secrecy of private life (banking secrets, professional secrecy[56]) and personal secret. Personal secret is the information closely related to a person, not subject to disclosure without permission of the owner of such secret. Though, the most important elements of personal sphere are not protected by private law and this means that such "vacuum" should be filled and this, logically, is related to general personal right.

3.2.3 Georgian Legislation about General Personal Right and Legal Protection of Private Life

Georgian legislation does not contain the term "general personal right", though it protects free development of a person (Article 1`6 of Georgian Constitution). Right of free development of a person includes general personal right and universal freedom, which, together, ensure absolute and full protection of individual's life and activities[57]. General personal right protects the spheres of life and activities of an individual, which are not protected by special fundamental rights. In this respect, general personal right is often called the "invisible, unwritten right[58]", which was called by the judicial law the "remained right" (sontiges recht). It is characterized by unlimited nature of general norm, for which it is considered as the framework right. General personal right is understood as person's right to independently determine the objectively defined and limited spheres, whether it is acceptable and if yes, to what extent (or within what scopes) collection and dissemination of information about him and prejudice of interests related to his person[59].

In Georgia general personal right is the basis for the fundamental rights recognized by the certain articles of Constitution, e.g. rights of inviolability of private life and informational self-determination. Concept of general personal right includes the whole set of rights, providing specification of the person's right of free development for different spheres of individual's life and activities[60]. In addition, general personal right has the functions of a) separation and b) ensuring active development of a person[61]. The

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55 See: *Petrosyan M.,* USA: Legal Protection from Intervention into the Personal Sphere. All Union Scientific-Research Institute of Soviet Legislation, „Education Notes, Вып. 30, M., 1974, 165-166 (In Russian).

56 See: *Tsatsanashvili M.,* Informational Law, Tb., 2004, 117-119 (In Georgian).

57 See: *Kublashvili K.,* Fundamental Rights, 2nd edition, Tb., 2010, 93 (In Georgian).

58 See: *Kublashvili K.,* Fundamental Rights, 2nd edition, Tb., 2010, 104 (In Georgian).

59 See: *Ehmann H.,* Zur Struktur des allgemeinen Persönlichkeitsrechts, in: JuS 1997/3, 193, 195, 196.

60 See: *Kublashvili K.,* Fundamental Rights, 2nd edition, Tb., 2010, 93, 95-96, 104 (In Georgian).

61 See: *Ehmann H.*, BGB, 12. Aufl., Handkommentar mit AGG, EGBGB, ErbbauRG, HausratsVO, LPartG, ProdHaftG, UKlaG, VAHRG und WEG, 2008, 25; *Frick M. Th.*, Persönlichkeitsrechte, Beiträge, Liechtenstein-Institut, Forschung und Lehre, Nr. 5, Liechtenstein, Fürstentum Liechtenstein, 1996, 6-7, <http://www.liechtenstein-institut.li/Portals/11/pdf/lib/LIB_5.pdf> [27.04.09].

judicial practice shows that general personal right is the basis for protection of the personal sphere within civil law[62].

In addition, number of personal welfares is unlimited and the circle of possible unlawful impairment would never be full; function of filling of these gaps ("special chapter") is imposed on general personal right for the fundamental rights, which are reflected in general personal tight and is applied to the relations between private persons[63]. Discussion about number of personal rights and general personal right took place in the soviet law literature as well[64].

Georgia has shared the theory of number of personal rights. Though, if this idea cannot ensure full protection of a person's interests and is intended for increase of number of the law norms, recognition of general personal right via judicial law is of significance[65].

Thus, recognition of general personal right by the judicial law is conditioned by protection of ideal interests in the civil code[66]. German Civil Code (hereinafter GCC) does not contain the institute of general personal right[67], though Article I of Constitution of Germany protects human dignity and Article II – person's free development[68]. Though, in Switzerland, Lichtenstein and Austria general personal right is provided for by civil legislation[69]. General personal right spreads beyond the concept o protection of human dignity to the sphere of protection of person's free development concept. General personal right ensures protection of the personal life sphere[70].

This, general personal right is the right derived from respect to human dignity and individual's development right, which imposes the obligation to respect on the government and its bodies, as well

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62 See: BGHZ 1954.25.05- *Schacht-Entscheidung;* BGHZ 1958.14.02- *Herrenreiter-Entscheidung;* BGHZ 1958.20.05 - *Tonband-Entscheidung; BGH, Soraya-Entscheidung,* NJW 1965,685 f. See: *Münch H.*, Der Schutz des Einzelnen vor Presseveröffentlichungen durch den Deutschen Presserat und die britische Press Complaints Commision, Eine Untersuchung zur Spruchpraxis unter besonderer Berücksichtigung des zivilechtlichen Rechtsschutzes der Privatsphäere (Dissertation), Konstanz, 2001, 109.

63 *Frick M. Th.,* Persönlichkeitsrechte, Beiträge, Liechtenstein-Institut, Forschung und Lehre, Nr. 5, Liechtenstein, Fürstentum Liechtenstein, 1996, 6-7,<http://www.liechtenstein-institut.li/Portals/11/pdf/lib/LIB_5.pdf> [27.04.09]; *Üsseler CH.*, Einwirkungen der Grundrechte auf das Schadenersatzrecht (Dissertation), Wuppertal, 2008, 73.

64 See: *Sukhoverski V.,* On Development of Protection of Personal Non-Property Rights and Interests of the Citizens „Pravovedenie", №3, 1972, 29-31 (In Russian).

65 Ibid, 30.

66 See: *Üsseler CH.*, Einwirkungen der Grundrechte auf das Schadenersatzrecht (Dissertation), Wuppertal, 2008, 73. This is confirmed by rich practice of European Court: BGH, NJW 1996-*Caroline von Monaco*-Entscheidung II; EuGHMR 2004-VI - *Von Hannover gegen Deutschland* (Application №59320/00); EuGHMR (große Kammer) 2006/11/07-*Jalloh gegen Deutschland* (Application №54810/00); Decision by First Senate of January 14 1998, 1 BvR 1861/93,1 BvR 1864/96, 1 BvR 2073/97; BGHZ 1954- *Schacht-Entscheidung...*

67 See: *Frick M. Th.*, Persönlichkeitsrechte, Beiträge, Liechtenstein-Institut, Forschung und Lehre, Nr. 5, Liechtenstein, Fürstentum Liechtenstein, 1996, 7-8.

68 See: <http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/gg_01.html> [03.04.2011].

69 See: *Frick M.Th.,* Persönlichkeitsrechte, Beiträge, Liechtenstein-Institut, Forschung und Lehre, Nr. 5, Liechtenstein, Fürstentum Liechtenstein, 1996, 8.

70 See: *BVerfGE* 54, 143, 153; *BVerfGE* 34, 238, 247; *BVerfGE* 6, 32; *BGHZ* 24, 72, 81. *Wasserburg K.*, Der Schutz der Persönlichkeit im Recht der Medien, Heidelberg, 1988, 51.

as on each person in the actions within private law[71]. In addition, the right of protection of private life in the international law is directed towards self-limitation by the state and is intended to protect individual's personal autonomy from arbitrary intervention from the side of state[72]. Self-realization right is protected by general personal right from the colliding interests – and especially from mass media[73]. In addition, the substance of personal rights is applicable to the economic sphere as well[74]. The image, name, other individual properties, like voice[75] have the economic value and this shows that property bases of private life are legally regulated.

It is clear that recognition of the right and the right not to impair the person are of substance nature. The matter is, on one hand, to recognize the person's right of living, physical and psychical inviolability, freedom and respect; on the other – individual's originality should be protected[76]. General personal right is the initial right, on which the special personal rights rely[77]. Special personal rights include the rights on name, copyright, personal data and dignity protection rights[78]. In addition, the sides of general personal right include protection of image, secrecy, self-development[79]. I.e. rights of protection of name, dignity, personal data (and others) are the elements of general personal right and meet the requirements of logic[80]. CCG protects the name, expression of the response and own image, by which the general personal right could be revealed. Constitution of Georgia protects the right of development of the own person, one of the elements of which is general personal right. Thus, existence of the general personal right in the legislation, not seemingly provided for by Georgian legislation, after in-depth analysis is possible on the basis of study of the most general concept ("free development of own person") and special elements ("name, image, personal data...")

Conclusion is the following: "general personal right" is a conventional term and it should be used to denote the personal rights (in wide understanding). Rights dealing with the person of an individual, his physical, mental and intellectual style of existence are personal[81]. As for existence of

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71 See: *Wasserburg K.*, Der Schutz der Persönlichkeit im Recht der Medien, Heidelberg, 1988, 53-54.

72 See: *Nowak M.*, UN Covenant on Civil and Political Rights, ICCPR Commentary, 1993, 288.

73 See: *Wittern F.*, Das Verhältnis von Right of Privacy und Persönlichkeitsrecht zur Freiheit der Massenmedien (Eine rechtsvergleichende Darstellung des Verhältnisses von Right of Privacy und Persönlichkeitsrech zu der Redefreiheit in den Vereinigten Staaten von Amerika und der Presse- und Rundfunkfreiheit in Deutschland), (Dissertation), Hamburg, 2004, 265.

74 See: *Wasserburg K.*, Der Schutz der Persönlichkeit im Recht der Medien, Heidelberg, 1988, 53; *Karl-Heinz Fezer*, Kommerzialisierung des Persönlichkeit, (vorgelegt von *Claudia Beuter*) (Dissertation), 2000, 78.

75 This is confirmed by: BGH, NJW 2000, 2195-*Marlene-Dietrich*-Entscheidung BGH, NJW 2000, 2201-*Blaue-Engel*-Entscheidung.

76 See: *Frick M. Th.,* Persönlichkeitsrechte, Beiträge, Liechtenstein-Institut, Forschung und Lehre, Nr. 5, Liechtenstein, Fürstentum Liechtenstein, 1996, 5-6, 11.

77 See: *Wasserburg K.*, Der Schutz der Persönlichkeit im Recht der Medien, Heidelberg, 1988, 49, 52.

78 See: *Wittern F.*, Das Verhältnis von Right of Privacy und Persönlichkeitsrecht zur Freiheit der Massenmedien (Eine rechtsvergleichende Darstellung des Verhältnisses von Right of Privacy und Persönlichkeitsrech zu der Redefreiheit in den Vereinigten Staaten von Amerika und der Presse- und Rundfunkfreiheit in Deutschland), (Dissertation), Hamburg, 2004, 154.

79 See: *Ehmann H.*, Zur Struktur des allgemeinen Persönlichkeitsrechts, in: JuS 1997/3, 194-195, 197-201.

80 This corresponds to the laws of contradiciton and sufficient basis, See: Bakradze, Logics, Tb., 1954, 427-428, 434-435 (In Georgian).

81 See: *Staudinger J.V.*, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, 12. Aufl., Einleitung, Erstes Buch, Allgemeinen Teil, erläutert von *Coing H.*, Berlin, 1980, 133-135.

general personal right in Georgian legislation, here are the law bases of the most general concept, but the legislation does not contain one wide concept ("general personal right"). Nevertheless, forms of revealing of the spheres of general personal right are scattered in the laws. Hence, it is implied that the category, within them is recognized by the law. Similarly, Georgian legislation protects special personal rights, in which one or another aspect of general personal right could be reflected. Thus, where personal rights are not protected in all aspects, it is reasonable to recognize general personal right.

3.3 Interrelation of Georgian Legislation and Judicial Practice with Respect of Private Life Protection

Among the legal means for protection of private sphere the role of judicial practice should be emphasized. Georgian and European Judicial practice should be taken into consideration. Here the place of international conventions in Georgian law space should be separately considered. According to Section II of Article 6 of Georgian Constitution, The legislation of Georgia shall correspond to universally recognized principles and rules of international law. An international treaty or agreement of Georgia unless it contradicts the Constitution of Georgia, the Constitutional Agreement, shall take precedence over domestic normative acts". Section I of Article 7 of Georgian Law on Normative Acts also demonstrates that the international agreement of Georgia is Georgian normative act. According to Article 5 of Georgian Law on International Private Law of the norms of the law of foreign country contradict basic law principles of Georgia, the norms of foreign country shall not apply. Section I of Article 6 of the Law on International Agreements of Georgia states that: "International agreement of Georgia is integral part of Georgian legislation." In addition, application of the European Convention on Human Rights by Georgian court is significant if the court can make by such applying the decision, which could not be made without thereof[82]. Georgia's international agreement is subjected to the principle "*on obligat lex nisi promulgata*" – law does not obligate unless it is published[83]. Also, according to Article 2 of Georgian Law on Freedom of Speech and Expression this law shall be considered in accordance with the Constitution of Georgia, international legal obligations undertaken by Georgia, including European Convention on Human Rights and Fundamental Freedoms and case law of European Court of Human Rights[84]. Specially should be mentioned European Convention on Human Rights, which became part of Georgian legislation in 1999[85], Universal Declaration on Human Rights, International Treaty on Economic, Social and Cultural Rights, International Treaty on Civil and Political Rights etc. Thus, application of the case law is also assumed, which provides wider possibilities of interpretation and in this respect, it provides precondition for further refinement of the

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82 See: *Korkelia K.,* To Integration with the European Standards: European Convention on Human Rights and Experience of Georgia, Tb., 2007, 27, 48 (In Georgian).

83 See: *Korkelia K.,* Application of the European Convention on Human Rights in Georgia, Tb., 2004, 46 (In Georgian).

84 Guidelines for Georgian Law on Freedom of Speech and Expression, Article 19, Global company of Freedom of Expression 2005, 26 (In Georgian).

85 See: *Korkelia K., Mchedlidze N., Nalbandov A.,* Compliance of Georgian Legislation with the Standards of European Convention of Human Rights and Relevant Protocols, Tb., 2005, 18 (In Georgian).

legislation.

3.4 Substance of Private Life According to the Judicial Practice

3.4.1 Understanding of Private Life According to Georgian Judicial Practice

Georgian judicial practice does not distinguish between private life and personal life. In addition, part of Georgian court decisions refuse to protect private life and part of them protects partially, or ineffectively, relying on various circumstances of under the influence of European Court. One of the reasons of this may be incorrect interpretation of private (personal) life. Though, Georgian judicial practice shows that personal life is understood as own life style, development of own life[86] and person, family welfare, relations between children and mothers, self-determination[87], personal secrecy[88], inviolability of correspondence[89].

On the basis of Article 20 of the Constitution and Article 8 of European Convention there was stated that the right on personal life is the right on personal life, i.e person's right to live in a way he/she desires and his/her (life style) was protected from publicity[90]. Personal life is the private sphere of individual's life and development. Right on personal life is the ability of individual to create and develop his private life at his own discretion and independently, to be protected from intervention into his private life from the side of the state and any persons[91].

In one of the awards of Georgian Constitution Court the elements of private life were stated. In particular, protection of family welfare, human rights of mothers and children, free development of a person, protection of the official and secret documents. It was explained that personal life is understood as the private sphere of individual's life and development. Though, it was also mentioned that regarding wide and many-sided contents of private life its full definition could not be made[92]. In addition, it was stated that if any of the components of personal life is impaired, personal life is prejudiced in general. Though, this does not mean that impairment of any of such components violates Article 20 of the Constitution. Without this statement the probability of danger of inadequate interpretation of the contents of component of personal life and allowable intervention scopes is too high[93]. In addition, according to Article 1106, marriage is the voluntary permanent ties between man

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86 See: Decision of 24th April 2003 (№3K-1240-02) of the Department of Civil, Entrepreneurship and Bankruptcy Cases of Supreme Court of Georgia (In Georgian).

87 See: Decision of the Constitution Court of Georgia of 19th December 2008 (№1/7/454), 2-6 (In Georgian).

88 See: Decision of the Constitution Court of Georgia Second Department of 30th October 2008 (№2/3/406, 408) (In Georgian).

89 See: Decision of the Constitution Court of Georgia First Department of 26 December 2007 (№1/3/407) (In Georgian).

90 See: Decision of 24th April 2003 (№3K-1240-02) of the Department of Civil, Entrepreneurship and Bankruptcy Cases of Supreme Court of Georgia (In Georgian).

91 See: Decision of the Constitution Court of Georgia First Department of 26 December 2007(№1/3/407) (In Georgian).

92 See: *Costello-Roberts v. the United Kingdom*, 25/03/1993, Section 36.

93 See: Decision of the Constitution Court of Georgia of 19th December 2008 (№1/7/454) (In Georgian).

and woman, for the purpose of creation of the family and registered with the territorial service of Civil Registry[94]. Family relations are not limited with explanation by European Court, only with relations based on marriage and may include other de facto family ties, if the parties life together, without marriage. Though Supreme Court of Georgia did not share this position[95] and this demonstrated timid nature of Georgian court, with respect of practical application of European standards. It should be taken into consideration that the contradiction was seen between European standards of human rights protection and Civil Code[96]. In addition, provision of the Law on Imprisonment providing only one meeting per month for one hour, between family members is against Article 8 of European Convention on Human Rights. Tbilisi city Court, made decision, on the basis of case "Novitska v. Poland", that the norm of the Law on Imprisonment violates the right on respect of family life. In this case, the preference should be given to the law at higher position in the hierarchy – the international agreements. Therefore, the City Court ordered the Ministry of Justice to issue the normative act, which would be in compliance with Article 8 of the Convention and would take into consideration the decisions of European Court[97], and this is a very positive moment[98]. Though, this situation changed to certain extent by declaring the Law on Imprisonment invalid and adoption of the Code of Imprisonment.

As it was already mentioned, one of the components of private life is personal secrecy, though, the court used the contents of the private life secrecy for explanation of personal secrecy and by this, it has one more time confused the concepts. The Constitution Court explained that though in Section II of Article 41 of Georgian Constitution no term "personal secret" is mentioned, but "information in the official records about individual's health, his/her finances and other private issues" is apparently personal secret. In addition, the private sphere could be protected until the person expresses the opposite will[99]. This is applicable to the right of self-determination, which is the element of general personal right[100]. By this the Constitutional Court has expanded protection of personal life.

Secrecy of private life could be expressed in protection of data on health as well. Disseminated data on illness of the plaintiff's child is the secret of personal family life as it does not concern his public life and is intended for certain circle. It was emphasized that data reflecting personal life secret may be the truth, but a person may be interested in protection against their disclosure. The court decided that the secrecy of personal family life was impaired[101]. In the decision words: "personal family life secret" was used artificially, especially regarding that this was not provided for by the law. Here the emphasis was to be made on private (family) interests – "secrecy of family life". One of the

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94 See: *Shengelia R., Shengelia E.,* Family Law, 2nd edition, Tb., 2011, 66-71 (In Georgian).

95 Case *Kroon v. the Netherlands*. See: Decision of 15 May 2008 (№AS-968-1269-07) of the Department of Civil, Entrepreneurship and Bankruptcy Cases of Supreme Court of Georgia (In Georgian).

96 See: *Korkelia K.*, Court Activism and Influence of the European Convention on Human Rights on Georgian Judicial Practice, „Overview of Constitution Court", №4, Tb., 2011, 49-50 (In Georgian).

97 See: Decision of 10th October of Department of Administrative Cases of Tbilisi City Court (№3/2058) (In Georgian).

98 See: *Korkelia K.,* Court Activism and Influence of the European Convention on Human Rights on Georgian Judicial Practice, „Overview of Constitution Court", №4, Tb., 2011, 48 (In Georgian).

99 See: Decision of the Constitution Court of Georgia Second Department of 30th October 2008 (№2/3/406, 408) (In Georgian).

100 See: *Kubvlashvili K.,* Fundamental Rights, 2nd edition, Tb., 2010, 95-96 (In Georgian).

101 See: Decision of the Constitution Court of Georgia Second Department of 24 April 2003 (№3k-124-02) (In Georgian).

cases of personal life is the secret of adoption of a child, what should be emphasized in case of disclosure of the adoption secret[102]. Component of private life is restoration of the legal status of a person. This could be achieved by taking into consideration the rehabilitation of a person. Here, restoration of the property rights is of significance, and this, to some extent, is directed towards compensation of emotions and pain[103]. The case should deal with compensation of losses in the amount sufficient for reasonable satisfaction of a person[104]. Though, in relation with the mentioned, Georgian judicial practice discusses only rehabilitation of a person[105].

One of the components of private life is inviolability of correspondence, intervention in which is allowed only in cases provided for by the law. This provision should be accurately formulated as well[106], what is based on one of decisions of European Court[107]. One of the aspects of private life is the image. Though, this was not discussed in one of the awards of the Supreme Court of Georgia, by which impairment of honor and dignity is confirmed. Though, after familiarization with the decision of European Court on this case, it becomes clear that the case was about personal life. In the given case impairment of personal life was caused by the article published by journalist in the newspaper "Akhali Taoba" and decisions made by the domestic judicial bodies in this respect. In addition, he submitted to the court the claim on unlawful gaining of his picture and refusal of public rejection of the slanderous information by the editorial office of the newspaper. The case included impairment of dignity, unpermitted use of the photos. And this is the matter of private life[108]. The mentioned spheres are the forms of general personal right. Thus, it is proposed that in Georgian legislation there are the elements of general personal right with substantial and practical judicial meaning. In addition the personal life is regulated by moral, its all-embracing protection will be possible by recognition of general personal right, and by this protection of personal sphere would be placed in certain scopes.

3.4.1 Understanding of Private Life Based on the Practice of European Human Rights Court

Right of protection of personal life opposes the private personal rights, which are the aspects of general right[109]. Based on this, European Court of Human Rights included into personal life the issues

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[102] See Decision of 18th October 2001 of the Department of Criminal Cases of Supreme Court of Georgia (In Georgian).

[103] See: *Frick M.Th.,* Persönlichkeitsrechte, Beiträge, Liechtenstein-Institut, Forschung und Lehre, Nr. 5, Liechtenstein, Fürstentum Liechtenstein, 1996, 19.

[104] See: *Ogus A.I.,* The Law of Damages, L., 1973, 195.

[105] See: Decision of 11th November 2003 of the Department of Criminal Cases of Supreme Court of Georgia (№125 KOL) and Decision of 24th March 2003 of Grand Chamber.

[106] See: Decision of 26 December 2007 (№1/3/407) of the First College of the Constitution Court of Georgia (In Georgian).

[107] See: *Kopp v. Switzerland*, Decision of 26th March 1998 72, <http://jesz.ajk.elte.hu/fenyvesi10.html> [15.01.11].

[108] See: Decision of 1 December 2001 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of Supreme Court of Georgia (№3K\644) and Final Decision of 17th October 2006 of the Wuropean Court of Human Rights. *Sciacca v. Italy*, no 50774/99, § 29, CEDH 2005.

[109] See: *Frick M.Th.,* Persönlichkeitsrechte, Beiträge, Liechtenstein-Institut, Forschung und Lehre, Nr. 5, Liechtenstein, Fürstentum Liechtenstein, 1996, 6.

related to collection and processing and maintaining of personal information[110]. Among the elements of personal life there were distinguished protection of name[111], freedom of sexual relations[112], physical and moral inviolability[113], relations made at a time of professional activities[114].

One of the components of private life is collection & processing and maintenance of personal data. Collection of personal information is allowed with consent of a relevant person or without such consent: a) in case of combating crime and investigation[115]; or b) on the basis of national security and safety interests[116]. Transfer of the suspect's photo to a third person is allowed as well, if this serves to investigation of a crime and the photo is gained in compliance with the procedural regulations[117]. Norms of Article 8 of the Convention were applied to the name and surname and other identification information. Here the case may be change of sex. It was stated that in case of person's will, after change of sex, person's old identification information shall become the secret[118]. Though Article 8 of European Convention does not include any provision with respect of surname, it is the element personal and family life, as it is the means of individual's identification[119]. The same could be said about name[120]. Spreading of the medical information for effective investigation and ensuring the right of fair trial, irrespective of personal nature of this information[121].

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[110] See: *Gaskin v. the United Kingdom,* 07/07/1989. <http://cmiskp.echr.coe.int/tkp197/view.asp?item=73&portal=hbkm&action=html&highlight=the%20|%20United%20|%20Kingdom&sessionid=76810528&skin=hudoc-en> [20.03.2011].

[111] See: *McVeigh, O'Neill and Evans v. the United Kingdom*, 18/03/ 1981.

[112] See: *Dudgeon v. the United Kingdom*, 22/09/1981, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=72&portal=hbkm&action=html&highlight=the%20|%20United%20|%20Kingdom&sessionid=76810528&skin=hudoc-en> [20.03.2011].

[113] See: *X and Y v. Netherlands*, 26/03/1985, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=X%20|%20Y%20|%20v.%20|%20Netherlands&sessionid=76810528&skin=hudoc-en> [20.03.2011].

[114] See: *Niemietz v. Germany*, 16/12/1992, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Niemietz%20|%20v.%20|%20Germany&sessionid=76810528&skin=hudoc-en> [15.03.2011]; *P.G and J.H. v. United Kingdom*, 15/12/2001, <http://cmiskp.echr.coe.int/tkp197/ view.asp?item=1&portal=hbkm&action=html&highlight=P.G%20|%20J.H.%20|%20v.%20|%20United%20|%20Kingdom&sessionid=76810528&skin=hudoc-en>, [15.03.2011].

[115] See: *McVeigh, O'Neill and Evans v the United Kingdom*, 18/03/ 1981.

[116] See: *Leander v. Sweden*, 26/03/1987, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Leander%20|%20v.%20|%20Sweden&sessionid=76810528&skin=hudoc-en> [16.03.2011].

[117] See: *Doorson v. Netherlands*, 29/11/1993 year resolution, as well as *Doorson v. Netherlands*, 26/03/1996, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=73&portal=hbkm&action=html&highlight=Netherlands&sessionid=76810528&skin=hudoc-en> [15.03.2011] .

[118] See: *B. v. France*, 25/03/1992, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=B.%20|%20v.%20|%20France&sessionid=76810528&skin=hudoc-en> [17.03.2011].

[119] See: *Stjerna v. Finland*, 25/11/1994, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Stjerna%20|%20v.%20|%20Finland&sessionid=76810528&skin=hudoc-en> [16.03.2011].

[120] See: *Guillot v. France*, 24/10/1996, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Guillot%20|%20v.%20|%20France&sessionid=76810528&skin=hudoc-en> [17.03.2011].

[121] See: *Z. v. Finland*, 25/02/1997, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Z.%20|%20v.%20|%20Finland&sessionid=76810528&skin=hudoc-en> [17.03.2011]

It should be noted that inviolability of personal life includes physical and psychical conditions, their identification and other elements. The photos and articles deal exclusively with the personal life details of a person, as if publication of the photos do not make any contribution to the public debates and do not serve to the official function, they are the scenes reflecting everyday life of personal nature[122]. If physical violence against person, as well as physical punishment are beyond allowed scopes, violation of Article 8 of European Convention takes place[123].

Imposition of sanctions against sexual life style is direct impairment of personal life. Freedom of sexual relations means independent choice of person's own sexual life style[124]. Though European Court has stated certain moral limit, in particular, of the case includes protection of the interests of minors, the state is authorized to apply restriction measures[125]. European Court of Human Rights also did not place group sex, intended for participation of new people, shooting of the scenes and their spreading within the area of protection by Article 8[126]. Though group sex not intended for dissemination of such information is regarded as the intimate sphere by European Court and applied Article 8 to it[127]. Some secrets, e.g. medical secrets shall be kept after decease of the patient[128].

European Court of Human Rights categorized family relations as those belonging to internal world of an individual and applied Article 8 of European Convention[129]. In family life the Court implies relations between spouses and children, within marriage, if purpose of marriage is creation of the family. Though, living together of the persons and their children without marriage, if such life is long and stable, is regarded as family life as well[130]. In the exceptional cases protection by Article 8 of the European Convention may be extended, irrespective cohabitation, on relations between parents

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122 See: BGH 128, 1-*Caroline von Monaco*-Entscheidung I; BGH, NJW 1996, 984, 985-*Caroline von Monaco*-Entscheidung II.

123 See: *Okruashvili M.,* Inviolability of Personal Life, Institute of Freedom Tb., 2008, 57 (In Georgian).

124 See: *Dudgeon v. the United Kingdom*, 22/09/1981, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=72&portal=hbkm&action=html&highlight=the%20|%20United%20|%20Kingdom&sessionid=76810528&skin=hudoc-en> [20.03.2011].

125 See: *Norris v. Ireland*, 26/09/1988, <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=76801410&skin=hudoc-en&action=request> [15.05.2011].

126 See: *Laskey, Jaggard and Brown v. the United Kingdom*, 19/02/1997, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Laskey%2C%20|%20Jaggard%20|%20Brown%20|%20v.%20|%20the%20|%20United%20|%20Kingdom&sessionid=76810528&skin=hudoc-en> [18.03.2011].

127 See: *ADT v. the United Kingdom*, 31/06/2000.

128 See: *Frick M. Th.,*, Persönlichkeitsrechte, Beiträge, Liechtenstein-Institut, Forschung und Lehre, Nr. 5, Liechtenstein, Fürstentum Liechtenstein, 1996, 10.

129 Ibid, 53.

130 See: *Johnston v. Ireland*, 18/12/1986, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Johnston%20|%20v.%20|%20Ireland&sessionid=76810528&skin=hudoc-en> [17.03.2011];

Article 8 of Convention on Himan Right deals with the relations between mother and child, irrespective of marital status of parents, See: *Marckx v. Belgium,* 13/06/1979; saqmeze _ *Kerkhoven v. the Netherlands* It was established that life of two women and newborn was not family life (application №15666/89, *Kerkhoven v. the Netherlands* (statement №15666/89, *Kerkhoven, Hinke & Hinke v. the Netherlands*, 19/05/1992 not published)

and children[131]. The relations between relatives – between grandparents and grand children[132], siblings, uncle and aunt and nephews and nieces, adopted parents and adopted children[133]. Thus, the family includes relation between pairs and relatives, in physical or normative sense (de facto family). Relations between spouses are understood similar to the relations between unmarried pairs[134]. Family life may be terminated in the exceptional cases only[135], irrespective of adoption[136] or expelling[137] from the family. In addition, blood relationships could not be regarded as necessary precondition for family life. For example, the adopted child is a part of family life[138]. Blood relationships does not imply as well necessarily the family relations, e.g. in case of sperm donor[139].

Protection by Article 8 of European Convention is applicable to the place of residence as well, which may be the cottage, temporary dwelling and auxiliary buildings and structures. To regard one or another territory as the place of residence, stable link with the accommodation is required[140]. In addition, European Court regarded that personal life includes business and professional activities as well, as the most part of relations takes place in the process of activities[141]. In some countries participants of the Convention and in Germany among them, business office could be regarded as well[142]. Thus, certain territory is protected by Article 8 of European Convention from unlawful impairment[143] and acts harmful for health[144].

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131 See: *Söderbäck v. Sweden*, 28/10/1998, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Soderback%20|%20v.%20|%20Sweden&sessionid=76810528&skin=hudoc-en> [18.03.2011].

132 See: *Boughanemi v. France*, 24/04/1986, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Boughanemi%20|%20v.%20|%20France&sessionid=76810528&skin=hudoc-en> [18.03.2011].

133 See: *Whalen v. Roe, 429 U. S.* 589, 599 (1977).

134 See: *Wolff H.A.*, Ehe und Familie in Europa, in "Europarecht", Eua, Heft 6., Nomos Verlagsgeselschaft, Baden-Baden, Nov-Dez. 2005, 725.

135 Case Law of European Court of Human Rights (materials collected and prepared by *Bokhashvili B.,* Association of Young Lawyers of Georgia*,* Tb., 2004, 266-270, <http://gyla.ge/files/publications/q9z18pmtnn.pdf>, [24.01.11].

136 Application №7626/76*, X v. the United Kingdom*, 11/07/1977, DR 11, 160.

137 ApplicationS №14830/89, *Yousef v. the United Kingdom*, commission report, 30/06/1992 Section 43.

138 See: *X, Y and Z v. the United Kingdom*, 22/04/1997, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=X%2C%20|%20Y%20|%20Z%20|%20v.%20|%20the%20|%20United%20|%20Kingdom&sessionid=76810528&skin=hudoc-en> [16.05.2011].

139 Relations between sperm donor and child will be regarded as family life, if tgere are evidences of close personal relationships between them Application №16944/90, *G v. the Netherlands*, 08/02/1993, 16 EHRR 38.

140 See: *Gillou v. the United Kingdom*, 24/11/1986, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=75&portal=hbkm&action=html&highlight=the%20|%20United%20|%20Kingdom&sessionid=76810528&skin=hudoc-en> [20.03.2011].

141 See: *Okruashvili M.,* Personal Life Inviolability, Institute of Freedom, Tb., 2008, 64 (In Georgian).

142 See: *Niemietz v. Germany*, 16/12/1992, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Niemietz%20|%20v.%20|%20Germany&sessionid=76810528&skin=hudoc-en> [18.03.2011];

P.G and J.H. v. United Kingdom, 25/09/2001, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=P.G%20|%20J.H.%20|%20v.%20|%20United%20|%20Kingdom&sessionid=76810528&skin=hudoc-en> [19.03.2011],

143 See: *Akdivar and Others v. Turkey*, 16/09/1996, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Akdivar%20|%20Others%20|%20v.%20|%20Turkey&sessionid=76810528&skin=hudoc-en> [17.03.2011].

Inviolability of private life may be impaired by the environmental pollution[145].

One of the elements of private life inviolability is inviolability of correspondence, though it implies not only written communication but sharing of information via various means of telecommunication as well[146].

Thus, private sphere includes family life, place of residence, links with the foreign countries, incomes and property, health status conditions, sexual life, personal secrets (medical, confession, lawyer's secret), intimate details, As for the social environment, it is the social sphere, where the individual is relatively protected. Protection of social environment is ensured by general personal right. Individual has to stand the public information and comments about hi person, when there is especial legitimate and actual information interest towards the above[147]. This is applicable to the absolute and relative persons of contemporary history.

4. Conclusion

Research showed that there is correlation between social and legal bases of private life, similar to the private and public spheres, In addition, in many cases the private and public spheres are so close that sometimes there is no limit between them at all. It should be noted that public life, with its substance, in some context, may be equal to the public life, though public sphere is the sphere related to implementation of the governmental and non-governmental (public) function. As for the concepts of private life and personal life, these are confused in everyday relations, science, legislation and practice. In addition, it is reasonable that private sphere implied what is not public, expressed in freedom of relations between people on non-public basis, where the individual may act at his own discretion (without intervention of the others). Personal life, on its side, is the part of private sphere, which is closely related to a person directly and deals with body and moral integrity (life, health, moral and physical inviolability), ensures person;s autonomy (secrecy of personal life, inviolability of personal life, secrecy of correspondence), develops individuality (honor, dignity, name, sexual freedom, self-expression, self-determination, life style), what can be created by birth, as well as by the law. Though, these components may exist independently as well. This, private and personal spheres are concepts correlated as general and specific, as there are type and form correlation between them.

According to the experience of international law, it is reasonable to classify personal life by "sensitivity": "especially sensitive" (racial, ethnical, religious belief, sexual and intimate relations,

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144 See: *López Ostra v. Spain*, 09/12/1994 , <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Lopez%20|%20Ostra%20|%20v.%20|%20Spain&sessionid=76810528&skin=hudoc-en> [19.03.2011] .

145 See: *Guerra and Others v. Italy*, 19/02/1998, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Guerra%20|%20Others%20|%20v.%20|%20Italy&sessionid=76810528&skin=hudoc-en> [14.03.2011].

146 See: *A. v. France*, 13/11/1993, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=30&portal=hbkm&action=html&highlight=A.%20|%20v.%20|%20France%20|%208&sessionid=76810528&skin=hudoc-en> [17.03.2011].

147 This implies private life, though term "personal life" is used, See: *Kublashvili K.,* Fundamental Rights, Tb., 2010, 115 (In Georgian).

health status...), "sensitive" (banking, taxation, medical etc.) and "common" (home, place of residence etc.) private sphere. They are unified by the criterion of secrecy. And by this characteristic, it is better to distinguish the banking, professional (medical, communication, notary, lawyer, adoption, insurance, confession), service secret, tax secret. personal secret. At the same time, it is necessary to distinguish protection of personal data within private law and within public law.

Mostly, elements of private (personal) sphere are not legally protected; they are regulated by the moral norms. With respect of legal technique of protection, the decisive role is added to general personal right. Researches showed that Georgian legislation includes some elements of general personal right and recognition of general personal right is the way to protection of the private (personal) life and it has practical sense as well. Consequently, if personal rights are not protected in all aspects, general personal right should be recognized. And this would fill the gaps related to lack of protection of the private (personal) sphere in some cases and failure to use the legal bases or improper study thereof in some other cases. In addition, the international agreements should be taken into consideration, especially regarding that they comprise the part of Georgian law system.

IRMA GELASHVILI[*]

LEGAL AND ETHICAL PROBLEMS OF SURROGACY

1. Introduction

According to the principles of the report of EU Experts' Committee of Artificial Human Insemination (hereafter "EU Principles), a surrogate mother is a woman, who bears an embryo for other persons and she has agreed before conception to hand over them a baby right after giving birth.[1]

At a glance, surrogacy is a reproductive alternative, which provides a childless family with unique opportunity to have a baby. Autonomy of the will is the most popular and major argument of the supporters of surrogacy, according to which if surrogate mother agrees to bear an embryo and hand over it to other persons after delivery, her freedom of action shall not be discriminated, especially that her action entails happiness and wellbeing rather than harm.

After in-depth analysis of this matter, many countries[2] have come to conclusion, that this type of deals should have been prohibited as they were considered unnatural, or to be permitted only in exceptional cases and only under strictly defined conditions.

Law of Georgia on "health care" (hereafter "law on health") recognizes an agreement on surrogacy, as a possibility for realization of reproductive rights. Besides, it has been decided that surrogate mother is not entitled to be recognized as a mother of baby. A commissioning couple shall be deemed child's parents with ensuing responsibilities and authority.[3]

By adoption of the abovementioned norm, a surrogate mother has been deprived of a right to be considered a parent, while by the legislation of European countries mother is a woman, who gives birth to a child. This law is limited to recognizing a person who places "order on child" as a parent, and regulation of other issues is entrusted to the will of the parties. Legalization of surrogacy caused many unforeseen problems. First of all, it has encouraged socially deprived persons – to provide their service to "clients" for a certain price and reject their own children. Surrogacy is prohibited in many countries as an immoral deal causing couples, who are unable to have their children travel to Georgia to use the abovementioned technology of artificial insemination. Georgia turned a cheap market; in addition, children born as a result of surrogacy are mainly taken from Georgia. Therefore, surrogacy is a focal problem requiring solution by authorities.

Present research aims at scientific analysis of legislation regulating surrogacy on the example of EU and other countries of common law system, assessment of these models, identification of positive and negative sides of problem regulation and provide suggestions for improvement of national legislation.

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1 Report on Human Artificial Procreation Principles, <http://www.coe.int/t/dg3/healthbioethic/Activities/04_Human_embryo_and_foetus_en/default_en.asp>.

2 e.g. Switzerland, Germany.

3 Law of Georgia on "Health Care", article 143.

The research is based on normative-dogmatic approach of study, which includes logical and systematic definitions of norm and determination of its place in the hierarchy normative acts, as well as comparative-legal method for the harmonization of legislation through analysis and generalization of similar institutes in different legal systems.

Present research includes suggestions *de lege ferenda.*

2. About the Reproductive Rights

Health right by article 37 of Georgian Constitution includes reproductive health too. Reproductive health therefore implies that people have the capability to reproduce and the freedom to decide if, when and how often to do so[4]. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant[5]. International documents, such as Universal Declaration of Human Rights, article 25 recognize the right of persons or couples of health care. According to article 16, of Declaration, men and women have the right to marry and to found a family. According to article 5, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children.

Protection of a recognized right is essential, when a person/couple is unable to have children through natural reproduction. The right should imply the possibility of enjoying/exercising it; otherwise, it is just a mere declaration. It would be interesting to know how to exercise this right without infringement of other person's interests (rights), or without affecting other persons, especially that all stages of infertility treatment must be useful for patients and legally justified.[6] Besides, the future child's interests shall be the basic and essential issue to take account of while conducting any auxiliary reproductive manipulations.[7]

3. Essence and Types of Surrogacy

Surrogacy includes several cases, when a woman gets pregnant through artificial and natural insemination, or embryo implantation, and a child right after his birth is handed over to third person. Surrogacy by the simplest form and in the narrow sense of the word is an arrangement between a

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4 UN International Conference on Population and Development, Action Program, chapter VII , paragraph 7.2. <http://www.unfpa.org/public/home/sitemap/icpd/International-Conference-on-Population-and-Development/ICPD-Programme№ch1>.

5 Ibid.

6 *Stone O.*, English Law in Relation to A.I.D and Embryo Transfer, in Law and Ethics of A.I.D and Embryo Transfer, A Ciba Foundation Symposium, Associated Scientific Publishers, Amsterdam, New York, London, 1973, 75.

7 Report on Human Artificial Procreation Principles, 1989, <http://www.coe.int/t/dg3/healthbioethic/Activities/04_Human_embryo_and_foetus_en/default_en.asp>.

couple that intend to raise the child and a woman, when the latter carries in her uterus a child, which is conceived via sperm of other woman's spouse and she delivers and gives a child to this couple.[8]

There are two forms of surrogacy, partial and full (total) surrogacy. In case of partial one, a surrogate mother is at the same time a genetic mother[9]. It is a so-called traditional surrogacy, when a surrogate mother is a genetic mother too and she assumes responsibilities to give birth and give a child to "client" family.[10] In other words surrogate mother is called "replacement mother" and "bearing mother"[11], as well as gestational mother[12]. In most of cases, a surrogate mother gestates an artificially inseminated ovum[13], however, fertilization may occur also via sexual intercourse[14]. In case of partial surrogacy, surrogate mother looks like surrogate wife.[15] In fact, a surrogate mother is literally a "parent". As regards the full surrogacy, embryo genetically belongs to a "customer"-couple. It is created via artificial fertilization outside the body – *in vitro* and when embryo divides into eight cells, it is transferred to the surrogate mother's uterus.[16] However, there is a practice of implantation using the reversed parameters; when a woman wishing to have a baby is unable to produce ovum, than donor's ovum fertilized in vitro is transferred to her uterus. Accordingly, a woman wishing to have a baby becomes a parent, while ovum donor, i.e. a genetic mother is a replacement mother.

There are also altruistic and commercial types of surrogacy. If the pregnant woman received compensation for carrying and delivering the child the arrangement is called a commercial surrogacy, otherwise the arrangement is referred to as an altruistic surrogacy.[17]

4. Surrogate Motherhood in Georgian Legislation

Surrogate motherhood is allowed by Georgian legislation, in particular by law on health, article 143, that reads:

1. a) Extracorporeal fertilization (IVF) is allowed for the purpose of treatment of infertility, as well as in case of risk of transmission of genetic disease on a wife's or a husband's part, by using sex cells or an embryo of the couple or a donor, if the couple's written consent has been obtained.

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8 *Staudinger*, BGB/BGB §1747 Rn. 6, <http://beck-online.beck.de/default.aspx?VPATH=bibdata% 2fkomm% 2fstaudinger%2f>.

9 *Herring J.*, Medical Law and Ethics, 3rd edition, Oxford University Press, USA, 2010, 375.

10 *Erickson T.M.*, Surrogacy and Embryo, Sperm & Egg Donation: What Were You Thinking? iUniverse.com, 2010, 65.

11 < http://beck-online.beck.de/default.aspx?VPATH=bibdata%2fkomm%2fstaudinger%2f>.

12 *Schwartz L., Preece P., Hendry R.,* Medical ethics: a Case Based Approach, 1st edition, Saunders Ltd, 2002,154.

13 *Greene B.G.*, Understanding Medical Law, Routledge-Cavendish , 2005,122.

14 *Staudinger*, BGB/BGB §1747 Rn. 6, <http://beck-online.beck.de/default.aspx?VPATH= bibdata%2fkomm%2fstaudinger%2f>.

15 *Field M.,* Surrogate Motherhood, Harvard University Press, Expanded Edition, 1990, 5.

16 *Edwards R., Steptoe P.*, Biological Aspects of Embryo Transfer, Law and Ethics of A.I.D and Embryo Transfer, A Ciba Foundation Sympozium, Associated Scientific Publishers, Amsterdam, New York, London, 1973,12.

17 *Boele-Woelki K.*, Perspectives for the Unification and Harmonization of Family Law in Europe, Intersentia, 2003, 415.

b) if a woman has no uterus, for the purpose of transfer and growth of the embryo obtained as a result of fertilization to the uterus of another woman ("surrogate mother"). The couple's written consent is obligatory.

