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History of State and Law and Political-Legal Thought

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Институт права собственности по *Обозрению Грузии по части прав и законоведения* Давида Багратиони

I. Введение: *Обозрение Грузии по части прав и законоведения* – еще один памятник древнегрузинского права

Тема моего выступления – институт права собственности в начале XIX века, по древнегрузинскому правовому своду – *Обозрению Грузии по части прав и законоведения*, автором которого является известный государственный и общественный деятель Грузии, последний наследник Картли-Кахетинского престола Давид Георгиевич Багратиони (Батонисшвили).

Обозрение Грузии по части прав и законоведения полностью составлен в России, не ранее 1813 года, как об этом указывает первооткрыватель труда и составитель глоссария к тексту, профессор Апполон Рогава, по мнению которого, царевич Давид «мог воспользоваться своим прежним проектом – *Самартали Батонисшвилис Давитиса* и постоянно пользовался им...»[1]. И, действительно, *Обозрение*... – итог российского периода деятельности царевича Давида, когда будучи сенатором, он, фактически, руководил той законодательной комиссией, на которую возложили обязанность русского перевода *Сборника законов царя ВахтангаVI* и, в особенности – соответствующих русскому законодательству начала XIX века, статей частного права, дабы с их помощью, регулировать частно-правовые отношения в новой колонии Российской империи – Картли-Кахетии. Необходимость такого перевода возникла после того, как имперские чиновники и их грузинские служащие тщетно пытались исправить возникшие пробелы и, надлежаще регулировать правоотношения: русские не знали местных обычаев и законов, которыми веками упорядочивались частно-правовые отношения, а грузины не признавали русские законы и, по прежнему в судопроизводстве преволировало грузинское законодательство. Следовательно, они нуждались в квалифицированном переводе Законов царя ВахтангаVI. В этих условиях целесообра-

[1] А.А. Рогав (ред.), *Багратиони Давид, Обозрение Грузии по части прав и законоведения*, Изд-во АН ГССР. Тбилиси 1959, с. 32.

зность руководства комиссией предполагала как знание тонкостей законотворческой деятельности, так и должного авторитета в грузинском обществе. Эти критерии удовлетворял царевич Давид Георгиевич Багратиони.

В *Обозрении Грузии по части прав и законоведения* царевич Давид подробно описал, действующую во второй половине XVIII века, систему восточно-грузинского права. В частности, здесь рассмотрены нормы из *Сборника законов царя ВахтангаVI*, законодательные акты периода царствования Ираклия II и Георгия XII. С какой же целью создавалось *Обозрение*...? По нашему глубочайшему убеждению, царевич Давид выразил благороднейшее желание, ознакомить передовую часть русского общества с многовековой традицией грузинской цивилизации и, в особенности, с трехтысячелетней историей грузинской государственности и правовой культуры, чтобы русские чиновники воздержались от унизительного и неподобающего отношения к грузинам, что, зачастую, имели место в адрес народов Крайнего Севера, Средней Азии и Северного Кавказа. Это – во первых. И, во вторых: Давид Георгиевич Багратиони, весьма наивно думал, что, когда-нибудь, по воле божьей, Россия внемлет просьбе царевича Давида и других грузинских патриотов и восстановит грузинскую царскую власть. Благородство царевича Давида проявилось лишь в неугасаемом желании восстановления грузинской государственности, а не в стремлении престолозамещения. Осуществить свою мечту Давид Багратиони пытался через *Обозрение Грузии по части прав и законоведения*, которое и по содержанию, и по законодательной технике схоже со вторым слоем *Самартали Батонисшвилис Давитиса*, т.е. с «С» сводом, который царевич Давид создал в Петербурге, в 1811–1813 годах.

II. Структура и основные положения *Обозрения Грузии по части прав и законоведения*

На основе *Обозрения*... предусматривалась регуляция следующих правовых отношений: Вера и присяга. Царь и царствующий дом. Духовенство. Военные силы. Непременной царской Совет. Иностранные дела. Народы, Грузию населяющие, их вероисповедание и преимущество. Казенные, дворцовые, церковные и помещичьи крестьяне. Пытка. О свидетелях. Штраф. Чины и должности. Народное просвещение. Действия против общественного и государственного порядка. Бунт. Обнажение оружия. Неуважение к судилищу. Подати и пошлины. Приписка в крепость чужестранцев. Переселенцы. Ложные доносители. Пленники. Брань и личная обида. Измена. Дезертиры. Насилие. Побег. Малоумие. Попавшие в плен. Вырубка чужого сада. Торговые люди и купцы. Опекуны и должность их – векили. Приданое – мзитеви. Векселя и долговые обязательства – тамасукиса. Фальшивая монета. Смерто-

убийство. Насилие, грабеж и разбой. Клевета и клеветники – огало. Каналы. Граждане и купцы. О карточной игре. О судье, изобличенного в мздоимстве. Брачной развод. Самозванцы. Архиереи армянские. Кредитор, должник и залог. Умышленное впускание чужой скотины в свой сад, чтоб убить их по управлению. Ремесленники. Бланки и т. д.