2. The couple is considered to be parents in case of the childbirth with the responsibility and authority ensuing from it. A donor or a "surrogate mother" has no right to be recognized as a parent of the born child.

This norm is quite ambiguous, first, in section 1 of the above article, extracorporeal fertilization is mentioned via donor's cell, and as there is not specified who might be a donor, one can assume, that donation of female cells – ovum is allowed too. Therefore, in this case donor is considered a genetic mother, while a "parent" is considered a mother, because "donor has not right to be recognized as a parent of the born child". Section 2 concerns full surrogacy, when surrogate mother's function is limited to "bearing" an embryo in her uterus. Therefore, ovum donation is allowed and in this case, genetic relationship is not taken account of while recognizing a mother, and only the fact of birth creates grounds for arising legal relationship between mother and child. As for the full surrogacy, the similar genetics is a decisive factor and a surrogate mother serves as an "incubator". The law recognizes a person desiring a child as a mother, rather than genetic one, or a woman who gave birth. Besides, Criminal Code of Georgia does not specify who is to be considered a mother either. It only stipulates the birth of children in compliance with the law as the grounds for mutual rights and obligations[18].

Medical service shall be provided to everyone in accordance with the principle of equity and fairness, prohibiting any discrimination. Consequently, if a woman, who can be a genetic mother but is unable to carry embryo has a right to have a child by means of surrogate mother, then the same right should be granted to a woman, who is neither able to be a genetic mother, nor bear embryo. In this case, if ovum donor arrangement is made with one person and agreement on surrogate motherhood to "bear" embryo with another person, and a commissioning mother is to be recognized as a legal mother after birth of baby, ultimately the three persons might pretend to motherhood with equal rights. However, the precondition of applying any reproduction technology is to protect the interests of future child that unambiguously contradicts the abovementioned. Though "interests of future child" is estimated concept to be determined for any particular case, existence of several mothers is not, no doubt, favorable to a child.

As was mentioned above, law on health stipulates the possibility of full surrogacy and ovum donation as well. However, article 143 should be defined in view of a goal, which considers inadmissible ovum donation and surrogate motherhood, i.e. partial surrogacy for the same person.

5. Partial and Commercial Surrogacy as Crime

In case of partial surrogacy, i.e. when replacement mother is a gestational and genetic one, who assumes responsibility after childbirth to transfer a child to commissioning couple, this action may contain the signs of crime stipulated by Criminal Code of Georgia, article 172 and be qualified as sale and trafficking of children for the purpose of adoption. To consider an action as a committed crime, the detection of the fact of child transfer to a buyer is required along with substantial terms agreed

[18] Criminal Code of Georgia, article 1187 (In Georgian).

between the sides (e.g. price). Trade in children for the purpose of adoption is considered a crime as a child is equated with a thing and is a subject of civil turnover and purchase agreement. Object of legal protection in this crime is inviolability of minors, to protect their right of survival and development in their own family,[19] with own parents.[20] From this very standpoint, this action is considered unjustifiable and punishable offense, though the motive of crime is noble aiming at child adoption and raising him in family conditions. Taking account of this specific purpose, lawmaker has categorized an illegal arrangement regarding the minors as lesser crime and provided for light punishment. Where a purchase of child or other illegal deal does not include adoption, such action is trade in minor[21], which is a grave crime because "the purpose attached different essence to offence and set a degree of more serious crime"[22]. Remuneration for child adoption is decisive in trade of children. Therefore, body of a crime will not exist, if a person desiring to have a child gives money to biological parents voluntarily and without prior agreement as a gift or compassionately. However, payment of money in any particular case shall be determined through investigation of factual circumstances of crime.

Word-by-word interpretation of the norm "sale of children for adoption" implies sale of born child and consequently, after childbirth the payment of money in compliance with prior agreement. While in case of surrogacy, payment is made by installments depending on pregnancy progression. The abovementioned crime differs from partial surrogacy for remuneration in the following: in the first case, "object of sale" – a child is already born, in second case arrangement and partial payment is made first, and after childbirth and payment of the rest of money, a child is transferred. From social danger standpoint, there is no difference between these two actions. Moreover, the level of self-interest of mother during partial surrogacy is higher, because her decision on pregnancy is money-oriented and she considers a fetus in her uterus a source of income. Accordingly, partial surrogacy when it is commercial one, according to the norm, shall be considered a crime and qualified as a trade in minors for adoption. For the commitment of crime child transfer is required in this case too, and an arrangement on surrogacy in accordance with article 18 I of Criminal Code can be considered as a crime preparatory stage – purposeful creation of circumstances for crime commitment. However, according to the II part of this article, as it is a lesser crime, action will not be punishable.

In case a child born from partial surrogacy is transferred to commissioning couple, and he/she lives in a family conditions, the court shall release a person who has committed a crime from responsibility, because it is inexpedient to impose criminal responsibility and criminal proceedings should be stopped as according to article 105 I "m" of Criminal Procedure Code of Georgia, an action does not entail social danger due to change of circumstance.

As regards transfer of partial surrogacy child to commissioning couple, despite the unlawfulness of a deal from the standpoint of social and legal danger, and consequently null and void, that why a child should return to biological parents, this case may be resolved different way too. In this case,

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19 Criminal Code of Georgia, article 1197, (In Georgian).

20 *Lekveishvili M., Todua N., Gvenetadze N., Mamulashvili G.,* Criminal Law Private part, v. 1, edition-3, Tbilisi., 2008, 328 (In Georgian).

21 Criminal Code, article143^2 (In Georgian).

22 *Gamkrelidze O., Turava M., Ebralidze T., Mamulashvili G., Putkaradze E., Bakanidze R.,* Commentary of Criminal Court Practice: Ccrime against Human, Tbilisi, 2008, 555 (In Georgian).

Convention on the Rights of the Child[23] shall prevail. According to article 3 of this Convention, "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." True interests of the child is a matter of fact and they are to be determined for any particular case. Account shall be taken to subjective opinion of the child along with objective ones regarding what is more favorable for the child[24] if possible. Therefore, if the court considers that it is better for a child to live in a family, in which he appeared without legal ground, then child adoption or foster care shall be a legal ground of parent-child relations.

6. Agreement on Surrogate Motherhood

Though law on health allows surrogacy, this type of agreement has not been stipulated by Criminal Code. This agreement is relatively closer to service agreement.

Three types of lease agreements had been recognized even by Roman law: lease of goods, *(locatio conduction rerum)*, services *(locatio conduction operarum)* and labor *(locatio conduductio operis)*[25].

Criminal Code of Georgia provides for hire contract, which is oriented on the result of work to be transferred to lessor.[26] Service agreement as such has not been regulated separately. In this case party to an agreement commissions a contractor to fulfill a work which does not relate to any particular material result.[27] Interests of authorized person are decisive – if client's interest is fulfillment of a particular work, it is a service agreement, if creditor is interested in work result, or result transfer, it is Contractor's Agreement, with a characteristic principle "the result crowns the work"[28]. Failure of Contractor's Agreement to achieve results entails non-fulfillment of obligations. While subject of service agreement is provision of service, which according to common rules has no result, or the result is nonmaterial.[29]

Agreement on Surrogate Motherhood can be referred to service agreement, for which transfer of work results is not obligatory. It is not significant who is a contrahent, as for signing of agreement physical and mental health condition is more important. Besides, the deal is based on specific credit. Agreement is deemed valid right after material terms are agreed.[30] It is worth mentioning that law on health provides for obligatory written agreement. It has not been specified whether this written form shall be simple or complex. However, the ground for registration of a child born via embryo implantation is a notarized agreement according to article 34 "a" of law of Georgia on "child adoption and foster care".

Despite the fact that relations between commissioning couple and surrogate mother, which have been based on the autonomy of the will and equal partnership, are regulated by private law, they include

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23 Adopted on November 20, 1989. Active in Georgia since July 2, 1994 (In Georgian).

24 *Detrick Sh.,* A Commentary on the United Nations Convention on the Rights of the Child, The Hague, Boston, London, 1999, 89.

25 *Pokrovski I.A.,* History of Roman Law*,* Petrograd, 1918, 428 (In Russian).

26 Criminal Code of Georgia, articles 629-656 (In Georgian).

27 *Ioffe O. S.,* contractual law, 1975, M., 489 (In Russian).

28 *Braginski M., Vitrianski V.,* Contract Law*, V.* 3, Statute, M., 2002, 572 (In Russian).

29 *Dzlierishvili Z.,* Legal Regulation of Contractor's Agreement, Tbilisi, 2011, 1, 6 (In Georgian).

30 Criminal Code of Georgia, article 327 (In Georgian).

also the elements of public law. In Vitro fertilization of embryo and implantation to surrogate mother shall be conducted in a licensed institution by a licensed doctor.[31] Medical document certifying IVF of embryo is also required for registration of a child born via surrogacy.[32] Accordingly, in case this requirement is not met, commissioning couple will be deprived of the right to be recognized as a parent.

Law on health stipulates surrogacy only in favor of a "couple". Consequently, neither single woman nor man is entitled to have a child via surrogacy. The law does not specify whether this "couple" should be hetero or, surrogacy is allowed for homosexual couples too, as practiced in some foreign countries[33]. However, as Criminal Code of Georgia considers a marriage as a voluntary relationship between man and woman[34], and "mother" and "father" are indicated when registering a child, accordingly "couple" implies a man and a woman. It is to be noted that EU Report provides for the application of IVF technologies only for heterosexual couples.

Obligation shall be fulfilled duly, on appointed place and time[35]. What would happen if commissioning couple fails to fulfill payment obligations? According to overall rule, one of the outcomes of unperformed obligations is the right of break of the agreement[36], which implies resumption of initial condition. While, if restitution is impossible, a party is entitled to demand compensation. Accordingly, if the commissioning couple does not pay price stipulated by agreement, surrogate mother is granted a right to break agreement. In this case, restitution is impossible through abortion neither, especially if term of pregnancy exceeds 12 weeks. The only right available to surrogate mother is to demand compensation for damage resulted from unfulfilled obligations. What is considered damage in this case? Child resulted from surrogacy or service costs and non-received income? Child even "unplanned" and undesired cannot be regarded as damage. Accordingly, surrogate mother shall be entitled to demand compensation (article 409 Criminal Code) of nonmaterial damages and non-received income too (article 413, Criminal Code).

Surrogate mother can violate obligation too, when she acts against the ethical principles, e.g. does not follow doctor's prescription, smokes, drinks alcoholic beverage, takes drugs. Accordingly, if surrogate mother's culpable conduct leads to the birth of retarded, disturbed child, authorized persons will have a right to demand compensation for damage caused by violation of obligations. However, as a rule, a commissioning couple in this case is not interested in genetic links anymore and denies accepting "fulfillment" and a child, who was just a means for the achievement of goal, remains without "parental" care. Surrogate mother's violation of obligation may also occur when she refuses to hand over the child. In this case, a right arises to a creditor – commissioning couple to demand child handover in accordance with article 143 of Criminal Code, but this is not a purely legal matter. Bioethical aspects creates problem too. Way out from this complicated moral and legal collision should be an answer on the following question – who is mother? The first precedent, when a surrogate mother *Mary*

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31 Report on Human Artificial Procreation Principles, 1989, <http://www.coe.int/t/dg3/healthbioethic/Activities/04_Human_embryo_and_foetus_en/default_en.asp>.

32 Law of Georgia on "registration of civil acts", SSM №3 08.11.1998, adopted on 15.10.1998 (In Georgian).

33 For example, this was allowed in Great Britain in 2008. *Probert R*., Family Law in England and Wales, Kluwer Law International, 2011,124 .

34 Criminal Code of Georgia, article 1106 (In Georgian).

35 Criminal Code of Georgia, article 361 (In Georgian).

36 Criminal Code of Georgia, article 352 (In Georgian).

Whitehead who had her own two children, refused to return the baby to the *Sterns*, the commissioning couple is known as a *Baby M*.[37] Baby genetically belonged to Mr. *Stern* and surrogate mother *Mary Whitehead*. The first instance court awarded custody of Baby M to the *Sterns* based on contract, but the Supreme Court of New Jersey, invalidated surrogacy contracts as against the law and public policy and infringing woman's dignity. The court took into consideration *Mary Whitehead*'s efforts during her 9-month pregnancy, possible risks to her health and awarded Mr. *Stern* custody and *Whitehead* visitation rights.[38] This precedent caused different approaches to this issue. However, according to general rule, mother is a woman who gave birth to baby. The same rule is included in EU Report.[39] Namely, according to principle 15, no doctor and institution has the right to use Artificial Human Insemination technique with respect to surrogate mother. Nevertheless, the states may allow surrogacy in exceptional cases stipulated by national legislation provided that arrangement between surrogate mother and commissioning couple is not coercive, surrogate mother does not take compensation and she has a right of choice whether to keep a child after birth. Incompliance of Georgian legislation with the EU Report is evident.

7. Comparative Analysis

7.1 Regulation of Countries of Common Law

Countries of common law can be considered to be the founders of surrogacy, in which arrangements of this kind are allowed, but there are certain limitations. According to general rule, mother is a woman who gave birth to baby. While a commissioning woman, even if she is genetic mother, *a priori* is not recognized as mother.

In 2008, in Great Britain *Human Fertilization and Embryology Act* was adopted. According to this act, surrogacy is allowed with certain limitations: it should be without indemnity, no gifts or profit to surrogate mother is permissible, only compensation of expenditure is allowed. Activity of organization aiming mediation for surrogacy for remuneration is regarded as unlawful. Besides, advertising of such services is prohibited. Surrogacy is allowed if the abovementioned requirements are met, and artificial human insemination is conducted in a licensed institution. The above mentioned act requires that medical institutions take into consideration the risk or possible damage to the child in case of non-fulfilled conditions of surrogacy agreement. Surrogate mother has not been unconditionally deprived of the right to keep a child. After signing agreement and after childbirth, surrogate mother is authorized to remain child's mother if she wishes so.[40] In case the commissioning couple decides to be recognized child's parents, there are two way to do so – to adopt the child or obtain *parental order*. The latter can be issued if:

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37 *Rothenberg K.,* Surrogacy and the Health Care Professional, Baby M and Beyond in Surrogate Motherhood, I Universe.com, 2010, 202.

38 *Merino F., Quiroz P.,* Adoption and Surrogate Pregnancy, Facts on File, 1st edition , Faith Merino, 2010, 37.

39 Report on Human Artificial Procreation Principles, 1989, <http://www.coe.int/t/dg3/healthbioethic/Activities/04_Human_embryo_and_foetus_en/default_en.asp>.

40 *Hope T., Savulescu J., Hendrick J.,* Medical Ethics and Law: the Core Curriculum, 1st edition, Churchill Livingstone, 2003, 144.

Ovum or sperm, or both belong to commissioning couple;

commissioning couple is married or live together;

the child lives with commissioning couple;

surrogate mother and "all parents" agree on issuing parental order;

court makes sure, that no remuneration has been paid for the services, except those expenses allowed by the court;

applicants came of age of 18 years;

applicants apply to the court no later than six months after childbirth.

Besides, surrogate mother's consent on child surrender is not deemed valid, if it is made no earlier than 6 weeks after childbirth. No doubt, this requirement has been set taking account of the interests of surrogate mother.[41]

The most important thing in the above list is that either man or woman from the commissioning couple shall be the genetic parent and that a single person is not granted such right. Therefore, if one of the conditions is not available, a party can request not parental order, but to adopt the child.

As was mentioned above, surrogate mother's consent on child surrender after childbirth is obligatory condition for recognizing commissioning couple as parents. In case of dispute, the court takes into consideration child's interests and only in case it is convinced that living with surrogate mother poses serious risk to child, the child may be handed over to commissioning couple.[42] According to this law, homosexual couples have the right to have children via artificial human insemination.[43] Despite the legalization of noncommercial surrogacy, Warnock committee that developed a draft to the mentioned law came to conclusion that surrogacy is nearly always unethical[44].

As was mentioned above, remuneration is prohibited in Great Britain. However, unofficially average price of this service is 15,000 pounds. In USA surrogacy is considered a profitable business, as its price in many cases reaches USD65,000.[45]

Approach to the agreement on surrogate motherhood in the USA is unequal. In some states all forms of surrogacy, including commercial ones are allowed by specific law or precedential law.[46] With this respect, California is more liberal. Precedential law in California has decided that a person intending to raise a child as his/her own child should be recognized as mother. Many states, such as Colorado, Georgia, Kansas, Mississippi, Missouri etc. do not regulate surrogacy via special law and there is no precedential law with this respect either. In a few states, only altruistic surrogacy is allowed (Washington, Florida, Nevada, and Louisiana). Separate states, such as New York, Michigan and Indiana completely prohibit such agreements as the arrangements against public order[47].

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41 *Stauch M., Wheat K., Tingle J.,* Sourcebook on Medical Law, 2nd edition, Cavendish Pub Ltd, 2002, 425.

42 *Herring J.*, Medical Law and Ethics, 3rd edition, Oxford University Press, USA, 2010, 377.

43 *Probert R.*, Family Law in England and Wales, Kluwer Law International, 2011,124.

44 *Teman E.,* Birthing Mother: the Surrogate Body and the Pregnant Self, 1st edition, University of California Press, 2010, 9.

45 *Herring J.*, Medical Law and Ethics, 3rd edition, Oxford University Press, USA, 2010, 376 .

46 *Wardle D., Wardle L. Nolan J., Nolan L.*, Family Law in the USA, Kluwer Law International, 2011, 151.

47 *Kindregan Ch., McBrein M.,* Assisted Reproductive Technology: a Lawyer's Guide to Emerging Law and Science, 1st edition, American Bar Association, 2006,149.

7.2. Regulations in the continental Europe

German law is quite strict towards the issues of motherhood. First of all, German Civil Code (GCC) considers a woman, who gives a birth to a child as a mother.[48] With this formulation the law-makeremphasizes that reproductive development makes a clear distinction between legal and genetical motherhood in those cases, whendelivering mother has been implanted the fertilized oocyte of another woman.[49] Thus, surrogate mother is considered a mother, regardless the fact that pregnancy was achieved through artifical insemination, *in vitro* fertilization or embryo implantation.[50]Considering the outstanding significance of the issue, beside the above-mentioned imperative norm, the law-maker has prohibited surrogacy by special legal acts. Namely, it is stated that up to three years of imprisonment or money sanctions will be imposed onany individual who conducts fertilization of oocyte or implantation of embryo to the woman, who intends to hand the future child over to the third parties for adoption or other form of long-term care.[51]

Considering above-mentioned, surrogacy arrangement is illegal according to the paragraph 134 of GCC; it has to be mentioned though, that during characterization of immoral arrangements considered by the paragraph 138of the GCC, the doctrine speaks about surrogacy contract in particular.[52]These cases will not be covered by the paragraph 331^{II} of the GCC either, which, in contrast with other countries, considers the embryo as the party with the rights of request, in the context of agreement contract made for the benefit of the third party.

The law does not recognize the institute of suing for the motherhood rights by either the donor mother or the "ordering" mother and therefore, this will not be covered by the right of request considered by the 2nd part of the paragraph 640of German Civil Procedure Code, as according to the law, the relationship between the parent and the child is not established, genetic origin is important only in those cases, when depending on the purpose of the norm, the issue of genetic origin is essential. An example is prohibition of marriage between close relatives of ascending or descending line.[53]Mediation with substitute mothers is generally considered immoral, as stated by the 1989 law "On prohibition of adoption and substitute motherhood". Therefore, such mediating contracts are considered void, as illegal arrangements.[54]

Similarly, Swiss law is against the surrogate motherhood without any exemption, based on the Article 4 of the Federal Act on Supported Medical Reproduction. Woman, who gives a birth to a child, is considered its mother.[55]

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48 Paragraph 1591 of GCC.

49 *Schulz W., Hauß J.*, Familienrecht, BGB §1591 Rn. 1-2, <http://beck-online.beck.de/default.aspx?VPATH=bibdata%2fkomm%2fSchHauKoFa>.

50 *Evans D., Pickering N.,* Creating the Child: the Ethics, Law and Practice of Assisted Procreation, 1st edition, Springer, 1996, 337.

51 German law "On protection of embryos", <http://bundesrecht.juris.de/eschg/__1.html>.

52 *Foster N., Sule S.,* German Legal System & Laws, 3rd edition, Oxford University Press, 2002, 391; *Reimann M., Zekoll J.,* Introduction to German Law,Kluwer Law International, 2005, 262.

53 *Schulz W., Hauß J.*, Familienrecht/BGB §1591. <http://beck-online.beck.de/default.aspx?VPATH=bibdata%2fkomm%2fSchHauKoFa>.

54 *Staudinger*, BGB/BGB §138 Rn. 450-451, <http://beck-online.beck.de/default.aspx?VPATH=bibdata%2fkomm%2fstaudinger%2f>.

55 *Dessemontet F.,* Introduction to Swiss Law, Kluwer Law International, 2004, 68.

The Greece approach to the issue is interesting:artifical insemination and surrogate motherhood is permitted in case of advance authoriation by the court, and written informed consent can be requested prior to transfer of the fertilized oocyte into the woman's body.[56]

Any form of surrogate motherhood is strictly prohibited in France based on 1994 Bioethics Act, which was later implemented in court practice, as well[57]. The similar solution is given in Spanish and Chezh legislation, too[58].In Italy, surrogacy used to be permitted by the court practice, but later it was prohibited by the special law.[59]At the Royal Conference in Canada, surrogacy was described as „trading with children, exploiting women, and therefore, generally harmful for the entire society" and any kind of surrogate motherhood was prohibited.[60]

8. Relation of freedom of action and ethical norms

Kant, who viewed freedom as an original source of human rights, has formulated the most general pirnciple of the justice, according to which, any action is justified, if it includes freedom of action of an individual in accordance with freedom of action of everybody and in accordance with the „general law".[61]The ultimate border of the freedom of action is created bythe interests of others and the „general law". It is difficult to set a border between individual's civil rights and interests. Many times, interest coincides with the notion of the right. Moreover, interest represents contents of the right, although, interest may go beyond the legal sphere. Accordingly,in this regard, interest is unimportant judicially. Thus, interest is a factual state which can not serve as a border of fulfillment of rights.[62]Exercising any right may result in violation of someone else's interest, but if the latter is not recognized by legislation, it can not be categorized as legal interest and therefore, can not be followed by restriction of the rights of the individual. The situation is completely different, when interest is legal and protected, and has a defined form of protection. This can be achieved by its recognition by the law-maker as particularly important interest.[63]In spite of evolution of theinterest into the right, an opinion exists, that interest itself has borders of realization, similar to the abuse of rights.[64]

Human being posseses right over own body, but this should not develop into the right of harming himself/herself, resulting from „the right of ownership".[65]By taking over obligation of surrogate

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56 *Kerameus K., Kozyris P.J.,* Introduction To Greek Law, 3rd Revised edition, Kluwer Law International, 2008,188.

57 *Woodruff T.,* Oncofertility: Ethical, Legal, Social and Medical Perspectives, 2010,147.

58 *Eriksson M.K.,* Reproductive Freedom: in the Context of International Human Rights and Humanitarian Law, 1st edition, Springer, 2000, 208.

59 *Mak Ch.,* Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England, 2008, 264.

60 *Teman E.*, Birthing a Mother: the Surrogate Body and the Pregnant Self, 1stedition, University of California Press, 2010, 9.

61 *Kant I.,* Metaphysics of Morals, part I. "Critic of the Practical Mind", СПБ, 1995, 285.

62 *Porotikova O., Problemofabuse of civilrights*, 2nd ed., M.: Walters Kluwer, 2008, 73.

63 *Porotikova O., Problemof abuseofsubjective civilrights.* Walters Kluwer, 2007, 74.

64 *Kurbatov A.,*Unacceptability of Abuse of Rights, as a Way of Setting Borders for Realization of Interests. "Khozyaistvo I Pravo", N9, 2001, 27.

65 *Kereselidze D.,* Most General Systemic Notions of Private Law, Tbilisi, 2009, 203.

motherhood, an individual harms her own body, since this means its exploitation, change of lifestyle, restriction of free personal development, which contradicts public order, and is harmful for „mother's" mental well-being as well, as the woman has to first estrange and then – despice the human being inside her body, to be able to give it up. Surrogacy is harmful for the children born as a result of this kind of arrangement as well, as when the child learns that caregivers are not his /her real parents, but he/she was born on a basis of comercial arrangement, for the purpose of financial gain by the mother, this can have negative impact on relationships between family members, as well as child's dvelopment and self-seteem. The same is true for the other children of the surrogate mother, who see the parent trading with children and become obsessed with the fear that they, too, can be „sold out".[66]Besides, intrusion of the third person between the spouses can endanger integrity of the family.

Georgian legislation, similarly to many other countries, prohibits organ trading as behaviour,not compatible with ethical values. Comercial arrangement over body organs is against principal human rights and liberties, first of all, against human dignity and individuality.[67]But the Georgian law „On organ transplanation" does not concern use of embryos and reproductive cells.[68]If sell-out of the body organ, even when it is an only possibilty to „save" an individual is violating human dignity and is thus unjustified, trade with embryos and genetical/reproductive „material" should be even more unacceptable, since, in contrast with individual organ, embryo is a potential human being.

Each part of the society has its own moral values and out of this abstract morals, strives to protect traditionally accepted rules. Violation of these moral rules means failure to comply to the minimal requirements of legal ethics, existing in the given time context. The issue is being complicated by the fact, that moral is a relative category, which changes over the time in accordance with the cultures of various countries, religions, traditional values. Moral is a rule of conduct, existing and functioning in a particular group of people. In German legislation, moral values are described as „ideas on honesty and integrity, established through the common sence and beliefs of every justly thinking human being"."[69]

Decision on ethical assessment of a particular norm should be made considering interests of all the people. The role of religion should be considered, as well, as vast majority of Georgian population are Orthodox Chirstians. At the Conference, organized by Georgian Patriarchy and the representatives of the Catholic Church on 23th March, 2011, surrogate motherhood was condemned as unacceptable behaviour.

In spite of above-mentioned, it is hard to imagine existance of generally accepted rule of conduct resulting from the moral norm, which would not be supported by respective legislation, so it is advised not to try to expand evaluation horizonspointing at ethical norms, but indicate on respective values existing in the legal system.[70]

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66 *Hendrick J.,* Law and Ethics in Children's Nursing,1st edition, Wiley-Blackwell, 2010,156.

67 Convention "On human rights and biomedicine" (2001).

68 Georgian law "On organ transplantation", Article 2, (Georgian Legislative Digest №8, 15/03/2000).

69 *Diefenbach A.K.,* Leihmutterschaft – Rechtliche Probleme der für andere übernommenen MutterschaftDarmstadt, Frankfurt am Main, 1990, 109.

70 *Kereselidze D.,* Most General Systemic Notions of Private Law, Tbilisi, 2009, 281.

9. Conclusion

Protection of reproductive rights is one of the preconditions for assurance of principal human rights and liberties. In the sphere of protection of given rights, protection of interests of a future child bears a particular importance. Georgian legislation permits a form of assisted reproductive technology – surrogate motherhood, but the existing norm only considers its legalization and does not cover number of important issues, regulated by the special laws in many other countries. The comparative assessment has clearly demonstrated the gaps existing in Georgian legislation, which justifies regulation of the issue by the special law, or making ammendments to the Georgian law „On health care“, which, in the process of legal regulation of supported medical reproduction, would take into consideration report ofEuropean Council, experience of the countries of continental Europe, cultural and religious values of Georgia,opinion of the orthodox church, and as a result – would not accept surrogate motherhood and would consider a woman, who gives a birth to a child–his/her mother.

KETEVAN KOCHASHVILI*

INTERDEPENDENCE BETWEEN OWNERSHIP AND PROPERTY

(With respect to the emergence of concepts and property right)

1. Concept of Ownership

1.1 Ownership Elements

Person's relationship with the things forms two types of order: *de facto* and *de jure*. *De jure* possession over the article is the property[1] and actual possession over the article[2], independently of legal basis of such possession is called ownership[3]. Title, as the legal power over the article is opposed by ownership[4], as actual power recognized by legal order[5]. Ownership is the situation where the articles are indivisibly linked with the owner's person and are subordinated to his will[6], subjected to his direct control[7]. German Pandects law, under the concept "Die Gevere" implied such fact of taking possession of the article, which provided for the owner's ability to perform certain actions with respect of the article (Girke).[8]

According to contemporary German civil law, ownership implies taking actual willful possession of the article, actual control over it (Baur) [9]. French civil law considers ownership as the condition of conscious, actual possession by a person[10].

Though according to the view recognized in civil law the ownership is the fact and not the right[11], there is the opinion regarding its consideration as a right: Savin regarding animus posidendi (ownership will) as the permanent basis for ownership and built ownership on the will of subject, considered ownership as a fact, as well as the right[12]. Some Russian and other civil law professionals regards

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1 *Westermann H.,* Sachenrecht. Ein Lehrbuch, Heidelberg, M**ü**ller, 1998, 128. reference in *Vasilevskaia L.Yu.,* Doctriine on Property Deals According to German Law, M., 2004, 68 (In Russian).

2 *Dernburg G.,* Pandects, *v*. 2. translation by *Blokh A.Yu., Galper A.Ya., Untelova D. I., Shneider K.A.,* editor *Meiendorf A.F.,* 1905, 3 (In Russian).

3 *Pokrovski I.A.,* Key Problems of Civil Law, M., 1998, 223 (In Russian).

4 *Ennektserus L.,* Course of German Civil Law, T. 1, M., 1949, 270 (In Russian).

5 *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tb., 2009, 223 (in Georgian).

6 *Sklovski L.A.,* Property in Civil Law, M., 1999, 127 (In Russian).

7 *Chogovadze L.A.,* Structure and Condition of Civil Legal Relations, M., 2004, 317(In Russian).

8 Citation from: *Vasilevskaia L.Yu.,* Doctrine on Property Deals According to German Law, M., 2004, 31 (In Russian).

9 Citation from*: Zhalinski A., Rericht A.,* Introduction to German Law, M., 2001, 408 (In Russian).

10 *Morander Zh.D.,* Civil Law of France, T. 2, M., 1960, 71(In Russian).

11 *Shapp Yan.,* System of German Civil Law, M., 2006, 81 (In Russian).

12 Citation from: *Vasilevskaia L.Yu.,* Doctrine on Property Deals According to German Law, M., 2004, 42 (In Russian).

ownership as a right: if the right is power of the will, ownership corresponds to this sign of right; as the object of ownership is a article, actual power over it is created irrespective of the will of passive subjects, is protected from all, as its violator may be any person and it place is among the property rights[13]. Ownership is not an actual condition; it is the right, though of smaller extent than the title[14].

In the law of continental Europe ownership maintains the substance coming from Roman law. It implies existence of two elements: material (objective – corpus possessions), what is the actual condition of taking physical possession over the article and willful (subjective - animus possidenti), what is expressed in the person's will to own the article for his own interests[15]. Thus, for gaining possession over the article, direct empiric influence over the article is required, which is accompanied by the owner's will to treat the article as its own one (Savin) [16].

Objective element of ownership is the actual ability of direct control over the article and exclusion of the influence of any other people over it[17]. Corpus is the external relation between the person and article, which exists until the article is actually within the composition of economic environment of the person[18].

Material element of ownership is achieved by the person's action, which may be the result of expression of one-sided or mutual will. For example, one-sided taking possession over the article, on its side, may be rightful (taking possession over the article without any owner) or wrongful (intentional arbitrary taking possession over the other person's article). Action implemented via expression of mutual will for creation of ownership is tradition (transfer of the article). There is the case of creation of ownership without its elements, through legal fiction. In particular, at a time of bequeaarticle ownership, the ownership is transferred to the heirs in the same form, in which it existed with the testator (Article 157 of Georgian Civil Code (hereinafter CCG)). In this situation, by objective will of the law, the supposed heir is recognized as owner, gaining of ownership does not depend upon whether the hair is aware about his condition and quantity of the bequeathed property. Purpose of fiction is maintaining of the heir's condition before acceptance of the inherited property and preventing prejudice of the right of succession[19].

Second necessary element for existence of ownership is existence of the ownership will. Animus means the desire to maintain actual possibility of use of the article. By this the ownership differs from person's simple spatial relation with the article. Sometimes, the will element is not apparently expressed by the person, but it is implied. For example, a person is regarded as owner of the article, which was brought to his home when he was out. Inclusion of the article into economic environment provides basis to offer that the person desires to maintain the right of use of the article[20]. Only legally

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13 *Shershenevich G.F.,* Textbook in Russian Civil Law T.1, 11th ed., M., 1914, 142 (In Russian).

14 *Mattey U., Sukhanov E.A.*, Key Provisions of the Property Law, M., 1999, 119 (In Russian).

15 *Vasiliev E.A., Komarov A.S. (ed.),* Civil and Commercial Law in the Foreign Countries, T. 1, M., 2004, 411-412 (In Russian).

16 From: *Vasilevskaia L.Yu.,* Doctrine on Property Deals According to German Law, M., 2004, 41. In common law, for gaining of legal ownership, which is identical to the institute of ownership in the law of continental Europe, with the intention of the distinguished control over the article execution of the factual control over it is required *Vasiliev E.A., Komarov A.S. (ed.),* Civil and Commercial Law in the Foreign Countries, T. 1, M., 2004, 411-412 (In Russian).

17 *Bagirov A.,* Concept and Civil Law Meaning of the Ownership, as the Element of Property Law. South-Caucasian Law Magazine, №1, 2010, 58 (In Russian).

18 *Grimm D.D.,* Lectures in the Dogmas of Roman Law, 5th ed., Petersburg, 1916, 156 (In Russian).

19 *Zoidze B.,* Comment to the Civil Code of Georgia, v. II, Tb., 1999, 52 (In Georgian).

20 *Grimm D.D.,* Lectures in the Dogmas of Roman Law, 5th ed., Petersburg, 1916, 156 (In Russian).

capable person can have the ownership will. Will of incapable person, with respect of the law, i not taken into consideration, it is regarded hat they are not able to own independently. Therefore, the element of will of the ownership is implemented by their lawful representatives[21]. Person's involuntary spatial connection with the article does not establish ownership. For example, physical touch with the article by a person cannot be regarded as ownership, when he is not aware about existence of the article[22]. In addition, not all wills create the element of willfulness, the intention of owning of the article for himself, as his own with full possession over the article should exist. [23]

1.2 Subjective and Objective Theories of Ownership

Ownership differs from holding and possession with the intention of owning. The holder has the will and by this he is distinguished from the simple dealing with, though his will is qualitatively different. Holder's will is directed towards taking possession of the article for the interests of a person, on whose behalf he owns[24]. Those, who fully depend on the others, has no basis to propose to use the article for his own interests and the owner, with the owner, with the servant's assistance, uses his own article as confidently, as if he had it in his hands[25].

It is apparent that existence of two elements in ownership was not doubted by the continental European law system. The dispute dealt with which element was constitutional in ownership. In this respect, the Savin's and Jhering's theories on ownership, i.e. Roman and German views about ownership oppose. According to Roman view, ownership i related to the legal result, if it includes two elements and in German view, which was formed in the medieval period, the ownership had not animus as the basis and legal outcome resulted from the factual situation[26]. According to Savin's subjective ownership theory, in setting of ownership the decisive is existence of the intention of ownership as such. Ownership is established by factual possession over the article performed with this intention only, if no such will exists, ownership is provided for the interests of the others and only detentio (holding) takes place[27].

This theory provided basis for Civil Code of France, which regards lessee, hirer, custodian, pledgee and all other subjects, who hold the proprietor's article temporarily, on the basis of property

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21 *Bagirov A.,* Concept and Civil Law Meaning of the Ownership, as the Element of Property Law. South-Caucasian Law Magazine, №1, 2010, 61 (In Russian).

22 *Simolin A.A.,* Definition of Ownership According to Our Project and German Layout, in the Book: Onerousness, gratuitousness, mixed agreements and other theoretical problems of civil law, M., 2005, 513 (In Russian).

23 *Belov V.A.,* Civil Law, M., 2003, 460 (In Russian).

24 *Zhalinski A., Rericht A.,* Introduction to German Law, M., 2001, 408. In common law to the term "hold" corresponds factual ownership, implying executing of actual control over the article by a person, without the right of special control over such article. In case of holding the proprietor does not refuse to execute power over the article, simply he subordinates it to the physical action of the other person. For example, workers in the enterprise, sales personnel in the shops. They have no desire to use and dispose the articles for their interests. *Jencs E.,* English Law, M., 1947, 253 (In Russian).

25 *Dernburg G.,* Pandects *v.* 2. Translation by *Blokh A.Yu., Galper A.Ya., Untelova D. I., Shneider K. A.,* editor *Meiendorf A. F.,* 1905, 109 (In Russian).

26 *Shershenevich G. F.,* Textbook In Russian Civil Law T.1, 11th ed., M., 1914, 254 (In Russian).

27 *Zoidze B., Possessio* Concept in future Civil Code of Georgia. in the book: *Zoidze B.,* Georgian Property Law, Tb., 2003, 427(In Georgian).

or obligation law, as a holder. The Code has presumption to differentiate the owner and holder: it is proposed that each person owns for himself, as a proprietor, unless it is proven that ownership commenced for the other person and vice versa, if actual possession commenced for the other person, before proving of the contrary, it is implied that it is performed in the same way as at a time of commencement[28].

Jhering's objective ownership theory, in establishment of ownership, adds decisive significance to corpus, i.e. implementation of actual, real possession over the article, though this theory does not reject the element of will. It is regarded that it is materialized in the material element and the latter, at the same time, includes the desire of owning, corpus, in a form of silence, contains animus[29], corpus is materialized animus[30]. Understanding of the power, control, always implies existence of the subject's will. Understanding by a person that he executes actual power over the article, is of decisive significance for giving legal significance to the actual relations with respect of the article[31]. According to Jhering' opinion, the Roman lawyers, with the exception of Pavlus, unlike Savin and his supporters, do not add to animus the most important legal significance for establishing of ownership. Pavlus's opinion was not the recognized principle o Roman law but the theoretical construction[32]. Savin, similar to Pavlus, attempted to dogmatize what was explained by the views of historical nature.[33].

German Civil Code was based on Jhering's theory, according to which, gaining of the article's ownership is provided via gaining of actual power over it (§854). Consequently, the ownership is terminated if the owner rejects actual control over the article, or loses it in any other way (§856)[34]. Though in German Civil Code there is not specified subjective element in establishing of the ownership, German civil doctrine and judicial practice recognizes it as one of the preconditions for gaining of ownership[35].

Based on the objective theory of ownership, German Civil Code recognized as owners all persons, who had actual possession over the articles, whether this was in their own name or on behalf of the others. German Civil Code considered persons, who owned the proprietor's property temporarily, on the basis of agreement (direct owners) aside to the proprietor and wrongful owner (indirect owner).

1.3 Norm of Georgian Civil Code – Modernized Unity of Subjective and Objective Theories

Georgian Civil Code elates establishment of the ownership with co-existence of subjective and objective elements: ownership of the article is created by willful gaining of actual power (Section I of Article 155). It should be noted that Occording to the position in Georgian civil doctrine, in Georgian

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28 *Yaichklov K.K.(ed.),* Civil and Commercial Law of the Capitalist States, M., 1966, 195 (In Russian).
29 Citation from: *Zoidze B.,* Georgian Property Law, Tb., 2003, 427(In Georgian).
30 *Jhering R.,* Theory of Ownership, M., 1895, 5 (In Russian).
31 *Chechelashvili Z.,* Property Law, Tb., 2006, 53(In Georgian).
32 *Jhering R.,* Theory of Ownership, M., 1895, 43 (In Russian).
33 *Grimm D.D.,* Lectures in the Dogmas of Roman Law, 5th ed., Petersburg, 1916, 164 (In Russian).
34 German CC (as of March 1 2010), translator and editor *Chechelashvili Z.,* Tb., 2010, 180 (In Georgian).
35 *Chechelashvili Z.,* Property Law, Tb., 2006, 53 (In Georgian).

reality animus does not play decisive role in ownership structure. By its establishment the law requires only general will, person's awareness that he executes actual control and not that at this time his will is directed towards possession as proprietor[36].

Though ownership shall be gained with expression of the owner's will, i.e. he shall desire to be owner, or a person shall become owner by his will[37], the element of will does not imply only awareness in ownership of the article, as not owner but even holder does not posses without awareness. He has the will as well, which implies possession not for his but for the others' interests. CCG, similar to Roman law, does not imply a person's will to possess only as proprietor, as in such case only proprietor or wrongful owner will be regarded as owner. It implies the owner's intention to own the article for his own interests; ownership should be directed towards the owner's personal use[38].

1.4 Legal Figure of the Holder

German civil law knows the category of holder as well, Jhering regarded that any possessor is the article's owner but in cases specified by the law he is regarded as holder[39]. In particular, person, who executes actual possession of the article, in the others' interests, for his benefit, in his house, enterprise or on the basis of the other relationships, where in relation with the article he follows the instructions of the other person and is dependent upon him (§855) [40].

Similarly, according to Georgian civil law, not all actual possessors of the article are regarded as owners. A person who executes possession of the article for the other person, for the others' benefit shall not be regarded as owner. In such case, the owner is a person, for the benefit of whom the actual possession of the article is executed (Section II, Article 155, CCG). Holder has no independent, personal interest in relation with the ownership of the article. His attitude towards the article is apparent and is based on social relationship with the owner, who may be of a nature of public law, for example, ownership of the weapons by the soldier or policeman or of an nature of private law, for example, ownership of the articles in enterprise by the worker, ownership of the proprietor's articles by the home servant or seller[41].

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36 *Chechelashvili Z.,* Ownership, characteristics of consideration of he civil cases, magazine Law and Justice, №1, 2007, 65 (In Georgian).

37 *Zoidze B.,* Georgian Property Law, Tb., 2003, 57(In Georgian).

38 *Chitoshvili T.,* Delict and Some Legal Aspects of Delict Obligations, Magazine "Jurisprudence", №1, 2008, 58 (In Georgian).

39 *Jhering R.,* Theory of Ownership, M., 1895, 3 (In Russian).

40 *Venkstern M.,* Bases of Property Law, in the book: Issues of Civil and Enterprise Law of Germany, M., 2001,183 (In Russian).

41 *Zoidze B.,* Georgian Property Law, Tb., 2003, 59 (In Georgian).

1.5 Double Ownership – Deviation from the Tradition of Roman Law

1.5.1 Finding of German Civil Law

By recognition of direct and indirect ownership over one and the same article the german legislator has created the structure of double ownership, unknown before for civil law[42]. Roman law did not know it, according to Roman law, full ownership of one and the same article by two persons could not be imagined as sitting of one person at the place where the other was sitting[43]. Direct and indirect owners stand not side by side, as in case of common property but one over another. Indirect ownership is the source for creation of direct ownership. Though direct owner has independent condition, but it is subordinated with respect of the indirect owner[44].

According to German Civil Law, direct ownership implies actual possession of the article. The owner is direct owner if he not only has the article in his hands but he is able to execute control over it, without direct contact; for example, the owner of the car at car parking[45]. Indirect ownership is created on the basis of legal relations. According to German Civil Code, if a person owns the article as usufructuary, pledgee, lessee, hirer, custodian or on the basis of similar legal relations, by virtue of which he is authorized or obliged to own for the stated term, with respect of the other person, the other person is the owner as well (indirect ownership - §855) [46]. In these relations the direct owner desires to be the direct master in his sphere, but he recognizes the proprietor's right[47].

If a person does not share ownership with anyone other, he, at the same time, is the independent owner, he owns by the desire of owning (e.g. proprietor, unlawful owner). And if he transfers the article to the temporary ownership of the other person, e.g. to the lessee, the proprietor's ownership will transform into indirect ownership and the lessee will be the dependent and direct owner, who takes into consideration existence of the article's proprietor. In case, where the lessee, upon proprietor's permit, transfers the article with sublease, the proprietor's indirect and independent, lessee's indirect and dependent and sub-lessee's direct and dependent ownership will take place[48]. Russian Civil Code does not know double ownership, though, in the doctrine there is expressed the view about its practical benefits, for the purpose of improvement of the legal and technical instru-

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42 Before creation of German Civil Code, in the philosophy of German Law, Kant's doctrine the concept of double ownership of one and the same article was developed in a form of intellectual and empirical ownership in the former case full ownership without use takes place, where the main thing is a person's intention – treat with the article as his own, without empirical possession, i.e. in this case there is the legal link understood intellectually with the article exists and the ownership of the latter type implies full use, with physical ownership, person's physical capacity to use the article at his own discretion, citation from: *Vasilevskaia L. Yu.,* Doctrine on Property Deals According to German Law, M., 2004, 37 (In Russian).

43 *Pokrovski I.A.,* Kay Problems of Civil Law, M., 1998, 230 (In Russian).

44 *Baur J.F., Stürner R.,* Lehrbuch des Sachenrecht, München, 16. Auflage, 1992, 59. Reference from: *Zhalinski A., Rericht A.,* Introduction to German Law, M., 2001, 4010 (In Russian).

45 *Piatin S.Yu.,* Civil and Commercial Law of the foreign Countries, M., 2009, 99 (In Russian).

46 *Vasilevskaia L.Yu.,* Doctrine on Property Deals According to German Law, M., 2004, 181 (In Russian).

47 *Berngeft F., Koler I.,* Civil Law of Germany, СПБ, 1910, 119 (In Russian).

48 *Piatin S. Yu.,* Civil and Commercial Law of the foreign Countries, M., 2009, 99 (In Russian).

ments, which could be used in development of the norms for protection of ownership, in civil and civil procedural legislation[49].

In German civil law, at a time of execution of actual control over the article the presumption of recognition o the person as owner applies as in establishment of ownership existence of corpus is sufficient, which includes the will of ownership. Each person acts in the property relations with his own interests and no intention to act for the other person's interests is proposed; therefore, existence of holding should be proven[50]. It should be mentioned that RFCC does not provide for the category of holder, it does not distinguish between ownership and holding[51].

1.5.2 Double Ownership and Co-ownership

Co-ownership and ownership of different parts of the article differ from double ownership. Similar to double ownership, here the ownership is legally split. In case of co-ownership one article is owned by several persons at one time and in case of double ownership direct and indirect ownership of one article take place. The difference between them is that in case of double ownership there is two-step dividing of ownership, while in case of co-ownership, condition of actual control of co-owners is of single-step nature: the co-owners are either direct or indirect owners. Co-ownership may be simple and qualified. Common property corresponds to the situation of simple co-ownership, while to the qualified co-ownership – share property. In case of simple co-ownership each co-owner has proprietary power, which should be respected by the others. For example, in case of purchase of the article by several persons, the property right of the article belongs to them jointly (shared title), Thus, each of them has right to use the common article[52]; similarly, in case of common property of the spouses co-ownership over the welfare in the common ownership, which they use jointly[53]. Qualified ownership corresponds well to the participation interests. Share in the common property may exist in a form of ideal share, where the share is determined on the basis of documents or agreement between parties, so that each of them is unaware, actually what is their share in the property, after determination, the share becomes actual[54]. Share property emerges, for example, on the basis of partnership agreement. Contributions of the participants of joint business (partnership), unless otherwise provided by the agreement, are regarded as common property of the participants. Their common property is also what is purchased on the basis of the rights in common ownership, or obtained in a form of compensation, in case of destruction, damage or withdrawal of the common property. Share is determined according to the contributions, or equally, upon agreement between participants. [55]

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49 *Vasilevskaia L.Yu.,* Doctrine on Property Deals According to German Law, M., 2004, 36 (In Russian).

50 *Dernburg G.,* Pandects *v*. 2. translation by *Blokh A. Yu., Galper A. Ya., Untelova D. I., Shneider K. A.,* editor *Meiendorf A. F.,* 1905, 26 (In Russian).

51 *Sergeev A.P., Tolstoi Yu. K.(ed),* Civil Law, Ч.1., СПБ, 1996, 297 (In Russian).

52 *Khetsuriani J.,* Comment to the Civil Code of Georgia, book IV, v. I, Tb., 2001, 333 (In Georgian).

53 *Zoidze B.,* Comment to the Civil Code of Georgia, v. II, Tb., 1999, 63 (In Georgian).

54 *Shotadze T.,* Comparative Analysis of the Norms Regulating Common Property and Shared Rights, According to Civil Code of Georgia Magazine "Law Magazine", №2, 2009, 21 (In Georgian).

55 *Khetsuriani J.,* Comment to the Civil Code of Georgia, book IV, v. I, Tb, 2001, 283 (In Georgian).

2. Nature and Private Law Bases in Property right

2.1 Property as the Pre-state Right

Ownership, as the substantial institute of civil law, shows the most common features with the property. Property is the integral part of juridical thinking. It is the a priori legal category and not the public one[56]. Category of property is ahead of legal experience of juridical thought[57]. Property belongs to the nature order of articles and therefore, it is the inevitable and unchanged fact of the life[58]. Similar to freedom, property is the elementary fundamental right[59].

Property right is the significant token of personal freedom. It is the means of development of the individual desires originating from human nature[60], the guarantee of revealing of the free will of individual. Conception of an individual, as a person, as the free creature with its nature is clearly expressed with the property. Property is the personal expression of individual, the external sphere of his freedom[61], it is the human freedom, which is realized in the world of events (Hegel), [62] only by owning and control of the property it is possible that individual embodied his desire in the external articles and pass beyond subjectivity of direct existence (Hegel) [63], property is certain qualitative nature of the person[64]. Property right is the feature of personality, personality is determined by its nature characteristics, human personality could not be imagined without property[65]. With the property the individual is manifested not only as intellect but also as a free subject[66]. Property is similarly valuable for each individual as is his life (Portalis) [67], only due to the property the welfare owned by the individuals is available, in a form of public and moral freedom (R. Zomi) [68]. Property right is the elementary fundamental right, which is internally linked with the guarantee of the personal freedom. Its objective is, within the common set of fundamental tights, to ensure freedom for those, having these rights, in the property sphere and thus

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56 *Radbrukh G.,* Philosophy of Law, translated from German by *Yumashev Yu. M.,* M., 2004, 151.

57 *Stammler R.*, Theorie der Rechtswissenschaft, Halle, 1911, 253. Reference: *Radbrukh G.,* Philosophy of Law, translated from German by *Yumashev Yu.M.,* M., 2004, 151 (In Russian).

58 *Pipes R.,* Property and Freedom, Tb., 2004, 25 (In Georgian).

59 *Zoidze B.,* Constitution Control and Order of Values in Georgia, Tb., 2007, 96 (In Georgian).

60 Frisero (Right of Respect to the Property, Article 1 of Convention on Fundamental Human Rights and Freedoms in the book: Property Right and Right to the Fair Trial, Materials for International Scientific-practical Conference, 2005, 33 (In Georgian).

61 *Hegel G.,* Philosophy of Law, M., 1990, 101. Reference: *Chanturia L.,* Ownership of Real Property, Tb., 1994, 85 (In Georgan).

62 Citation from: *Pipes R.,* Property and Freedom Tb., 2004, 60 (In Georgian).

63 Citation from: *Pipes R.,* Property and Freedom, Tb., 2004, 894 (In Georgian).

64 *Sklovski K.I.,* Property in Civil Law, M., 1999, 133 (In Russian).

65 *Zoidze B.,* Concept of the Entrepreneur and its Theoretical-Practical Significance, Characteristics of the Property Right in the Corporative Companies (Based on the Practice of Constitution Court) in the book: Theoretical and Practical Issues of Contemporary Corporative Law, Tb., 2009, 89 (In Georgian).

66 *Zoidze B.,* Concept of the Entrepreneur and its Theoretical-Practical Significance, Characteristics of the Property Right in the Corporative Companies (Based on the Practice of Constitution Court) in the book: Theoretical and Practical Issues of Contemporary Corporative Law, Tb., 2009, 94 (In Georgian).

67 Citation from: Civil, Commercial and Family Law of Capitalist States, Collection of the Normatiev Acts: Civil and Commercial Codes, *Kulagin M.M.* (*ed.),* M., 1986, 4 (In Russian).

68 Citation from: *Saveliev V.A.,* Civil Code of Germany, M., 1994, 42-43 (In Russian).

allow them arranging of their own life with their responsibility[69]. Property, due to its fundamental nature and constitutional value, maintains the highest rank among other rights[70].

2.2 Property – Distinguished Power over the Article

Civil Law order considers the property as the property right of the highest rank. Property right means person's direct power over the article, person's direct control over the article, in which the determined nature of the articles' world is realized to serve to satisfaction of the human requirements[71]. A person with property right executes all his rights over the article himself, without relations with the other person and against him is the undetermined circle of persons, who are obliged to respect his power, or the property right is the measure of power secured by the law, for the subject with this right, in relation with the article and other persons, with respect of the article, for satisfaction of his own interests (Girke) [72].

In the concept of property, the property law implies particular power of the proprietor over the article. Property is the unlimited and distinguished power of a proprietor (Savin)[73], it is the right of all-embracing power allowed by the law and order[74], it is the human right executed over the article[75], it is the right providing full entirety of power over the article, what is compatible with the legislation, nature and law[76], it is the power of will in relation with the article[77], it is the right, by virtue of which the subject is subordinated unconditionally and particularly, to the actions and will of a person, [78] it is the legal granting of the property to a person[79].

3. Concept of Property Substance

3.1 Reasonability of the Concept

Doctrine of civil law defines the concept o property and positive civil law – the contents of the property. In addition, there is the view that formulation of definitions, in many cases, is unreasonable, as it is hard to find the required expressions[80]. The definitions should be rather regarded as the sphere

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69 *Zhalinskli A., Rericht A.,* Introduction to German Law, M., 2001, 418 (In Russian).

70 *Zarandia T., Jugeli T.,* Property Right Abuse and Conditions of Non-Desposability according to Georgian and French Laws, South Caucasian Law Magazine, №1, 2010, 17 (In Russian).

71 *Kniper R.,* Law and History, Baden-Baden, Almaty 2005, 205 (In Russian).

72 Citation from: *Arkhipov S.I.,* Problem of Property, Magazine „Jurispudence", №1, 2007 (In Russian).

73 Citation from: *Mattey U., Sukhanov E.A.,* Key Provisions of the Property Law, M., 1999, 43 (In Russian).

74 *Baur F.,* Lehrbuch des Sachenrechts. München, 1975, 1731. Reference: *Lazar Yan,* Property in Bourgeois Law Theory, M., 1985, 48 (In Russian).

75 *Zhalinski A., Rericht A.,* Introduction to German Law, M., 2001, 416 (In Russian).

76 *Dernburg G.,* Pandects *v*. 2. translation by *Blokh A. Yu., Galper A.Ya., Untelova D. I., Shneider K.A.,* editor *Meiendorf A.F.,*1905, 59 (In Russian).

77 *Sklovski L.A.,* Property in Civil Law, M., 1999, 150 (In Russian).

78 *Planiol M*., Traite elementaire de droit civil, 1920. t I. P. 718. Reference: *Vacheishvili Al.,* From the History of Georgian Law, III, 1963, 32 (In Georgian).

79 *Izoria L.,* Protection of Rights on Land, Minerals and Natural Resources, Comparative Legal Analysis on the basis of Georgian and German Law, Tb., 2002, 19 (In Georgian).

80 *Saveliev V.A.,* Civil Code of Germany, M., 1994, 20 (In Russian).

of doctrine. Doctrine and legal practice should become the basis for definition of the legal goods, what would become not the reason of legal chaos but rather facilitate making correct decisions by the courts. As for the legislator, he shall be careful with the definitions, as it is dangerous, because it may fail to reflect the actual situation[81].

In general, position, with respect of legal definitions, is partly shared with respect of the concept of the property right. It is unreasonable to formulate specific definition of the property as all definitions are limitations, placing within certain scopes (definitio – identification of limits, limitation (Lat.)) and therefore, definition of the property right within the legislation is useless. Definition of its substance by listing of the proprietor's rights will never be full, as there will always be such authorities, which were not included into the list. In case of existence of the latter the great energy will be wasted, regarding circulation interests, in appropriating the specific everyday requirements with the list of authorities[82].

3.2 Elements of Property Substance Concept

Irrespective of the above view, staring from Roman law, the attempts of abstracting of the property substance concept is within the civil law science. There is the view that general definition of the substance of property right within the scopes of the law, in a form of ownership, use and disposal rights is the reasonable abstraction, which is useful and necessary, if we do not require more that it can express[83].

According to the view adopted in German doctrine, the concept of property within civil law provides the basis for constitutional-legal understanding of the property; civil law still remains the teaching master in the center of constitutional-legal dogmatics. [84]

The Romans distinguished 5 elements in the concept property substance. In addition to 3 elements, which composed the concept of substance of the property, in the medieval period, in a form of so called triad (ownership, use and disposal), the Romans also included into the property the rights of gaining products of the property and the right of withdrawal from the unlawful owner[85]. As for the triad, according to the position, dominating in the doctrine, jurisprudence of medieval period is regarded as the source of its origination[86], though, there is also the view that traditional definition of the proprietor's authorities, in a form of ownership, use and disposal is characteristic for all formations[87]. Authority of ownership – Ius possidenti is the possibility to actual possession of the article, authority of its use given

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81 *Zoidze B.,* Reception of Private Law in Georgia Tb., 2005, 156 (In Georgian)

82 *Sklovski L.A.,* Property in Civil Law. M., 1999, 133 (In Russian).

83 *Jorbenadze S.,* Property and Property Right, TSU Works 1960, 111. ReferenceL Chanturia L., Ownership of Real Property Tb., 1994, 47 (In Georgian).

84 *Leisner,* Walter Eigentum: Schriften zu, Eigentumstgrundrecht und Wirtschaftsverfassung, 1970, 1996, Hrsg von Josef Isensee. Berlin: Dunker und Humbolt, 1996, Schriften zum affentlichen Recht, BD, 712, 112. Reference: Zoidze B., Constitution Control and Order of Values in Georgia. Tb 2007, 95 (In Georgian).

85 *Nadareishvili G.,* Roman Civil Law, Tb., 2008, 64 (In Gerogian).

86 *Rubanov A.A.,* Problem of Improvement of theoretical model of property right. Development of the Soviet Civil Law at Current *Stage M.,* 1986, 105 (In Russian).

87 *Vebediktov A.V.,* State Socialist Property M., 1948, 17(In Russian).

to a person – Ius utendi implies use of the article at one's discretion, gaining of the products and incomes from it and in the right of disposal – Ius disponendi the possibility of implementation of actions determining the legal fate of the article at one's discretion is understood[88].

3.3 Reasons of Creation of Triad

In the medieval period, creation of the triad was conditioned by the number of social, formal and cultural reasons. This was the period of rituals and formalism, which was sick with its predilection for classification. Unlike the epoch of Roman law, here the unambiguous understanding of freedom and equality is rejected, there is no common, clearly understanding of freedom, there is no full freedom and there is no full limitation as well[89].

In the feudal epoch there is the fractured, relative ownership. Unlike the beneficiary ownership, where the vassals had only the right of use of land only, what was ended by his or seignior's death, at a time of feoffment, on the side of vassals there appear the signs of property rights, though depending on the others. Both, the seignior and vassal had the rights of ownership, use and disposal, at more or less extent[90]. Ideal side of the property belonged to the seignior and the actual side belonged to the vassal, the subordinated owner. He owns and uses the property entirely, but he is restricted with respect of disposal authorities[91]. By transferring of the property to vassal the seignior did not lose the property right over it. He only gave to the vassal the part of authorities of classical triad, to certain extent, which was close to the property right or included the vassal's authority to dispose of the estate at certain degree[92]. The legal figure of splitted property was developed in the 12th century, by Italian glossators. Further it spread all over Europe, to distinguish the conditions of vassal and feoffment lord, the latter's right was in a form of the supreme proprietor and of the vassal – using owner[93].

3.4 Choice of Contemporary Positive Law – Rejection of Triad

In contemporary world the lawyers are not satisfied with definition of the proprietor's authorities in a form of triad and they attempt to understand the substance of property in a new way. Some of them attempt to state short definition, emphasizing the substantial features of the property, the others add new elements to the triad. This s observed as in the doctrine of continental Europe also in the doctrine of common law. For example, in the opinion of Italian lawyers, property includes two authorities: authorities of use and disposal. At the same time, disposal is the extreme limit of authority of use. Thus, the property right can be reduced to the authority of use[94]. Critical approach to the triad is observed in positive law as well.

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88 *Sklovski L.A.,* Property in Civil Law, M., 1999, 118-119 (In Russian).

89 Ibid, 124.

90 *Planiol M.,* Traite element. de droit civil. 1920. t.I p. 716. reference: *Vacheishvili Al.,* From the History of Georgian Law, III, 1963, 54 (In Georgian).

91 See: *Pobedonostsev K. P.,* Course of Civil Law, T. 1, M., 2003 (In Russian).

92 *Berman G.D.,* Western Tradition of Law Formation Epoch. M., 1998, 425 (In Russian).

93 Kniper R., Law and History, Baden-Baden, Almaty 2005, 208 (In Russian).

94 *Kulagin M. I.,* Selected Works, M., 1997, 252 (In Russian).

Civil Code of France (§544), in defining of the property substance specifies two elements only – use and disposal: property right is the right of use and dispose of the article, in the most absolute form, so that the use was not of a type prohibited by the law or regulations. [95]

German Civil Code, unlike the legislation of Democratic Republic of Germany, where the property was formulated in a form of triad[96], does not provide for traditional list of the proprietor's authorities, as it is regarded that the property right is not a sum of separate authorities. Code specifies the disposal authority only. In particular, in accordance with section 903, the owner of the article may, unless it is in contradiction with the law or rights of the third person, use the article at his own discretion (authority of influence) and exclude all influence of the others over it (authority of exclusion) [97]. It should be note, that German constitutionalists particularly distinguish disposal, among property elements. Disposal is the significant manifestation of free use of the property and viability of civil circulation. Right of disposal of the property is the traditional and basic aspect of the property. By disposal the property right is showed as free will of individual. Disposal is the necessary condition for movement of the property[98].

Russian Civil Code maintained understanding of property substance in a form of triad. In Russian doctrine there is the view that it is characteristic for their national legislation only[99].

According to Article 209 of Russian Civil Code, the proprietor has the authorities of ownership, use and disposal. Consequently, the doctrine defines the property nigt as the legally ensured ability of a person to own, use and dispose of his property, with his own power and at his own discretion, within the scopes established by the law[100].

Irrespective of different approaches to the substance of the property right, in the law of continental Europe ownership, as the legally ensured ability of execution of control of the article[101] is regarded as the key authority, without which existence of the property could not be imagined.

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95 *Piatin S.Yu.,* Civil and Commercial Law of the foreign Countries, M., 2009, 84 (In Russian).

96 *Dornberger G., Kleine G., Klinger G.,* Civil Law of German Democratic Republic (property law) translation from German by *Boguslavski M.M.* and *Narishkina R. L.,* M., 1957, 78. Constitution Court of german Democratic Republic in one of its decisions stated that private property ownership, use and disposal are the elements of freedom of individual's freedom of action. Kniper R. Law and History, Baden-Baden, Almaty 2005, 215 (In Russian).

97 *Shapp Yan,* System of German Civil Law, *M.*, 2006, 65. Though in the concept of the property developed by the Constitution Court of Germany specifying use and disposal. Property is legal attributing of the articles to persons executed by private benefits and special disposal authorities Leisner, Walter, Eigentum: Schriften zu Eigentumsgrundrecht und Wirtschaftsverfassung, 1979-1996, Hrsg.von Josef Isensee -Berlin: Dunker und Humbolt, 1996, 88. Reference: Zoidze B., Comment to the Civil Code of Georgia, v II, Tb, 1999, 100(In Georgian)

98 *Zoidze B.,* Comment to the Civil Code of Georgia, v II, Tb, 1999, 99(In Georgian)

99 *Sukhanov E.A.,* Civil Law, textbook, M., ч. 1, 1998, 486. (n Russian)

100 *Piliaeva V.V.,* Civil Law, General and Specific Parts. M., 2006, 115. As for the common law, there are different concepts of property substance, with 6, 11 or 3 authorities of the proprietor, e.g. the property right is defined as special right of possession, use and disposal of the article or right of economic value Lask G., Civil Law of USA M., 1961, 461. English lawyer Onore specifies 11 authorities: ownership, personal use, gaining of revenues, disposal, destruction etc. citation from: Nadareishvili G. Brief Overview of Civil and Commercial Law of Foreign Countries Tb ., 2007, 111.

101 *Belov V.A.,* Civil Law, M., 2003, 462. *Chogovadze L.A.,* Structure and Condition of Civil Legal Relations M., 2004, 37 (In Russian).

According to explanation of French lawyer of 18th century, Burgone, there is no better manifestation of existence of property right than ownership of a property[102], ownership is reality of property (Jhering) [103], the easy form of proving of its existence (Tere) [104]. The manifested act of ownership is necessary for property, by taking possession over the article expressing of the will towards this article becomes apparent for the others, subjectivity achieves objectivity[105]. By ownership the right is manifested, declaration of trust from the side of third persons is provided to the visible factual composition, serving to the security of circulation[106].

4. Interrelation between Ownership and Property in Relation with Initial Means of Creation of the Property right (Occupatio, Finding, Treasure, Acquisition Time Limitation)

4.1 General Description of the Initial and Derivative Means

Property right emerges on the basis of norms of law and in case of existence of certain legal facts regarded as means for gaining of this right. These may be initial and derived ones. This classification is based on the criterion of succession. In case of initial means, the property right over the article is created for the first time, in full extent, or independently from the will and rights of the previous owner[107]. In case of initial means the property rights over the article either did not exist at all or belonged to the other person, though no any direct link between him and new acquirer existed[108]. In such case the rules of acquisition of the property is determined by the law only and not by the agreement between the parties or unilateral willful actions of the previous owner. While in case of the derived means, acquisition of the property rights is provided through succession, i.e. the property right originates based on the will of previous owner, which is directly expressed or implied by the agreement or unilateral deal, the right is transferred to the new owner to the extent of belonging to the previous owner[109].

Among initial means of creation of the property right gaining possession over the article having no owner, treasure, finding and acquisition time limit are of interest, as in such cases the fact of ownership is the precondition for establishment of the property rights.

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102 Citation from: *Sklovski L.A.,* Property in Civil Law, M., 1999, 224 (In Russian).

103 Citation from: *Dernburg G.,* Pandects *v*. 2. translation by *Blokh A.Yu., Galper A. Ya., Untelova D. I., Shneider K.A., Meiendorf A. F (ed.),* 1905, 22 (In Russian).

104 Citation from: *Gvishiani G.,* Place of Ownership and Title in the Property Law, Magazine „Law“ №1-2, 1998,@ 41(In Georgian).

105 *Sklovski L.A.,* Property in Civil Law, M., 1999, 147 (In Russian).

106 *Cherepakhin B.B.,* Legal Nature and Justification of Acquisition of the Property RIght from the Unauthorized Disposer, Scientific Notes of Sverdlovsk Institute of Law, T. I, 1947, 96 (In Russian).

107 *Chitoshvili T.,* Key Legal Aspects of Creation of Title on Real Property, Tb., 2006, 6.; *Vasiliev G.S.,* Succession of Title as Type of Singular Succession, Magazine „Jurisprudence“, №6, 2006 , 57.

108 *Annenkov K.,* System of Russian Civil Law, v. 2, СПБ, 1900, 124 (In Russian).

109 *Ennektserus L.,* Course of German Civil Law, T. 1., M., 1949, 87 (In Russian).

4.2 Occupatio (taking possession over the unowned article)

Regarding that the owner is independent in disposal of the property, he has the right to reject the property and abandon the article[110].

Article is unowned if it has no owner, or if it was abandoned voluntarily, for the purpose of rejection of the property right by the owner[111]. According to Section I of Article 225 of RFCC, the article is unowned if it has no owner, if the owner is unknown, or if the owner has rejected the property right over it[112]. In the law of continental Europe, the mode of unowned article is applicable to the movable property only, while the real estate, having no owner is deemed state property, what excludes recognition of this property as unowned one. Legal basis for creation of the property right over unowned article is taking possession over it, establishment of control over it, for the purpose of appropriation, where the owner has direct ability to act over the article at his own discretion and eliminate the possibility of influence of the others[113]. In such cases RFCC gives preference to the proprietors or lawful owners of land parcels or other objects, where the abandoned article is located[114]. According to German Civil Code, if taking of possession is to the prejudice to someone's special rights at a time of occupation, the occupant cannot become the owner[115]. According to Georgian civil procedure law, if the court recognizes that the property is unowned, or such property is abandoned by the owner, without intention to maintain the property right over such property, it makes decision on recognition of the unowned nature of the movable property and its transfer to the ownership of the person, who has taken possession over such property[116].

4.3 Treasure

Treasure is the valuable movable article, buried or hidden for such long period that it i impossible to identify its owner[117]. Property right over the treasure belongs to the proprietor of the land parcel or movable property, where the treasure was found, if the discoverer is the proprietor of such property and if the discoverer is the other person, the discoverer and property owner will have the equal rights over the treasure[118] (Article 716 of Civil Code of France). RFCC, in such cases provides for different determination of the shares in the common property. For the purpose of observance of the law and property rights, seeking of the treasure in the other person's property, without consent of the latter is unlawful, therefore, in such case the discoverer of the treasure shall

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110 *Nadibaidze L.,* Legal Bases of Porperty Acquisition, Tb., 2002, 10 (In Georgian).

111 *Vasiliev E.A., Komarov A.S.* (ed.), Civil and Commercial Law in the Foreign Countries, T. 1, M., 2004, 363 (In Russian).

112 *Sadikov O.N.,* Comment to the Civil Code of Russian Federation, Ч. 1, M., 1997, 273 (In Russian).

113 *Shershenevich G. F.,* Textbook In Russian Civil Law, T.1, 11th ed., M., 1914, 325 (In Russian).

114 *Masevich M. G.,* Bases for Acquisition of the Title over Unowned Articles. in the book: Issues of Contemporary Civil Law, *Litovin V. H., Rakhmanovich V.A.*(ed.), M., 2000, 177 (In Russian).

115 *Berngeft F., Koler I.,* Civil Law of Germany, СПБ, 1910, 136 (In Russian).

116 *Imnadze D.,* Recognition of the Property as Unowned, Magazine "Law", №1-2, 2001, 35(In Georgian).

117 *Zoidze B.,* Bases of Creation of the Porperty Right in Anient Georgian Law (Finding and Treasure) in the book: *Zoidze B.,* Georgian Property Law, Tb., 2003, 404 (In Georgian).

118 *Vasiliev E.A., Komarov A.S.(ed.),* Civil and Commercial Law in the Foreign Countries, T. 1, M., 2004, 364 (In Russian).

have no property rights over the treasure, it fully belongs to the owner of the property where the treasure was discovered. Similar is the result, where the discoverer acted with the owner's consent, though within the scopes of his service duties (RFCC, Section I, Article 233) [119].

4.4 Finding

Finding means finding of the lost article. The legal result is not the fact of finding of lost item, but taking of possession of the finding. Finding is taking over of the other person's article, lost or forgotten, over which the owner has lost not only ownership but also the possibility of taking possession over it[120].

Unlike the treasure, which was lost for so long that proposal about existence of its owner is excluded, the finding creates the proposal that the owner of the property exists but he has lost possession thereof[121].

According to the Civil Code, the finder of the article shall transfer the article to its owner or, if he is unknown, transfer it to the mayor, who shall publish announcement. If, within 1 year period, from the date of announcement no owner is found, the finder will gain the property right over the finding. If the owner is found, the finder has the right to claim the reward and compensation of expenses made for maintenance of the article[122] (articles 927-929). According to RFCC, the finder shall perform the actions provided for by the law, for identification of the owner and to return the article to him, ensure its protection. In particular, he shall inform about the found article the person who has lost it or to the lawful owner, known to him, or transfer the finding to local self-government body. In 6 months from the date of announcement (special time limit), in case of absence of data about lawful owner, the finder shall gain property right over it. In case of waiver of such right by the finder the municipal property right creates. The finder has right to demand the rewards and compensation of expenses made for maintenance of the finding from the lawful owner or local self-government body, at a time of creation of the lawful property right[123].

4.5 Acquisition Time Limit

4.5.1 Scopes of Ownership Time Limit

Law of continental Europe knows the institute of acquisition (ownership) time limit. Western European feudalism wasted several centuries to lend Roman usucapio and thus, create the concept of acquisition time limit, as it was in the process of reception of Roman law[124].

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119 *Sadikov O.N.,* Comment to the Civil Code of Russian Federation, B. 1, M., 1997, 279 (In Russian).

120 *Annenkov K.,* System of Russian Civil Law v. 2, СПБ, 1900, 152 (In Russian).

121 *Shershenevich G.F.,* Textbook In Russian Civil Law T.1, 11th ed., M., 1914, 331 (In Russian).

122 Civil Code of Italy, P. III, Property, Title II, Chapter II, Ways of Acquisition of Title, translation by *Z.Chechelashvili,* Collection of Georgian Private Law, Tb., 2004, 300 (In Georgian).

123 See: *Gomola A. I.,* Civil Law, M., 2003 (In Russian).

124 *Bek A.,* Reception of Roman Law in Western Europe, M., 1950, 196 (In Russian).

Substance of the acquisition time limit institute implies that in the conditions provided for by the law, the actual control over the article, after certain period of time, creates the property right over it[125]. In such case the time turns the fact into the right. Here the right is created because the factual condition corresponding to such right was maintained for long period[126]. In case of acquisition of the property by time limit the situation is that the relations with respect of rights are unclear and only its owner may find the way out and due to ownership time limit it becomes the source of creation of the right[127]. This institute is applied where acquisition lacks one of the conditions with legal effect necessary for acquisition. To avoid such gap excessive care is required and this could not be claimed from the innocent participant of civil circulation in case of accelerated circulation[128]. The gap may be related to lack of authorities of the disposer (basis for absence of the property right), his legal ineffectiveness or unprotected form of deal. It is possible that no basis for gaining property right existed. For example, the owner erroneously regards himself as the heir by law or by will, while there is the heir by law, with the prevailing right, or the will for his benefit was later replaced by the will unknown to him and consequently he was deprived the right of succession.

Georgian Civil Code provides for the institute of acquisition by time limit as well. For the movable property five year innocent ownership of the property is required, while for the real property the term is fifteen years. At the same time, for the real property, the fact of ownership shall be registered with the Public Registry, where, though the owner is recorded in the Registry as a proprietor of real property, acquisition has blemish. For example, the property was acquired without any legal basis, the person registered as the proprietor has acquired the property from the unfair disposer, disposal has taken place on the basis of faked documents, or the interests of a person having the priority acquisition right were violated etc[129]. At the same time, the real property may be acquired by the unfair owner as well, as in this situation the data of Public Registry are of significance, rather than subjective attitude of a person, with respect of validity of acquisition. Fact of registration annihilates the unfair will[130]. It should be noted that Georgian legislator has allotted the regress force to the time limit, in the transition provisions of the Code there was included the provision stating that the mentioned term shall be counted from 1993, as this institute was introduced into Georgian reality in the Law on Property Rights 1993[131].

4.5.2 Significance of Acquisition Time Limit for Civil Circulation

Though there is the view that the acquisition time limit is not innocent and unlawful, with its nature, as it always opposes the property right[132]. But according to the dominating opinion, it serves

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125 *Grimm D.D.,* Lectures in the Dogmas of Roman Law, 5th ed., Petersburg, 1916, 191 (In Russian).

126 *Zarandia T.,* Place and Terms of Fulfillment of Contractual Obligations, Tb., 2005, 32 (In Georgian).

127 *Zoidze B.,* Georgian Property Law, Tb., 2003, 172 (In Georgian).

128 *Chechelashvili Z.,* Property Law, Tb., 2006, 93 (In Georgian).

129 *Chitoshvili T.,* Delict and Some Legal Aspects of Delict Obligations, Magazine "Martlmsajuleba", №1, 2008, 43(In Georgian).

130 *Zoidze B.,* Georgian Property Law, Tb., 2003, 177 (In Georgian).

131 Ibid, 18.

132 *Engelman I. E.,* On Time Limitation According to Russian Civil law, Historical-Dogmatic Study. M., 2003, 127 (In Russian).

to ensuring stability of property relations and normal operation of the civil circulation. For the interests of social peace, it is reasonable to strengthen the continuing factual situation[133], for the purpose of protection of the specific subjects and entire society, in the legal relations dealing with factual ownership clarity is achieved and ownership right is transformed into the property right[134].

Legislation provides to the proprietor sufficient time for restoration of his right. Failure to use shows that he does not need this property. If a person does not care for execution of his rights and gives up its use to the other person, he deserves seizure of the right[135]. Proprietor who does not care about his property deserves less protection, compared with the innocent owner[136]. Thus, due to this institute the economic welfare will be strengthened with the true destinator[137]. In addition, with time, difficulty of collection of evidences for determination of the truth increases. Thus, deprivation of the previous proprietor of the right is based on involvement of the acquirer's will, innocent acquisition and requirements of circulation stability[138]. Some Russian civil law scientists cannot see the sense of acquisition time limit in the conditions of existence of vindication limitation rule. They cannot take into consideration that the acquisition time limit is applicable where the above rule is not, i.e. where vindication is allowable[139].

4.5.3 Conditions of Acquisition Time Limit

Acquisition time limit conditions are different in civil legislation of the countries of continental Europe law system, though the common conditions could be identified: ownership of relevant property for the term established by the law, uninterruptedly (objective elements) performed for the intention of proprietorship (subjective elements) creates the property right.

4.5.3.1 Ownership Object – Property with Circulation Ability

Ownership object may be as movable also immovable property. According to the French law, real property is the property which is such by its nature (land parcel and all articles thereon) or their purpose (those required for use of the land parcel for its purpose, e.g. agricultural instruments, production plants, cattle[140] and movable property includes such article, which can change their location independently (animals) or under the external impact (inanimate objects) [141].

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133 *Morander Zh.D.* Civil Law of France T. 2., M., 1960, 72 (In Russian).

134 Civil Order, Project of the Higher Founding Editorial Commission for Civil Order. 1, ed. Tutromov I. M. СПБ, 1920, 764 (In Russian).

135 *Meyer D.I.,* Russian Civil Law 1, СПБ, 1861, 282 (In Russian).

136 *Knipper R.,* Ownership in Civil Law of Turkmenia, in the book: Law, Economics, Welfare, Significant Issues of Legal Reform in Turkmenistan, (*Nuriliov Ya, Chanturia L.),* Asgabat , 2010, 107 (In Russian).

137 *Petrazhitski L. I.,* Right of Innocent Owner on the Incomes from the Point of View of Dogmas and Policy of Civil Law, M., 2002, 212 (In Russian).

138 *Sklovski L.A.,* Property in Civil Law, M., 1999, 242 (In Russian).

139 Ibid, 496.

140 *Bushev A. O., Makarova O.A., Popondopulo V.F.,* Commercial Law of the foreign Countries, M., 2003, 85 (In Russian).

141 Civil Code of France, Annex to a Book: *Kulagin M. I.,* Selected Works, M., 1997, 293 (In Russian).

According to German law, the immovable property includes land parcels, buildings and structures, as well as the fruit thereon, as well as the property rights related to the land parcel[142]. In addition, in Germany, with respect of creation of the property right on real estate, due to operation of the manorial log system, acquisition time limit is applicable to the movable property only and to the real estate the log time limit is applicable according to which, only ownership time limit does not create property right, at the same time, registration of the owner as proprietor with the manorial log is required[143].

4.5.3.2 Innocent Ownership

Innocence means that the owner is confident in lawfulness of his ownership, i.e. he believes that the basis of gaining of property by him is sufficient to gain the property right[144]. He is unaware in existence of the other, more effective right and he believes, in good faith that he has gained ownership without prejudice of the others. Beneficial nature of civil circulation and ethics coincide here[145]. Innocence is the attribute of acquisition, Acquirer, as the party to the deal, examines legitimation of the disposer to certain extent and his actions are evaluated in this respect, as prudent or unfair[146]. Acquisition time limit is not applicable to the wrongful, unfair owners, who intentionally gained possession of the other person's property, against the will of its proprietor[147]. Acquisition time limit transforms illegitimate, passive actions of the owner into the right after expiry of the term[148].

According to French civil law, the owner is deemed innocent if he owns as the proprietor and is unaware that the basis of acquisition of the ownership is blemished.

According to Roman law, existence of bona fide was sufficient only at a time of gaining ownership and the error, discovered later, in the period of ownership, did not prevent innocently commenced time limit[149]. Based on the opinion of roman lawyers the lawyers of medieval period formulated the provision: further unfairness shall not detriment rightfully commenced usucapios[150].

Contemporary civil law strengthened the provisions of the medieval canonic law, according to which, unfairness, emerged in the later period shall terminate the course of time limit[151]. I.e. fairness is required not only at a time of ownership gaining bit also for the entire period of ownership within time limit. Fairness is terminated when a person learns about blemish of the ownership basis, for example, via submission of the vindication claim. For certain considerations, the owner does not lose his fairness, though, with respect of responsibility, he is closer to the condition of unfair owner[152].

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142 *Chanturia L.,* Ownership of Real Property, Tb., 1994, 140 (In Georgian).
143 *Piatin S. Yu.,* Civil and Commercial Law of the foreign Countries. M., 2009, 201 (In Russian).
144 *Khvostov V.M.,* System of Roman Law, M., 1996, 253 (In Russian).
145 *Petrazhitski L.I.,* Right of Innocent Owner on the Incomes from the Point of View of Dogmas and Policy of Civil Law, M., 2002, 364 (In Russian).
146 *Sklovski K.I.,* On Vindication of the Right, Magazine "Economics and Law", №4, 2010, 48 (In Russian).
147 *Sukhanov E.A.,* Textbook of Civil Law, M., 1999, 495 (In Russian).
148 *Dernburg G.,* Pandects Property Law, СПБ,1902, 127.
149 *Pokrovski P.A.,* History of Roman Law, Petrograd 1917, 344 (In Russian).
150 *Dozhdev D. V.,* Roman Private Law, M., 1997, 369 (In Russian).
151 *Berngeft F., Koler I.,* Civil Law of Germany, СПБ, 1910, 141 (In Russian).
152 *Meyer D. I.,* Russian Civil Law, 1, СПБ, 1861, 268 (In Russian).

It is impossible to evidence fairness, as an internal fact, covered in the owner's consciousness. Owner's verbal or written statement about his existence is doubted as he has apparent interest that certain facts were taken into consideration as he desires. Therefore, existence of bona fide is assumed on the side of owner and the objective of the plaintiff is to prove mala fides of the owner[153]. Hence, in the civil law science, it is regarded that good faith does not require evidences, it is presumed, on the owner's side, unless contrary is proven, unlike the rule established in civil circulation that unfairness is never proposed[154].

It should be noted that French civil law provides for presumption of the owner's fairness: in particular, person stating that the owner is unfair, shall evidence the mentioned, i.e. he bars the burden of evidencing[155]. RFCC does not provide for such presumption, though, in general, it provides for assumption of prudence and bona fide (Section 3, Article 10). Hence, it is proposed that any acquirer of the article is innocent[156].

Innocent ownership implies peaceful and apparent ownership, but French law these are provided in separate conditions. Peaceful ownership means that it should not be based or maintained by violence. Apparent, open nature of ownership means that ownership fact should be known to the unlimited circle of people person should not conceal the fact of existence of property in his ownership and should not prevent the surrounding people to collect information about him[157].

4.5.3.4 Continuous Ownership within the Term Stated by the Law

4.5.3.4.1 Substance of Continuity

Term is the legal category, it is certain time moment or interval, coming or expiry of which is associated with occurrence of certain legal result by the legislator[158].

Continuous, permanent ownership implies that once started, the ownership should not be interrupted or abandoned. Termination may be caused by the legal or factual circumstances. Ownership will be terminated legally, if by the owner's actions the property right of the other person over the article is recognized, as well as by submission of the vindication claim by proprietor to the owner. And factual termination will take place where the owner willfully abandons ownership or it is taken away from him forcedly[159]. Ownership prescription is counted from the moment when the ownership of the other person is ended and new ownership commences. Here time count commences and old prescription shall not be taken into consideration. The exception is succession, where the prescription times of the testator and heir are added[160].

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153 *Sabini F.K.,* Law of Obligations, translation from German *Fux F.* and *Mandro N. M.,* 1876, 456 (In Russian).

154 *Dernburg G.,* Pandects *v*. 2. translation by *Blokh A. Yu., Galper A. Ya., Untelova D. I., Shneider K.A., Meiendorf A. F. (ed.)* 1905, 135 (In Russian).

155 *Morander Zh.D.,* Civil Law of France, T. 2., M., 1960, 144 (In Russian)..

156 Kuzina S., Problems of Protection of the Interests of Innocent Acquirer, Magazine "Economy and Law" № 8, 2006, 115 (In Russian).

157 *Zoidze B.,* Georgian Property Law, Tb., 2003, 173 (In Georgian).

158 *Sukhitashvili D.,* Law and Time, Tb., 2004, 31(In Georgian).

159 *Pobedonostsev K. P.,* Course of Civil Law, T. 1, M., 2003, 130 (In Russian).

160 *Zoidze B.,* Georgian Property Law, Tb., 2003, 175 (In Georgian).

Law of continental Europe provides for presumption of ownership continuity. For example, in accordance with Paragraph 938 of German Civil Code, if a person owned a article as his own property, at a time of commencement and completion of the ownership term, it is proposed that he owned the article for the entire period[161]. Presumption of continuity of ownership is not provided by RFCC, what, in the opinion of Russian civil law scientists is weakness of the Code, as evidencing of continuity takes place at court hearings and protection of the owner's interests is not fully guaranteed[162].

4.5.3.4.2 Acquisition Time Limits and Rules of their Calculation

It should be noted that acquisition time limits differ for types of unlawful ownership and types of articles. For example, according to French civil law, to the unfair owners of movable and immovable property 30-year time limit is applied, while to the innocent owner of the movable property, who has acquired the property removed from the proprietor's ownership against his will – time limit is three year. As for the innocent acquirer of the real property, here the terms differ depending on whether the owner and real proprietor live in one and the same (10 year term) or different (20 years) territorial units[163].

German CC sets 10-year term for the movable property and with respect of the real property so called log time limit applies, according to which, if a person is registered with the manorial log, as a proprietor so that he has not acquired the property, but the record was not appealed against, for 30 years from the time of registration, after expiry of this term even unfair acquirer becomes the proprietor (§900) [164].

RFCC links commencement of the period of limitation with the moment of establishment of ownership. If, for creation of the title over property state registration is required, counting of the term shall commence from the moment of registration of the owner. In the opinion of a part of Russian civil law scientists counting of the limitation term should commence from the time of expiry of the action term. In the opinion of critics of this position, as the action limitation term, according to the general rule, starts from the moment when a person learnt or should learn about violation of his right, addition of the acquisition prescription term to the action limitation term would lead to the situation where the action limitation term for vindication claims, in many cases, is counted not from the moment of violation of the property rights or other titled ownership rights but after certain period[165]. In the other opinion, course of the term should be linked with the malicious action of the owner, in which case the course of term would commence only at a time of expiry of action limitation term and in case of innocence – from the moment of establishment of ownership[166].

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161 Civil Order in Germany, v. 1, translation from German, *Bergman V.(ed.),* M., 2008, 350 (In Russian).

162 *Tolstoi Yu. K.,* Correlation of Action and Acquisition Time Limitation, Magazine "Jurisprudence", №6, 1993. In Russian Soviet civil law science there dominated the view that the owner with ownership prescription term should prove that for the entire period of this term, every day, he was the owner of the article. *Rubanov,* citation from: *Shadrina N.,* Course of Acquisition Time Limitation According to the Civil Law of Russia. Magazine "Economy and Politics", №9, 2003, 120 (In Russian).

163 *Piatin S. Yu.,* Civil and Commercial Law of the foreign Countries. M., 2009, 47 (In Russian).

164 *Zalesski V.V.,* Key Institutes of Civil Law of the Foreign Countries, M., 2000, 241 (In Russian).

165 *Shadrina N.,* Course of Acquisition Time Limitation According to the Civil Law of Russia. Magazine "Economy and Politics", №9, 2003, 118 (In Russian).

166 *Konovalov A.V.,* Ownership and Ownership Protection in the Civil Law, M., 2002, 43 (In Russian).

Law of continental Europe assumes succession in calculation of the limitation term, i.e. adding of the terms of the pervious and new owners, in case of both, universal and singular succession. Succession takes place where there is the legal relation between the previous and new owners ownership of the new owner bears all properties born by the previous one and complies with the acquisition limitation term conditions. Succession is assumed if ownership of the successor commenced with the consent of initial owner and not arbitrarily, in such case fair cession is necessary[167].

Course of the ownership prescription term terminates with ownership termination. According to French civil law, ownership terminates by the action of the owner, by which he recognizes property rights of the other person on the property, by submission of the claim by proprietor, taking over the ownership by force from the owner by the proprietor, if the owner fails to regain ownership for one year period. If, by the action for restoring of the ownership the ownership is regained, course of the limitation term will be continued and it will be regarded that no interruption of ownership has taken place[168].

5. Interrelations between Ownership and Property Right with respect of Traditio as the legal Way for Acquiring Title over the Movable Property

One of the criteria for classification of legal systems for creation of the title on the movable property is the moment of creation of the property right, i.e. title is transferred from one person to the other from the moment of agreement between parties or transfer of the property to the acquirer. Respectively consensual and tradition systems are distinguished.

5.1 Ownership Element in the Consensual System

According to the consensual system operating in France, so called pure agreement principle, the property right over the article creates from the moment of execution of the agreement, conclusion of deal within the obligations law, between the parties. In French law, purchase agreement is an integral legal act, which, on one side, transfers the property right on sold property from the seller to buyer and on the other side, creates obligations of each party: transfer of the property to buyer and payment of the agreed price by the buyer. According to Article 1583 of French CC, the purchase agreement is effective and the property is transferred from the seller to buyer from the moment when the parties agreed upon the property and its price, even if the property is not transferred yet and the price is not paid[169]. Though transfer of the title over the articles circulating by such system is simplified, as the acquirer becomes the proprietor even without transfer of the article, but such simplicity is related to increased risk for the buyer, as he is regarded as the proprietor from the moment of acquisition and the risk of accidental loss of the article is transferred to him as well, so that he has not actually

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167 *Butovski A. K.,* Prescription Term of Ownership, СПБ, 1911, 42 (In Russian).

168 Vasiliev E.A., Komarov A.S. (ed.), Civil and Commercial Law in the Foreign Countries, v. 2, M., 2006, 365 (In Russian).

169 *Lezhe R.,* Great Legal Systems of Contemporary Period translation from French: *Gradova A. V.,* M., 2009, 321 (In Russian).

received the article yet. In addition, this system does not pay proper attention to the natural role of ownership, as the external sign of property right[170].

In addition, there are the exclusions in the consensual system, with the emphasis on the ownership element, which are considered without limitation of consensual nature[171].It should be noted that in French law, the pure agreement principle set by the legislation is applied to the articles determined by the individual sign and for the articles determined by the type sign the property right is created from the moment of transfer to the acquirer's ownership. French civil law, in general, similar to the law of continental Europe, is based on the principle of determination, according to which the title and other property rights may exist, respectively set and transferred for certain articles. Transfer is the means of individualization of the generic articles[172]. In French law there is the exclusion in relation with the future articles as well. In such cases the property right is created not from the time of agreement but moment of creation of the articles, their origination and transfer to the acquirer's ownership and their acceptance by the latter[173]. Similarly, in case of selling of the article to several persons the preference is given to an acquirer in whose ownership the article is, irrespective of with whom the agreement was made earlier, as in French law the following rule applies: Ownership, with respect of the movable property, is equal to establishment of the right[174].

In English law, according to the Law on Procurement of Goods (articles 16 and 18), the moment of creation of the title is the will of the parties, though, if the subject of purchase is the generically determined or future article, the acquirer becomes the proprietor when the article is individualized and its transfer to the acquirer is possible.[175]

5.2 Substance of the Tradition System

According to the tradition system, for creation of the title over movable property conclusion of the deal (i.e. agreement between parties) within the law of obligation is not sufficient. In addition, the article shall be transferred to the ownership of acquirer. For gaining of the property right only agreement between the parties is not sufficient, it is necessary that the agreement was realized through transfer of ownership[176]. Though, in the tradition system may be some deviations from this

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170 *Chanturia L.,* Title on the Real Property, Tb., 1994, 157 (In Georgian).

171 *Danelia E.,* Principle of Isolation on the Basis of Agreement on Gift, Magazine "Overview of Georgian Law, Special Publication, 2008, 39 (In Georgian).

172 *Haskelberg B.L.,* On Establishment and Moment of Transfer of the Title in Movable Property by the Agreement. Magazine "Jurisprudence", №3, 2000, 122; *Sklovski K.,* On the Right of Disposal of the Property Without Transfer of Ownership. Magazine "Economy and Law", №8, 2003, 117 (In Russian).

173 *Chechelashvili Z.,* Transfer of Property Right on Movable Property, Collection of Georgian Law, v. I, Tb., 2004, 93(In Georgian).

174 *Zoidze B.,* Georgian Property Law, Tb., 2003,145 (In Georgian).

175 *Dzlierishvili Z.,* Legal Nature of the Agreements on Transfer of the Property into Proprietorship, Tb., 2010, 110 (In Georgian).

176 *Guliaev A.M.,* Civil Laws with the Explanations of the Governing Senate and Comments of Russian Lawyers, *Tyutryumov I.M.,* M., 2004, 538. Reference: *Lomidze O.G., Lomidze E.O.,* Return of the Obtained by Invalid Deal, Vindication and Con-dication. Magazine "Gazette of Supreme Arbitration Court of Russian Federation", № 11, 2004, 150 (In Russian).

general rule, in case of so called conditional property. The transfer may take place but no transfer of title occurs, if, upon agreement between parties, the condition for transfer of title is payment of the price of article by the buyer. Consequently, up to full payment of the price of transferred property the property shall remain the seller's property[177]. Roman law applied the tradition system: acquisition of the article was possible not only by the act of agreement but at the same time the transfer of the ownership of the article should take place – traditio. According to Digests, agreement creates the obligation of transfer of the property only and the title over such property created only from the moment of property transfer. The Romans, in this process, distinguished the basis (titulus) and acquisition way (modus). Actual legal relation was regarded as the basis, for example the purchase agreement and modus meant physical transfer of the property or similar executive act[178]. According to Pavlus's opinion, pure transfer would never transfer the title. This occurs when it is preceded by purchase or other legal basis, from which the transfer results[179]. Thus, the purchase agrement, as such, did not grant to the purchaser the title, it created claim of transfer of the property from the seller. This deal within the law of obligations linked one person to the other. To determine the link between them within the property law the special act of transfer (traditio) was required[180].

5.2.1 Tradition System in Co-existence with Abstraction and Isolation Principles on One Side and with the Principles of Unity and Cause on the other side

In Germany the tradition system operates together with the abstraction and isolation principles and in Georgia and Russia – together with the cause and unity bases. According to German civil law, for creation of the title over movable property the deal within the law of obligations should be concluded, which creates the seller's obligation to transfer the property to the buyer, as well as the deal within the property law (agreement), implying agreement of the parties on transfer of the title over the property, stating that from given time the property will be the buyer's property and also, transfer of the property[181].

Similarly, RFCC relates creation of the title over movable property upon agreement to transfer of the property, unless otherwise provided by the law or agreement[182].

In German law, the substance of abstraction and related isolation principles imply that the agreement within the law of obligations, creating the obligation of disposal of the title (right of claiming of the title transfer) and agreement within the property law, by which transfer, change or termination of the property right actually takes place (isolation principle) [183] and the deal within the property law does not depend on validity of main agreement within the law of obligations, it is abstracted from the latter (principle of

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177 *Dzlierishvili Z.,* Legal Nature of the Agreements on Transfer of the Property into Proprietorship, Tb., 2010, 35 (In Georgian).

178 *Khvostov V.M.,* System of Roman Law, M., 1996, 140 (In Russian).

179 *Krüger P.,* Corpus Juris Civilis, Volumen Primum, Paulus, Ohne Auflage, Berlin, 1849, D. 41.1.31. reference: *Vasilevskaia L. Yu.,* Doctrine on Property Deals According to German Law, M., 2004, 91 (In Russian).

180 *Pokrovski P.A.,* History of Roman Law, Petrograd 1917, 244 (In Russian).

181 *Vasilevskaya L.Yu.,* On Specific Nature of Legal Structure of the Property Agreement in German Law. Magazine "Gazette of Supreme Arbitration Court of Russian Federation", №5, 2003, 121 (In Russian).

182 *Grioshaev S.P. (ed.),* Civil Law Questions and Answers, M., 2002, 29 (In Russian).

183 *Danelia E.,* Principle of Isolation on the Basis of Agreement on Gift, Magazine "Overview of Georgian Law, Special Publication, 2008, 32 (In Georgian).

abstraction) [184]. This conditions the situation where invalidity of the agreement within the law of obligations does not cause invalidity of the agreement within the property law. Consequently, the title is still transferred to the buyer, though, the initial proprietor, relying on the norms of unjustified enrichment, claims from the new proprietor, without legal basis, returning of the purchased property[185].

Also for the principles of unity and cause, according to these principles, the agreements within the law of obligations and property law are not divided. The agreement within the law of obligations is sufficient, which, due to its legal nature, is able to transfer the title (principle of unity) and transfer the property. Invalidity of this agreement, from the outset or later, causes non-transfer of the title to the acquirer[186] (cause principle).

Georgian Civil Code provides for cause and tradition system. It contains titulus (cause) and modus (transfer). Though, there are different opinions with respect of Article 186, in particular, its statement – the proprietor shall transfer the property to the acquirer on the basis of valid right. "Valid right" implies the deal within either property or obligations law, or the title. It is reasonable that it implied that the disposer should be the proprietor or a person equipped with the disposal authority by him, as according to the well-known axiom, no one has the right to transfer to the other person greater rights than he has. In addition, the deal made by the authorized person shall have no any other breach causing invalidation.

Actually CCG does not provide for additional deal on surrender of the property, at a time of making of the deal within the law of obligations thinks that only based on this deal he shall be transferred the property[187]. If the "valid right" implied not the right but the deal, it should be of the nature of obligations law (for example purchase).

Difference between abstract and cause deals is that in case of cause deal the cause is included into the contents of the deal, while in case of the abstract one it is not. Existence of Causa is the condition of causal deal, as existence of legal fact and contents of the abstract deal does not contain the basis on which it relies. The abstract deal, by virtue of the law and regarding the contents of the deal has independent significance[188].

In German law, the process of creation of the title over movable property includes 3 stages:

1. Making of the deal (binding, causal) within the law of obligations. Such deal creates only seller's obligation to transfer the title over the subject of deal, for example, the purchase agreement creates the

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184 *Schapp/Shur,* Sachenrecht, 3. Auflage, 2002, 91. reference: *Bachiashvili V.,* Rights of Additional Implementation, Cancellation of the Agreement and Price Reduction Demand in Purchase (on the basis of Georgian and German law), Magazine Overview of Georgian Law, Special Edition, Tb., 2008, 161. Doctrine about abstract property agreements developed from the second half of 19th century and are associated with the name of Savin. In his opinion, from the sphere of causal deals, the will of parties with respect of transfer of the property into the ownership should be divided and considered together with the transfer act, as independent agreement, for which, the obligations agreement effective before would be invalidated. *Buchholz S.*, Abstraktionsprinzip und I mamobilarrecht(r) Frankfurt, 1978, 2. Reference: *Vasilevskaia L. Yu.,* Doctrine on Property Deals According to German Law, M., 2004, 451 (In Russian).

185 *Kereselidze D.,* Application of the Norms of Unjustified Enrichment, Magazine "Overvioew of Georgian Law", Tb., №4, 2003, 600 (In Georgian).

186 *Chechelashvili Z.,* Transfer of the Title in Movable Properties. Collection of Georgian Law, Tb., 2004, 90 (In Georgian).

187 *Zoidze B.,* Georgian Property Law, Tb., 2003, 145 (In Georgian).

188 *Vasilevskaia L.Yu.,* Doctrine on Property Deals According to German Law. M., 2004, 51 (In Russian).

seller's obligation – to transfer the title on the property and the property to the buyer, as well as the buyer's obligation – pay the price of the property[189]. This agreement as such does not create the title, it provides only basis, Cauza of legal action, act, legitimating transfer of the property[190].

In the countries where the causal system operates, only deal within the law of obligations is capable to transfer the property rights. Will of disposal of the property expressed in it is sufficient that its accompanying transfer was directed towards fulfillment of the agreement and no additional expression of the will on disposal is required[191]. For example, by the purchase agreement the will of transfer of title is already expressed. One can think about intention of the seller based on the contents of the deal providing basis for transfer of the title. Purchase agreement has double function; it is the binding act and basis for transfer (Cauza traditionis). The latter, in sense, that it contains implied will of the parties in relation with transfer of the property on the basis of purchase. This common purpose forms the basis for tradition and justifies transfer of the property[192].

For example, according to Article 477 of Georgian CC, by the purchase agreement the seller shall transfer to the buyer the title over the property, related documents and deliver the goods and the buyer shall pay to the seller the agreed price and accept the purchased property. This norm responds to Vienna Convention of 11th April 1980 on International Trade in Goods (effective from January first 1988), to which Georgia joined on 3rd February. According to Article 30 of the Convention, the seller shall deliver the goods, relevant documents to the buyer and transfer the title to him in accordance with the requirements of the agreement and Convention and according to Article 53 of the Convention, the buyer shall pay the price of goods and accept the delivered goods[193].

For the other considerations, in the tradition system the deal within the law of obligations does not contain the will of parties with respect of transfer of the title, it only provides basis for transfer of the property[194].

2. Agreement within the property law (disposal, abstract deal) – agreement on transfer of the title. Property deal implies agreement between parties on transfer, change or termination of the property right. Agreement requires expression of at least two wills[195]. In such case one of the parties expresses its will to transfer the tile to the other party and the other – will of accepting of the title, i.e. mutual expression of the will takes place. By this deal, which, in relation with the movable property, does not requires the obligatory form and is used at a time of making of basic deal, direct action on

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189 *Lezhe R.,* Great Legal Systems of Contemporary Period translation from French: *Griadova A.V.,* M., 2009, 322 (In Russian).

190 *Shershenevich G.F.,* Textbook In Russian Civil Law, T.1, 11th ed., M., 1914, 182 (In Russian).

191 *Sklovski K.I.,* Entitlement and Authority in the Mechanism of Creation of the Civil Rights, Magazine "Economy and Law", №11, 2004, 19 (In Russian).

192 *Zimmermann R.,* The Law of Obligations. Roman Foundations of the Civilian Tradition, 1992, Cape Town, 239. Reference: *Sklovski K. I.,* On Validity of Disposal of the Other Person;'s Property, magazine "Gazette of Supreme Arbitration Court of Russian Federation", №9, 2003, 87 (In Russian).

193 *Shengelia E., Kandashvili I.,* Effect of Vienna Convention on Sale and Purchase Agreements. magazine "Jurisprudence" №3, 2008, 19 (In Georgian).

194 *Westermann H.P.*, Erman Burgerliches Gesetzbuch, 11. Auflage, Aschentorffrechtsverlag, Köln, 2004, 3335, Rn 2-3. reference: *Kikoshvili S.,* Protection of the Property Right in Case of Invalidity of Porperty Deal Basis work for seminar, Tb., 2010, 6 (In Georgian).

195 *Shopp Yan.,* System of German Civil Law, M., 2006, 87 (In Russian).

the right takes place. The result is within the property law, implying movement of the title over the property (creation, change and termination) [196].

In German Doctrine the property deal is considered in narrow and wide sense, it is considered as legal composition related to circulation of the property right, set of property agreement and actual transfer of property and in narrow understanding the property deal implies only property agreement[197].

3. Property transfer. According to German law, to transfer the title, the proprietor shall transfer the property to the buyer, to fulfill the agreement made between them (Paragraph 929 of German CC)[198], i.e. the property agreement is the basis for transfer of the property. For creation of the property right actual possession over the property is not always required, though one of the conditions for determination of the right is transfer of the property. Property transfer implies transfer of the possession over the property, transfer of the ownership, with the intention of transfer of the title[199]. In English-American law, delivery means transfer of the ownership, At a time of ownership transfer the previous owner refuses ownership for the benefit of the other person, who acquires the ownership. Transfer is confirmed by acceptance of the goods by the buyer, or action confirming acceptance of the property.

Transfer of the article generally differs from transfer of the property, creating legal composition, implies, in case of existence of certain legal facts, termination of the property rights of one person and in casual relation, their creation on the side of the other person[200].

5.2.2 Legal Nature of Transfer

5.2.2.1 Ensuring Visual Understanding of the Right

According to the tradition system, creation of the title through transfer of the property is dictated by the attempt to avoid splitting of the property and ownership, at this time the role of ownership as sign of title in circulation is revealed[201]. Acceptance of the property by acquirer, via transfer, in the public understanding, implies gaining of the title, what could be explained by historical interrelation between ownership and title. In the underdeveloped legal situation property was confused with the ownership and was not understood without it[202]. In contemporary situation, within the tradition

196 *Chanturia L.,* Ownership of Real Property, Tb., 1994, 152 (In Georgian).

197 One of the first German civil law scientist, who considered the issues of the pribciple of splitting of the property deal and property agreement was Phelip Pek, who, in his work published in 1937 – "Abstract Property Deal" the doctrine about the above. *Vasilevskaia L.O.,* On Specific Nature of the Structure of Property Agreements According to German Law Magazine „Gazette of Supreme Arbitration Court of Russian Federation", №5, 2003, 130-132 (In Russian).

198 German CC (as of March 1 2010), translator and editor *Chechelashvili Z.,* Tb., 2010, 308 (In Georgian).

199 *Chegovadze L.A.,* Structure and Condition of the Civil Legal Relations, M., 2004, 40 (In Russian).

200 *Meyer D.I.,* Russian Civil Law, 1, СПБ, 1861, 394-395 (In Russian).

201 *Dernburg G.,* Pandects *v*. 2. translation by *Blokh A. Yu., Galper A. Ya., Untelova D. I., Shneider K. A., Meiendorf A. F. (ed.),* 1905 (In Russian).

202 *Sklovski K. I.,* Property in Civil Law, M., 1999, 210 (In Russian).

system the civil circulation is oriented towards actual belonging of the property and results from the lawful intentions: owner of the movable property is its proprietor[203].

By transfer of the property to the ownership realization of the principle of publicity is achieved, clarity of the undisputed fact that at a time of transfer of the property to buyer, he simultaneously shall become the proprietor of the property[204]. Property lacking ownership lacks reality and is unstable. Ownership, for the title, is not only the external or accidental sign, but it is the element by which the property as a social phenomenon acquires great significance[205]. Ownership is the reality of title, normal external legal condition of the article, as at this time it fulfills its economic purpose – serve to an individual[206].

This approach is reflected in the positive law as well, where the legislator sets the preference of the buying owner, compared with the other acquirer. For example, according to Article 485 of CCG, if the seller has sold one and the same goods to several persons, or made purchase agreements with several persons, irrespective of what was the goal of the seller, whether deceiving of the buyer or anything else, irrespective of the seller's desire, the preference is given to the buyer, to whose ownership the goods were transferred[207].

5.2.2.2 Tradition – Deal or Factual Action

According to one position, transfer is the property deal, while according to the other – it is legal behavior only, According to Roman law, traditio was the agreement with the result within the property law, as it contained the agreement between the transferor and acceptor of the property[208]. In case of tradition, the seller, who shall be the proprietor of the property or the person, acting in the name of the proprietor, on the basis of relevant authority, with his consent and he shall have the intention to transfer the property to the buyer and the buyer shall have the intention to become the proprietor[209]. This position has supporters in German doctrine as well[210]. Transfer is the deal directed towards transfer of the property right, act of manifestation of mutual will, what is implemented through manifestation of the seller's will to transfer possession of the article and manifestation of the

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203 *Barinova E.A.,* Property Rights in the System of Subjective Civil Rights, in the book: Significant Problems of the Civil Law, *Shilokhvost O. Yu.(ed.),* M., 2003, 157 (In Russian).

204 *Chanturia L.,* Ownership of the Real Estate, Tb., 1994, 158 (In Georgian).

205 *Ihering R.,* Ueber den Grund des Besitzessschutzes Fine, Revision d.Lehre vom Besitz. 2. Verb. U verm Aufl. Jena: Maukejs Verlag, 1869, 143-145. Reference: *Lapach V. A.,* System of the Objects of Civil Rights, M., 2002, 158 (In Russian).

206 *FlumeW.,* Augemeiner Teil. des Burgerlchen Rechtes. Zweiter. Band: Das Rechtsgeschaft. 4 Aufl. Berlin Heidelberg New York: Springer–Verlag, 1992, 153. Reference: Vasilevskaia L. O. On Specific Nature of the Structure of Property Agreements According to German Law Magazine „Gazette of Supreme Arbitration Court of Russian Federation", №5, 2003, 126 (In Russian).

207 *Kakhadze M.,* Comment to the Civil Code of Georgia, IV, v I, Tb., 2001, 30 (In Georgian).

208 *Novitski I.B.,* Basics of Roman Civil Law, M., 2000, 93 (In Russian).

209 *Grimm D.D.,* Lectures in the Dogmas of Roman Law, 5th ed., Petersburg, 1916, 183 (In Russian).

210 *Vasilevskaia L.Yu.,* Doctrine of Property Deals According to German Law, M., 2004, 45 (In Russian).

buyer's will to accept the article, gaining of possession over the article. As for the tradition the agreed will of the parties is required, therefore, tradition, with its internal substance, is the agreement[211].

In the opinion of the others, agreement of the wills of parties is provided within the scopes of property agreement and tradition acquires the willful substance by this agreement and transfer is the real, factual action and not the legal deal[212]. Tradition is the type of legal behavior. Without tradition the property agreement has no legal force, it was not realized in transfer. By transfer it acquires the physical sense, realization. Property agreement is the basis for transfer of the property[213].

5.2.2.3 Main Form of Transfer and Surrogates

Transfer is the transfer of ownership, for the purpose of transfer of the title over the property. According to German law, ownership is achieved through gaining direct possession over the article not only by the acquirer but also by the person, who provide ownership in his interests, is through holder. At this point the acquirer becomes direct owner of the article and gains the title. It is possible that the proprietor granted to the holder the status of direct owner, taking his desire into consideration. Actual transfer of the article is not required as it is already in the ownership of acquirer, which has changed the basis of ownership and moved from the position of holder to the position of the owner-proprietor[214].

CCG thoroughly provides the cases of property transfer and primarily this implies delivery of the article to the acquirer's direct ownership. This is the case, where the points of agreement between the parties and transfer of the article coincide[215].

German law provides for the surrogates of ownership transfer. Though, regarding the universal significance of tradition, in such cases transfer of the title, without transferring of the article, should be specially agreed by property agreement.

According to Paragraph 929 of German CC, if the acquirer owns the article with the other legal basis, the property agreement is sufficient. This rule is called short hand transfer[216]. It is provided in RFCC as well: if at a time of making agreement the article is in the acquirer's possession, the article shall be deemed transferred from the moment of execution of the agreement (Section 2, Article 224). Though CCG does not particularly divide this rule, the doctrine regards that transfer of the article into direct ownership, includes this rule as such[217]. Similarly in the common law, if the goods subject to sale are in physical possession of the buyer, before execution of the agreement. in such case, continuation of its ownership from the side of buyer should be regarded as handing of the sold article buy seller to buyer[218].

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211 *Haskelberg B.L.,* On Establishment and Moment of Transfer of the Title in Movable Property by the Agreement. Magazine "Jurisprudence", №3, 2000, 125 (In Russian).

212 *Gierke O.,* Deutsches Privatrecht, IIBand, Sachenrecht, Leipzig, 1905, 496-498. reference: *Vasilevskaia L.Yu.,* Doctrine on Property Deals According to German Law, M., 2004, 174 (In Russian).

213 *Flume W.,* Allgemeiner Teil. des Burgerlchen Rechtes. Zweiter. Band: Das Rechtsgeschaft. 4 Aufl. Berlin Heidelberg New York: Springer–Verlag, 1992, 153. reference: Vasilevskaia L. On Specifics of Legal Construction of the Property Agreement According to German Law, Magazine „Gazette of Supreme Arbitration Court of Russian Federation", №5, 2003, 129 (In Russian).

214 *Zhalinski A., Rericht A*., Introduction to German Law, M., 2001, 422 (In Russian).

215 *Zoidze B.,* Georgian Property Law, Tb., 2003, 149 (In Georgian).

216 *Dernburg G.,* Pandects, Property Law, СПБ, 1902, 115 (In Russian).

217 *Zoidze B.,* Georgian Property Law, Tb., 2003, 149 (In Georgian).

218 *Dzlierishvili Z.,* Legal Nature of the Agreements on Transfer of the Property, Tb., 2010, 103 (In Georgian).

Surrogate of article transfer is also establishment of so called ownership constitute (constituere – decision Lat.). In such case the seller and buyer make agreement, after which the seller remains the direct owner of the article, after transfer of the title to the buyer and actual transfer of the article is replaced by the agreement between proprietor and acquirer (Paragraph 930 of German CC). After establishment of the ownership constitute the acquirer becomes the owner for himself and the seller – the owner for the others, as he commences ownership for the acquirer. In case of ownership constitute the seller can own as on the basis of property also on the basis of obligation basis. This form of transfer is used in German law in case of security property as well, where the property is transferred to the creditor for the purpose of credit security[219]. Similarly, according to CCG, article shall be regarded as transferred to the indirect ownership, if, with the agreement of the buyer and seller it remains in direct ownership of the seller, on the basis of he other agreement, e.g. custody, hire, lending[220].

Surrogate of transfer is also transfer of the request for ownership of the article to the acquirer (Paragraph 931 of German CC). In such case the article in the ownership of the third person is disposed off and the disposer orders him to transfer the article to the acquirer. By virtue of property agreement between the disposer and acquirer, the request on ownership of the article is surrendered to the acquirer from the third person. The acquirer's title is created not from the moment of its accepting from the third person but from the moment of surrender or agreement[221]. This construction simplifies circulation, as for execution of the proprietor's authority of disposal no hading of the article by the third party is required. By the property agreement on surrender the acquirer acquires the property and as the proprietor, he has the right to demand the property claim, i.e. in this case, the right on vindication claim is not transferred to the acquirer, independently from the title, but rather it is the result of property transfer[222]. This form of transfer is often realized through securities, e.g. sale of the goods entrusted to the warehouse is possible without removing of these goods from the warehouse. In such case, the entrusted owner issues the warehouse certificate to the third person, i.e. acquirer, bu endorsement, what implies, as such, that the acquirer was granted the right to claim the property from the warehouse and its transfer to his ownership. From the moment of granting of this right the goods stored in the warehouse are deemed as transferred to the acquirer[223].

By the agreement between parties and transfer of the article, not only title can be created but the other property rights as well, e.g. the lien. In particular, in case of ownership pledge, through property deal and transfer of the article to the ownership of the pledgee or the third person specified by him. Here the "short hand" transfer may take place as well, as the article is already transferred and for creation of the lien only agreement between parties is required.[224]

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219 *Zhalinski A., Rericht A.,* Introduction to German Law, M., 2001, 423 (In Russian).

220 *Chitoshvili T.,* Key Legal Aspects of Creation of Title on Real Property, Tb., 2006, 6; *Vasiliev G.S.,* Succession of Title as Type of Singular Succession, Magazine „Jurisprudence", №6, 2006, 23 (in Georgian).

221 *Vasilevskaia L.Yu.,* Doctrine on Property Deals According to German Law, M., 2004, 184 (In Russian).

222 *Chechelashvili Z.,* Property Law, Tb., 2006, 96 (In Georgian).

223 *Chitoshvili T.,* Key Legal Aspects of Creation of Title on Real Property, Tb., 2006, 6; *Vasiliev G.S.,* Succession of Title as Type of Singular Succession, Magazine „Jurisprudence", №6, 2006, 24 (In Georgian).

224 *Zarandia T., Jugeli T.,* Securing of Claims with Movable Property in Georgian Law, Magazine „Jurisprudence and Law" №2, 2009, 29 (In Georgian).

TAMAR SHOTADZE*

COMPARATIVE ANALYSIS OF THE MORTGAGE AND "SECURITY PROPERTY"

1. Introduction

Dynamic development of the finance relations impacts the process of security law improvement. At the current stage, the increased risk factor in the obligations of financial nature added significance to the scientific research of the credit security means in private law. This article is one of the chapters of dissertation work "Mortgage, as the Means for Securing Bank Credit".

The article provides consideration of the reasonability of introduction of the security property legal institute and the prospects of its implementation in Georgian private law, as well as whether coexistence of alternative security means in addition to the mortgage is possible. It offers comparative analysis of the mortgage right and right of purchase and redemption.

Study of two independent institutes of security is provided on the basis of the analysis of Georgian and German legislation and judicial practice.

2. Mortgage and other Security Means

2.1 General Overview of the Security Means

In Georgian private law the security means of private law are classified as the means of obligations' law and property law. Security means within the property law include the mortgage and lien[1]. Means of additional security the obligations' nature include forfeit, prepayment, debtor's security.[2] Means of contractual (obligations) security include bail[3] and bank guarantee[4].

According to Georgian obligations, the parties to contractual relations have option to include into the agreements the means of security acceptable for them and suitable for the contents of the agreement. Though, in practice, the choice is always made in favor of the security characterized with economic nature of rights protection and promptness of satisfying of the claim.

At the current stage the banking and finance institutions actually do not grant any credits without security. Mortgage is regarded as the widespread form of securing of the money obligations, compared with the other security forms. This feature has always been characteristic for the institute of mortgage. And this fact is conditioned by the object of mortgage, regarded as the liquid item with its substance and economic value.

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1 Articles 254-307 of CCG, (In Georgian).

2 Articles 417-426 of CCG (In Georgian).

3 Articles 891-905 of CCG (In Georgian).

4 Articles 879-890 of CCG (In Georgian).

According to Georgian legislation, one contractual requirement may be secured by several legal means. Taking into consideration the autonomy principle the parties independently determine, which means of security should be used for securing of the claim. Legislation does not provide any quantitative limitations though the claim should be secured by the means of security provided for by the law. For example, imperative requirements of the law are applied to the emergence and termination of the security right.

Mortgage is not an only means for securing the claims created on the basis for credit agreement. In practice, regarding the bank credit agreement, the claims are secured by two types of legal means. The commercial banks secure against risks conditioned by credit relations not only by the mortgage but also the agreement is made on forfeiture, inclusion of which into the deal is for the purpose of additional security.

According to Article 417 of the Civil Code of Georgia (CCG) the forfeiture is the money amount determined by the agreement between parties imposed on the debtor for non-fulfillment or improper fulfillment of his obligations. CCG does specify any type of forfeiture. It shall be stated by the agreement between parties. Function of the law is limited to imposition of the judicial control in case of inadequately high forfeitures. Forfeiture amount, as a rule, is set as the percentage of the principal amount of the agreement.

2.2 "Numerus Clauses" (Closed Number) Principle

In Georgian private law alienation with respect of security property institute is directly related to the numerus clausus[5] principle effective in property law. In practice, only security means specified by the legislation and accepted in private law relations will gain legitimation. The security means not provided for by the law, irrespective of theoretical considerations, can not find any place in the civil turnover.

Regarding the principle of obligatory recording of the rights on real property, no property right may be created over the real property unless provided for by the law. Irrespective of the possibility of free determination of the contract contents, the first outcome of which is "security property", it, as a right, is not recognized by Georgian legislation.

Norms regulating the property rights are the integral part of civil legislation of EU member countries. All European countries recognize numerus clausus principle, which regards that the property rights provided for by the civil code could be assumed into the civil turnover. Parties may achieve agreement only with respect of those property rights, criteria of which are provided for by the legislation and on the basis of which the freedom of action is limited or possibility of free determination of the property relations is excluded. In law doctrine, numerus clausus, as a fundamental principle, is called, in other words, the "protector of the property law"[6].

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5 See: *Chanturia L.,* Ownership of Real Property, Comparative Law Research (on the Example of german Law), Tbilisi University Publishing House, Tb., 1994, 132-133; *Zoidze B.,* Georgian Property Law, 2nd improved edition, Tb., 2003, 5 (In Georgian); *Akkermans B.,* The Principle of Numerus Clausus in European Property Law, Intersentia in Antwerp, Portland, 2008, 5 etc for numerus clausus principle.

6 Gatekeeper. See: *Akkermans B.,* The Principle of Numerus Clausus in European Property Law, Intersentia in Antwerp, Portland, 2008, 8.

Quite different and problematic issue is admissibility of the institute of transfer of the property right security with respect of the property law. Against this doubt the key words may be the references to the quantitative limitations of the property rights. It, similar to typical enforcement in the property law, prohibits development and "discovering" of the property law institutes not provided for by the law. Modification of the preconditions and contents of the property law provided for by the law and order is prohibited as well[7].

On the basis of CCG, the contractual parties shall achieve some balance between the contractual freedom and legal restrictions.

Hain Boling compares two legal relations: security claim and security agreement[8]. In Georgian legal doctrine the term "security claim" was introduced through improper translation. In this case the secured claim should be considered instead, which provides basis for creation of some type of security. The appurtenance created on the basis of secured claim is the category expressed in the imperative form and contents of the law. The property rights created on the basis of secured claim are not subject to contents modification by the contractual parties. For example, the parties may not change the order of legislative regulation of the mortgage, as property security, rather they can take it into consideration within the normative scopes set by the law.

As for the security agreement (here is the term inaccuracy as well and "agreement on security" should be used), it is always of the consensus nature, allowing the participants of private law relations the opportunity for free coincidence of the law and legal will[9].

Such security agreement within the law of obligation is basically assumable on the basis of Article 319 of CCG – based on the principle of freedom of contracting.

Principle of freedom of contracting is one of the significant cornerstones of contemporary private law. Freedom of contracting implies free expression of the will of the person, possibility to act at one's own discretion, without any obstacles and without subordinating of the other person's will. In the legal literature the freedom of contracting is determined as freedom of choice, making of decision independently from anything[10]. Within the scopes of freedom of contracting a person expresses his will voluntarily and deliberately, which is adequate to his internal requirements and motivations.

Contractual freedom is conditioned by many factors: freedom of economic activities, common economic space, possibility of free replacement of the goods, services and finances, constitutional guarantees of protection of the property. Contractual freedom could not be regarded without such independent principles as equality of parties, autonomous will of the subjects of civil law, realization of the civil rights without any barriers.[11]

Possibility of enjoying the property right specified in Article 21 of the Constitution of Georgia is the constitutional guarantee of freedom of contracting.

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7 *Boling H.,* Securing of the Property by Real Property on the Example of Georgian Civil Code, Anniversary Collection of Works Dedicated to 75th Birthday of Professor *Liluashvili T.*, Tb., 2003, 73 (In Georgian).

8 Ibid.

9 As an example of security agreement the forfeiture could be named, quantity and payment periodicity of which may be freely set by the parties.

10 *Alekseev S.S.,* Philosophy of Law, M., 1998, 84 (In Russian).

11 *Tanaga A.N.,* Principle of Freedom of Agreement in the Civil Law of Russia, SPB, 2003, 31-36 (In Russian).

Regulation provided by Article 319 of CCG is the logical continuation of the constitution right, setting, on its side, the special regulation, having its contents and enforcement significance. Contracting freedom is the constitutional, non-disposable and non-property civil right, granted to a person from his/her birth.[12]

In the context of contractual law, contractual freedom is considered as the subjective civil right, with the exactly stated limits and implementation contents.[13]

Subjective right of free contracting is regarded as the abstract right limited by the right of making or not making specific deal by one or another person. Regarding of the contracting freedom as the subjective right may be in close relation with the pre-contract responsibility theory – culpa in contrahendo.[14]

3. "Security Property"

CCG does not provide for the institute of security property, though discussions about it are frequent in Georgian scientific publications.

In Georgian legal doctrine the institute of security property was first considered by Lado Chanturia.[15] In the comments to vol. II of CCG he wrote: "There are some cases where the creditor registers the debtor's entire property in his own name provided that after fulfilling of the obligation he/she would return the real property to the debtor. Such relationships are within the principles of contractual autonomy provided by the Civil Code, though this should not be qualified as mortgage. This means for securing of the obligation could be regarded as specific type of relationships.[16]

Later, Hein Boling dedicated the special work to the institute of security property. The article deals with the certain issues of operation of the security property institute for real estate, as well as the relevant preconditions, admissibility and scopes, on the CGG example.[17]

"No foreteller is required to predict triumph of this institute in Georgian law. As this process is irreversible in Germany, it could not be stopped in Georgia as well. The requirements of economy, indeed very high, could not be satisfied sufficiently by the security rights provided by law and especially the law of lien of the movable property, claims and rights and mortgage – in case of real property.[18]

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12 *Ershov Yu. L.,* Contracting Freedom Principle and its Implementation in the Civil Law of Russia, Ekaterinburg, 2001, 47-48; *Vlasova A.V.,* Structure of Subjective Civil Law: Autoreference, Dissertation for Awarding of the Degree of Candidate of Law, CPB, 1998, 4; *Yoffe O.S.,* Selected Works in Civil Law: From the History of Civic Thought. Civil Legal Relationships, Criticism of the "Economic Law", M., 2000, 290 (In Russian).

13 See *Osakve K.,* Contracting Freedom in English and American Law: Concept, Substance and Scopes, "Russian Law Magazine", №7, 2006, 85; *Bratus S.N.,* Subjects of Civil Law, M., 1950, 8-10 (In Russian).

14 See: pre-contract relations in: *Vashakidze G.,* System of Complicated Obligations of the Civil Code, Tb., 2010, 81-93 (In Georgian).

15 *Chanturia L.,* Property, as the Means for Securing the Claim, Tb., 1999, 95 (In Georgian).

16 *Chanturia L.,* Comment to the Civil Code of Georgia, Vol. II, Article 302, Tb., 1999, 300 (In Georgian).

17 *Boling H.,* Securing of the Property by the Real Estate on the Example of Georgian Civil Code, Anniversary Collection of Works dedicated to 75th Birthday of Professor *Liluashvili T.,* Tb., 2003, 70-99 (In Georgian).

18 *Boling H.,* Securing of the Property by the Real Estate on the Example of Georgian Civil Code, Anniversary Collection of Works dedicated to 75th Birthday of Professor *Liluashvili T.,* Tb., 2003, 74 (In Georgian).

In German law and judicial practice, by introduction of this institute the weaknesses characteristic to the mortgage were subsidized. Its characteristic feature is that the property, as a means of security is transferred from the debtor to creditor on the basis of special agreement between parties within the law of obligations[19].

In German security law the issue of creation of the creditor's rights is as disputable, as earlier. German Civil Code (hereinafter GCC) provides for the number of norms undermining development of the security property institute.[20]

GCC prohibits transfer of the subject of mortgage into the creditor's ownership up to present. According to Clause 1149, before the due date of fulfillment of the claim to proprietor the latter can not grant to the creditor right to claim transfer of the title over the land parcel or dispose of it in any other way for the purpose of satisfaction of the claim, unless via forced execution.

Security property, as an institute, in the current form, exists due to the judicial practice and legal doctrine.[21] German judicial practice includes numerous decisions, by which the security means other than mortgage – security ownership was assumed as the legal means for dealing with the problem.[22]

German court supported unilateral gaining of the property right by creditor on the basis of non-fulfillment of the obligation, without participation of the debtor.[23]

When Georgian and German scientists justified, on the basis of comparative study of the security property, its advantages, compared with the mortgage, in CCG the legal pattern was different with respect of the mortgage institute.

From the date of enforcement of CCG, up to legislative changes of May 2007, transfer of the security property to the direct ownership of the creditor in case of violation of obligation was prohibited. Further, in case of non-fulfillment or improper fulfillment of the requirements the long-lasting and costly procedures for protection of rights and complicated procedures for execution were added to this. Because of such legislative restrictions the parties to legal relations applied various methods to ensure the greatest degree of legal protection of the creditor in case of non-fulfillment of the obligations by debtor.

Hein Boling describes the negative factors related to mortgage in details. He justifies the reasons for using of "such manipulations in credit economy". In his opinion, the norms regulating mortgage granted to the debtor the opportunities to use numerous undesired protective means against creditor.[24]

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19 *Zoidze B.,* Georgian Property Law, Security Property as the Institute Supplementary to Mortgage, Tb., 2003, 357 (In Georgian).

20 GCC, Clauses 925, 1149 and 1229.

21 *Boling H.,* Securing of the Property by Real Estate on the Example of Georgian Civil Code, Anniversary Collection of Works Dedicated to 75th birthday of Professor *Liluashvili T.,* Tb., 2003, 89 (In Georgian).

22 BGH, Beschluss vom 19, 3, 2009-IX ZR39/08 (OLG Koblenz); NJW-RR 2009; BGH, Beschluss vom 19 3, 2009-IX 39/08. NJW Spezial 2009, 342; BGH, Urteil vom 02-02-1984-IX ZR 8/83 (Bamberg) NJW 1984, 1184; Verdict of 07.11.96. Deutsche Notarzeitung (DnotZ) 1997, 727, with *Eikman's* critical notes. Reference by Boling H., Securing of the Property with Real Estate on the Example of Georgian Civil Code, Anniversary Collection of Works dedicated to 75th Birthday of Professor *Liluashvili T.,* Tb., 2003, 90 (In Georgian).

23 (1) Decision of 23.06.95 Neue Juristiche Wochenschrift (NJW 1995, 2635), (2) Reference, *Boling H.,* Securing of the Property with Real Estate on the Example of Georgian Civil Code, Anniversary Collection of Works dedicated to 75th birthday of Professor *Liluashvili T.,* Tb. 2003, 89, case 33 (In Georgian).

After changes made to CCG in May 2007, the legislative policies towards mortgage institute was changed. Norms regulating the mortgage, currently, comprise mostly the law protecting the creditor's interests. In the beginning of the contractual relations the parties have the opportunity to avoid the long and costly procedures related to disposal of the property and agree, at a time of contracting, on transfer of the security subject[25], without trial.

3.1 "Security Property" or Purchase with the Right of Redemption

In case of securing the claim by real estate the mortgage right is registered on the property. CCG did not provide for and currently it does not provide for the security property as the independent institute of security.

Currently, in private law, the process of creation of the property rights over each type of object is imperatively set by the law. Each right bears certain purpose and function in the relations within private law.

Legislative changes made in relation with mortgage in Georgia lead to the logical question: whether there exists the necessity of introducing of the security property institute still or not, maybe such institute is in the CCG, which, without any legislative changes, is practically applied instead of the security property.

Though Georgian legislators have not shared the institute of security property, in the Codex system there is the similar legal structure practically used for securing the claims. The purchase agreement with the redemption right provided for by CCG is implied. Articles 509-515 of CCG provide detailed regulation the institute of redemption in the purchase agreements.[26]

In the mentioned work, Hein Boling describes the actual case similar to security property as follows: "basically, the matter is quite widespread case: as a rule, the loan agreement (in accordance with Article 623 of CCG) between lender (e.g. bank) and borrower is made. The borrower is owner of real estate, e.g. the dwelling apartment, where he or his family live. This apartment would secure the claim of debt repayment for the lender. The legal institute provided for by the law is mortgage (according to Article 286 of CCG). For the certain reasons the parties refuse to register the lien over the real estate for the creditor's benefit. Instead the agreement is made, according to which the creditor becomes the owner of real estate. It is registered with Public Registry, in accordance with Article 183 of CCG. Details related to property transfer agreement depend upon the specific case. In the notary's deed, the purchase agreement is specified as the basis for purchase. As a rule, the loan agreement is not mentioned at all. In the cell where the purchase price should be stated the loan currency is specified. As a rule, the notary's deed does not specify when and upon what conditions the property should be returned to the debtor."[27]

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[24] On Weaknesses of Mortgage before Legislative Changes of May 2007 in CCG see: *Boling H.,* Securing of the Property with Real Estate on the Example of Georgian Civil Code, Anniversary Collection of Works Dedicated to 75th Birthday of Professor *Liluashvili T.,* Tb., 2003, 78-81; *Chechelashvili Z.,* Articles 288 and 299 of Georgian Civil Code – Disappearance of Mortgage or Owner's Mortgage or Owner's Land Debt? Collection of Georgian Private Law, Vol. I, Tb., 2004, 99 (In Georgian).

[25] See: Article 300 of CCG (In Georgian).

[26] In relation with the redemption institute, see: *Dzlierashvili Z.,* Legal Nature of Purchase, Tb., 2006, 66-68 (In Georgian).

[27] *Boling H.,* Securing of the Property with Real Estate on the Example of Georgian Civil Code, Anniversary Collection of Works dedicated to 75th birthday of Professor *Liluashvili T.,* Tb., 2003, 77 (In Georgian).

The above actual picture corresponds to the normative contents of the purchase-redemption right provided by CCG. The security property and purchase & redemption rights legal institutes have different names though, actually, with respect of contents, these are the institutes of identical legal nature.

At current stage, if in the registration practice there are the cases similar to security property, this is basically in a form of purchase & redemption. The agreements with such titles do not directly specify the loan relations, though the contents of contractual agreements between the parties provide the basis for propositions. For example, the agreements on interests and changes of exchange rates are regarded as the substantial conditions for loan agreements.[28]

The contractual interest of the buyer is purchase of the legally and materially unblemished property. The logical question is: how many fair buyers ready to return the property to seller after expiry of the term is in Georgia? In most cases, actually, the purchase agreement with the redemption right covers the loan agreement with transfer of rights over real property.[29]

In such case it is proposed that the parties have made purchase agreement with redemption right, until the contrary is proven. If the parties do not claim against their fraudulent agreement themselves, scarcely any third person can prove the actual contents of their deal. The relationships dealing with loans via purchase agreements with redemption right are mostly those made between natural persons.[30]

4. Emergence of the Property Right

In case of execution of loan through purchase agreement with redemption rights the buyer (lender) in the Public Registry gains the right over the borrower's property in the beginning of contractual relations. While in case of mortgage the creditor is registered at first as a mortgagee and his registration as a proprietor is provided in case of gaining of the property right.

Priority of the "security property" (purchase with redemption right) for securing of the violated obligations (basically of money nature) compared with the mortgage institute is related to the creation of the property right over the security property. In case of loan with the purchase & redemption agreement the creditor (seller) gains the property right from the outset of contractual obligations.

Attractiveness of creditor's registration as the owner is in gaining of the property right before the claim is emerged. Hence, through registration of the property right he feels himself safe. The creditor's only obligation is to wait for expiry of the redemption term. If the debtor (e.g. person with the redemption right) fails to enjoy the right provided by legislation (redemption right provided for by the agreement), the

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28 *Boling H.,* Securing of the Property with Real Estate on the Example of Georgian Civil Code, Anniversary Collection of Works dedicated to 75th birthday of Professor *Liluashvili T.,* Tb., 2003, 84-85 (In Georgian)

29 The award of Civil, Entrepreneurship and Bankruptcy Department of the Supreme Court of Georgia of 19th November 2009 (case AS-550-859-09) states: "The disputed agreement was made formally, only because the creditor took advantage of heavy material condition and lack of experience of the other party to the agreement, what resulted in execution of so called purchase agreement through fraud, instead of the mortgage agreement."

30 In Georgia the banking sector is regarded as one of the successful spheres. Most banks have the status of authorized persons of the Public registry and this obligates them to maintain good business reputation. In case of use of the real estate as security the mortgage agreement is executed. The banks avoid and it may be said they actually do not use the other "quasi security means". Implemented changes allowed the banks use of numerous legal structures provided by CCG (for their benefit)

purchaser (creditor), without any additional legal actions and costs, can enjoy the property right. In case of loan executed via purchase & redemption agreement, in the event of non-fulfillment of the obligations the creditor does not need to pass any additional registration procedures as he was granted the owner's status from the outset of the contractual relations, improper fulfillment of the obligations, non-compliance with the redemption term deprives the debtor of right to regain the title transferred to the creditor.

Debtor (owner) who has surrendered his place to the creditor is recorded in the cell of obligations as the obligated person undertaking to cover the amount owed to the creditor and in such case the debtor is recorded in the registration data as an obligated person who shall pay the amount stated in the agreement before expiry of redemption term, otherwise, he is deprived of the right of claim.

One significant condition to be taken into consideration by the participants of civil turnover is that after expiry of the redemption term the record on redemption, in the cell of obligations is not cancelled automatically, the record is maintained up to its invalidation in accordance with the rule established by the law. For invalidation of the record the joint application on termination of the obligation to the registration authority shall be submitted by the owner and person with the redemption right or the recognitive application by the person with redemption right hall be submitted to the registrar, stating that he has missed the redemption term and on this basis he applies to the registrar for invalidation of the record in the obligations' cell. The mentioned legal situation is equalized to the situation provided for by Section 2, Article 300 of CCG: legal action of joint application to the registrar and this obligates the participants of legal relations to consider one more time the undesired outcomes, in case of use of the concealed deal.

4.1 Transfer of Title upon Agreement

In German legal doctrine it is regarded that the institute of security property creates high risk of power abuse.[31] There is the reasonable proposition that the debtor can lose the title over land parcel without counter-execution.[32]

Up to 2007, CCG, similar to GCC[33] recognized the lex comisaria principle, according to which, by virtue of Section 2, Article 302 of CCG the agreement providing for direct transfer of the mortgage subject to the creditor unless the creditor's claim was not satisfied or was not satisfied in a timely manner, was declared invalid.

By the legislative changes made to CCG on 29th June 2007 the above mentioned restriction was rejected and in accordance with Section 1 of Article 300 of CCG and transfer of the real property burdened with mortgage to the creditor (mortgagee) became possible, if this was directly provided for by the agreement on mentioned mortgage.

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31 *Gaul,* Archive of Civic Practice, 168 (1968) 380, reference: *Boling H.,* Securing of the Property with Real Estate on the Example of Georgian Civil Code, Anniversary Collection of Works dedicated to 75th birthday of Professor *Liluashvili T.,* Tb., 2003, 91 (In Georgian).

32 *Tidke*, Zeitschrift fur Wirtschauftsrecht (Magazine of Trade Law), 1996, 57, reference: *Boling H.,* Securing of the Property with Real Estate on the Example of Georgian Civil Code, Anniversary Collection of Works dedicated to 75th birthday of Professor *Liluashvili T.,* Tb., 2003, 91 (In Georgian).

33 Clauses 1149 and 1229 of GCC declare invalid the deals according to which the title is transferred to the creditor in advance, without violation of any obligations.

Here the question arises, whether Section 1 of Article 300 of CCG could be regarded as the normative basis for the institute of "security property" or not? There may be many arguments against this opinion. Registration of one and the same person as mortgagee and as owner is regarded as the fact of "consolidation" and examination of legal force of the claim each time would significantly decelerate the civil turnover.

Such contents of the norm in Georgian private law should be regarded as assumption of opportunity of gaining of the title over the security property by creditor rather than the legal basis for the security property. "Substance of security property institute" is related to unconditional prior gaining of the property, while agreement within Article 300 of CCG is related to certain future condition, in particular, "delaying" of the obligation.[34]

Article 300 of CCG was promptly recognized in the contractual relations, it could be said that it became the standard condition of the credit agreements of commercial banks, allowing them avoidance of the long-lasting and costly procedures related to disposal of the security objects.

Section 2 of Article 300 of CCG caused certain irritation and some confusion of the creditors. According to this Section, if the debtor delays fulfillment of the obligation secured by the mortgage the real estate burdened with mortgage may be transferred to the creditor's (mortgagee's) ownership, if the creditor and debtor apply to the Public Registry with the joint application.[35] It is easy to imagine, what difficulties are related to submission of joint applications. Debtor, losing the only real property will always make his best not to fulfill the creditor's will.

It seems that the sense of prior agreement on the property right was lost because of joint application obligation. The parties will have to achieve consensus before registration of the property right. No contractual agreement can ensure unconditional creation of the creditor's title.

Contradiction in the contents, within single article was finally removed by the decision of Grand Chamber of the Supreme Court of Georgia.[36] Contractual condition on the basis of Section 2, Article 300, CCG, granting to the creditor the right to submit independently to the registrar with the request of property right registration, by virtue of Article 54 of CCG was regarded as unlawful deal ro be deemed invalid.

Article 300 of CCG regulates the cases when the debtor fails to fulfill the obligations and by the reason thereof, submits to the Public Registry the joint application together with the creditor on transfer of the property used as security to the creditor's ownership.

Grand Chamber of the Supreme Court of Georgia explained Section 2 of Article 300 of CCG: "the law does not prohibit prior agreement on future implementation of the actions provided for by Section 2, Article 300 of CCG, but such agreement (stating that the borrower agrees to submit joint application to the Public Registry in case of non-fulfillment of obligations) hall deal with the future action – submission of joint application. Law does not provide for prior execution of such agreement.[37]

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34 It is desired that the legislator used term "violation" instead of "delaying".

35 Similar regulation is provided for by the Instruction on Public Registry, Article 18 of which, in accordance with Article 300 of CCG, in case of transfer of the mortgaged real property to the creditor's (mortgagee's) ownership, registration of the creditor's title shall be provided on the basis of creditor's and debtor's joint application, stating transfer of the mortgaged property on the basis of the occurrence of the fact of non-fulfillment of the obligation.

36 Department of Civil Cases of the Supreme Court of Georgia, case AS-1283-1538-09, 25th May 2010 (In Georgian).

37 Department of Civil Cases of the Supreme Court of Georgia, case AS-1283-1538-09, 25th May 2010 (In Georgian).

5. Prohibition of Disposal of the Security Subject

One of the most significant guarantees of legal protection of the lender giving preference to the loan agreements with redemption right in case of money obligation, is Article 513 of CCG, according to which, if the buyer disposes off the purchased item before effectiveness of redemption right, such disposal shall be deemed invalid. Due to this norm, the purchase agreement with redemption right is preferred, compared with the mortgage. According to the mentioned regulation, the creditor, gaining the property right from the beginning of the contractual relations has restricted right of disposal of the property as such disposal, within the term of redemption, shall be deemed invalid by virtue of Article 513 of CCG. Such limitation of the owner (creditor) is the stable guarantee of protection as up to expiry of the redemption term he should not worry as the "claim security" means is not subjected to the danger of disposal, otherwise, he will be granted the opportunity to provide invalidation of the deal between owner and third person via court. In this case, title as absolute right is restricted for the redemption period.

On its side, in case of the loan secured with the redemption right the owner (creditor) is protected as he has taken over the from the debtor (person with redemption right) the possibility of disposal of the security object through registration of the property right. By this fact the creditor avoids the legal problems related to turnover ability of the security object thus excluding the possibility of disposal of the property without his content.

In credit relationships the creditor's desire is gaining of the right of preference satisfaction of the claim, as well as excluding of the mortgagees of the further levels, whose claims comprise heavy burden for the creditor's security object and reduces the possibility of full satisfaction of the claim from the security object.

In various legal systems the different regulations are provided to protect the creditor from the problems of priority order with respect of the mortgage. The debtor may be deprived of the right of disposal of the subject of mortgage in agreement with the creditor, i.e. the parties have the opportunity to achieve the agreement on so called "negative mortgage". The agreement of such contents protects the creditor from legal problems arisen in case of disposal off or other burdening of the subject of mortgage from the moment of creation of the mortgage right. The national laws dealing with the contents of agreements on "negative mortgage" are different in different the countries.[38]

According to Article 290 of CCG, one real estate may be burdened with mortgage several times. on the basis of Article 294 the proprietor is not prohibited to dispose off the property. By virtue of Section 4 of Article 294 of CCG, unless otherwise provided for by the law, the agreement by which the proprietor undertakes the obligations to the creditor, not to dispose off, not to use and otherwise burden the real property shall be invalid. Validity of such deal for the third persons may not be dependant on

[38] According to the legislation of Poland, Serbia, Slovenia, Croatia, Czech Republic, Estonia, similar to the rule provided by Section 5 of Article 294 of CCG the agreement prohibiting the possibility of further burdening with mortgage the real property already mortgaged is deemed invalid. In Hungary and Slovakia the legislation provides for the agreement on "negative mortgage". Ukrainian legislation obligates the owner to gain consent of the previous mortgagee in each case of mortgaging, if the property was once burdened with mortgage. In Kazakhstan, Russia and Romania the agreement on "negative mortgage", together with the other data is recorded with the land registry. See: "Mortgages in transition economies. The Legal Framework for Mortgages and Mortgage Securities, 20, available at: www.ebrd.com.

creditor's con sent. This norm of the law states imperatively the possibility of free disposal of the security subject by the proprietor.[39]

This imperative provision of the law set for the commercial banks provided basis for numerous legal problems, thus motivating them to seek alternative legal ways. Condition stated in the credit agreement of one of the commercial banks could be regarded as some way out from the current situation. Extract from the bank credit agreement secured with the mortgage: "if the property mortgaged or pledged to secure this loan is further mortgaged/pledged with the mortgage/pledge of the further order, for the benefit of the other commercial bank or other credit institution, the bank shall be entitled to provide repayment before term within 10 banking days from the date of client's written application."

Though by this provision the commercial bank can not prohibit disposal of the security subject under the agreement, such decision of the proprietor of security property can provide basis for early termination of the credit agreement.

Part 4 of Article 294 of CCG, allegedly facilitating unrestricted execution of the proprietor's rights, prejudices the creditor's interests as, independently from his will, the subject of security may be burdened so, that no claim satisfaction will be possible.

Regarding all above, it would be reasonable to transform Section 4 of Article 294 of CCG into the norm with dispositive contents, the parties of credit agreement should be given the right to achieve agreement with respect of prohibition of disposal of the mortgage subject allowing the parties avoidance of the financial and legal risks related to excessive turnover ability of the property, showing up with particular significance in case of priority order with respect of the mortgage subject.[40]

6. Contractual Freedom or Fraudulent Deal

One matter is allowability of the security property in the legislative space and the other – where the parties desire to secure the claim using the legal norms regulating the other institutes. Execution of the purchase agreement with redemption right instead of securing of the credit claims with mortgage is implied.

Comments to Article 45 of CCG clearly state the contents of fraudulent deal: expression of the actual will of the parties is covered with the other deal.[41]

Article 6:103 of European contractual law principles, about invalidity of seeming deals does not contain any reference. Regarding the substance and purpose of regulation of this norm such deal will be invalid only where it is against the law.[42]

Purchase, with redemption right is the legal structure provided for by the law. When the agreement on purchase with the redemption right is submitted to the registrar the interested person demands registration of title over the property. Submitted documents and registration requirement are in full correspondence with one another.

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39 The court decision deals with the dispute about disposal of the part of security subject emerged at the stage of sale by the joint creditors. See: decision of 1st March 2010 by the Department of Civil Cases of Supreme Court of Georgia, case AS-140-133-2010 (In Georgian).

40 Unlike the institute of mortgage, CCG allows agreements on "negative pledge", according to Section 1 of Article 266 of CCG, the parties may agree upon that the pledger shall not dispose off and shall not dispose off the subject of pledge, up to termination of the lien.

41 *Zoidze B.,* Comments to Article 56 of CCG, Vol. I., Tb., 1999, 186 (In Georgian).

42 *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tb., 2009, 311 (In Georgian).

In this case, their unlawful nature is in their use for the other purpose. On the basis of Article 5 of CCG the loan agreement made in a form of the purchase agreement with redemption right shall be deemed unlawful as, according to Section 3 of Article 5 of CCG, the norms regulating special relations (exclusion norms) may not be applied with similarity. In this case, the provisions regulating the redemption right, as the special norms, with their contents, shall not be used for the purpose of securing of the loan.

Hein Boling wrote: seemingly made purchase agreement shall be invalid (Section 1 of Article 56, CCG) as there is not serious intention. In the legal doctrine the loan secured with the purchase agreement with redemption right could be regarded as the classical example of seeming deal. Appearing of such types of agreement and their introduction into the practice reveals the gaps in legislation. In such cases the contractors act in agreement as they do not share the rules offered to them by the law.

The characteristic feature of the seeming and fraudulent deals is that the participants of the deal, with mutual agreement, intend to mislead the third parties. Such third parties may be as the party to the agreement also the state authority.[43]

Parties, achieving the agreement with respect of the loan, though legally they based such loan on the redemption, in legal respect, foresee the expected legal outcomes. Such deals are seeming and fraudulent not to one of the parties to the deal but to the state.

In the system of Georgian courts of general law numerous cases with such subject of dispute were considered.[44] In such cases the court always faced the problem: what are the scopes of use of such rules by the court? I.e. the court has to discuss the actual obligations between the parties or it should be limited with the identification of the rules applicable to the covered deal? In case of such disputes the court not only declares the deals invalid but, irrespective of the plaintiff's claim, restores the original situation by virtue of its decision. The court obligates the parties to restore the covered rules, i.e. those, applicable to the mortgage, effective at a time of making of such deal, in case of invalidation of the fraudulent deal.[45]

Court, obligated by the law not to exceed the limits of claim, may, on the basis of Section 2 of Article 56 of CCG may not only recognize the fact of invalidity of the deal but also decide that the actual relationship between the parties is the loan secured by mortgage. Decision made on the mentioned basis provides basis for invalidation of the purchase and redemption right, as well as creation (registration) of the mortgage right.

In case of loan secured by purchase agreement with redemption right there is the blemish of will.[46] Though, here the question arises what kind of blemish takes place?

For the will as a person's readiness to achieve legal agreement with the other party of relationships the law sets the external form expressed in signature. It is hard to assess, whether the party is aware in possible negative and positive outcomes or not. In case of dispute not only the issue of validity of the

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43 *Chanturia L.,* Introduction to the General Part of Georgian Civil Law, 1997, 366 (In Georgian).

44 Awards of the Grand Chamber of Georgian Supreme Court: AS-1380-1602-05 (26.07.2006); AS-1-453-06 (14.07.2006); AS-1324-1554-05 (11.07.2006) (In Georgian).

45 See: explanations of the norms applied in the decisions of 2006 by the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia (In Georgian).

46 See: *Chanturia L.,* Introduction to the General Part of Georgian Civil Law, 1997, 365 for blemish of will (In Georgian).

expressed will is doubted. The parties witness their will to execute the agreement by their signatures. Parties put their signatures either before notary or before the registrar, otherwise the deal is not subject to registration with Public Registry.

In case of covered deal, there is the blemish of internal will of the parties covered by the contents of the other deal and the actual will of the parties is expressed in the actual relations between parties.

Article 56 of CCG is the version unifying Articles 116 and 117 of GCC. In CCG, there is no norm with the contents of Article 116 of GCC, declaring the deal made with covered condition invalid.[47] Loan agreement made via purchase agreement with redemption rights is neither seeming and nor fraudulent, it is the covered deal, with its contents, covering the actual contractual purpose of the parties. This gap of the legislator is recovered by Section 2 of Article 56 of CCG, naming the fraudulent deal as covered deal and hence, in case of dispute, makes decision on application of the norms regulating actual relationships.[48]

In case of the deal made via purchase agreement with redemption right the parties achieve the agreement but such deal covers the actual purpose of the parties – to secure the money obligations via property transfer.

7. Conclusion

Comparative study of mortgage and redemption rights clearly revealed their positive ad negative aspects, gaps in the positive legislation and practice. Taking the scientific conclusions made on the basis of the research into consideration in the legislation would allow to the participants of contractual relations proper choice of the of the security means for the loan and credit obligations, thus reducing the negative outcomes caused by high pace of civil turnover.

Currently there is no necessity of introduction of the security institute in CCG, though, the norms regulating mortgage, providing for the procedures of transfer of the title over the mortgage subject in case of non-satisfaction of the claims, require further analysis and improvement.

Regarding the advantages specified in the article, with respect of the institute of security property and their implementation in the norms regulating mortgage, the universal rules for legal regulation of mortgage could be obtained.

It is desired that the agreement on "negative mortgage" was introduced into Georgian private law. It is desired that Section 4 of Article 294 of CGG was made of the dispositive nature, on the basis of which the parties will be given the opportunity to restrict or prohibit disposal off of the mortgage property by the proprietor, in case of mortgage, upon agreement.

Irrespective of the mechanisms provided for by the law, if the participants of the relations within the private law make decision to place the loan agreement under the regulation of the other institute,

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47 For Article 116 of GCC see: *Kereselidze D.,* The Most General Systematic Concepts of Private Law, Tb., 2009, 313 et seq. (In Georgian).

48 Decision of 29th June 2009 by Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia, case AS-253-578-09. On the basis of specified acknowledgement the court regarded that no one of the parties to the disputed real estate purchase agreement desired the outcomes directly resulting from the contents of said agreement. Thus, the disputed purchase agreement covered the mortgage agreement and the mentioned, according to Section 2 of Article 56 of CCG, is the basis for invalidation of the deal.

they should take into consideration Section 2 of Article 56 of CCG, according to which the dispute will be considered according to actual relationships.[49]

For the contractual parties it would be better to clearly state in the agreement the legal contents related to their intentions. German scientist, Hein Boling gives similar recommendation to them: "the parties and especially the banks in the role of creditor, by such easily understandable seaming deals endanger the desired guarantees and the fact of repayment of the secured loans. Therefore, I should advice them to make the agreements with affirmative force at court and by this protect themselves and the lawful interests of the bank and security. It is desired that the parties openly executed the security agreement."[50]

It is not a secret that the creditor desires to gain the highest profits and satisfy his claim within the shortest term and with the minimal expenses and this should not become the reason of practical use of the covered deals. Desire to promptly take the title over the debtor's property should not allow the creditor using of the norms regulating the relationships, though lawful but with the other contents.

According to the legislation the redemption right i not included into the list of rights and obligations subjected to registration. Its registration with the Public Registry depends on the parties' desire. It would be desired to make registration of the redemption right obligatory by the law, what would allow us to watch the dynamics of the "covered" deals in Georgia.

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[49] Section 2 of Article 56 of CGG: If the parties desire to cover the other deal by making the seeming deal, the rules applicable to the covered deal shall apply (fraudulent deal) (In Georgian).

[50] *Boling H.,* Securing of the Property by Real Property on the Example of Georgian Civil Code, Anniversary Collection of Works Dedicated to 75th Birthday of Professor *Liluashvili T.*, Tb., 2003, 85 (In Georgian).

IRAKLI KAKHIDZE[*]

SYSTEM OF STATE SUPERVISION OVER THE ACTIVITIES OF LOCAL SELF-GOVERNMENT BODIES IN GEORGIA

(Problems and Solutions)

1. Introduction

Alexis de Tocqueville (1805-1859), a famous French statesman, historian and social philosopher wrote as far back as 150 years ago: one can say with certainty that "it is precisely in municipalities that the power of free nations lies. Municipal institutions are for freedom what elementary schools are for science; they make freedom accessible to people; they endear its peaceful use to people and accustom people to using it. Without municipal institutions, a nation may create free reign for itself, but cannot have a freedom-loving spirit.".[1]

John Stuart Mill, English philosopher and politician provides the following assessment to the importance of local self-government: Local democracy allows the citizens to express their freedom and local identity in that form and to the extent, which might be impossible through central power. This is because local government is more close to the population, than central one. Local elective bodies can offer people different service, which meets local priorities, requirements and environment/ conditions. Besides, higher level government becomes more pluralistic and takes more account of local interests.[2]

Establishment of new self-government system in Georgia is linked with ratification of European Charter of Local Self-Government (hereafter "Charter") in 2004. With joining the Charter, new wave of local self-government reforms has been stimulated in Georgia aimed at bringing Georgian legislation into compliance with high standards the Charter sets for its member states. In response to this challenge, Parliament of Georgia has undertaken significant series of legislative amendments, including adoption of Organic Law of Georgia on Local Self-Government (hereafter "Organic Law") in 2006. With the adoption of this Organic law, law of Georgia on Local Self-Government and Governance of 1997 was canceled and the system of local governing bodies was abolished. Organic law was logically followed by approval of the law of Georgia on State Supervision over Activities of Local Self-Government Bodies (hereafter "Law on Supervision"). The latter was the first normative act, which codified regulatory norms of state supervision over activities of local self-government bodies. New chapter on local self-government added to the Constitution of Georgia in 2010 was the final phase of the legislative reform.

When analyzing newly established local self-government system, state supervision system over activities of local self-government bodies (according to the Charter – "administrative supervision") is one of the interesting topics. The Present article is dedicated to identification and seeking the ways out

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[1] *Tocqueville A.,* About Democracy in America, Fourth printing, Clark New Jersey, 2007, 42.

[2] *Mill J.S.* in: *John P.,* Local Governance in Western Europe, London, 2001, 2-3.

of the problems existing in the sphere of state supervision over activities of local self-government bodies in Georgia.

"Essence of local self-government mainly is determined by the extent of state supervision. Extent of state supervision is a scale to define how local self-government is ranked in state structure".[3]

"The concept of self-government draws on the idea that power should be limited and non-absolute in nature. Systems of control exist to prevent overstepping of the limits and to guarantee preservation of the balance between the public interest, the community interest and individual rights."[4]

However, a question arises: what types and methods of supervision used by the state might restrain the principle of local self-government?

According to the article 8 of the Charter, "Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.".

Intervention in the activities of local self-government will be proportional of the interests to be protected, if selected intervention method provides achievement of desirable results with a minor intervention in the local autonomy. In other words, among the supervisory powers, the softest measures of administrative supervision should be taken; as for the repressive measures, they must be taken only in emergency, when it is impossible to remedy or prevent any significant affect by other means.

2. State Supervisory Bodies

State supervision over the activities of local self-government bodies in Georgia is conducted by State Trustees – Governors (hereafter "Governors"). State supervision over the activities of local self-government bodies in the Autonomous Republics of Abkhazia and Ajara and Tbilisi city is within the competence of Prime Minister of Georgia. By governmental decree, state supervision can be exercised by other bodies and officials too.

According to Georgian legislation, Governor has an original legal status. He undertakes the functions of both the Head of State, and the representative of the Government of Georgia. Therefore, the dualism of executive branch familiar with the mixed system of governance is noticeable also in its vertical structure in Georgia. This dualism declines in favor of the Head of State, because the President of Georgia makes decisions on appointing a Governor and approval of Governor's charter and list of staff.[5]

According to the October 15, 2010 Constitutional amendments, to be entered into force after 2013 presidential election, Governor is completely out of control of the Head of State and occupies its due place in a unified vertical of executive branch as an official with general competence under direct control of the Government of Georgia.

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3 *Furman U., Svanishvili A.,* Law of Georgia on State Supervision Over Activities of Local Self-Government Bodies, Comments, Tb., 2007, 5 (In Georgian).

4 Report by the Steering Committee on Local and Regional Democracy (CDLR) prepared with the collaboration of *Prof. Pastor J.S. and Prof. Nemery J.C.,* Supervision and Auditing of Local Authorities' Action, Local and Regional authorities Europe, No. 66, 16.

5 See: *Melkadze O.,* Georgian Municipalism, Tb., 2009, 248-251 (In Georgian).

When the Constitutional amendments enter into force, regulation of procedures of appointing the abovementioned officials will logically be high on the agenda. According to new wording of the constitution, Governor is appointed by the Government of Georgia. Therefore, two possible scenarios of Governor's appointment procedure must be presented: (1) Governor is approved by the Government of Georgia upon the submission of the Head of Government; (2) candidate to be a Governor after consultation with the relevant ministry, is selected by Prime Minister and appointed by the Government of Georgia.

When analyzing state supervision system of Georgia, question arises regarding the place of the Ministry of Justice in the system of administrative supervisory bodies. Ministry of Justice is not stipulated as a state supervisory body by the Law on Supervision. Ministry of Justice has been preparing legal conclusion for certain normative acts of local government, which will serve as a general recommendation for supervisory body.

If Governor is a body, which exercises legal supervision, then why is not he granted a full right to draw up legal conclusions? Especially that the special offices have been formed for this purpose within Governor's Administration. Besides, the law declares Governor's administration a "confidence" to such extent, that it is granted discretion not to consider legal conclusion of the Ministry of Justice.

Moreover, it is also confirmed by the law of Georgia on Normative Acts, that Ministry of Justice also exercises the function of legal supervision over normative acts of local government to a certain extent. Namely, according to the law of Georgia on Normative Acts normative acts of local government shall enter into force on the date of publication. Under the same law, Ministry of Justice is entitled to refuse local government to publish normative act, if: (1) in individual legal act is issued in the form of normative act; (2) requirements concerning the use of state language is not met; (3) normative act lacks the obligatory requisites specified by the law, or they are incorrect.[6] In this case, there is no answer in Georgian legislation on the question – what is the role of a Governor?

In 2011 certain steps were made to improve the abovementioned situation – according to the legislative amendments, number of normative acts does not require the conclusions of the Ministry of Justice any more.

Legal regulation of the relation of Ministry of Justice and other sectoral ministries with Governor is problematic too. As was mentioned above, conclusion of the Ministry of Justice is not obligatory to supervisory bodies.[7] Besides, by the Law on Supervision within the delegated authority the Governors exercise state supervision over the activities of local self-governing bodies in consideration of consultations with governmental institutions exercising state governance in the respective field.

It is natural that questions arose with respect to this matter too: What would result if a Governor does not share the Ministry's positions? According to the Law on Supervision, Governor's position is decisive, however, is it expedient to grant him a right of final decision?

Sectoral ministry has more expert-capacities and specialization in appropriate field, which the Governor's administration lacks in many cases. Governor, while exercising the right of supervision

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6 See: law of Georgia on Normative Acts article 28, I paragraph, b sub-paragraph, Legislative Messenger of Georgia, №33, 09.11.2009, article 200 (In Georgian).

7 Law of Georgia on State Supervision over Activities of Local Government Bodies, article 8, paragraph 5, Legislative Messenger of Georgia, №22, 19.06.2007, article 194 (In Georgian).

delegated by the ministry, requires qualified directions and recommendations. Besides, the hierarchy of executive branch is theoretically violated by the relations between the ministry and Governor. Namely, it is logical, that a Governor should not possess a stronger position than a ministry.

While evaluating activity of state supervisory bodies, weak mechanisms of their coordination attract our attention. For example, precedents may be established, when different Governors have different understanding of the law or position about the expediency of the activities of local self-government within the same delegated authorities. Who is responding to such circumstances and in general, who analyzes, generalizes and prepares appropriate recommendations on Governor's supervisory practice?

According to the Law on Supervision, supervisory body shall prepare and publish by February 1st every calendar year official report on its activities. Official report shall be presented to the President of Georgia and the Parliament. President and President's Administration, in consideration of their terms of reference and wide spectrum of activities are deprived of the possibility to be engaged in technical issues, such as generalization and preparation of appropriate recommendations on Governor's supervisory practice. As regards daily supervision over Governor's activity and coordination, this type of mechanism simply does not exist.

Regulation of the above mentioned issues will become possible if superior (higher) supervisory body is determined, which would be any ministry, instead of the President or the Government of Georgia. This body may be the Ministry of Justice too, which should assume responsibility of elaboration/implementation of state supervision policy for local government activities, generalization of current supervisory practice and preparation of appropriate recommendations, guidelines etc.

In the case of state supervision over the delegated authorities relevant sectoral ministry should also be the higher supervisory body. While a Governor in this case must obey the instruction and directions of the ministry.

The above mentioned issues should be taken into consideration while deciding about the procedure of Governor's appointment. In consideration of the necessity for higher supervisory body - relevant ministry, it is desirable that higher supervisory body be involved by any form in the process of the Governors' appointing/dismissal too, which can be expressed by proposing appropriate candidate to Prime Minister. This is vital with a view of increasing Governors' responsibility to higher supervisory body. Otherwise, the Governor will only be responsible to Prime Minister politically and administratively, if he is granted a mandate exclusively from Prime Minister and the minister's possibilities to coordinate them will always be limited.

The abovementioned approach is applied by foreign countries. For example, in France, Prime Minister in consultation with the Ministry of Interior Affairs selects candidate for Governor; in Poland, the ministry responsible for state governance proposes Voivode candidate to Prime Minister; in Hungary, two ministries propose a candidate for State Representative to Prime Minister; in Italy, Prefect is appointed in consultation with the Minister of Interior Affairs. Besides, in Italy and France, Prefects belong to the system of the Ministry of Interior Affairs. Accordingly, the ministries are charged with supervision of bodies of general competence, generalization and coordination of their activities.

3. State Supervision over Lawfulness and Expediency

3.1 Supervision over lawfulness

The main goal of supervision over the lawfulness of decisions made by local self-government bodies is to insure the observance of the principle of rule of law within the local authorieties activities. In this contest, it is important to identify, whether supervision over lawfulness includes assessment of compliance with sub-law acts. In this case, extent of control is higher, and discretion of local self-government – limited.

That is why the Charter recommends supervision over rule of law only concerning compliance with constitution and laws. According to article 8 of the Charter, "Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles". However, the words "as a rule" imply a possibility, that administrative supervision should include assessment of adherence to other legal acts too.

Based on the abovementioned words - "as a rule", Georgian legislation expanded administrative supervision over activities of local self-government bodies also in relation to other normative acts (sub-laws) of the central government.

Such approach contradicts to the "spirit" of the Charter, because "as a rule" means that other cases may exist only as an exception; for example, "as a rule" is applied to exercising delegated authority only, rather than all fields of local government activity.

Such wide interpretation of supervision over lawfulness within the own authorities of local self-government significantly limits autonomy of local self-government. Besides, possibility of determining and adjusting the limits of authority through sub-law acts poses a danger of making a practice of inadequate interpretation of wording of laws.

Supervision limited to compliance with the law may be defined negatively as not authorizing the supervisory authority to determine boundaries of lawfulness at its own view.[8] Wilson D. and Game C. famous British scientists made up the following conclusions regarding the wide boundaries of lawfulness: regulation of the activity of local self-government through sub-law acts of state secretaries causes expansion of boundaries of lawfulness. This authority "allowing State Secretaries legislate by decrees -effectively amend, or even repeal primary legislation", which is a flagrant violation of the autonomy of local self-government and entails serious danger to them.[9] That is why Professor Loughplin J. called governance system of Great Britain "hyper-centralized"[10].

Therefore, it is expedient to limit the boundaries of the assessment of lawfulness of state supervision over activity of local self-government. To have an optimum effect, the state supervision should be limited to compliance only with laws (in Autonomous Republics of Abkhazia and Ajara, compliance with normative acts of Supreme Councils of Abkhazia and Ajara too). As for the delegated authority, old

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8 Report on monitoring the implementation of the European Charter of Local Self-Government by *Delcamp A.,* European Local Government Association for Research (ELGAR), <https://wcd.coe.int/ViewDoc.jsp?id=903897&Site=DG1CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>, [12.06.2011].

9 *Wilson D. and Game C.,* Local Government in the United Kingdom, Fourth Edition, New York, 2006, 160-161.

10 *Loughplin J.,* Subnational Democracy in the European Union: Challenges and Opportunities, Oxford, 2001, chapter 2.

regulation can be maintained – provision of compliance with the legislation of Georgia (laws and sub laws). This practice is stipulated by the legislations of Czech Republic, Poland, Denmark and Slovenia.

3.2 Supervision over Expediency

Supervision over expediency implies assessment of act's content value. While controlling expediency, along with lawfulness of act the supervisory body evaluates the boundaries and elements of its operation (such as content and dates of planned activities etc.), in order to reveal effectiveness of act to be adopted, or amendment needs in consideration of all circumstances.[11]

Nowadays a trend of sharp decrease and abolishment of the abovementioned supervision is noticeable mainly in the Charter member states and especially post-Soviet countries (Hungary, Finland, Lithuania, and Czech Republic). Supervision over expediency with certain exceptions, as a rule exists within the sphere of delegated authority.

Supervision over expediency entails danger to the autonomy of local self-government. In this case, discretion of local self-government is limited, which creates a risk of turning it into a territorial unit under the direct subordination to the administrative supervisory body. Possibility of effective management adapted to local conditions, based on the Principle of Subsidiarity, has been reducing too.[12]

However, the latter should not be interpreted as the existence of supervision over expediency automatically causes inefficient activity of local self-government. Supervision over expediency with respect to the regulation of matters of state importance, which is beyond the limits of local interests, may have a certain positive effect because it relates to the necessity of unified approach and coordination while dealing with issues of super-local importance. However, in this case it is hard to dissociate where the local and state interests start and where they end. Due to different conceptual understanding of the given topic, the countries develop different approaches.

In Austria, right of supervision over expediency is stipulated by federal constitution. According to article 119a of constitution, Land is entitled to control financial management of local bodies with respect to "thrift, efficiency, and expediency. The result of the examination shall be conveyed to the mayor for submission to the municipal council."

In Germany, Lands legislation provides for two types of supervision: Legal and Expert. Expert control has been undertaken in the sphere of activities within delegated authority of local self-government and it may have the form of control over both, lawfulness and expediency. Supervision over expediency is regulated by sectoral legislation and conducted as a rule by land executive bodies. If relevant body is not difined by the law, Expert control is provided by the general supervisory bodies.[13]

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[11] Report by the Steering Committee on Local and Regional Democracy (CDLR) prepared with the collaboration of *Prof. Pastor J.S. and Prof. Nemery J.C.,* Supervision and Auditing of Local Authorities' Action, Local and regional authorities Europe, No. 66, 27.

[12] Report Prepared for the Steering Committee on Local and Regional Authorities (CDLR), Definition and limits of the Principle of Subsidiarity, Local and regional authorities Europe, No. 55, 13-32.

[13] *Haschke D.,* Local Government Administration in Germany, <http://www.iuscomp.org/gla/literature/localgov.htm>, [12.06.2011].

Supervision over expedience is limited to the issuance of instructions. As for other mechanisms of supervision, such as inspection, relevant permit of general supervisory bodies is required.[14]

Real threat to self-government is hidden in the authority of changing, suspension and cancellation of local decisions as if they are conflicting "Public Interests" (State Interests). The procedures of approving these decisions also entail danger.[15]

For example, despite the serious reforms undertaken in Belgium over recent years, system of administrative supervision is still based on traditional French "administrative tutelle" model. According to article 162 of Belgian constitution, administrative supervisory bodies are entitled to cancel local government's acts if they contradict the law or "General Interests". The latter constitutes a mechanism of political control of local decisions. Interpretation of "General Interests" conception allows regional authorities to suspend or abolish local decisions on the grounds of incompliance with general interests of central government, regional and local communities.[16]

Administrative Supervision of the expediency of local government's activities is not provided for by the legislations of Sweden, Finland and Denmark. This institute is replaced with the form of supervision of management and its results.

Over recent years many European countries regard the effective performance management as a key element of "Good Governance", which plays important role in governance of local services.[17]

Effective performance management is a decisive factor for successful activity – positions of Osborne D., and Gaebler T. had a strong effect on modern state management system. Their conception looks simple: if you do not assess an outcome, you will not be able to distinguish between success and failure; if you cannot see success, you would be able to foster it; if you cannot foster success, you probably foster failure by doing so; if you cannot see success, you cannot learn from it; if you cannot see failure, you will not be able to make success; if you can demonstrate results, you will receive support from society, and finally what is measurable, that is achievable too.[18]

By Georgian legislation, supervision over expedience is permitted only within the sphere of delegated authority. According to the Constitution of Georgian, state supervision aims to "duly exercise delegated authority".

Under the Law on Supervision, state supervision aims at "ensuring local authorities act consistent with the interests, targets and policies of the State within the sphere of its delegated competences".[19]

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14 *Hoffmann-Martinot V., Woollmen H.,* State and Local Government Reforms in France and Germany, Divergence and Convergence, Wiesbaden, 2006, 135-136.

15 Report on monitoring the implementation of the European Charter of Local Self-Government by *Delcamp A.,* European Local Government Association for Research (ELGAR), Paris, <https://wcd.coe.int/ViewDoc.jsp?id=903897&Site=DG1CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>, [12.06.2011].

16 *Rynck F. and Wayenberg E.,* Belgium*, in Goldsmith M.J. and Page E.C.,* Changing Government Relations in Europe, From Localism to Inter-governmentalism, New York, 2010, 24-25.

17 *Jeanrenaud C., Martin S.,* Report on Performance Management at Local Level, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1376537&Site=DG1CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>, [09.06.2011].

18 *Osborne D., Gaebler T.,* Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector, New York, 1993, 146-166.

19 Law on Supervision over Local Self-Governments, article 4, "b" subparagraph, Legislative Messenger of Georgia №22, 19.06.2007, article 194 (In Georgian).

It is worth noting that the wording of law does not include the abovementioned constitutional term "duly exercise authority". Therefore, the relevant law is to be brought into compliance with terms specified by the Constitution of Georgia.

Determination of the limits for supervision over expediency is one of the problematic issues in the system of administrative supervision. This problem is evident with respect to Georgian legislation too.

In order to creat the effective mechanism of supervision over expediency, legislation must have the clear answer on what can be the measure of expediency and how it must be supervised.

According to the Law on Supervision, supervision over expediency should ensure exercise of delegated authority "in accordance with state interests and directions given by the delegating body".

Under the Organic Law, delegation of authorities to the self-governing unit by the state governance bodies shall be allowed on the basis of law, and the agreement. Lawmaking power has the Parliament of Georgia and the laws generally does not define governing body, whose authority has been delegated. Therefore, it is unclear which body should issue directions. Besides, under the law on supervision, Governors carry out supervision, unless otherwise specified in governmental decree. Accordingly, an agency, whose authority is being delegated, does not automatically fulfill the functions of supervisory body. Hence, it is expedient that the law on supervision include the term "state supervisory body" instead of "delegating body".

It is also ambiguous, why the Law on Supervision differentiates the "state interests" and "directions", as directions naturally should be issued in compliance with the state's interests.

Another problem occurring during legal regulation of supervision over expediency is more complex. This problem relates to the difficulty to determine "State Interests" and to explain it, which complicates also determination of boundaries for supervision over expediency.

General Administrative Code of Georgia is also unable to give clear answers on the above questions - the term "expediency" is mentioned only once in the Code. According to General Administrative Code, expediency and lawfulness of administrative-legal act concerning the administrative complaints is inspected by administrative body which considers the appeals.[20]

Possibility of cancelation of administrative-legal acts on the grounds of inexpediency is mentioned in the chapter on Official Supervision of Georgian law on Authority, Structure and Rules of Operation of the Government of Georgia.[21] The law applies to the activity of bodies within unified hierarchy of executive branch and does not concern local self-governing bodies; however, its content is more detailed compared to wording of the Law on Supervision, which contains unclear indications on state interests, objectives and policy while defining supervision over expediency.

Law on supervision does not stipulate any obligation of administrative body while undertaking supervision over expediency, even the requirement of making a reasoned decision on cancelation of administrative-legal acts on the grounds of inexpediency.

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[20] General Administrative Code of Georgia, article 201, paragraph 3, Legislative Messenger of Georgia 32(39), 1999, article 166 (In Georgian).

[21] Law on Authority, Structure and Rules of Operation of the Government of Georgia, article 33, "An act or action of an official may be annulled due to illegality or inexpediency if the act or action evidently contradicts the governmental program or the state policy that is based on the requirement of law and is carried out by the President of Georgia, the Government or a Minister, or results in irrational use of state property and budgetary funds or causes damage to the state interest in any other way" (In Georgian).

Such ambiguous regulations of law contain danger of excessive limitation on discretion of local self-government within delegated authority, which may lead to violation of paragraph 5, article 4 of the Charter, according to which "Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions". Compliance with Charter means availability of such legislative formulation too, which excludes the chance to be interpreted other way.[22]

Therefore, it is recommended that Law on supervision include a wording, which will make the limits and form of supervision over expediency clear and comprehensive. To that end, Law on Supervision should be amended as follows: "administrative-legal act of local self-government can be abolished by the rule of this law under the grounds of inexpediency, if it clearly conflicts with governmental program, directions and instructions of state supervisory bodies and/or cause nonrational utilization of property and budgetary funds. Cancellation of act under the grounds of inexpediency should be made by reasoned dicision".

Besides, with the view of raising effectiveness of local governance, we should consider the establishment of result-oriented effective management system at local level too. This is a laborious process requiring certain time. With this respect, first step should be made towards establishing the state standards for authority delegated to local self-government. Formation of this system will also require formation of supervisory system of management and its results.

4. Powers of State Supervisory Bodies

Following powers are stipulated by Law on Supervision for state supervisory bodies: appeal against normative-legal acts, request, cancel legal acts (within delegated authority), obligatory directions and request information.

According to the legislation of Georgian, only court is entitled to abolish normative acts issued within the own authority of local self-government, and legal acts issued within delegated authority can be cancelled in case of normative acts by government of Georgia, and in case of individual acts – by state supervisory body.

State supervision over normative acts is also stipulated by the Constitution of Georgia after amendments introduced on October 15, 2010. According to the constitution, "state supervision aims to ensure compliance of normative acts issued by local self-government with Georgian legislation and due implementation of delegated authorities". This norm of the constitution creates an impression that the goal of state supervision concerning the normative acts can only be the insurance of legality. It is unclear whether the lawmaker meant this. May be this is certain discrepancy caused by editing, as constitutional amendments had not been followed by relevant changes in law.

Ambiguity with respect to right of cancelation of administrative-legal acts of local government is caused by mismatch of Law on Supervision and General Administrative Code. The latter was adopted

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[22] Report on monitoring the implementation of the European Charter of Local Self-Government by *Delcamp A.,* European Local Government Association for Research (ELGAR), Paris, <https://wcd.coe.int/ViewDoc.jsp?id=903897&Site=DG1CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>, [12.06.2011].

in 1999, and the Law on Supervision – in 2006. Necessity of legislative amendments to the code has not been considered while adopting the law, which would be logically conditioned by its enactment of the law.

According to the Law on Supervision, proposal of administrative body on nullification of normative act is to be considered by the Government of Georgia, and decision shall be made within a month. While supervisory bodies are authorized to nullify themselves individual-legal acts of local government on the ground of inexpediency. However, according to General Administrative Code, "administrative-legal act shall be declared null and void by the administrative body issuing this act and in case of complaint or suit – by higher administrative body or court". Administrative-legal act shall be declared invalid by the administrative body issuing this act.[23]

As far as the Government of Georgia and supervisory bodies are not the agencies issuing the administrative acts, and supervisory body applies to the government with a proposal for nullification of normative act rather than with complaint, it looks like General Administrative Code does not provide for authority of a supervisory body to cancel acts of local self-government.

It is worth noting that article 8 paragraph 7 of the law on supervision contains a wording of one of the most ambiguous norm of the law: "If the normative act issued by local self-government bodies and its officials affects state security, protection of cultural heritage, environment, health, thorough functioning of state bodies as well as organizations and institutions, exercise of constitutional rights and freedoms of citizens, or this decision results in irreversible significant damage, relevant body supervising the activities of local self-government bodies is authorized to ensure taking appropriate measures for elimination or/and preventing the damage upon consulting with and warning relevant self-government officials in line with the rules set forth by the law. Decision over appropriate measures for elimination or/and preventing the damage can be appealed in court in line with the rules set forth by the Georgian legislation.".

First of all, it is not clear, what is implied by the term "appropriate measures". Article 9, paragraph 9^1 which has similar content and concerns supervision over normative acts on exercising of delegated authority, specifies the term "appropriate measures" indicating suspension or cancelation of normative act. This paragraph probably implies immediate submission to the government of a proposal on suspension or cancelation of normative act.

Article 8 does not include even a hint on suspension or cancelation of normative act. Possibility of suspension or cancelation of normative act is provided by legislation only through court. While according to the logics of article 9, in the phrase – "ensure taking appropriate measures", the rights to apply to the court immediately should be implied (without prior notification to local government).

However, there is one circumstance opposing the abovementioned logics. According to the same article of the Law on Supervision, self-governing unit is entitled to appeal to the court against the decision of administrative body on taking "appropriate measures" for prevention and/or elimination of the affect. The question arises: what decision must be appealed by self-governing unit? It is obvious, that self-government cannot submit a complaint about the fact of appealing against its normative act. Then what decision is meant? May be "appropriate measure" is nullification of normative act by the Government of Georgia within the own authority of local self -government? Probably it will become

[23] General Administrative Code, article 60^1 paragraph 3 and article 61 paragraph I, Legislative Messenger of Georgia 32(39), 1999, article 166 (In Georgian).

clear in the future, when this article is put into practice. Article 8 contains terms also requiring clarification, such as "state security", "protection of cultural heritage", "thorough functioning of state bodies and its officials", which may have very wide interpretation creating possibility for assessing expediency of normative acts.

According to law on supervision, "appropriate measures" shall be taken "if the normative act … affects state security, protection of cultural heritage, environment, health, thorough functioning of state bodies as well as organizations and institutions, exercise of constitutional rights and freedoms of citizens, or this decision results in irreversible significant damage".

The above wording requires revision, namely, potential threat of irreversible, severe damage by normative act should not be an alternative circumstance for taking "appropriate measures", and it should exist in cumulative regime with other circumstances, because intervention in authority of self-government will be proportional if there is a significant irreversible damage or threat of such damage. A minor damage cannot be the reason for taking "appropriate measures". Accordingly, there should be close "and" instead of "or".

Such formulations allow assessment of expedience of normative acts issued within the own authority of local self-government and their nullification through "appropriate measures". Ultimately, this will create a risk and also a real mechanism for non-proportional limitation of the rights of local self-government.

Analysis of the authority of supervisory bodies creates an impression that Georgian legislation tries to conform to the standards of Charter and Council of Europe in the field of supervision over activities of local government bodies. However, it will be hard to achieve due to ambiguous procedures and just through fulfilling formal requirements.

When determining the authority of state supervisory bodies, the following circumstance should be taken into account: goal of state supervision is to ensure lawfulness of the activities of local government and due implementation of delegated authorities. Accordingly, supervisory bodies must be granted powers necessary for exercising their functions effectively. Besides, while exercising their authorities, they should not go beyond the enforcement of law and non-proportional limitation of the autonomy of local government should not take place.

It is required to find a certain balance. Deprivation of powers of supervisory bodies is not a way out. According to Professor Allen Delcamp in his report about Charter implementation, "the new States have been encouraged to set up from the outset systems for the supervision of activities which are highly effective from the democratic point of view (reduced to supervision of legality alone, and very often entailing judicial rather than administrative supervision). The situation has thus passed from one extreme, dominated by the hierarchical principle to another" ambiguous and bureaucratic one[24].

Therefore, it would be better if state supervisory bodies are equipped with effective mechanism of supervision, application and rules of which are clearly stipulated by legislation. Accordingly, the circumstances and the results of its application will be predictable and self-government – protected.

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[24] Report on monitoring the implementation of the European Charter of Local Self-Government by *Delcamp A.,* European Local Government Association for Research (ELGAR), Paris, <https://wcd.coe.int/ViewDoc.jsp?id=903897&Site=DG1CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>, [12.06.2011].

When assessing the competence of state supervisory bodies of Georgia, the need for new additional authorities becomes evident, namely Georgia legislation does not provide for the right of supervisory bodies to take measures against local self-government, if they fail to fulfill their obligations specified in the legislation, i.e. they do not meet the requirements of the law and violate rights of citizens by omission. For example, what should be the government's action, when a significant damage occurred or there is a threat of such damage due to unfulfilled functions of local self-government, or/and Georgia assumed a certain responsibility under international agreement which is within the competence of local self-government, but local self-government do not respond in an adequate or timely manner.

In this case, law on supervision leaves the administrative bodies legally "unarmed". Consequently, there is only one means of political response left.

For example, according to the Organic Law, street cleaning and disposal of household waste is a competence of local self-government, however, it refuses to fulfill this function. After a certain period, it is obvious that a town will face serious problem creating significant discomfort to citizens, moreover, serious risk to their health too. In this case, the law says nothing about legal forms of response of supervisory bodies. The same is true for the failure of fulfilling the authority delegated by state concerning the calling up for military service.[25]

This topic is connected with indefinite obligatory nature of the functions of local self-government too. Organic law does not specify, whether fulfillment of own and delegated authorities is a right or obligation of local self-government, which provides legal justification for unfulfilled functions of local self-government.

With the view of regulating the above-mentioned cases, experience of foreign countries is based on the mechanism of "Subtitution of Self-Government[26]" (Substitution of Action[27]), e.g.

According to the legislation of Bavaria, Federal Republic of Germany, if self-government fails to fulfill in a due time instruction of state supervisory body on changing illegal decisions and fulfillment of its legal obligations, then supervisory body makes decisions and acts instead of local self-government.[28]

Mechanism of "Subtitution of Self-Government" is applied in Spain too. In Spain central and autonomous governments are entitled to act instead of self-governing unit if the latter fails to fulfill its legal obligations and thus hinders central and autonomous governments in exercising their functions. This right arises in two cases: (1) local self-government was provided with budgetary and legal capacities to fulfill this obligation, (2) local self-government failed to keep within the term set for

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25 Exception is the case of unissued normative act within delegated authority, when the relevant act is issued by the government by presentation of supervisory body. However, in this case too, unless inaction is expressed by issuance of normative act, the law says nothing about the form of responding by supervisory body (In Georgian).

26 *Subtitution of local self-government* – mechanism of replacing local government by central government when local government fails to fulfill the mandatory authority. As a rule, in this case central government acts at the expense of local self-government (In Georgian).

27 Report on monitoring the implementation of the European Charter of Local Self-Government by *Delcamp A.,* European Local Government Association for Research (ELGAR), Paris, <https://wcd.coe.int/ViewDoc.jsp?id=903897&Site=DG1CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679> [12.06.2011].

28 *Haschke D.,* Local government Administration in Germany, <http://www.iuscomp.org/gla/ literature/localgov.htm>, [12.06.2011].

resolving the problem (one month). Despite the general formulation, these conditions provide local self-government with more or less guarantees to defend themselves through the court from illegal intervention in their authorities.[29]

Mechanism of "Subtitution of Self-Government" in Italy is used when local self-government fails to fulfill local and international obligations, or when it is necessary for legal and economic integrity of the country, namely to meet basic standards established for civil and social rights.[30]

In Slovenia, mechanism of "Subtitution of Self-Government" is used for both, delegated authorities and mandatory own authorities. In case of unfulfilled directive of relevant ministry within delegated authority, supervisory body acts instead and at the expense of municipality; while within own authority, "Subtitution of Self-Government" can be used if inaction poses irreversible damage to human health, nature or living environment, and/or property.[31]

According to the Law of Czech Republic on Municipalities, if municipality fails to fulfill delegated authority, by decision of regional administration, other municipality will be charged with fulfillment of this authority.[32]

To create legal mechanism in Georgia for supervisory bodies to respond to local self-government's inaction, it is expedient to make the following changes:

(1) Specify a list of mandatory own authorities in the Organic Law and specify nature and volume of delegated authorities in the sectoral legislation;

(2) Mechanism of "Subtitution of Self-Government" (Subtitution of Action) shall be stipulated by law on supervision. State supervisory bodies shall be entitled to replace self-government, if inaction of self-government entails violation of human rights under the Georgian Constitution, Chapter 2 or Georgia's fulfillment of international obligations.

(3) To launch the mechanism of "Subtitution of Self-Government" following conditions are to be met: situation cannot be improved through any other means; local self-government received prior notification; reasonable time was given to improve the situation; local self-government has legal and financial capacities to act.

Besides, supervisory bodies shall be entitled immediately stop illegal normative act issued within delegated authority, if it entails significant and irreversible damage or poses real threat of such damage. Accordingly, term for cancellation should be reasonable (10-15 days), during which supervisory body should apply to the Government of Georgia with recommendation of cancellation of the act[33]. If the Government fails to make decision within this term, act shall automatically enter into force.

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29 Structure and Operation of Local and Regional Democracy, Spain, Council of Europe Publishing, Strasburg, 1997, 56.

30 Study of the European Committee on Local and Regional Democracy (CDLR) with the Collaboration of *Gerard M.,* Local Authorities Competences in Europe, 2007, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1377639&Site=DG1CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679> [12.06.2011].

31 The Law on Local Self-Government of Slovenia, Articles 90 and 90a, <http://lgi.osi.hu/country_datasheet.php?id=157>.

32 Structure and Operation of Local and Regional Democracy, Czech Republic, Council of Europe publishing, Strasburg, 2004, 11 and 12.

33 If the recommendation on identifying the higher supervisory body will be considered, then "of higher supervisory body and by presentation of the latter" (In Georgian).

Georgian legislation provides for the procedures of dismissal, suspension of authority and termination of activity for the representative bodies of local self-government.

According to the Constitution of Georgia, President of Georgia[34] "is entitled by consent of parliament to stop activity of the representative bodies of local self-government or of the other territorial units, or dismiss them if their activity posed threat to state sovereignty, territorial integrity and exercising constitutional rights of central governing bodies".

When analyzing legislative basis regulating the procedures of dismissal of representative bodies and suspension of their authority, the issues have been revealed which require additional explanation and improvement.

(1) Grounds difined in the constitution for dismissal of local self-government are too general and they are not specified by any other legislative acts either. Identification of general grounds always complicates right correlation of norms and provides for the possibilities of wide interpretation. Hence, it is expedient to determine more precise cases of dismissal of representative bodies.

For example, to consider systematic flagrant violation of Georgian constitution, legislation and citizens' rights[35] as well as non-execution of court decisions as the grounds for dismissal of local self-government bodies.

(2) Unlike constitution, Organic Law specified another additional ground for dismissal. "President of Georgia is entitled to dismiss Sakrebulo (Local Council), if Sakrebulo fails to approve self-governing unit's budget within 3 months after passing draft budget of Georgia prepared in compliance with Georgian legislation."[36]

Here two problems occur: (1) constitution does not specify this type of grounds for dismissal; and (2) the demand for parliament's consent on this decision of the President is "omitted". It is also unclear, why this norm appeared in the article regulating suspension of authority, as a special separate article is dedicated to dismissal procedure in the Organic Law. Therefore, it is recommended to regard a failure of approving the budget within set term as grounds for suspension of authority, or add relevant norm to the list of the reasons for dismissal of the constitution.

(3) Georgian legislation provides for the possibility of suspension, termination of authority and dismissal only for representative bodies and does not specify the future of the executive bodies in this circumstance. It is logical that suspension of authority for representational bodies may be followed by suspension of authority for executive branches too.[37] This topic requires relevant legislative regulation.

(4) Parliament's involvement in decision-making about dismissal of local self-government may lead to several drawbacks. Based on the analysis of Slovenian legislation, Professor G. Trpin mentions with respect to the above drawbacks: how precisely the parliament can assess the fact of law infringement, which is beyond the competence of the parliament, as a political governance body. In this

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34 According to October *15* 2010 constitutional changes, which will enter into force on the date of President's oath elected on October 13, 2013 presidential election. President exercises this authority by government's presentation and upon consent of the parliament (article 73, paragraph 1, sub-paragraph "j") (In Georgian).

35 *Zardiashvili D.,* Constitutional regulation of local self-government status, Tb., 2009, 13 (In Georgian).

36 Organic law of Georgia on Local Self-Governments, article 63, paragraph 2, Legislative Messenger of Georgia, №2, 09.01.2006, article 12 (In Georgian).

37 *Zardiashvili D.,* Constitutional regulation of local self-government status, Tb., 2009, 146 (In Georgian).

case, preparation and registration of decision is actually fulfilled by other body (administrative body). Therefore, the procedure has a formal character. On the other hand, there is a threat that parliament will make decision by political sense. The Professor considers that the best way out is when decision on lawfulness of dismissal of local self-government is made by the Constitutional Court, which consists of professional lawyers and is not influenced by political pressure[38]. This should be taken into consideration by Georgian lawmakers too.

(5) The relevent amendments should be provide for in order to insure conformity of Organic law on Local Self-Government and law of Georgia on Direct State Governance.

Under the Organic Law, "Sakrebulo's authority will be terminated before its expiry date if: self-governing unit is abolished by the decision of the Parliament of Georgia; number of Sakrebulo members reduced to less than half"[39]. According to the law on Direct State Governance, "Sakrebulo authority can be be terminated before its expiry date on the grounds of its incapability to exercise its authority granted by the legislation of Georgia"[40].

Logically, reduced number of members to less than half makes Sakrebulo incapable and it can be considered in above concept, however conclusion on Sakrebulo's incapability can also be drawn in other circumstances; e.g. Sakrebulo does not or cannot gather over long period, or/and it does not exercise own and delegated authorities specified by Organic Law and other legislations. Therefore, it is expedient that the law is limited to the terms of Organic Law, and if necessary, to specify additional grounds for dismissal.

Besides, the law provides for the procedures of suspension of authority rather than dismissal when Sakrebulo fails to approve budget within the term contrary to Organic Law.

Finally, to ensure solid guarantee for protection of local government's rights, it is expedient to share proposal of Mr. D.Zardiashvili, concerning the inclusion of the grounds for termination and suspension of Sakrebulo authority and dismissal in relevant chapter of the Constitution of Georgia.[41]

5. A Priori and A Posteriori Supervision

According to the legislation of Georgia, state supervision over the activity of local self-government mainly is carried out by a posteriori supervision; however, the forms of a priori supervision are also included in separate legislative acts, which is conducted over expediency, and lawfulness. A priori supervision is carried out as the issuance of permits and approval of decisions.

Law on Supervision within own authority implies the supervision over lawfulness of normative acts only and says nothing about the possibility for the inspection of lawfulness of individual acts; while

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38 *Trpin G.,* Local Government Reform in Slovenia, from Socialist Self Management to Local Self-Government, In: *Baldersheim H., Illner M., Wollmann H.,* Local Democracy in Post Communist Europe, Opladen, 2003, 178.

39 Organic law of Georgia on Local Self-Governments article 63, I paragraph, Legislative Messenger of Georgia, №2, 09.01.2006, article 12 (In Georgian).

40 Law of Georgia on Direct State Governance, article 5, paragraph 1, Legislative Messenger of Georgia, №23 (30), 1999, article 106 (In Georgian).

41 *Zardiashvili D.,* Constitutional regulation of local self-government status, Tb., 2009, 46 (In Georgian).

other legislative acts of Georgia consider inspection of lawfulness and in some cases expediency of individual acts within a priori supervision.

Law on Supervision does not recognize preventive supervision, however, a priori supervision is stipulated by following legal acts: Organic Law[42], laws of Georgia on Denomination of Geographic Objects; on Property of Self-Governing Unit; on Advertisement; on The Basis of Spatial Arrangement and Urban Development. Existence of a priori supervision shall not be considered as the gross intervention in local self-government's autonomy; however, the problem of proportionality still exists, which should be assessed individually.

In this sphere, the following problem has been revealed: sectoral legislation needs to come in accordance with Organic Law and the Constitution of Georgia.

For example, according to the law on "Property of Self-Governing Unit", "agreement on direct selling of the property of Tbilisi city through direct sale and competitive selection enters into force only upon the consent of the President of Georgia". President of Georgia makes decision on disposal of property of self-governing units (except Tbilisi) through direct selling by the submission of the Ministry of Economy and Sustainable Development and in emergency by the Government of Georgia.[43]

This regulation shows that the president controls the (in case of Tbilisi) expediency and lawfulness of agreements. While in case of other self-governing units, decision-making is fully within his competence without participation of self-government.

Pre-supervision is considered acceptable in the report of European Committee on Local and Regional Democracy with respect to disposal of significant property, and it is not regarded as a non-proportional intervention in the local autonomy.[44]

Nevertheless, it is to be taken into account that this article contradicts the Constitution of Georgia, Organic Law and Law on Supervision. According to Organic Law, only self-government is entitled to make decision on management and disposal of property owned by self-government.[45] Organic law is formulated imperatively, keeping the right of property disposal within exclusive competence of local self-government. According to the constitution of Georgia, "own authorities specified by organic law are exclusive"[46]. Accordingly, they cannot be distributed among other agencies. In addition, under the Law on Supervision, only supervision over lawfulness of normative acts is permitted within own authorities of local self-government. By the same logics, limitation of local self-government is unlawful – to alienate basic property only in case it loses its functional purpose.[47]

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42 Organic law of Georgia on Local Self-Government, article 8 and 22 first paragraphs "x", Legislative Messenger of Georgia, №2, 09.01.2006, article 12 (In Georgian).

43 Law of Georgia on Property of Self-Governing Unit, article 19^1 paragraphs 12 and 14. Legislative Messenger of Georgia, №15, 19.04.2005, article 101 (In Georgian).

44 Report by the Steering Committee on Local and Regional Democracy (CDLR) prepared with the collaboration of *Prof. Pastor J.S. and Prof. Nemery J.C.,* Supervision and Auditing of Local Authorities' Action, Local and Regional Authorities Europe, No. 66, 39.

45 Organic Law of Georgia on "Local Self-Governments", article 16 paragraph 2, "f" sub-paragraph, Legislative Messenger of Georgia, №2, 09.01.2006, article. 12 (In Georgian).

46 The Constitution of Georgia, article 101^2 paragraph 2 (In Georgian).

47 Law of Georgia on "Property of Self-governing Unit", article 13, Legislative Messenger of Georgia, №15, 19.04.2005, article 101 (In Georgian).

Similar contradictions with Organic Law of Local self-government is revealed in other cases too.[48]

Georgia has ratified European Convention on Transborder Cooperation Between Administrative Territorial Units or Governmental Agencies by the decree of the parliament №2961-1S of April 28, 2006 (Madrid, May 21, 1980). Within this convention by the resolution of the Parliament of Georgia, Georgia will conduct transborder cooperation with the convention member states through signing interstate agreements. By ratifying the convention, Georgia recognized authority of local self-government to conclude transborder agreements with the relevant local government units of the other countries. Parliament of Georgia while ratifying the convention has not taken into consideration the need for legislative amendments, which was required for enactment of the convention.

The abovementioned competance is not provided for by the Organic Law in the list of own authorities of local self-government. Besides, neither mechanism of state supervision over transborder agreements is stipulated by the law. Negligence regarding this issue is expressed by the fact that Georgia has signed such international agreement with only one state and neither self-governing unit has concluded the agreement so far.

In view of upward trend of contemporary economic growth and European experience of transborder cooperation, Georgia will have to make certain steps in this direction. Accordingly, mechanism of state supervision over transborder agreements will have to be established too.

The transborder cooperation falls beyond the category of issues of just local importance. Therefore, it is permitted and obligatory as well to elaborate relatively strict mechanism of state supervision. Preventive supervision will probably be the most effective mechanism, aiming at ensuring lawfulness of transborder agreements. Preventive supervision in this sphere is common practice of European countries.

A priori supervision, as was mentioned above, does not contradict the principle of local self-government; however, in case of wide-scale application may cause limitation of self-government's discretion. Preventive supervision reduces the chance for enactment of unlawful legal acts and consequently the risks of damage; however, it is not a completely effective mechanism, as it does not exclude appellation of enacted act by concerned persons and nullification of act, which had once already been subjected to a priori supervision. Therefore, application of a priori supervision mechanism is expedient only in special, exclusive cases and it should be specified by Organic Law. Organic Law shall also provide for a priori supervision for the decisions of local self-government, such as decision on signing trans-border cooperation agreements and approval of document of spatial-territorial planning.

State supervision over the activities of local self-government in Georgia has been conducted through a posteriori supervision and preventive supervision is used only in the exceptional cases.

A posteriori supervision over normative acts of local self-government is obligatory and is applied to all normative acts. Supervisory body while executing legal supervision follows the legal conclusion of the Ministry of Justice. According to amendments introduced to law of Georgia on Normative Acts in 2011, conclusion of the Ministry of Justice shall not be issued for number of normative acts, which are

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48 Law of Georgia on Denomination of Geographic Objects, article 10, paragraph 5 – Organic Law, article 16, paragraph 2, „dz" sub-paragraph; law of Georgia on Advertisement, article 6, - paragraph 4 referring – article 16, paragraph, sub-paragraph "n"; law of Georgia on Basis of Spatial Arrangement and Civil Construction article 21, paragraph 3 referring – Organic Law article 16, paragraph 2, sub-paragraph "r" (In Georgian).

defined by the Minister of Justice. However, under the Law on Supervision, state supervisory bodies should supervice all normative acts issued by local self-government bodies.

It is expedient that state supervisory bodies follow the Ministry of Justice and release all or almost all normative acts issued within their authority from obligatory state supervision, and use the obligatory supervision only for normative acts issued within the delegated authorities.

Besides, the possibilities needs to be strengthened for the third persons to initiate procedures of administrative and court supervision over lawfulness of acts issued by local self-government bodies. Here is meant first of all granting the right to Sakrebulo members to apply to court with abstract complaint[49], which is a mechanism of democratic control and will effectively intensify internal control too.

6. Supervision over Exercising Own and Delegated Authorities by Local Self-government

Legislation of Georgia recognize dual task model of local self-government and accordingly authorities are divided into own and delegated ones.

As regards the obligatory nature of responsibilities, which divides the competences into two more types – mandatory and voluntary functions, Georgian legislation does not recognize this sort of differentiation. Own authorities of local self-government are voluntary functions, which formally releases them from the responsibility in case they fail to fulfill their functions. It is to be noted that in many cases, mandatory nature of delegated authorities has not been stipulated neither by sectoral legislation, which makes this circumstance even more ambiguous and unclear.

Moreover, the above situation releases the central government from responsibility too - local self-government provides the independent financial resources necessary for exercising their authorities, which ultimately causes the weakness of local self-government.

Therefore, it is expedient to divide own authority of local self-government into mandatory and voluntary ones, which will lead to arising of bilateral responsibility for fulfilling mandatory competence, of local self-government on the one hand – to ensure execution of mandatory functions, and central government on the other hand – to grant financial and material resources to local self-government required for execution of mandatory functions. This will greatly contribute to the development of local democracy and improvement of living conditions of the local communities.

Another significant problem of the legislation of Georgia concerns the regulating of own authority in sectoral legislation, which was mentioned above. Sectoral legislation may determine the rule of exercising own authority, special procedure or appropriate obligatory standards, but it shall not limit exclusiveness of own competence.[50]

Georgian legislation is original with the standpoint that responsibility for exercising delegated authority is equally distributed among representative and executive branches, unlike the majority countries, in which authority is delegated either to high-rank official of the executive branch only, or fully to self-governing unit, but within the direct responsibilty of the executive branch.

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49 Actio Popularis.

50 *Zardiashvili D.,* Authorities of Self-governments. Tb., 2009, 37-38

Therefore, representative and executive branches as well as high-rank officials and their acts are subject to supervision over fulfillment of delegated authority. State supervisory bodies in the field of delegated authority have wider competences that are expressed by their capacity to nullify individual and normative acts on the grounds of inexpediency and in case of inaction of a representational body, issue normative acts for it.

Supervisory body is entitled to nullify on the ground of inexpediency individual legal acts, which relate to disposal of material and financial resources while exercising delegated authority.

7. Conclusion

Despite the overall positive trends of the development of local self-government in Georgia, the system of local self-government requires further improvement. With this regard the issue of state supervision over the activity of local self-government bodies is not an exception.

Based on the analysis of legal basis of state supervision over the activity of local self-government bodies, several significant problems have been identified. First of all, the compliance of Georgian legislation with the Charter is to be revised. Impact of a new chapter of constitution on current system of local self-government is to be considered. Incompliance of Organic Law and the Law on Supervision with other sectoral legislations is a problematic issue. Besides, the list of authorities of state supervisory bodies and the effectiveness of their activity are to be revised and assessed.

The present document certainly does not pretend to a complete capacity of identifying overall problems of Georgian legislation with respect to local self-government. However, it should greatly contribute to the formation of a complete pattern of the system of state supervision over the activities of local self-government bodies and focusing on current drawbacks. Hopefully, this will create a basis for further analysis and relevant reforms aiming at the improvement of Georgian legislation.

IRMA KHARSHILADZE[*]

AN ADMINISTRATIVE COMPLAINT AS A PREREQUISITE OF CLAIM SUBMISSION

Among the generally acknowledged human rights and freedoms one of the main rights is – to go to court, by which the citizens provide the protection of their legal interests. The mentioned procedural right is guaranteed by the 42nd Article, I section, of Georgian Constitution, according to which "Everyone has the right to apply to a court for the protection of his/her rights and freedoms".

An appeal to a Court and the guarantee from the Court is one of the main principles of the procedural justice, on the basis of which the material justice is being realized. Naturally, the mentioned thesis refers to administrative justice, along with the other fields of the justice, but since the latter is distinguished with various features, the right to appeal to a Court, is regulated otherwise in some countries' procedural justice, than it is established in the civil procedural regulations.

One of the reasons is that, unlike the other fields of the law, in the administrative law, the material administrative law is not separated. Generally, in the administrative law, the material and procedural law are compiled together. So is, for example, the Institute of Administration Complaints. The complaint against the citizens' violated, illegal decisions and actions in the Administrative agency, is not a right of interested person, but an effective legal way to protect his/her rights and freedoms. In terms of legal protection, the right to apply a complaint to an administrative body and to apply to a Court with the administrative lawsuit**,** are close to each other, and for the purpose that, finally, the objective and fair judgment is warranted for doubtful issues, before going to law it could be determined the obligation to bring a one-time complaint to the administrative body. In this way, the enactment of an administrative complaint function in full size should be possible, which is primarily expressed by human rights protection, the self control of the administrative bodies, and unloading of courts. The imposition of the prejudicial regulation stipulates the improvement the quality of administrative justice.

It should be noted that before the amendments of the Administrative Procedure Code of Georgia (hereinafter - APCG) December 28, 2007, which comprised to bring a one-time complaint as necessary precondition of allowance to the court, the administrative complaints functions had not been implemented in practice.

The diverse evaluation from the lawyers had been followed to the legislative innovations included in APCG. Some of them believed that the mentioned changes will affect a person's right of application to the Court, which is contradictory to the Constitution of Georgia and international legal acts. And the opponents of those views considered that the establishment of administrative complaint appeal as a precondition is a very positive moment, in order to solve such problematic issues, as increasing the role of the administrative bodies in the direction of the protection of human rights, the courts unloading and provision the effectiveness of their activities.

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Due to evaluation of those two opposite views, first of all, it must be determined whether in reality, the amendments made in Article 2, Section V of APCG, causes the limitation of the human procedural rights to appeal to court. In particular, the mentioned article says, "the court fails to lodge an appeal against an administrative agency, if the plaintiff did not use the possibility of one time filing of an administrative complaint established by the General Administrative Code of Georgia (hereinafter - GACG).

The right of application to Court, is one of the oldest procedural rights, which is established by various international acts, is recognized by almost all the country's national legislation, a lot of interesting scientific researches have been done about it, but the declaration of the basic human rights by the state and reviewing the theoretical aspects of this issue in the scientific works is not enough for the real and perfect operation of the court protection guarantees in practice.

"The basic right of judicial protection formally means, the possibility of applying to court, and conceptually provides the human full legal protection."[1] It is impossible not to share this thesis, but for the condition of fair trial rights in the court, the appropriate precondition should be existed, which implies the obligation of the one-time claim to administrative agency before appealing to court.

In the foreign countries the restoring of the contentious or violated rights are produced through the court or quasi-court. However, it should be noted that in many countries of the European court, the right for appeal (external control) is allowed only after a contentious issue is appealed to an administrative law, and the scope of the legitimacy of the decision is determined by of internal legislation. It is reasonable to review each of them separately.

For example, in the French administrative law the administrative claim is considered as a special form of the administrative control, which, except for exceptional cases provided by law, should be prior to appeal to the court. In the other words, the appeal to the state council and administrative court, exempt for the established cases, is possible only after administrative appeal.[2]

It is also interesting, the German federal state established procedure of appeal: If human rights are violated by the actions of the state agency, a citizen can apply to court to defend his/her own rights. In compliance with the principles of the Constitutional Federalism, there are federal and the land administrative bodies and courts in Germany. According to this system, the bodies consider and resolve only those issues which can not be resolved in the lower level.

The Administrative appeals initially are considered in the land administrative agencies; afterwards, it is possible to appeal to the Land Administrative Court, and the final instance of cassation is the Federal Administrative Court. The "Law of the Administrative Proceeding" states: "If the administrative body considering the administrative complaints, did not take a resolution regarding the complaint within three months after the complaint applying, the interested party, who applied the complaint, has the right to protect his/her rights to apply to the court for cancellation of the related act. The administrative law system consists of three instance proceedings. Two instances on the Land level: the Administrative Court and Supreme Administrative Court and the third instance on the federal level- the Federal Court.[3]

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1 *Kublashvili K.*, The Major Rights (Juridical Manual), Edition "GSI" , Tb., 2008, 341

2 Administrative Law of Foreign Countries, Edited by *A.N. Kozyrina* and *M.A. Shtatinoy*, Tutorial, Publishing House "Spark", Moscow, 2003, 266.

3 Ibid, 294.

The German administrative procedural law, in particular cases, establishes prior administrative appeals proceedings.

The pre-trial proceedings of litigation are prior administrative procedures, which implements the self-control by the administrative authorities.

The pre-trial proceedings also serve for the purpose of legal protection of a citizen, because, in this case, the administrative authority's decision is reconsidered with the whole volume and fully verified, that is sometimes, impossible by the court regulation.

"The pre-trial proceedings, as the way of court actions simplifying is not so bad objective, because the existence of these conditions enables the unloading of courts." [4]

In the Administrative Justice of the Netherlands is recognized that an interested party must file a complaint not to the administrative acts issuing agency, but by the superior body, which is called the "administrative appeal". Though, according to the same country legislation, it is also admitted to apply to the court by the direct appeal.

For the clarification of applying the court right's content, the explanation of the Constitutional Court it is interesting, which was established by the resolution of 3 July, 2003 on the case – the citizen Avtandil Rizhamadze and the citizen Neli Mumladze against the Parliament of Georgia. According to this decision: "The 42nd Article, I section, of the Constitution, Everyone has the right to apply to a court for the protection of his/her rights and freedoms. The realization of the right of defense by the court is achieved by the unity of procedural norms and means, in compliance with law principles, which provides the fair implementation of a justice and restoration of citizens' rights. The application to a court may not be limited only to a lawsuit, it covers all stages of the civil process, the rights of the citizens, recognized by the Constitution of Georgia and the law at those stages, the right to go to a law, should not only exist, but be practically realizable." Thus, during the discussion of the constitutionality of the norm, it can not be limited only by a narrow understanding and legal admissibility. For the complete explanation of the issue, it is necessary to study its practical realization opportunities; to select the effective means of the rights protecting, in the way, not to ignore the legitimate purpose and, consequently, unequal restriction of constitutionally protected rights. As mentioned, the realization of the right of defense by the court is achieved by unity of procedural norms and means. Due to peculiarities of the administrative proceedings, the institution of procedural appeal should be considered as such means that is, at the same time, a guarantee of quality and fair administration of justice.

In compliance with The European Court decision on the case on November 28, 2006 – "apostil against Georgia" - emphasizes "the availability, not only the theoretical and practical, of the complaint at the relevant time, but the offer of a reasonable prospect and existence of the successful use of these means". Based on those criteria, the European Court does not consider the inter-legislative means settlement as obligatory for the case, if the using of those means can not offer success to an applicant. Accordingly, considering these factors the court stated: The court must take into account not only the fact of the formal means existence, but the general legal and political context in which they operate.

It is true, that a complaint discussion is connected to a number of gaps in the administrative agency, but it is not enough to refuse the rule of pre-legal complaint. Establishment of the mentioned

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[4] *Vachadze M., Todria I, Turava P., Tskepladze* N., The Administrative Procedure Code comments, Tb., 2005, 139.

legislation innovation has various preconditions. The necessity of its implementation is caused due to the specifications of the administrative proceedings. In particular, it is known that:

- One of the particular characteristics of the administration agencies is that, on the one hand, they conduct administrative proceedings; but on the other hand, they appear the arbitrages of the legality and the reasonability of the management activities.
- A complaint is the first step to review the decision already made by the administrative agency. It aims to give the opportunity to the administrative agency, to evaluate once again the act issued by it, but to give the opportunity the higher body to exercise control over the subordinated agency.
- Discussing the administrative complaints, the administrative agencies assure protection and refurbishment of violated rights, that, itself, supports to the strengthening of the legal regime and if the rule of complaint at the administrative agency remains the mandatory preconditions for legal proceedings, it will support to the realization of the idea of fair trial.
- Administrative control frames exercised within the administrative complaint frames are rather wide than the trial control. In particular, the decision reasonability and legality is tested in case of administrative complaint within administrative proceedings, but the trial is limited only to the examination of the legality.
- As mentioned above, an administrative complaint has the function of a complaint admission necessity precondition under the Administrative Procedure Law of Georgia. Main characteristic of the legal state is that the interested party enjoys the possibility to demand the review of the decision issued under administrative proceeding.

Therefore, this change established in the administrative procedural law should be regarded quite acceptable. Though, it should be noted that this legislation innovation has its own gaps that need to be clarified and explained. It is reasonable to discuss the problems listed in the Administrative Procedures Code of Georgia in Articles 22 and 24 in accordance with the types of the complaints.

As mentioned above, according to Administrative Procedures Code of Georgia, an administrative complaint has the admission precondition of administrative complaint. Deriving from the notion of the administrative complaint and Article 177 of General Administration Code of Georgia, file to complaint against the administrative decree is subject to Articles 22 and 24 of the Administrative Procedures Code of Georgia. Though, there is one opinion that the declaration of an administrative decree as invalid is not the function of the law. A more correct formulation would be that there is no need to trial protection of the private right violated under this decree, as such decree is legal and its invalidation is connected to the existence of the circumstances envisaged under Article 61 of General Administration Code of Georgia. Legal function is to declare the legality of the administrative decrees issued by the administrative agency compliance to Georgian legislation. If it turns out that a disputed administrative decree or act is unlawful, the court shall declare it as nullified after its appeal at administrative agency. That's why the existence of Article 22 of Administrative Procedures Code of Georgia up to today's existence should be regarded as inappropriate. It is necessary to change its formulation and, consequently the title itself. In particular, if the demand of the interested parties is the invalidation of a legal administrative decree, then they should apply to the administrative agency that issued the decree with a complaint to invalidate the administrative decree. If the refurbishment of arguing or abolished

subjective private right is possible through the invalidation of the administrative decree, then the interested party should use the rule envisaged by Part V of Article 2 of the Administrative Procedures Code of Georgia and apply the court with the complaint to invalidate the administrative decree. The issue of confession complaint is questionable. In particular, some lawyers reckon that the complaint acceptance condition does not spread over the real act. In other case, as a matter of fact, the possibility to file a complaint shall be excluded for the made actions envisaged by Article 24 of the Administrative Procedures Code of Georgia and it will always be the type of complaint declaring the invalidation of the decree issued compliance to administrative complaint. Though, it should be noted, that it is possible to demand the realization of the actions by the administrative complaint, but in case of rejection, the goal is achieved not by the annulment of the complaint decision (Article 22 of Administrative Procedures Code of Georgia), but by the complaint towards action realization (Article 24 of Administrative Procedures Code of Georgia). Though, deriving from the principle of quick justice, it is reasonable not to spread the prejudicial complaint rule over the complaint towards action realization.

Selection of legal mechanisms of the protection of right to find the administrative decree invalid has significant importance, as at legislative level, there have been established vague norms, and, consequently, there are such cases in practice, when it is hard to estimate the degree of the law being abolished towards justice. In particular, in compliance to Part III of Article 5 of the General Administrative Code of Georgia "the administrative decree issued in abuse of power and the action performed by an administrative agency in abuse of power shall be nullified". Pursuant to the Paragraph "b" of Part I of Article 60 of the same code – "an administrative decree shall be nullified, if it was issued by incompetent institution or official". In this case it is problematic to defined the degree of the gap of authority, as by the Paragraph "b" of Part I of Article 60 of the General Administrative Code of Georgia it is considered the both the abuse of power and also realizing action without possessing such power. According to the degree of illegality, the separation of legal consequences is estimated and defined, and this issue is directly connected to the complaint remoteness of the administrative decrees. A citizen is not obliged to estimate the degree of illegality himself and that's why there should be clarified precisely what is meant under the abuse of power in the General Administrative Code of Georgia. As it is known, recognition of an administrative decree as nullified is realized with the 1 month period from its presentation, but there is not defined any time frames for not recognizing the administrative decrees. In case of recognizing administrative decrees nullified, it is necessary for the interested parties to use the rule of prejudicial complaint. What concerns the no recognition of administrative decrees, in such case the abuse of power is so high that that decree is nullified upon its issuance and has no obligatory strength to be completed, and the addressee does not pay any attention to it. But in case if the administrative agency commences realization of not recognized administrative decree, the interested party should have the right to appeal to the court directly with a complaint/appeal for the purpose of preventing from illegality.

Administrative complaint is not a precondition of complaint admitting the disagreements regards putting, implementing and terminating administrative agreements. Administrative agreement, as well as the individual administrative decree, is an administrative procedural procedure, but the different between them is that if the first one is reached based on mutual agreement of the sides, the other one is expression of one sided will and does not require the agreement and consent from the other side. Consequently, complaint regarding administrative agreement is impossible.

Pursuant to active legislation, administrative complaint is inadmissible towards the individual administrative acts (Article 161 of the General Administrative Code of Georgia) issued by an independent administrative agency, also, in the cases where there does not exist a higher agency than the one issuing the decree (for example, Parliament of Georgia, Chamber of Control, National Bank, Self-Governing Bodies, etc). There are special characteristics regarding the administrative acts issued by the Legal Persons of Public Law. Compliance to active legislation, they are independent and the acts enforced by them are directly appealed in the court, but it is indicated in the Article 11 of the Law of Georgia on "Legal Persons of Pubic Law" that "A legal person of public law shall be under state control, i.e. the conducted activities with respect to lawfulness, expediency and efficiency as well as financial economic activities shall be supervised". In the framework of this control, a body exercising state control is entitled to suspend or revoke unlawful decision of a legal person of public law. The mentioned provisions often create misunderstandings in practice. There are often such cases when the administrative act of the head of the legal person is appealed directly at court, but it is the authority of state control body to exercise supervision over the appealed act. It is natural that in such cases a court, at the stage of admissibility, refuses to accept the appeal. Such circumstances cause the case extension in time. In order to avoid such delays, it is reasonable to identify in the legislation the spheres of the head of the legal person of public law that is subject to state control exercise.

The administrative agency decision regarding the administrative complaint discussion is an administrative act. That's why Chapter 13 of the General Administrative Code of Georgia deals with the rule of the administrative decree appeal and the prejudicial appeal rule should be exercised on them, but what concerns the annulment of the dispute normative administrative acts, interested party should enjoy the right to apply directly to the court.

To correct the existing gaps in practice, an amendment should be made in the General Administrative Code of Georgia and administrative complaint should set as a separate article as a precondition for a complaint admissibility, where once again there will be highlighted the necessity of the existence of this institutions and there will be defined the circumstances where the prejudicial appeal rule will not be spread. Such exception should also touch the cases when the subject of dispute is the compliance of the normative administrative act to Georgian legislation; or the obligation of the administrative agency on the issue of issuance a normative administrative act/decree; enforcement of real action or refrain from the enforcement; if the individual administrative decree issuing agency does not have the higher administrative body; also, when the decision is made by an independent administrative agency. The list might not be exhaustive, but Part V of Article 2 of Administrative Procedural Code of Georgia does not apply to the mentioned issues.

Tax disputes have some peculiarities. In particular, in the June 22, 2004 Tax Code (later referred as TCG), compliance to Part I of Article 157, in case of a complaint disapproval by the Revenue Department of the Ministry of Finance, or in case of partial approval, the issued decision used to be appealed at the council or the court through the Revenue Department of the Ministry of Finance. The mentioned rule undoubtedly had to be changed, as it came against the recognized principle of the General Administrative Law – complaint over complaint is inadmissible. Consequently, the decision of the Revenue Department of the Ministry of Finance in connection with the complaint discussion should be appealed at court compliance to Part V of Article 2 of Administrative Procedural Code of Georgia. It

is true, that the Tax Code adopted on September 17, 2010 does not include such record, but its Article 305 is still rather specific, according to it, "in case the Revenue Department of the Ministry of Finance makes not desirable decision for the complainant, the latter enjoys the right to appeal the decision within the 10 days time at the dispute discussion council or at court".

The following conditions appear when generalizing the court practice: when the court defines a gap on the court appeal statement and obliges the appellant to present proofs for appeal one time present, an interested party refers to the court with a specified appeal indicating the fact that the defined rule envisaged by Part V of Article 2 of Administrative Procedural Code of Georgia has been used. Though, when testing the relevant documentation it is obvious that that appellant applied to the administrative agency with a complaint only after the gap definition. Also, there are quite frequent cases, when there is some proceeding in the administrative agency in connection with an administrative complaint the way that the duration for the discussion of the mentioned issue has not passed and the party files a complaint at the court on the same issue.

Therefore, the qualified enforcement of the administrative complaint, as a complaint filing precondition, is connected to a number of issues that need reaction and solution. Consequently, the reflection of the presented proposal at legislative level shall support to the improvement of the correction of theoretical and practical gaps.

ZURAB PAPIASHVILI*

LEGAL PROBLEMS RELATED TO THE STRUCTURE OF AND SERVICE AT THE MINISTRY OF INTERNAL AFFAIRS OF GEORGIA

1. Structure of the MIA, current gaps and the ways for their resolution

Service at the Ministry of Internal Affairs of Georgia (hereinafter – the MIA), like service at a similar administrative body of any state is associated with significant difficulty. The mentioned problem became especially current after the entire state, and specifically, this institution came to face new challenges that can be taken with dignity and be addressed through fundamental changes only by way of a successful reform. Further, the probability of mistakes associated with fundamental changes must be minimized as much as possible. One of the preconditions for a successful reform is multifaceted study and analysis of the activity of a relevant field. For this purpose a policymaking body in the given sector should be studied thoroughly. Therefore, against the backdrop of the reform underway at the MIA it is necessary to study its structure, identify existing problems, eliminate and increase efficiency of staff performance.

It is a structure that is systematized and operates smoothly; this can be regarded to be a guarantor for successful and efficient performance of the MIA of Georgia. Hence, one of the initial stages of the reform to be effected in this area must be comprised of structural changes. Therefore, when judging about the performance of various administrative bodies in the first place the structure of the mentioned organization needs to be considered and its advantages or disadvantages need to be identified. The basis for any institution is the system of structural units that ultimately make up this body as one whole. Well formed system and smooth, coordinated operation of its units is a guarantor for the success of any administrative body. The failure of even a single unit in the structure will certainly cause delay in the performance of the entire system. Naturally, the MIA of Georgia is not an exception.

Notably, the structure of the MIA of Georgia, despite implemented fundamental changes and reforms needs significant refinement. Namely, the mingling of subject, hierarchic or territorial powers in hampers successful implementation of the commenced reform.

The present article will present gaps of the system of the mentioned institution and ways for their elimination.

There is a wide variety of MIA or similar institutions around the world that, first of all, are expressed through their structural constitution.

In the majority of the post-Soviet republics MIA is an institution that carries out police, law enforcement function, while in many countries of Europe it may be performing other no less important functions as well, for example, supporting state security. Prior to the changes effected in 2004-2005 in Georgia as well the MIA was functioning in the form as was during the Soviet regime.

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The passage of the Law on Modifications to the Law of Georgia on the Structure, Authority and the Rule of Operation of the Government of Georgia on December 24, 2004 on the basis of which the Ministries of Internal Affairs and Security were merged to become a single structural unit became an event of decisive importance for the operation of the MIA of Georgia. The above-mentioned changes were accompanied by changes effected earlier through which police, state security, including, counterintelligence and border protection functions were ultimately brought together under the structure formed as one ministry. This was the result of bringing the Ministry of Internal Affairs and the Ministry of Security and State Department of Border Protection together under a single Ministry. Despite many counterarguments against the mentioned reform implemented changes must be considered as a necessary step and a precondition for the establishment of a well-functioning structure. Although, the introduction of the mentioned model is characterized by gaps.

First of all, we should explain the factors of success of the mentioned reform: as a result of uniting the organizations the unhealthy practice was eradicated that was established in the mentioned ministries. Namely, prior to the reform these two administrative bodies were two confronted law enforcement bodies that were constantly attempting to divide up the spheres of influence. Lately the MIA was succeeding in this process. This success often was conditioned by the leadership of the MIA and their influence over political rulers. Duplication of functions between ministries was frequent; both Ministries had the authority to respond to the same types of crimes, such as, for example, investigation of economic crimes. This example is interesting also because the mentioned area was especially important for both bodies from corruption standpoint as well. Operative offices of these two ministries almost never exchanged information obtained through operative or other means; on the contrary, this information would be used against each other which, often, would have deplorable outcome. Another factor of the success of the mentioned reform was that the MIA and its staff started more coordinated operation: exchange of information among units, their submission as tasked became mandatory. They no longer win over each other's secret staff intentionally or by chance which was also facilitated by the development of a unified information base, the process of dividing up territories of operation or the scope of activity has been discontinued since every structural unit of the MIA operates within the authority prescribed thereof under the Regulations, and if necessary, the unit will get involved immediately which competence is the response to received information. Although, some gaps remain in this direction that will be addressed below. The implemented change was very important from financial and administrative standpoint as well, that was followed by optimization of staff and funds.

Considering practice around the world often such ministry is comprised of not only police or security bodies, but military bodies as well. Naturally, in this case it does not imply the structures that are of a military character but confined under the police framework such as, for example, interior forces of the MIA in the Russian Federation; and in Czech prior to the implementation of the reform, even the management of election-related matters was the competence of the mentioned body;[1] a similar union of police and military structures exists in the Kazakh Republic, where: "The composition of the Interior bodies is comprised of: the Criminal Police, Administrative police and other police bodies, as well as

[1] *Kaparin M., Marenin O.,* "Transformation of Police in Central and Eastern Europe", Geneva Center for Democratic Control over the Armed Forces (DCAF), Tb., 2008, 227.

military-investigation bodies and the MIA military police, which has a status of military formation;[2] therefore, main point is not the redistribution of powers, fields and powers between the ministries for preventing encroachment of authority but bringing them in line with the reality and demonstration of strong political and civil will.

To better analyze problems that the MIA of Georgia faces its structure need to be studied. Structural units of the MIA are: Administration of the MIA, General Inspection, HR and Organizational Department, Mobilization Service, Information-Analytical Department, Operative-Technical Department, Counterintelligence Department Constitutional Security Department, Special Operations Center, Special Activities Department, Special Operative Department, Criminal Police Department, Patrol Police Department, Interpol National Central Bureau in Georgia, Emergencies Management Department, Special Tasks Department, Counterterrorism Center, Strategic Pipelines Protection Department, International Relations Main Division and territorial bodies of the MIA that are represented as main divisions. Moreover, the MIA sphere of management includes its state sub-agency – the Border Police of Georgia and legal entities of public law (LEPL): MIA Academy of Georgia, Security Police, Healthcare Service, State Material Reserves Department, Service Agency of the MIA and the MIA Archive[3] (See Appendix 1).

Despite smooth functioning of the MIA a number of its structural units cannot be considered to be brought in line with the reality. Therefore, it is necessary to continue reforms and optimize the MIA in this direction as well.

To set a uniform status for each structural unit of the MIA of Georgia it is advisable to form them as the units with an equal status. Otherwise it is not clear why, for example, Counterterrorism Center has a status of a department, and, respectively, higher positions and salaries, and National Central bureau of Interpol in Georgia has the status of a main Division considering that the latter is not behind the Counterterrorism Center according to the number of employees or functions. Respectively, it is necessary to perform the equalization of the status of structural units in a uniform type. The modifications into the Regulations of the MIA entered under the President of Georgia Decree No 501 of August 11, 2009 through which Main Divisions of Special Tasks and Strategic Pipelines Protection were turned into departments was absolutely justifiable. In this respect successful completion of the reform is important according to which structural and territorial bodies of the MIA will be formed as departments, and the offices under them as main divisions, divisions, etc. The mentioned changes will also prevent other intermingling. For example, when a main division under a department is regarded to have lower status compared to an independent main division which results in certain contradiction in case of promotion of a servant.

A proper change was effected with regard to territorial offices in 2005. They were all given a similar status as a result of the reform. Turning Guria Regional Division into Main Division and all city and district police departments into divisions can be brought as an example. Prior to this change it was absolutely unclear why some district police offices had the status of a division, and others – of a section. For example, Gori district police had the status of a division while Mestia district police was a

[2] About the Interior agencies of the Republic of Kazakhstan, Article 4 of the Law of the Republic of Kazakhstan, dated December 21, 1995.

[3] Appendix 1.

department. The arrangement of territorial offices has been regulated to a certain extent but some comments can still be made: For example, it would be better to form Regional main divisions as departments. This is reasonable since the mentioned offices that currently have the status of main division are equalized with a department function- and status-wise and are often regarded as offices more significant than many of these. This is demonstrated even by salaries of their heads and the highest special ranks. Respectively, if their status is equalized under legislation it will only have positive outcome and will be another step towards elimination the misunderstanding that is characteristic of the intermingling among structural units.

In many states, for example, the Russian Federation and the United States of America, police is conventionally divided into central and municipal offices. In Georgia the application of this analogy cannot be regarded justifiable since even in the Russian Federation that is characterized by quite complex state setup and is comprised of territorial units that have numerous various statuses such division of the police system is nominal and it is necessarily subordinated to the central leadership of the MIA. And in relation to territorial offices of the MIA of Georgia certainly other types of serious gaps are in place that requires regulation through legislation. Namely, the presence of territorial offices of the Special Operative Department that not only are subordinated to but are not even under double subordination to regional police leadership, which is contrary to the essence of the centralized unified system of the MIA. It is worth noting similar analogies are rife in the practice of various countries, for example, in Belarus, where the law prohibits subordination of the offices that fight against organized crime and corruption to district police (district, city).[4] Despite the above-mentioned examples it is better if any unit within a territorial office is subordinated to the head of the local body of the interior agency; this would exclude misunderstandings and inadequate response to various operative materials. Legislation of many countries of the world, especially of European states have approach different from that of Georgia in relation to territorial bodies.

For example, in Estonia similar to Georgia territorial offices are not created according to districts or regions. Estonia is divided in 4 prefectures, i.e., in the case of Georgia, regional main divisions, and prefectures comprise only police territorial offices that are created not according to district boundaries but only in case where the population of a territorial unit they are to serve is comprised of at least 50 000 persons.[5] In Estonia 1 policeman is envisaged per 400 citizens and police offices are staffed respectively. The above-mentioned once again confirms that police in Estonia is not linked to territorial borders. This is a very noteworthy approach worth consideration because priority direction of a policeman's work is protection of security and wellbeing of citizens. Therefore, it is very important to have correct vision with regard to the estimation of the optimal number of people to be served by a single policeman.

In addition to the specific gaps covered above it is necessary to effect fundamental structural changes in order to make this system more flexible and refined. The changes, mainly, need to be carried out in two stages: firstly, similar offices must be brought together, and ultimately they must be merged according to the sphere of activity and directions. These basic directions are: police, security, emergencies, border protection and those services that will provide various types of services to the MIA as a whole as well as for the above-listed directions, for example, the Administration.

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4 Article 9 of the Law of the Republic of Belarus on Police (February 26, 1991).

5 Article 111 of the Law of Estonia on Police (September 20, 1990) .

It is advisable that non-operative offices that have the status of independent units: HR and Organizational Department, Information-analytical Department and International Relations Main Division on the basis of the systemic changes to be effected in the MIA to be brought under the administration of the MIA that will facilitate efficient resolution of organizational issues of functioning of the MIA as a whole; further, it will be reasonable if the MIA administration is staffed with civilians since the mentioned office, given its content and the specificity of work is effectively a civil service. Similar changes were successfully implemented in the Ministry of Defense of Georgia. This practice has proven the advantages of these changes.

Bringing together the offices with similar functions under a single department should be considered as the most significant change. For this purpose, first of all, police department needs to be created that will combine all offices with police function. Although, the problem will not be solved merely by mechanically bringing together these offices under a single department– it is necessary to organize the offices brought under the Department according to roles and duties.

It is advisable to consolidate the following offices under the Police Department: Criminal Police, Patrol Police and Special Operative Departments, the portion of the Constitutional Security Department that performs police functions, as well as the National Central Bureau of Interpol in Georgia. Certainly, regional offices, i.e., in the case of Georgia, main regional divisions will fall under the same Department and the leadership of the Department will provide coordination and control to regional main divisions.

Changes to be effected within the Department envision the liquidation of offices that carry out operative-investigation activity or incorporate them under a single main structure. These are the departments that clearly have duplication of functions. Therefore, if two ministries were merged to avoid the above-mentioned, having the departments under a single Ministry that respond to the same category of crimes and perform similar functions is even more unjustifiable. For example, performing detection (search) is the function of the Criminal Police Department as well as of the Special Operative Department.[6] The same can be said in relation to the response to effectively any type of crime. As was already mentioned, it is also unjustifiable to have the Constitutional Security Department as an independent unit. This functions of this Department comprise state security elements as well as the investigation of purely criminal offences. For example, "main objective of the Constitutional Security Department is to detect, stop and neutralize the circumstances that hamper normal functioning of state or other institutions in order to weaken the state, and the interests of special services of foreign states."[7] At the same time, its competence includes response to crime of officials that, despite destructive impact on any state, still falls under the so-called "criminal" crimes, not under the crimes directed against state security. Hence, it has functions that are duplication of those of not only of Special Operative and Criminal Police Departments, but firstly, those of the Counterintelligence Department direct function of which is to perform activities to avoid and stop intelligence activities of Special Forces operating under

[6] 2011 In accordance with Article 21(l) and (m) of the President of Georgia Decree № 614 dated December 27, 2004, on Approving the Regulations of the MIA of Georgia.

[7] Article 21(k) of the President of Georgia Decree No 614 dated December 27, 2004 on Approving the Regulations of the MIA of Georgia.

the cover of foreign agencies and organizations directed against Georgia.[8] Therefore, the similarity of functions between the Counterintelligence and Constitutional Security Departments is clear.

Based on all the aforesaid it is advisable to form a unified service on the basis of the Criminal Police and the Special Operative Departments to which separate functions of the Constitutional Security Department will be given. For example, fight against official crime; while the functions related to state security must be transferred to the Counterintelligence Department that, in turn, will form part of State Security Department, according to the presented draft. Respectively, on the basis of the above-mentioned, it is advisable to form two departments instead of the four mentioned departments with absolutely delineated functions of police and security which scope of authority will cover the entire country. Quite good examples of a similar model are presented in Eastern European countries, for example, in Poland, where the Police Department is the only body with police function throughout the entire country, which head – high commissioner – subject to the Minister's nomination is appointed and dismissed by the Prime Minister, and according to the Constitution he is accountable before the military tribunal. [9] Estonian model is more acceptable for Georgia; in Estonia police units of the entire country as well as the Security Police department that is in charge of the security of the country are subordinated to the Police Department. Although, introduction of a model identical to that of Estonia cannot be regarded reasonable for a number of rules are not implemented in practice, for example, the director of the Police Department in Estonia is appointed for a 5-year term, which is explained by that the Minister of Internal Affairs, as a political and civilian person can be replaced according to political state and the director of the Police Department who is selected based on professional characteristics, not appointed, should not be dependent on the change of the Minister of Internal Affairs. This position must have stability. Although, as has been demonstrated in practice if there is an opposition between the Minister of Interior and the Director of the Police Department the latter is forced to leave office despite the fact that the Minister does not have the authority to release him early.

We think that at the initial stage for Georgia it is more acceptable for the matters of appointment and dismissal of officials under his subordination to fall under the Minister's authority, for it would be really unjustifiable for a leading official of the Ministry not to have the authority to move his subordinate to another position, or, if necessary, dismiss from the Ministry in case of certain opposition. This would result in misbalance and would create serious problems in the activity of the MIA; In the future, at a new stage of reform and development it will be reasonable to create those additional guarantees and independence for such departments and their heads as, for example, in the case of the brought example countries. The above-mentioned especially concerns the MIA of Estonia that has a quite well-functioning and interesting structure and introduction of its analogy in Georgian reality should be justifiable with an exception that envisages appointing by elections of officials for a definite term on certain positions and thereby limiting the Minister's authority.

Therefore, it should be justifiable to establish within the MIA system of Georgia provisionally a service similar to the Police Department of Estonia that would bring together all police bodies.

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[8] Article 21(i) of the President of Georgia Decree No 614 dated December 27, 2004, on Approving the Regulations of the MIA of Georgia.

[9] *Kaparin M., Marenin O.,* "Transformation of Police in Central and Eastern Europe", Geneva Center for Democratic Control over the Armed Forces (DCAF), Tb., 2008, 289.

It is reasonable to establish under the same Department a separate office that would investigate such multi-episode and especially important cases such as for example: bribery, trafficking, etc. Also, the one that would control and coordinate the activity of the entire Criminal Police of Georgia. It should be regarded reasonable also to bring the Patrol Police under the Police Department as a separate unit. It must be mentioned also that it is possible that the director of the department according to the Estonia model at the same time to be a deputy of the Minister of Interior or this position to be equalized to the position of a deputy minister.

Another structural unit that must be established within the MIA system is the Security Department. Respectively, this structural unit must be comprised of the Counterintelligence Department and the units of the Constitutional Security Department that work on state security issues, as well as Counterterrorism and Special Operations Centers. The circumstance must be highlighted that at present the presence of Special Activities Department which function also includes the protection of State Security and Sovereignty is absolutely unclear. To eliminate this gap it is reasonable to abolish the mentioned structural unit for currently two departments have similar functions.

Consolidation of the Counterterrorism Center and Special Operations Center of the State Security Department as one unit can be listed as another necessary change. Similar to the above-covered cases this consolidation should not be done due to the downsizing of staff and saving budget resources. On the contrary, downsizing Ministry staff is unjustifiable for even the current number of staff is often not sufficient for addressing the matters that fall under the MIA purview. A practical example can be brought for illustration: often an investigator has several scores criminal cases in the process that naturally has a negative impact on the quality of investigation. The necessity to consolidate Counter-terrorism Center and Special Operations Center is clearly confirmed as a result of consideration of their functions. The tasks of the Counterterrorism Center are "Fight against Terrorism" and the implementation of operative-investigative activities for this purpose, and the objective of Special Operations Center is to "provide operational forces for operative activity".[10] And the above-mentioned, given their functions and professional trainings first and foremost relates to anti-terrorism activities. This is demonstrated also by the fact that all other operative sub-units provide operational forces to their operative activity on their own. Therefore, it must be deemed advisable to consolidate these two structural units as a single office which would implement independently operative investigative activities as well as the supply of operational forces as well, which, of course, would significantly in-crease the efficiency of the performance of these offices. This, at the same time, does not exclude if necessary, the use of their operational forces for resolving other tasks of the MIA. Through this con-solidation organic unity of these two offices will be ensured. Especially that a similar model has been tested and is used in many countries that fight quite successfully with terrorism, including the United States of America.

Further, the Emergencies Management Department needs to be established within the MIA system; this Department would bring together the following structural units: Special Tasks, Protection of Strategic Pipelines, Emergencies Management Departments, Mobilization Service and the State Material Reserves Department, a legal entity of public law. Further, it is advisable to effect change

[10] Articles 21(j), (s) of the President of Georgia Decree № 614 dated December 27, 2004, on Approving the Regulations of the MIA of Georgia.

under the Emergencies Management Department, namely to consolidate the Strategic Pipelines Protection Department with the Special Tasks Department. One of the functions of the Strategic Pipelines Protection Department is the protection and security of the Supsa Oil Terminal, Main Oil pipeline of Baku-Tbilisi-Jeihan and the section on the territory of Georgia of Baku-Tbilisi-Erzurum gas pipeline, as well as performing complex activities for the protection of their infrastructure sites.[11] while one of the functions of the Special Tasks Department is also the "protection and security of the section on the territory of Georgia of the Baku-Supsa main pipeline".[12] Establishing of the Strategic Pipelines Protection Office at the initial stage was conditioned by the demand of foreign partners that were interested in the construction of these pipelines. Although, at this stage the above-mentioned office can be consolidated with the Special Tasks Department that has a similar function that given better technical or human resources and experience is certainly able to implement the given objectives. Even in the given case it is necessary not to liquidate the office and dismiss the employees from the MIA but their consolidation and bringing under a single structure. The authority of the same department should comprise one of the functions of the Criminal Police Department: "ensure the implementation of Operative-investigation activities related to the Baku-Supsa main pipeline."[13] This change will finally eliminate the dispersion in this area and ensure the coordination of activities. Respectively, this Department will itself implement physical protection of strategic pipelines as well as the implementation of operative-investigative activities, as necessary. And the Special Tasks Department certainly has technical and physical resources to perform this. Certainly, transfer of these functions fully and additionally does not mean the removal of those other functions that they currently have. As for the Emergencies Management Department due to its most important functions in some countries it is represented as an independent ministry. For example, the Emergency Situations Management Ministry of the Russian Federation. The opposite is the case in Georgia; the functions of Emergency Situations Management Department are allocated to fire services at local municipalities. This is especially noticeable in case of the necessity for their use in countryside of Georgia. Therefore, since the Emergency Situations Management Department cannot discharge entrusted functions fully: "coordination of activities towards avoiding emergencies throughout the country, mitigation and liquidation of their consequences, as well as implementation of civil protection objectives during the martial law",[14] it is advisable that this structural unit is also consolidated under the Special Tasks Department and create a single department that given relevant technical equipment and trainings will surely be able to better implement entrusted duties. Consolidated human resources will also enable this to happen. Therefore, the formed structural unit, along with relevant local municipality services throughout the country will perform the resolution of the problems arising from emergencies. In this process will be involved the specialized service staff as well as entire staff, including military staff subordinated to this department. Having this department and its empowerment is reasonable not only because of the above-listed considerations but due to our reality and external factors in the first place: in certain areas of the country where according to international agreements the use of military force is prohibited it will be possible to use this structural unit in the frame of international legislation as needed.

[11] Ibid, Article 21(t).
[12] Ibid, Article 21(r).
[13] Ibid, Article 21(m).
[14] Ibid, Article 21(q).

The Border Police that is represented under the MIA system as sub-agency suits the suggested model of the MIA structure the best. Current Border Police is a close model of having above-mentioned police, security and emergencies management departments under the MIA. Even the appointment of the heads of these structures is most in line with the above-mentioned examples of European or Baltic states. The head of the Border Police who is at the same time deputy Minister of Internal affairs upon the nomination of the latter is "appointed by the Prime Minister, in agreement with the President of Georgia, and is dismissed from office by the President of Georgia at his own initiative, or by the Prime Minister, based on the Minister of Internal Affairs recommendation."[15] Although, this degree of independence of a body, as well as its leadership at the given stage should not be considered appropriate and respectively neither the replication of the analogy to other departments should be deemed reasonable. All four departments at this stage need to be formed as MIA structural units and leaders should be appointed and dismissed from office by the Minister of Internal Affairs. Although, after certain period the introduction of a requirement of Presidential or Prime Minister's approval prior to their appointment or dismissal would be reasonable in order to grant to them more stability and guarantee.

It should be said as an additional remark in relation to this body that the offices under this agency are fairly fragmented and dispersed. Since the excessive division and segregation of functions is not acceptable even to the MIA itself such division within a structural unit is all the more unjustifiable. Therefore, it would be better to bring non-operative units of the Border Police under one structure, for example, administration. Moreover, if the Border Police will no longer be a sub-agency it will be automatically removed of a whole number of functions like a large portion of logistics functions and these functions will be transferred to relevant units of the MIA.

Thus, on the basis of many operative units currently at the MIA of Georgia system four ones can be established– police, security, emergency situations management and border police departments. 16 (See Appendix 2).[16]

The changes to be performed within the MIA system mainly concerned the MIA structural and territorial offices. And in relation to the LEPL under its system a comment can be expressed with regard to the Security Police. The mentioned field is truly in need of a reform.

Although in many states there are almost identical structures, for example, as in Azerbaijan and Ukraine, or similar agencies in the USA that are marked by its specificity but having a similar structure is a kind of anachronism in current reality. Georgian lawmakers and MIA representatives to a certain extent agree to this, they considered the passage of the draft law of Georgia on Private Security Activity in the Parliament as another step towards the implementation of the ultimate reform. Regulation of the labor market in this area and ordering the activity of legal entities of private law involved in it may bring up on the agenda the issue of liquidation of the Security Police department, as of an MIA unit, liquidation and this field entirely be regulated through business relations. Although private sector carries out activities in this field but it still is limited to a certain extent given the monopolies superiority of the Security Police. The experience of foreign states is to be taken into account in this regard as well. First of all, Baltic States integrated in the European Community and other post-Socialist states should be

[15] Article 6 of the Minister of Internal Affairs of Georgia Order No 786 dated June 21, 2006, on Approving Regulations of the Border Police of Georgia, a state sub-agency of the MIA of Georgia.

[16] Appendix No. 2.

mentioned. For example, Polish reformers back in the 1990'ies at the very initial stage of the reform determined the role of the police as of the overseer of such services when they set the following as one of its duties: "overseeing municipalities and city security services, as well as private security services".[17] Following the breakup of the Soviet regime both Baltic states and Czech addressed this issue at the initial stage of law enforcement structure reform – they abolished property security non-departmental police and gave this field fully to private law subjects where the employees currently there have much higher remuneration than the persons working in the police system; an interesting model is in the USA similar to which with certain changes is advisable to be introduced in Georgia reality at a transition stage until finally the mentioned body is finally liquidated. Personal security police in the USA is considered as part of the unified police system.[18] This office currently carries out the activities identical to the Security Police of the MIA of Georgia: protection of individuals or legal entities through the use of physical force as well as of certain technological tools, etc. Unlike Georgian service private security police performs detective work as well, which, in our opinion needs to also be taken into account. According to recent data funds attracted in this field is over several hundreds of milliard and the number of employed persons – several scores of million. The majority of workers in the mentioned field are former employees of law enforcement bodies. Moreover, a survey commissioned by the National Institute of Justice of America identified the fact that 24% of government police workers in work at personal security services on non-working days."[19] Although, one serious drawback of this system in the US as well in Georgia is poor qualification of staff employed in the security police, the lack of relevant knowledge and training. The experience of Baltic States is to be taken into account in this field. The authority of security should be transferred entirely to legal entities of private law and control over their activity must be effected by an MIA structural unit established on the basis of a property security police. It is necessary to have state control over the mentioned area in order to avoid illegal movement of arms, establishing of armed criminal formations, or the employment of the persons with intentional serious criminal prior conviction.

Therefore, it is advisable to continue and to bring to a logical end the reform that has been underway for the past few years in the direction of the above-mentioned gaps which will further strengthen one of the most stable institutions in Georgia and ensure its effective functioning. Therefore, it is desirable to form the following structures of the MIA on the basis of the reform: police, security, emergencies management and border protection departments that will carry out activity in their fields. Along with these offices there will be the following units within the MIA system: administration, police academy, health service, general inspection, operative-technical office, service agency, expert-criminalist office, archive that will carry out activity to support the activities of the MIA as a whole as well as of its specific structural units.

Following the determination of a general structure of the MIA the matters of structural arrangement of the departments need certainly to be considered. Since a base that would regulate the mentioned field is absent, certain matters are determined directly according to personal considerations.

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[17] *Kaparin M., Marenin O.,* "Transformation of Police in Central and Eastern Europe", the Geneva Center for Democratic Control over the Armed Forces (DCAF), Tb., 2008, 232.

[18] *Adler F.,* Miuller G.o.V. Laufer, V.S. Criminology and the Law Enforcement System, Tb., 2003, 72.

[19] Ibid, 73.

This is about the structural constitution of the MIA as a whole, its hierarchical and territorial subordination. It must be ascertained as to which is the lowest and highest level, the subordination between the units, the reporting subordination, etc. This matter must necessarily be determined under a normative act in order not to leave uncertain the matter of subordination among bodies.

And all this hampers the implementation of official oversight, for example, the suspension and cancellation of an administrative-legal act issued by a subordinate by a higher official. To regulate this problem it is advisable to have a lower, first-level structural unit of the MIA of Georgia as a sub-section, second one to be a section, third – a service, fourth -- a division, fifth – -- main division, and the closing point in this chain will be a department that will be an independent unit within the MIA system (See Appendix 3).

Following determination of structural constitution and subordination of MIA units it is necessary to determine minimum number of staff required for the formation of various structural units. This will help avoid the situation when the number of employees in a unit that has the status of a service is twice higher than the number of the individuals employed in a main division.

Such cases have become quite frequent in current practice. For illustration it must be mentioned that the creation of a section should not allowable in case of less than 10 employees in such a structural unit.

Following the identification of gaps in terms of structural setup of the MIA it is appropriate to focus on salaries of those employed in the mentioned structural units. In this regard the current situation is not correct and requires new arrangement. Namely, despite the function to be performed by a specific office the persons in similar positions should not have different remuneration. For a civil servant salary is one of the factors that determine employee status and role. Therefore, despite equal positions a person with lower remuneration turns into a secondary officer which is certainly unacceptable and requires legal regulation.

Given the specificity of the MIA a clerical office employee has an important function similar to an employee of Special Operations Center in a comparable position for good and successful functioning of the MIA system. Therefore, their remuneration should not be different. T boost effectiveness of the MIA activity it is advisable to set the same salary for the officials of the same rank within the mentioned system, regardless of the entrusted functions. Following the implementation of the above-mentioned reforms the MIA of Georgia will be even more prominent and progressive in the entire post-Soviet space.

2. Main conditions for service within the MIA

2.1. Rule of hiring at the MIA and reinstatement into service

Following the review of the MIA structure it is advisable to consider the matters that are related to the service and the exercising of rights and duties on a daily basis by an MIA employee. One of the most important issues for starting employment at the MIA system is the hiring of a servant.

This is the point when it is determined whether the life and activity of an individual will be linked to this very specific field. Therefore, at this stage a minor inaccuracy, negligence or gaps in legislation may have destructive effect and deprive an individual of the possibility to realize oneself in this direction. Therefore, careful consideration of the mentioned matter will be a possibility to eliminate gaps. Unlike

other agencies the persons interested in entering the MIA system are subjected to very stringent censorship from the very beginning. First of all, a specific age limit is set. There is a certain collision with regard to age limit in Georgian legislation. This age limit range is18-35 years, but at this stage already there is a collision in legislation. For example, the Law of Georgia on Police sets forth 18 years as minimum age limit while the President of Georgia Decree on Approving the Regulations for Serving at Interior Agencies of Georgia (hereinafter – the Rule of Service at Interior Bodies) does not prescribe a minimum age limit but sets maximum age limit – 35 years which is in accordance with the provisions of the Law on Police. Although, fairly progressive changes were made to the Law on Police in 2005, and to the Rules of Service at Interior Bodies on May 28, 2006 that in parallel to the strict upper age limit envisage the possibility of exceptions as well. This was truly a correct decision, for, for example, for operative-technical Department age of a person should not be of big importance if this person, let's say, is a good specialist in radio engineering. Setting age limit would probably be appropriate for the employees of structural units performing operative work (for example, Criminal Police Department). While in a unit which with its essence should have a civil structure the setting of age limit is absolutely unjustifiable. Although age limit is set in many countries a uniform approach is lacking even in the states that have such similar structures as the Russian Federation and Belarus. For example, in the Russian Federation age limit was established to be 18-50 until very recently. Specifically in Militia maximum age was 35 years. And recently under the Law on Police 35 years was set expressly as the upper limit. And, in case of Belarus, a person above 25 years may not be hired for an ordinary and low level management position, and a person above 30 years – for an average and middle and high level manager's position. This, certainly, is wrong practice and using this as an example can only be viewed as a step backward.

Limit is set with respect to education as well. Minimum requirement is a general education certificate which is a certain impeding factor for some categories. It is better to bring down the minimum requirement for education for various regular employees to incomplete general education.

These could be drivers, shooters, etc. Otherwise, of course, special educational minimum requirement is necessary. Such requirement exists in many countries. For example, in the Russian Federation a person may be appointed on a middle and high level management position only in case of higher or general special education.

Limitations are set also with respect to health as well which is absolutely outdated and unacceptable and requires new regulation. While many European countries have a standard that envisages that at any state institution including, at the MIA it is mandatory to create all conditions to ensure work environment for the people with disabilities and for their movement an absolutely unjustifiable requirement is in place in Georgia according to which the following will not be admitted to the MIA system:

"A person suffering from alcoholism, drug addiction, addiction to toxic substances, AIDS, mental and other chronic conditions."[20] It should be mentioned with respect to the above-mentioned that chronic diseases is a very broad concept and currently no normative act sets forth their exhaustive listing. Relevant agencies were instructed to establish such listing back under the July 4, 2007 modifications to the Law on Police.[21] Moreover, this concept implies many such diseases that will not

[20] Article 9 of the Rules of Service at Interior Bodies.
[21] Article 19, the Law of Georgia on Police, 1993.

hamper an individual in any way in performing activities and this wrong formulation becomes an obstacle hampering recruitment. Another gap emerges here: if hiring such individuals within the MIA system is limited then why it is not mandatory to dismiss them from service in case of the disease and why is legislator silent on this? For example, Hepatitis C is a curable disease for it is possible to "conserve" it in the body after which it does not progress further. Since an individual with Hepatitis C is considered to have chronic condition a restriction applies to such individual despite the fact that following treatment such person is able to properly perform any activity.

Therefore, it would be reasonable if this restriction applied only to the cases when it is established that the disease will hamper an employee in the implementation of official duties or jeopardize other individuals' health. For example, an individual that cannot move around freely will face obstacle if he works as an operative worker or so-called Special Forces units but can freely work at legal service. A similar provision can be found in the Decree of the President of the Republic of Belarus on Service at Interior Bodies of the Republic of Belarus according to which an individual may not be hired for service at interior agencies if there is "a certified conclusion of a medical institution on a disease that interferes in the implementation of official duties."[22]

In the USA there are even certain prohibitions with regard to denial to hire people with disabilities. It is necessary to consider their disability only in the context of performing the rights and duties to be entrusted in the future i.e., to assess the possibility that this factor will become an impediment in the course of the discharging of specific rights and duties. Even the physical test of the applicants is not assessed via scoring; rather, just a record is made with regard to passing the test. Certainly, special healthcare and physical preparation centers are involved in designing a test. It is advisable to consider their experience and introduce this successful practice.

The following limitation that should not be applicable to any individual is "prior conviction." A legislator expressly set forth that "people with prior conviction will not be hired at the MIA." The mentioned rule rules out the recruitment of a person with prior conviction regardless of the type of crime committed thereof. In this regard Georgia has a much more progressive rule as compared with a number of countries since in these states restrictions with regard to the recruitment at the MIA apply not only to the persons with previous conviction but also to the individuals that were ever subject to criminal charges. Similar rule was in effect in the Russian Federation as well, until March 1, 2011. After a person is cleared of criminal charges an individual does not face obstacles in Georgia in terms of recruitment. Still, this fact cannot be promising. In this case, the example of Estonia is to be considered. Namely, Pursuant to Article 9(3) of the Law on Police only the persons with previous convictions related to intentional crime are not admitted to police service which is absolutely acceptable and progressive decision. It should not be considered justifiable that a person with the history of prior conviction for such crime of negligence as the offences arising as a result of a car accident is restricted from working at the MIA system. More loyalty is better with regard to the mentioned issue in order to achieve utmost integration of persons with prior conviction in the society which is the best means for placing them in a correct direction. It could be possible, as an exception to start at this stage hiring on certain types of work at the MIA of individuals that have prior conviction for selected types of crimes; the above-mentioned would promote their involvement

[22] The President of the Republic of Belarus Decree No. 761 dated November 13, 2001, on Approving the Regulations for the Service at interior agencies of the Republic of Belarus.

in public life. Naturally, this would not include the persons that have a number of cases of prior conviction. The persons that have committed less severe crime for the first time would be eligible for hiring at the MIA. This is probably more a matter of probation although it is worth considering, along with the service at the MIA, as acceptable and reasonable.

The requirements formulated here need to be apply to the individuals that start work at the MIA for the first time, as well as to the category of individuals who already have certain years of work and for various reasons resume work at the mentioned institution, for the current legislation treats the persons of both categories in a similar manner, save one exception: age limit is not applicable to the individuals that used to work at the MIA system before.

2.2 Service at the MIA

It is important to focus on problems and gaps associated with the service at the MIA, and ways of their identification and resolution. Initial stage for service at the MIA is enrollment of an individual and assigning a rank.

As for the procedure of enrollment of applicants to work this is preceded by the study of a candidate.

This practice was used at State Security Ministry and its introduction at the MIA is a truly correct step for in the course of the assessment of an applicant, as a rule, quite often impeding circumstances are discovered. Prior to the introduction of this novelty at the MIA no assessment was performed, the cases of hiring individuals with prior conviction were frequent. Through the introduction of this novelty gaps were not eliminated in full; still, the mentioned procedure is a good way for preventing problems. Practice was introduced on the basis of the direction of the Minister of Internal Affairs according to which when hiring individuals priority must be given to those staff that served compulsory military service term at an administrative body in accordance with Article 21^1 of the Law on Police. This is also quite progressive and innovative approach for relevant staff could be recruited more correctly from this category for they have already undergone certain preliminary examination as well as physical and weapons training. Further, certain opinions will be in place about them throughout the entire period of compulsory military service. At the same time, these youth already more or less have an idea of the type of agency and service the MIA system is and realize what their wish to continue work at the mentioned ministry involves. Quite many young individuals are from this category are currently serving successfully at the MIA.

As for service at the MIA a really progressive step is hiring of youth of pre-military age, i.e., of the ones that have not undergone compulsory military service. On the basis of the MIA leadership decision in accordance with modifications entered to the Law on Police on July 4, 2007 recruitment of individuals of pre-military age to police was made allowable; these individuals are granted a rank of a police private and in case they have 4 years of continuous service experience it will count as compulsory military service. This is a quite rational decision that enabled many youth to undergo compulsory military service at an institution to which they are to link their future.

2.3 Special educational requirements

One of the most important reforms that were implemented at the MIA over the past years is related to the Police Academy and training processes within this agency. Enrollment at the Police Academy and completion of a relevant course is one of the first and essential stages for starting service within the MIA system. After the Police Academy as a higher educational institution was abolished and was transformed into a Western type special vocational institution a decision was made that made it mandatory for the individuals that were to start working at operative services of the MIA to take a relevant course following successful completion of which they would be eligible to take a relevant position. The above-mentioned was stipulated under the Minister of Interior Order Dated August 1, 2007 on Approving Special training programs for hiring of and hired individuals with pre-military age and Special training Programs for the assignment of a police junior lieutenant's special rank. This order set forth those general or special basic training timeframes and conditions that became mandatory for the applicants for employment at police considering relevant specifics. Similar order is used with regard to the training candidates in the area of security as well.

The above-mentioned changes are really a step forward. Prior to this novelty Police Academy would train and issue diplomas of lawyers for the specialty of law and the subjects necessary for getting this knowledge had nothing to do with, let's say, day-to-day work of a patrol officer, save few exceptions. Respectively, considering American and European models, Police Academy was reformed and transformed into its present form, which means not a five-year, but much shorter training courses, but the ones that are directed at the development of specific skills. Although, it is worth mentioning that current training timeframes are not sufficient for preparing highly skilled specialists and for the development of relevant skills. It is necessary to extend the duration of training to enable utmost mastering of necessary knowledge. The most important precondition for starting service at interior bodies is successful completion of a training course at the Police Academy which will minimize the possibility of improper staff getting within the MIA system.

2.4 Initial assignment of ranks

Right after the enrollment of an individual within the MIA the matter of assigning rank to this person raises. In this regard the most important and essential is the mingling of ranks within the MIA system. Currently there are special military and police ranks within the MIA system. Police ranks, in turn, are broken down into police and border police special ranks. The presence of these two types of ranks results in significant difficulty and misunderstanding. Firstly, this is due to the fact that the assignment of these two types of ranks are regulated separately. Even within the MIA it is not expressly determined as to which structural unit uses which rank. Often both types of ranks are used under the same department which also should be considered unjustifiable. Often assigning rank is based on a wish of a specific person which is absolutely unacceptable. It is better to have a single category rank within the MIA of Georgia system that would be mandatory for any unit that has employees with ranks. Further, the requirement to assign rank to all servants should not be regarded advisable. It would be better if the servants of those structural units that do not perform operative work or supporting such

units with physical force do not have ranks, but rather be civilians. Respectively, it would be more reasonable to have a uniform special rank that will be assigned to the employees of the MIA system that will eliminate the misunderstanding associated with the moving from one rank to another. The mentioned rule is in effect in the states where the MIA has the similar form as in Georgia. Such example is Estonia where police as well as security functions are under a single ministry. Nevertheless, an individual employed in any structural unit is assigned a special police rank.[23] A number of countries have a different approach with regard to assignment of rank to an individual. For example, in Estonia this is based on the years of service; every specific position has its relevant rank. After a servant takes a position he automatically receives relevant rank and after every movement to another position he automatically loses a previous rank and is granted a rank envisaged for a new position. We do not regard the described rule justifiable for the rank is the recognition of the achievements of an individual and its granting should not be related only to moving a special position. Service-related achievements need to be taken into account in this case as well. Assignment of a rank is the recognition and the compensation for the efforts and work a person made throughout his performance period. At the same time this is still to a certain extent linked to his official position. Respectively, in this case mostly any achievement and success of an individual is assessed. Therefore, it would be more reasonable if special ranks are assigned by taking into account years of service and if a person retains this rank even in case of leaving office. A comment can be made with regard to the absence of restrictions with regard to the assignment of special rank. Until recent modifications legislation envisaged certain restrictions with regard to the assignment of military ranks. Relevant modification should necessarily be entered to the Law of Georgia on Special State Ranks and a restriction should be introduced with regard to the assignment of special military and police ranks within the MIA system on the basis of which the assignment of rank early will be possible only once. Therefore, it should not become the similar type of incentive as the expression of gratitude, which can be given to an individual without restriction. This would eliminate the possibility of the situation similar to current one in the future -- when after 5 years of service a servant has a rank of police "polkovnik" (colonel) and another employee with a similar position and twice as much years of service has a much lower rank. Unfortunately, the abundance of such examples really does not make a healthy environment. Currently there is no need to implement changes in relation to the names of special or military ranks (for example, introduction of a "colonel" special or military rank instead of "polkovnik") and succession, for they are quite accepted in Georgian reality. The present paper will not address in detail the types of legislative gaps such as, for example, envisaging the introduction of special ranks of interior forces in the Rules of Service at Interior bodies. The MIA system no longer includes interior forces or similar institution, and, respectively, legal norms regulating their activity are regarded cancelled. It is necessary to eliminate numerous such gaps in legislation. Article 38 of the Rule of Service at Interior bodies is necessary to be specified and exacted that stipulates that "individuals with prior conviction that later were rehabilitated by the court at the time of restitution at interior bodies may be assigned special rank one step upper than the previous rank considering missed years in case they are eligible for the following rank as a result of factoring in the missed years."[24] It is necessary to make the assignment of the above-mentioned rank through an imperative norm.

[23] The Law of Estonia on Service at the Police dated May 14, 1998.
[24] Article 38 of the Rules of Service at MIA bodies.

2.5 Terms of exercising official rights and duties at the MIA

One of the most important issues is detailed stipulation of the rights and obligations of MIA servants and the conditions for their implementation under the legislation. For example, the rule of using a weapon needs to be detailed in the Law of Georgia on Police; the rule would set out every action of a policeman in case of use of a weapon. In this regard the experience of Great Britain and the USA is significant and should be considered. The norms regulating the conditions for the discharge of rights and duties by Ministry servants are so outdated and do not conform to reality that they are practically inactive. Among the normative acts that regulate the activity of the individuals employed within the MIA system Chapter 5 of Service at MIA Agencies is most in need of refinement; this Chapter sets forth the conditions for service. This chapter resembles the most similar normative acts of other post-Soviet countries. Namely, norms of identical content are present, for instance: in legislation of Georgia, Russia, Belarus, Kazakhstan, Uzbekistan, Moldova, etc. One of the current issues is work and off-work time of an MIA employee. Determination of unfixed working hours is improper from the outset when this is not necessary. Such need can arise for insignificant portion of staff and this, in turn, needs to be regulated via a normative act. This evil practice is a remnant from the Communist system, the entire staff stayed at workplace throughout the same hours as leadership did. The above-mentioned rule has been abolished since 2009 on the basis of a strict verbal order of the Minister of Interior. The working hours schedule set for any civil servant under the October 31, 1997 Law on Civil Service needs to apply to MIA servants.

The issue of maximum number of working hours of a servant during a week is controversial. Under Article 48 of the Rules of Service at MIA bodies a 41-hour work week is set for an MIA employee while in accordance with Article 40 of the Law of Georgia on Public Service the number of work hours during a week must not exceed 40 hours. The rules of Service at MIA bodies approved under the Presidential decree needs to be brought in line with the Law of Georgia on Public Service on the basis of which uniform working hours are determined for all public servants. The norms governing vacation in the Rules of Service at MIA bodies need to be revised. The provisions for such matters as training leave at the MIA of Georgia institutions due to a curriculum year or graduation of institutions, or leaves to be granted to the participants in relation to winter or summer holidays need to be modified. These norms have not been applicable since the higher education institution status of the MIA academy was cancelled, and, respectively, it does not serve students any longer.

Currently the MIA Police Academy is functioning in the capacity of a special institution where various training courses are provided. For example, special basic training courses for the applicants to the Patrol Police of the MIA, which duration is not longer than 6 weeks. Respectively, the trainees are not eligible to summer or winter holiday leaves. They become MIA servants only in case of successful completion of the training course and become eligible for the benefits envisaged under the Law for the employees. Monetary compensation for vacation of servants and their family members at “sanatoriums” and “pansionats” is a Soviet relict; similar can be said about the reimbursement of travel expenses. Azerbaijani legislation went further in this regard and any travel other than taxi and international transport was made free for MIA servants: “police employee is entitled to use any public transport (other than taxi and international transport) throughout the entire territory of Azerbaijan free of

charge"[25]. Prior to the entry of modifications Georgian legislation had a similar provision. A similar norm setting benefits is stipulated in the Order of the President of Georgia in accordance with Article 57(3) of the Rules of Service at the MIA offices: "employees and family members (spouse, minor children) of the MIA system are reimbursed the cost of a travel package in the amount of 50%." Despite the mentioned provision nobody has used the mentioned benefits, at least over the past decade.

Having such norms in place was justifiable in the Soviet Union when any rest institution and transport company was under the state ownership. Respectively, a state-owned transport company would sponsor the travel of MIA employees. Having such norms at present is a clear anachronism. State and, in this specific case, the MIA may reimburse only the movement of an employee related to the discharge of official rights and duties.

Hence, such outdated norms should be removed from legislation. Like the majority of European states MIA employees need to have social protection guarantee such as adequate salary fund that will enable them to take care of their vacation or travel.

2.6 Providing incentive and disciplinary persecution

It is also important to cover the matters related to incentives and disciplinary responsibility of MIA employees for this is closely linked to day-to-day work, success or disciplinary infringements in the course of exercising official authority by any employee.

One of the most important notes in relation to incentive and disciplinary responsibility of MIA employees is the regulation of the same issue under various administrative acts. These are: Rule of service at MIA bodies and the Minister of Interior Order on Approving the Disciplinary Statute of the MIA of Georgia." Respectively, with regard to all essential issues there is conflicting regulation. In this regard it would be significantly better if the Minister of Interior order on Approving the MIA of Georgia Disciplinary Statute is cancelled and relevant norms are included in the presidential Decree. Further, legal force of a Presidential Decree is higher than that of the order of the Minister of Interior.

In addition to having two contradicting legal acts the matter itself requires new regulation.

First of all, the matters of incentive or punishment of MIA employees must be considered, their grounds, forms and the persons entrusted with authority to take the measures of incentive or punishment. Under the current Disciplinary Statute the list of persons having the authority to impose disciplinary responsibility to an employee is quite mingled. In relation to this matter as well Georgian legislation bears resemblance to the law of the countries of post-Soviet area (Russian Federation, Ukraine, etc.) Even such specific form of incentive as awarding of an employee with a photo taken at the flag that is very widely used in the Russian Federation is reflected in Article 42 of the Rule of Service at MIA bodies with the only difference that in Georgian reality this form of motivation can only be used in relation to the participants of the MIA training institution. Although, according to official statistics it has not been used at all over the past several years.

Under the norms of the Rules of Service at the MIA bodies and the acts of Georgia on Approving MIA Disciplinary Statutes direct supervisor as well as any deputy of the Minister of Interior and, of

[25] The Law of Azerbaijan on Police, Article 38(4).

course, the Minister himself has the authority to impose disciplinary measure to an individual. For the imposition of disciplinary measure to an individual job-related examination, interviewing must be conducted and explanations obtained, etc. The only the General Inspectorate is entrusted with the implementation of these functions at the MIA. Therefore, it is unclear as to how disciplinary measure can to be imposed, for example, by the head of administration on his employee in the absence of relevant authority. Respectively, without interviewing and official examination of interested individuals objective truth on the case cannot be established and the rights of the mentioned individuals will certainly be infringed upon. Therefore, it will be much more reasonable and justifiable to limit the circle of the individuals authorized to apply disciplinary measures on the MIA system employees. Therefore, only the General Inspection must be entrusted with this function; it will undertake investigation on the basis of which the Minister or his authorized deputy will impose a relevant disciplinary measure on an individual that has committed a misdemeanor.

The matter of the discovery of disciplinary misdemeanors and the implementation of relevant activities by other structural units of the MIA should be handled similarly and it should be made the competence of a one service. It is also improper for the Patrol Police Department to identify and respond to the facts of relevant disciplinary infractions. The information about discovered infraction must be notified and forwarded for further response to the General Inspection. We must mention the gaps in legislation with regard to the use of disciplinary measure. Two conflicting sub-legal normative acts governing the mentioned issue set forth different types of disciplinary measures. The mentioned collision in legislation should be eliminated immediately. For example, the Rule of service at the MIA bodies approved by the President contains such measure of disciplinary responsibility as "disciplinary imprisonment by placing in guard-room from 3 to 10 days", as well as imposition of a disciplinary measure on the MIA Academy training participants. While these are not included in the Disciplinary Statute that distinctly sets forth the types of disciplinary measures. Majority of determined types of incentive in the above-mentioned acts do not coincide. For example, the presidential act comprises such measures of incentive as:

"increase scholarship", awarding a training participant with a photo taken at the open flag of the institution, sending a thank you letter to parents, receiving a permission to freely leave the institution, awarding 1st, 2nd, and 3rd degree medal to an employee for productive work over 10, 15 and 20 years at MIA bodies for Outstanding Service as well as granting an honorable rank of a Distinguished worker of the MIA of Georgia. At the same time, in the Disciplinary Statute prescribes such types of incentive that are not indicated in the Rules of Service at MIA bodies, for example: granting a gift of value, awarding MIA medal and awarding MIA medallion, as well as nomination for state award. Often even the wording of the types of incentive does not coincide and one can establish their identical nature only according to concept. For example, Disciplinary Statute stipulates the following as the type of incentive: awarding personal firearm, and in Disciplinary Statute – awarding with civilian or official weapon". These concepts differ not only term-wise but also conceptually.

Only the Minister or authorized deputies should be granted the authority to apply types of incentive at the MIA. And it is advisable that the heads of structural or territorial units retain the authority to award cash bonus.

Considering current practice it is necessary to enter modifications in the regulatory norm of timeframes of imposition of a disciplinary measure. According to current legislation disciplinary measure is used upon the identification of an infraction, but not later than 1 year from the day of its commissioning, excluding the period of sickness or leave of a servant. Exception is admissible only in relation to the violations identified on the basis of a financial-logistical inspection for which 2 years is set. Although, in relation to this matter as well there is a collision and unlike the Disciplinary Statute that stipulates only the above-mentioned exception the Rule of Service at MIA bodies, in addition to financial inspection sets forth a 2-year period according to the Disciplinary Statute the period of criminal proceedings is not factored in the timeframes of the imposition of disciplinary measure. In the process of elimination of legislative gaps it is reasonable to use 2 years instead of the current 1 year for the infractions discovered as a result of financial-logistical inspection as well as in general for the application of disciplinary measure. Unfortunately, one year is not an optimal period during which disciplinary measures can be used most effectively since often it is impossible to identify existing infractions within the legislation-prescribed timeframe. For example, in the course of inspection of staff performance or operative case processing often certain infractions are identified but since 1 year has already lapsed a relevant unit is powerless and cannot react and use any type of measures. Given the volume of work to be performed it is impossible to identify the violations throughout the country during one year. Therefore, increasing the term established for the imposition of disciplinary measure to 2 years will significantly reduce the cases of impunity. The mentioned timeframe is acceptable and sensible although it does not fully ensure the elimination of existing gaps, for example, in relation to the facts of using forged diplomas.

2.7 Movement (to positions) within the MIA

Movement (to positions) is the matter that is closely related to service at the MIA system. Various countries of the world have absolutely different rules in this regard. Georgian legislation governing the mentioned matter is outdated and repeats the norms analogous to those of the majority of post-Soviet republics, while absolutely different approach has been formed in many leading European countries.

Georgian legislation sets forth not so much the conditions and grounds for movement (to positions) within the MIA but the terms and procedures of transfer of employees sent for official duty to elective and executive government authorities. Currently there are no objective limiting factors for the movement within the MIA. This is often based on personal opinions of authorized subjects that must necessarily be based on objective circumstances. Movement within the MIA system often takes place on the basis of not objective criteria but subjective opinions. Further, legislation regulates just the procedural matters related to the movement of an MIA employee and leaves beyond regulation such fundamental concept as promotion. Within the MIA system, similar to other public agency certain criteria and restrictions with regard to promotion are not established, with the exception of, in particular cases, the necessity of attestation. Considering the aforementioned it is mandatory to establish certain restrictions in this regard. Given the specificity of work, work experience that is most important than all personal qualities needs to be taken into account, in addition to intellect, education and personal qualities of an individual. Significant mechanism for avoiding promotion on the basis of subjective

opinion is the creation of certain barrier through the years of service. This will be beneficial to performance for it will rule out the appointment of random and inexperienced staff to positions. Many countries of the world have such analogies. For example, in Estonia the prerequisite for appointment as a police department head is at least 3 years experience of work as a deputy department director. In turn, an officer with at least three years of service as a high level police official is eligible for appointment on deputy department director's position. [26]

Experienced staff is better familiar with work specificity and staff. Therefore, bringing the mentioned model in line with Georgian reality and introduction thereof would be one of the factors determining the reform underway at the MIA of Georgia. Although, the mentioned model should allow for certain exceptions for low or middle level positions but not for department directors or their deputies. At the same time we think that the mentioned model must allow for making certain exception. The authority to allow exceptions must be granted to the Minister of Interior only if necessary. Further, one of the important issues is to increase the duration of a one-week course prescribed under the Minister of Interior of Georgia Order No 1494 dated December 18, 2006 on Additional Requirements for hiring at and promotion within some structural units of the MIA of Georgia to up at least 2 months period in order to develop skills necessary for a supervisor, including those of planning operative activity and supervision. Legislation-prescribed term for a candidate to be promoted is not sufficient for full-fledged development, or, even for the development of the above-mentioned minimum skills.

Therefore, the above-mentioned need to be reflected in the Rules of Service at the MIA Bodies and not be regulated only under the Minister of Interior order. Although, having certain tests and evaluation criteria in place in this respect is a really progressive step. Movement of employees of certain category is related to service at MIA bodies and causes quite disorderly processes as well. This matter is to some extent related to promotion and the introduction of minimum requirement for the years of service would also regulate this matter to a certain extent.

For example, in accordance with the Minister of Interior Order No 1034 dated August 24, 2006 on the Imposition of obligation to neighborhood inspectors enrolled in the MIA of Georgia a neighborhood police inspector following the enrollment in the MIA system and completion of a relevant training course at the Police Academy is obligated to work for 3 years on an appointed position and for which it took a relevant training course. Although, despite this restriction they often move to other units for example, to the Patrol Police department that results in incorrect and improper spending of financial and human resources incurred on their education and at the same time, strengthening of one structural unit at the expense of another, which must also be regarded unacceptable. Therefore, it is better to reflect the above-mentioned order of the Minister in relevant regulations of the Rules for Service at the MIA bodies where the responsibility of MIA employees that underwent training for non-fulfillment of the imposed requirements will be set out strictly. This requirement must apply also to the category of servants that following the completion of work refuse to work at MIA bodies and are released from held positions. It will be highly productive to impose certain financial obligations on them. Further, this category of individuals should be restricted from the employment at the MIA in the future. Performing the mentioned activities will facilitate to returning to the state of the expenditures incurred on the education and equipping of these individuals. This model has been well used and operates effectively in a number of countries. For example, according to the legislation of Kazakhstan a contract is concluded with an

[26] Article 13 of the Law of Estonia on Service at the Police, May 14, 1998.

applicant for work at the MIA bodies who studies at a relevant educational institution that sets forth the issue of compensation in case of the breach of the conditions; [27] And pursuant to Article 35 of the Law of Estonia on Police Service an individual is obliged to work in the police system for at least three years following the completion of training, otherwise he will be required to refund the money that was incurred in relation to him.

Further, a range of circumstances are to be taken into account and it would be better if the Rules for Service at the MIA bodies approved by the President set forth the exceptions when an individual will not be imposed the obligation to reimburse the expenditures incurred in relation to him. For example, dismissal due to the care for a family member with a physical deficiency.

Setting these types of obligations is much more justifiable since Article 64 of the Rules of Service at MIA bodies already sets forth certain restrictions for regular staff: "candidates for a regular staff member position conclude a written agreement – on the obligation about the duration of work at MIA bodies (for 3 years)." Respectively, it would be much more justifiable and acceptable if the servants of every rank are regulated under a unified legal framework and equal restricting and obligatory norms are applicable to each of them.

2.8. Legal and social protection of the MIA employees

One of the most important preconditions for service of the MIA is legal and social environment in which they will have to perform operations, or life following dismissal. Respectively, this field plays a very important role for any servant of the MIA and as well as for the individuals that plan in the future to link their activity to the MIA. It is recognized in the USA that when choosing a policeman's profession the factor of guaranteed social protection plays a very big role that envisages medical insurance, lifelong pension, etc. All this is significant incentive for the individuals that are starting activity in this field. Therefore, it is very important to pay special attention to this matter for it will have huge impact not only performance of an employee but on his situation after leaving the service.

The mentioned issue is regulated under the Law of Georgia on Police that stipulates general norms of social protection and a sub-legal act, the President of Georgia Decree N 1082 dated December 23, 2005 on Social Protection of MIA servants and civilians and material support." Given their importance it would be better if the matters of social protection of the MIA employees are regulated under the Rule of Service at MIA bodies, rather than under individual administrative-legal acts. This could be achieved by way of bringing out the norms with social content as a separate chapter. In such case there will no longer be a need for a presidential decree regulating the same matters.

Considering these changes a unified normative act must be issued that will consolidate the most important matters related to service at the MIA including the rules of a Disciplinary Statute and social protection provisions; this will simplify the regulation of the mentioned matters and will eliminate the contradictory norms. Such legislative act will be a guide for any MIA employee.

A number of comments can be expressed in relation to the norms regulating the above-mentioned matter. The present paper will suggest the ways of resolving those, as well as the ways of new regulation.

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[27] Article 15 of the Law of the Republic of Kazakhstan on the MIA bodies of the Republic of Kazakhstan dated December 21, 1995.

2.8.1 Legal protection of the MIA servants

Legal protection of the MIA employees is provided under all those general norms that govern legal protection of any individual in general. Namely, MIA employees have basic human rights and freedoms stipulated under Chapter 2 of the Constitution of Georgia. Further, special rights and duties conditioned by professional activity. It can be considered that they have a special legal status.

A substantial comment in this relation is that current legislation does not grant an MIA employee the right recognized under the Constitution of Georgia on the participation in trade associations. Prohibiting norms are not applicable in this regard; but, still, since there are stringent restrictions with regard political activity of MIA employees[28], it is advisable to include in the Law of Georgia on Police as well as in the Rules of Service at MIA bodies the norm that will grant MIA employees the right to participate in professional associations. This is especially important for the employees in this field for they have limited means for the protection of own job-related interests as compared with other citizens. Effectively, the only means for this is court which competence is not the determination of the matters of expediency. Trade associations are considered the best means for the protection of employee interests worldwide. Therefore, granting mentioned possibility to MIA employees will only be beneficial. Similar model is used in progressive and successful states, for example, in the USA, as well as less developed countries, for example, in the Russian Federation, which Rules of Service at MIA bodies has the entire Chapter 6 dedicated to professional unions.

Although the MIA system of the same Russia contains such archaic remnants as the courts of honor[29] that is a precise analogy of Courts of Honor of Soviet times and this must be considered an absolutely unacceptable institution. When talking about this issue Article 26 of the Constitution of Georgia is to be mentioned that reads that "every person has the right to create public associations, including trade unions and the right to enter thereof."

If the right of employees to participate in trade associations is included in the Rules of Service at the MIA bodies activity performed on the basis of these norms will contribute significantly to forming and displaying the MIA as a much more transparent and democratic structure.

2.8.2 Social protection of the MIA employees

Social protection is of special importance for an MIA employee as well as any individual employed in public or private sector. Respectively, a correct vision must be formed towards the matter in order to avoid the mistakes following the reforms that will have negative influence on MIA employees.

Individuals employed at the MIA bodies in Soviet Union times were regarded as the most socially protected category which was retained on the legislation level even in the post-Soviet period. But in the reality of independent Georgia unlike Communist rule the state was unable to practically implement

[28] "An MIA employee is prohibited to participate in a political organization, see Article 4 of the Rules for Service at MIA bodies.

[29] Article 42, the Decree of the Supreme Council of the Russian Federation dated December 23, 1992, on Approving the Regulations for the Service at MIA bodies of the Russian Federation and the text of an oath of an employee of the MIA bodies of the Russian Federation.

these norms in financial or legal terms for the economic formation was changed in that period attended with all repercussions. Everyone refrained from cancellation of inactive social norms that were only on paper or from bringing those in line with reality. Although neither this was of essential importance for Georgia of the 90's, since even such inviolable and vital social norms that provided for the right to labor remuneration were inactive and people employed in this field were unable to receive due salary for years, nothing to say about additional social guarantees. Currently the reality in Georgia is different and therefore a correctly led reform is of special importance.

National legislation of the majority of post-Soviet Republics still have legal norms of the Communist period that currently cannot be exercised or it will become impossible to use them in the future. For example, providing telephone to employees, etc. These norms are absolutely in active under the market economy conditions as opposed to the period where everything was state-owned. Government must undertake responsibility for this category of employees and create normal living and working conditions for them that should be reflected respectively on an employee salary.

Therefore, labor remuneration is one of the most important social protection guarantees. It can be said in relation to labor remuneration that currently a differentiated salary system is used at the MIA, i.e., various structural units have established different salary for the same position which is not correct and needs to be revised. Every activity performed under the MIA is of absolutely equal importance no matter the field, for example, operative activity or logistics. Respectively, equal positions should have similar remuneration. Specific performance can be appreciated and incentivized, for example, through a bonus; and performance due to the number of years of service must be appreciated and incentivized according to the number of years of service by way of a supplement which is determined absolutely correctly under current legislation.

The matter of mandatory state insurance of an MIA employee must be noted. The measures taken by the government in this regard are absolutely acceptable and justifiable. The program of policemen insurance is actually being implemented in Georgia.

The matter on the vacation of MIA servants requires new regulation. According to Article 31(8) of the Law of Georgia on Police "duration of annual vacation of a policeman is 30 calendar days", while according to Article 50 of the Rules of service at MIA bodies' regular annual paid leave is given to employees in the following number of days:

"regular annual leave will be given to a MIA body employee:

for up to 10 years of service – 30 calendar days;

for 10-15 years of service – 35 calendar days;

for 15-20 years of service – 40 calendar days;

above 20 years – 45 calendar days."

Therefore, these two most important normative administrative-legal acts are contradictory and need to be brought into conformity. It is also necessary to introduce new regulation of the norms related to training leave.

MIA employees should have certain priority in this respect in relation to other public servants and considering the years of service they should be given the possibility to use additional vacation days. For example, after 10 years of service it is possible to determine the duration of the vacation of a policeman as 30+10 days. Similar regulation is used in foreign countries as well. For example, according to Article 37 of the Law of Moldova on Police a police employee is entitled to additional paid leave on top of annual leave in case of 10 years of service – 5 days, in case of 15 years – 10 days, and in case of 20 years of service – 15 days. Respectively, this change needs to be reflected at the level of a normative act.

Inactive norms in the Rules of Service at MIA bodies need to be cancelled, as was mentioned above; example of such norms is the provision according to which the MIA "once a year will pay an MIA employee the cost of travel to and from the destination of vacation for one of the family members." The mentioned provision actually was never used and is still inactive.

The matter of payment of compensation in relation to the death and bodily injury of MIA employees while on official duty requires legal regulation. First of all, the concept of performing official duty should be defined on a legislative level. A person may not be considered to have died or injured while on official duty if he dies or gets bodily injury as a result of an activity that is not related directly or indirectly to official duties. Respectively, amounts need to be issued only to the individuals whose death or bodily injury was caused by an action that took place directly during performance. For example, a policeman that died or was wounded during the operation of taking a bandit-like formation. Otherwise these norms should not be applicable. The Federal High Court of Germany rendered a very interesting decision in relation to a similar matter that can be useful and become a guiding example for Georgian lawmakers in the course of regulation of the above-mentioned matter through legislation. Namely, in the Federal Republic of Germany a public servant had an official meeting and negotiations with the agency head out of town. The meeting was about flight safety and it took place on the territory of the airport. Public servant went to the airport on his private vehicle. On his way back due to negligence he had an accident as a result of which his passenger received severe bodily injuries. The Federal High Court of Germany considered the mentioned matter and established the criteria for drawing the line between public and private legal activity. The Senate explains in its decision that: "the involvement of a servant in traffic that is not related to the execution of his special rights can be regarded as main part of public activity. Therefore, the activity of an employee can be qualified as the discharge of public authority in case the purpose towards which he was acting falls under the field of state activity and in case inner or external link between the purpose and the damage resulting from the action is so strong that such action falls under public activity."[30] The mentioned decision should be regarded absolutely acceptable for policemen's activity and the associated relations.

Based on all of the above-mentioned it is advisable to clearly define in administrative legal acts that in case of death or bodily injury of a MIA employee state will issue a one-off cash assistance only in case a policeman's life and health was affected during the discharge of official duty or an action directly related thereof. Similar provision is included in Article 49 of the Law of Georgia on Public Service which envisages assistance to a family of a fallen public servant in case of death of a servant as a result of an assault. It is not reasonable to apply the norm in this very form to MIA employees for their death or mutilation can be caused not by an assault but can occur, for example, as a result of traffic accident when following a criminal suspect. Therefore, quite a large number of victims affected while on official duty can be left beyond the law. Therefore, it is more advisable to take into account the provisions of Article 17 of the Law of Georgia on Medical Social Expert examination that sets forth that death or mutilation is considered to have taken place in the course of discharging of official duties if it is related directly to the discharge of official duties. Respectively, when effecting necessary adjustment and modification in the Law of Georgia on Police and in the Rules of Service at MIA bodies it is possible to set forth expressly as to what must be regarded as the implementation of official duties and in which case the state is to issue assistance.

[30] Richter, Ingo/Schuppert, Gunnar Folke, Casebook Verwaltungsrecht, München, 1995, www.ams-ag.de.

A comment related financial aspects can be made in relation to this matter as well. At present a family of a policeman that dies during discharging of official duty receives from the state 15,000 GEL as one-off assistance, and in case of mutilation or bodily injury – GEL 2,000 to 7,000. This amount is not in line with actual economic condition. Prior to legislative amendments in 2005 these amounts equaled 10-fold salary in case of death and the amount of salary of 1 to 5 years in case of bodily injury. Such provision is still in place in the Rules of Service at MIA bodies[31] which, is also a collision in legislation that requires fixing immediately and bringing in line with the requirements of the Law on Police. Although financial assistance envisaged for other public servants that is set at GEL 10,000 in case of death and GEL 5,000 in case of bodily damage[32] is lower than that set for MIA servants but equalizing these two categories of employees is improper due to different risks related to the performance of their activities. According to statistical data the number of the MIA employees that died while discharging official duties during a year significantly exceeds the total number of killed state public officers.

When considering this issue it is important to take into account the income of a dead or mutilated individual. These factors should not be overlooked for a victim's family should be provided reimbursement during at least a certain period; the reimbursement should be of the same amount in order for the family to be able to adapt to new reality and reallocate obligations in a new way. Not to mention moral damage resulting from the loss of an individual or his bodily injury. Therefore, it would be better if the amount of such assistance is determined according to an employee salary. Namely, in case of death of an employee it will be desirable to give to a family assistance equal to 5 years of salary, and in case of bodily injury in the amount of salary for up to 1 year.

The model of one-off assistance suggested in the paper that envisages the support to dead or mutilated employees is established at the Russian Federation. The Kazakhs went even further and envisage the payment of compensation to a family of a dead employee even in case a dead person had left the MIA one year ago and his death is caused by a trauma suffered during the discharge of official duties. In this case the amount to be paid is sixty times the salary envisaged for the most recent position of an employee.[33]

To conclude reviewing social protection guarantees of MIA employees we should focus on the gaps in legislation as well as inactive that are rife in Chapter 5 of the Rules for Service at MIA bodies approved under the Decree of the President which regulates the conditions of service. For example, Articles 57 and 58 are to be removed entirely; these articles concern various benefit for the MIA employees; for the provisions of this norm cannot be implemented due to absolutely different economic environment of new regulation of these matters. For example, the possibility of receiving land free of charge by an MIA employee, etc. Respectively, these modifications will eliminate gap in legislation.

2.9 Termination of service at the MIA

Termination of service at the MIA and dismissal from office is one of the important issues grounds for which are detailed exhaustively in current legislation. According to Article 59 of the Rules of Service at MIA bodies the following are the grounds for termination of service at MIA:

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31 Article 55 of the Rules of service at MIA bodies.

32 Article 49 of the Law of Georgia on Public Service (October 31, 1997).

33 Article 28, the law of the Republic of Kazakhstan dated December 21, 1995 on Interior agencies of the Republic of Kazakhstan.

a) dismissal from MIA bodies;

b) termination of citizenship Georgia;

c) Declaring the MIA system employee missing according to a law-prescribed rule;

d) death of a MIA system employee (killing).

The same normative administrative-legal act, following the grounds of termination of service regulates the grounds for release from MIA bodies, such as, for example, reaching determined age or the expiration of the term of service envisaged under an agreement, etc. although today it is absolutely unclear as to what is the purpose of separation of the grounds for the dismissal of an employee from the MIA and the grounds for termination of service. These norms were relevant when the concept of "reserve" was used in the MIA i.e., the officers that for certain reason terminated service at the MIA bodies could be enrolled in the so-called reserve. Respectively, dismissal from MIA bodies would take place when an individual would also be removed from the "reserve" list as well. After the so-called Reserve no longer exists these two concepts, i.e., dismissal from office and termination of service come to bear absolutely the same content. Therefore, their presence in this form and differentiation it is absolutely unclear. This causes even more misunderstanding for the Law of Georgia on Police does not envisage such differentiation between dismissal from office and termination of office and respectively Article 22 is formulated as the Rule of Dismissal of Policeman from office." In this case, too, it will not be a valid argument than the termination of office implies the termination of official duties while in the meantime a person may be at the disposal of HR department. Termination of relations between the MIA and an employee at the disposal of HR department takes place only on the basis of dismissal thereof. During the period an individual is at the disposal of HR department an individual may receive assignment and implement any function he performed prior to moving at the disposal of HR department; moreover, despite the above-mentioned argument no difference will and can exist between the grounds for moving at the disposal of HR Department (which will be followed by the termination of office) and dismissal. Therefore, to avoid and eliminate this misunderstanding instead of two different articles in the Rules of Service at the MIA bodies that regulate the matter of dismissal of an employee from the MIA system it is advisable to formulate one article that would reflect requirements of both articles in force since, for example, one of the grounds for termination of office – death of an employee of MIA bodies implies obligation to dismiss thereof from office. Probably, Russian lawmakers were guided by similar considerations when they did not include death among the grounds for dismissal. [34] Considering the above-mentioned modification grounds for dismissal of an MIA employee from the will become much more clear.

Another serious gap is the mingling of the grounds for dismissal of servants from the MIA. As in cases of disciplinary punishment of incentive we see collision in this case as well. One of these most important matters related to an MIA employee performance is regulated by two legislative acts: the Law of Georgia on Police and the Rule of Service at MIA bodies. The Law of Georgia on Public Security Service that also regulates the activity of certain structural units of the MIA does not regulate altogether the grounds for termination of employment relations which must be taken into account when effecting legislative modifications.

The Law of Georgia on Police and the Rules of Service at MIA bodies regulate the grounds for dismissal from the MIA are in collision. The Law of Georgia on Police envisages the grounds for

[34] *Kondrashov B.P., Solovei Y. P., Chernikov V.V.,* Commentary to the Law of the Russian Federation on Militia, 5th revised and supplemented edition, M., 2006, <www., iskra.ru>.

dismissal of an employee such as: reorganization, own wish and corruptive offence, in accordance with the rule envisaged under the Law of Georgia on the Conflict of Interest and Corruption in Public Service while nothing is said about these grounds in the presidential decree which, in turn, stipulates such grounds as termination of Georgian citizenship or declaring an employee of the MIA system as missing, that are not stipulated under the Law of Georgia on police. The above-mentioned acts formulate conceptually identical grounds in different versions. For example, in accordance with Article 22(b) of the Law on Police a policeman can be dismissed from office: "due to the deterioration of health condition, mutilation or a chronic condition that prevent him from continuing service", Article 60 of the Presidential Decree formulates these grounds in two separate paragraphs:

"g) disease that prevents him from continuing service;

h) due to the deterioration of health condition that prevents him from continuing service."

Considering the above-mentioned consolidated grounds for dismissal from the MIA need to be formulated in the Rules of Service at MIA bodies and the Law of Georgia on Police that will eliminate collision between these legal acts.

Another modification that needs to be effected in the Rules of Service at MIA bodies relates to the age of dismissal from office. In foreign countries employees of this institution have a lower pension age as compared to the employees of other state institutions. Of course, this does not apply to the Ministry of Defense. The reason for this is easy and understandable for all. Although, setting 45 years as retirement age, and, respectively, limitation of employment for the servants with special ranks from a private up to a lieutenant colonel in Article 59 of the Rules of Service at MIA bodies of the Russian Federation cannot be considered justifiable. Especially that the above-mentioned is not based on scientific research. 45 years is often considered to be ideal age for any job. For example, statistical data shows that the majority of foreign companies regard the servants aged 35- through 45 as best employees. Therefore, roughly, releasing them at the age of 45 is to be regarded really unjustifiable. In the process of reforming the MIA of Czech in late 20th century when the harmonization with factually new standards was taking place one of the main reformers of police, Petr Zelasko, manager of the police presidium and ex-head of the department of minors, regarded that: "staff of a good specialized department must be comprised of honest, educated highly experienced professionals, with average age of 45 years. They may not be good at running fast but a shrewd mind is more necessary."[35] Certainly, it is not justifiable to compare the regime of other states' institutions and health conditions of their employees with the regime of any so-called law enforcement agency that is directly reflected on the health of the individuals employed there, but the setting of such low age limit is still to be considered excessive. Therefore, it is necessary to set a different age limit in this respect as well as that would be different from that of other public offices. Currently pension age ranges from 50 to 60 years, and in certain cases, up to 65 years. It will be reasonable if 55 years is set for an employee of operative service as a uniform retirement age, and 60 years - for civilians that work in less stressful environment. In special cases, according to the needs of the service, at the decision of the Minister and considering the health condition of employees it needs to be possible to have their retirement age extended. Although, unlike current legislation this norm needs to apply to all servants and not only the employees that have a

[35] *Kaparin M., Marenin O.,* "Transformation of Police in Central and Eastern Europe", Geneva Center for Democratic Control over the Armed Forces (DCAF), Tb., 2008, 232.

special rank of a police colonel. Further, the above-mentioned norm contains a legislation-related gap as well for because of this provision individuals with military rank are excluded from legal regulation under the Rules of Service at MIA agencies. Estonian legislation prescribes certain priority status of high-ranking employees. In Estonia 55 years was set as retirement age for junior and senior officers, 60 years - for top-ranking officers.[36] Such approach towards the matter is absolutely unclear and unacceptable since physical or intellectual status of an individual is not defined by his rank. There may be certain difference in terms of qualifications but in this case the need for sharing qualifications and experience of any such person should be specifically determined. Article 61 of the Rules of Service at the MIA bodies requires modifications as well, according to which an employee may work at the MIA until the attainment of the following age: "a) 50 years (reserve) -- junior police lieutenant – police captain; 55 years by stepping down" it is absolutely unclear as to what the words "reserve" or "by stepping down" mean. It could mean the dismissal of a junior lieutenant into reserve although this concept has also been out of use for years. Probably such individual would be "retained" in reserve for 5 years after which he would be dismissed from the agency. Still, an explicit approach towards this issue is still lacking. For example, an employee with a junior police lieutenant is dismissed from office at the age of 55, by indicating the very above-mentioned grounds. And all this is done not in accordance with legislation, but according to established practice. It will be much better if age limitations of 55 and 60 years are set. Most importantly, all norms about dismissal of an employee from the MIA need to be defined in the same way for absolutely all categories, considering the specificity and not current situation when the dismissal of privates and officers' staff from the MIA is regulated by various legal norms. Moreover, in addition to the above-listed grounds for dismissal the following articles set forth additional, different grounds for these two categories. For example, in accordance with Article 65 of the Rules of Service at MIA bodies, members of regular staff can be dismissed from the MIA "illness, in case they are deemed by military medical committee to be unfit for military service in peaceful time (in the state of war – fit according to the 2nd degree of limitation) or unfit for military service by removal from military registration." At the same time, nothing of this kind is mentioned in Article 66 that regulates the rule of dismissal of the officers' staff; Article 67, which having separately also causes misunderstanding prescribes similar limitation, only with certain alterations, according to which officers are dismissed into reserve, for example: "those considered fit for military service in peace times by a military-medical committee due to the deterioration of health condition, other than active services (in war conditions – fit according to 1st degree of limitation) in case they cannot be used in service due to the lack of a relevant vacancy."

Thus, having a general rule excludes misunderstanding. Norms regulating the above-mentioned issues are the version of the norm of Soviet Militia times rendered into Georgian, which analogue can still be seen in the analogous acts of the majority of post-Soviet republics. The analysis of the problems described in the paper is not the only and unconditionally correct way for fixing gaps in legislation; but, considering the opinions provided in the paper will contribute to resolving legislative as well as practical problems.

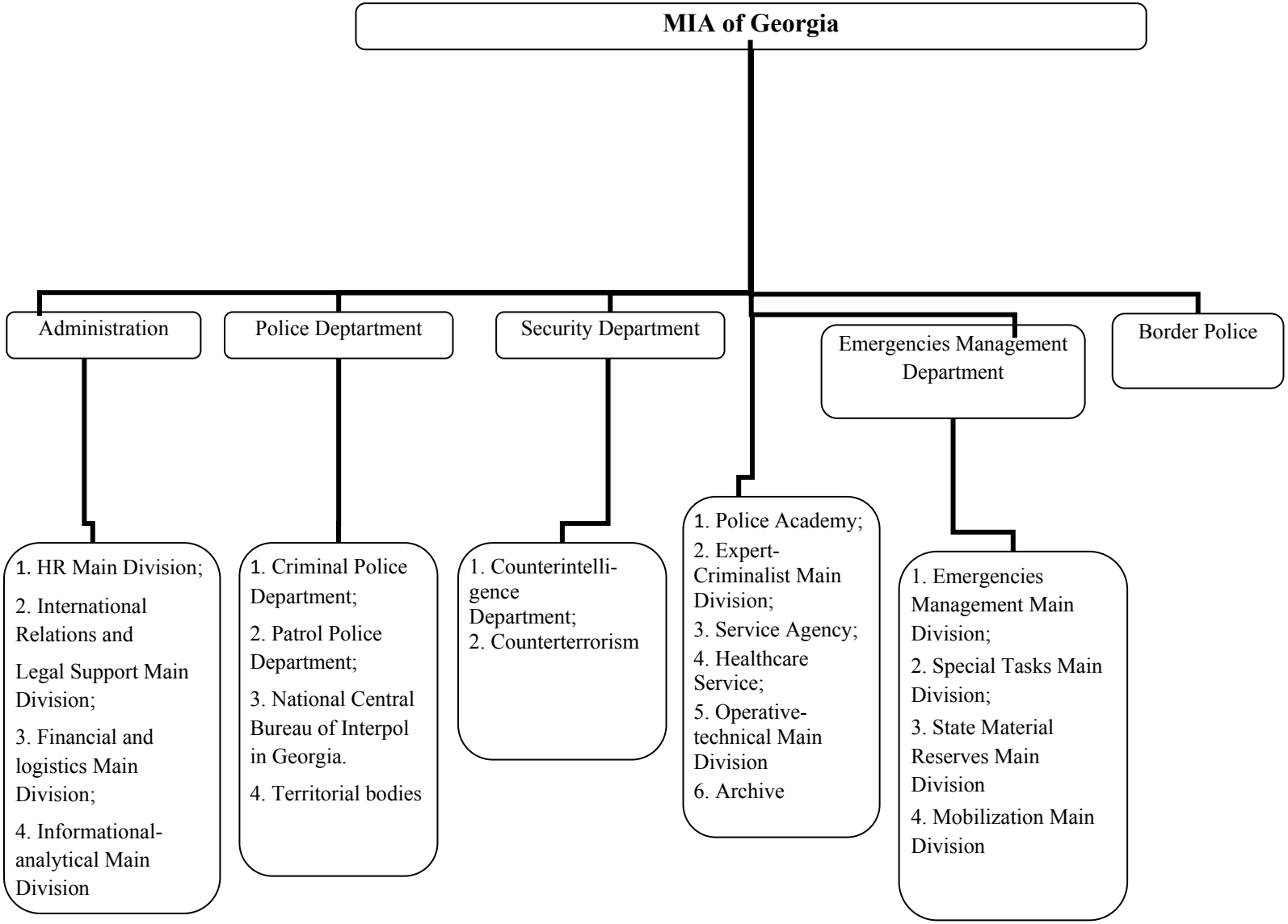
[36] The Law of Estonia on the Service at the Police, Article 49, May 14, 1998.

Appendix No 1

Structure of the MIA of Georgia

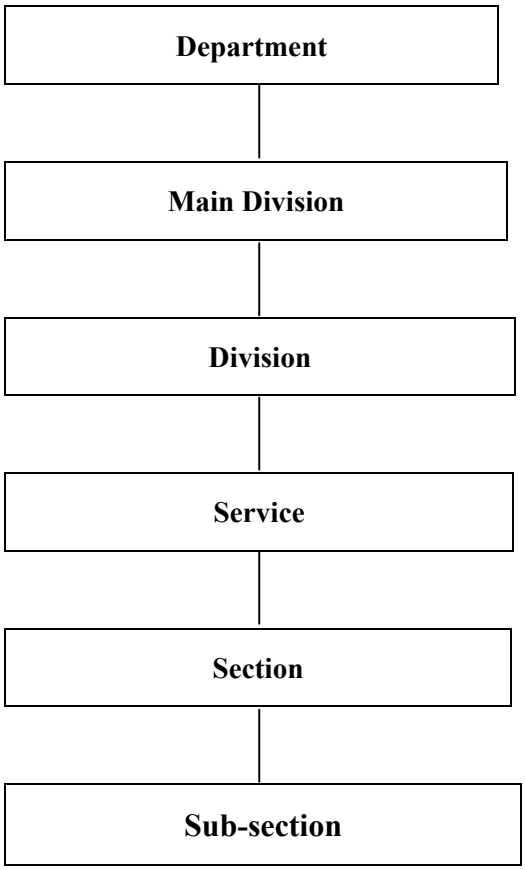
Structural Sub-units	**Territorial Bodies**	**Legal Entities of Public Law Under the MIA Management**	**Sub-agency**
1. Administration 2. General Inspection 3. HR and Organizational Dep.; 4. Mobilization Service; 5. Informational-analytical Dep; 6. Operative-technical Dept.; 7. Counterintelligence Dep.; 8. Constitutional Security Dep.; 9. Special Operat. Center 10. Special Activities Dep.; 11. Special Operative Dept; 12. Criminal Police Dep; 13. Patrol Police Dep.; 14. National Central Bureau of Interpol in Georgia 15. Emergencies Management Dep.; 16. Special Tasks Dep.; 17. Counterterrorism Center; 18. Strategic Pipelines Protection Dep.; 19. Main Division for International Relations.	1. Abkhazia 2. Ajara 3. Tbilisi 4. Mtskheta- Mtianeti 5. Shida Kartli 6. Kvemo Kartli 7. Kakheti 8. Samtskhe-Javakheti Imereti, Racha-Lechkhumi and Kvemo Svaneti 9. Guria 10.Samegrelo-Zemo Svaneti	1. Academy of the MIA of Georgia; 2. Security Police; 3. Healthcare Service of the MIA of Georgia; 4. State Material Reserves Department. 5. MIA Service Agency, a Legal Entity of Public Law. 6. Archive of the MIA of Georgia	1.Border Police of Georgia.

Appendix No 2



Appendix No 3

Structural Constitution of the MIA of Georgia



Guidelines for Authors

1. Circle of Authors

Law Faculty Journal includes articles covering all branches of jurisprudence. The following persons are authorized to submit articles or other material:

- TSU Law Faculty professors and teachers (including invited teachers);
- Law Faculty doctoral candidates;
- Scientists engaged in law sphere and lawyers in private practice – as coauthors of a Law Faculty Professor;
- TSU Law Faculty MA course alumni (whose master's work received the highest grade. Article should be a part of master's work);
- Other authors to prepare publications on different matters on instructions of editorial board.

2. Article Size

Approximate size of article should not exceed 60 000 symbols; submitted article should be accompanied with resume no more than 1 page.

3. Content Requirements

- Articles presented by academic personnel and covering acute problems of law and the suggested ways for their resolution will be attached special importance;
- Scientific value of the articles presented by practicing specialists and including analysis of law enforcement practice will be determined by author's identification, bringing up and substantiated resolution of practical legal problems.

4. Procedure and Form of Submission

An author should present his/her article in *Microsoft Word* through e-mail and should include the following data:

a) author's full name
b) article name
c) contact details and e-mail address
d) date of submission

Georgian version of article should be in ***AcadNusx–12***, foreign-language articles - ***Times New Roman–12***, footnotes – same font size 10; spacing – 1; indent by one ***Enter*** instead of Tab; styles should be equal and no hyphens are allowed. Right indent – 4 cm; pagination – each page, lower right corner.

Structure of article should be developed not only through numeration of chapters, but also subtitles of issues to be discussed. When dividing an article in chapters, subchapters and sub-subchapters Arabic numerals should be used, e.g. 1.; 1.1.; 1.1.1. etc., introduction and conclusions should be given separately.

Text mainly should be in third person; while express his/her own position, an author should try to avoid telling in first person.

Article should not have the references (sources are given as footnotes).

4. Citation and Footnote Technique

Footnotes should involve the sources of citation (quotation) and factual circumstances.

No abridgements of words, names and titles are allowed in text and in footnotes, except for the universally known ones (e.g. paragraph — §, for example – e.g., reference – ref.

Etc).

If an article includes abbreviation first should be given the full version of it, and then abbreviation in parentheses (e.g. German Civil Code (hereafter "GCC"); accordingly, frequently used names of conventions, laws etc. should be shortened using key words, i.e. first should be given the full version of it, and then key words in parentheses (e.g. EU Convention for Human Rights (hereafter "the Convention").

• When using **legal act,** its full name and source it has been published should be given in footnote, as well as date and page.

• When using **literary sources,** the following data are required to be included in footnote:

1. for **a book** – author's surname, first letter of first name, title of book (no quotation marks), number of part, section, volume (if necessary), place and year of publication, page number (without "p".)

2. for an **article from collection** – article author's surname, first letter of first name, title of the article (no quotation marks), title of collection (no quotation marks), editor, number of part, section, volume (if necessary), place and year of publication, page number (without "p".)

3. for an **article in a journal (newspaper) - —** article author's surname, first letter of first name, title of the article (no quotation marks), type of periodical in brief (magazine, newspaper) title (in quotation marks), number of copy, year (month, date), page number (without "p".);

All bibliographic elements of foreign sources should be in original language, or in language the author have read in (indicating appropriate official translation).

Unified system should be maintained regarding footnotes: author and the work title should be emphasized (e.g. author – italic, other information – ordinary fonts, italic should be used also for all surnames used, e.g. editor), besides each units (except for surname and first name initial) should be separated by comma and at the end of footnote should be a point.

Materials obtained through Internet should have relevant webpage and date of updating; In case of an article, author's surname, article title, webpage and date are required. E-address should be in <....> last updated in brackets [....].

4. for **decisions of international court and foreign countries:**

Court of Justice

e.g. Case 16/62, Van Gend en Loos, [1963] ECR 95.

European Court of Human Rights

e.g Kostovski v. The Netherlands, [1990] ECHR (Ser. A.), 221.

International Court of Justice

e.g. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, [1995] ICJ Reports, 6.

Names of cases and decisions on them should be used in Georgian (Italic). Full versions can be given in original language in text, or as a footnote with the following order: party vs. party, year, publisher, page, court.

e.g. for Great Britain courts: case *Argyll v. Argyll*, [1967] 1Ch 302,324, .332));

for US courts: case *Brown v. Board of Education,* 347 US 483 (1954)).

5. for decisions of **national courts** official national style should be maintained. In case of absence of equal national approach, the author should follow the following basic rule:

When using Georgian court decisions, the events should be emphasized - 1. Decision is published; 2. Available in official electronic source; 3. Accessible only in court archive – and unified approaches should be developed.

6. Documents of International Organizations

Official style of International Organizations should be used (see official sites).

7. Conventions and International Agreements

Conventions and International Agreements should be cited, e.g. 1985 Vienna Convention for the Protection of the Ozone Layer, International Legal Materials, 1985, 1520. Reference should be given when a quote is in quotation marks and footnote is in accordance with above mentioned rules. When citing source of periphrasis or separate opinion, the word "see" or "compare" should be used. "Compare" is used when author wants to cite different opinion.

In basic text references to information or analysis necessary for the achievement of the goal or related to work title can be made. References to additional information can be made in footnote.

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The following quotation marks are to be used: „." in Georgian text, and "." in foreign text.

Punctuation marks at the end of quotation, such as point, semicolon, colon or dash should be used only after quotation marks. Question mark and exclamation mark or dots - before quotation mark, if it belongs to the word or words included in quotation marks, and after quotation mark, if it belongs to entire sentence along with the word or words included in quotation marks.

When there are simultaneously several punctuation marks, quotation mark and footnote mark with word, the following order should be adhered to: 1. quotation mark, 2. punctuation mark, 3. footnote mark; and at the end of quotation (i.e. sentence): 1. quotation mark, 2. punctuation mark,

3. footnote mark. Two quotation marks should not be written together. In case of parentheses, the different forms of it can be used;

Dash and hyphen should be identified. Hyphen is short line with no intervals before or after it, while dash is longer line and intervals are required before and after it;

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b) when indicating an author or work that has been mentioned in previous footnote, and not in the above one, the full name of source can be indicated with page, or number of that footnote, in which the source has been last mentioned with relevant page number (e.g. see footnote 15, 20).

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