1. Институты частного права

Обозрение Грузии по части прав и законоведения – сборник средневекового права, регулирует многие институты частного права. 595–596 статьи *Обозрения...*[2] касаются необходимости совместной жизни и деятельности людей, как разумных существ и возможности получения ими взаимной выгоды, при всеобщем законопослушании. Царевич Давид поучал, что неукоснительное соблюдение законности – залог внешней безопасности и внутренней стабильности общества. Поэтому, каждый член общества должен заботиться о благополучии всего социума и его политического организма. Лишь при верховенстве закона можно достичь прогресса в государстве. Закон строго наказывал злостных нарушителей гражданских сделок. В других статьях (289–294, 640–641) законодатель устанавливал ответственность в отношении как должностных лиц, так и всего общества, если имели место явное нарушение закона и неуважительное отношение к судебной власти, неповиновение его решениям, необоснованное обжалование судебных актов, несмотря на их законность. Подобные деяния, по мнению царевича Давида, наносили непопровимый ущерб авторитету государства, пораждая в обществе иллюзию безнаказанности и вседозволенности. Внедрение принципа законности и правопорядка, для которых автор ввел в правовой оборот весьма оригинальное грузинское понятие – «каргиереба» (хорошее дело), свидетельствует о влиянии идей европейского Просветительства и его основных принципов на юридические взгляды Давида Багратиони.

А) Субъекты частного права

Субъектами частного права, по 421–422 статьям *Обозрения...* были: царь и его семья, все три категории тавадов (князей) и все четыре категории азнауров (дворян), достигших 20-летнего возраста и не лишенных дееспособности в виду душевного расстройства и слабоумия. Защита прав и интересов несовершеннолетних и совершеннолетних, но недееспособных лиц (в виду их душевной болезни или слабоумия) возлагалась на их векили – опекунах и попечителях, которым в *Обозрении...* посвещено существенное количество статей (423–448 – «Опекуни и их должность – векили»). Законодатель не забыл, что институт опеки и попечительства не был чужд

[2] Тамже, с. 319.

древнегрузинскому праву и, в сборнике, довольно четко, определил основания возникновения опеки и попечительства, права и обязанности опекуна (попечителя) и опекаемого, возраст опекаемого лица, его личное и имущественное положение, условия прекращения опеки и попечительства и др. Царевич Давид прямо указывал, что назначение векили – опекуна вызвано осиротением лица в малолетнем возрасте, когда он еще не достиг возраста дееспособности и поэтому не мог самостоятельно осуществлять свои права и обязанности. Опека продолжалась до срока достижения совершеннолетия, т.е. – до 20-летнего возраста. Главной обязанностью векили была защита имущественных прав опекаемого лица, в том числе и на суде. Защита же личности опекаемого возлагалась на его надзирателя, если сирота не проживал в семье своего векили. Опекунство возлагалось лишь на лиц благородного происхождения – честных и бескорыстных. Законодатель четко определял каждую социальную категорию и соответствующих ей опекунов: для благородного лица опекуном может стать только лицо благородного происхождения; для горожанина – только горожанин; для царских крестьян – только моуравы и нацвалы этих крестьян; а заботу об осиротевших господских крестьянах закон возлагал их крепостников. В *Обозрении*... допускалось осуществление полномочий опекунства и со стороны родителей малолетних сирот. Однако, при несоблюдении или недолжном соблюдении ими своих обязанностей, они изгонялись с опекунства и несли полную материальную ответственность за причиненный ущерб. Здесь же рассмотрены случаи попечительства над недееспособными лицами, которые лишались возможности осуществления своих прав и обязанностей по причине тяжелой неизлечимой болезни или психического расстройства. В данном случае, срок попечительства не был ограничен, кроме тех случаев, когда лицо выздоравливало или вступало в брак, имея собственное здоровое совершеннолетнее потомство. После истечения срока векильства, опекун обязан был представить отчет о проделанной работе бывшему опекаемому, – теперь уже совершеннолетнему лицу. В случае преждевременной кончины опекуна или попечителя, опеку и попечительство малолетней сироты или совершеннолетнего недееспособного лица, продолжали наследники умершего или, при полном соблюдении вышеперечисленных условий, назначались новые векили.

В значительной степени ограничивалась правосубъектность низов грузинского общества – крестьян. Здесь же законодатель оговорил правовой статус того этнически негрузинского населения – армянского и еврейского, которое вправе заниматься торговлей, как внутри страны, так и с другими странами. В 214–218 статьях *Обозрения*... регламентируется правосубъектность различных объединений – товариществ.

Б) Право собственности: виды, возникновение и защита

На наш взгляд, главным результатом воздействия идей европейского Просвещения над автором *Обозрения*..., было подробное упорядочение института права собственности.

В позднее средневековье законными основаниями возникновения права собственности в Грузии, по прежнему, были: царская воля – за верность престолу; приобретение права собственности в порядке его отчуждения, путем включения в гражданский оборот; наследование собственнику; присуждение в судебном порядке. Возникновение права собственности всецело зависило от царской воли. Согласно 826–831-ой статьям *Обозрения*..., царские грамоты и указы («цкалобис цигни» и «окмиса») считались наиболее важными, по юридической силе, документами, присваивающими лицу право собственности на недвижимое имущество: «828. Пожалованное по ним имение остается навсегда в полном распоряжении и наследственном владении тому, кому дана грамота. 830. Грамоты и указы, объявленныя по смерти царей, означенных в них имений во владении за помещиками не утверждают»[3]. Заметим, что автор особо предписывает незыблемость соблюдения условий действительности царской грамоты и купчей (ст. 352–354 *Обозрения*...). В отношении царской грамоты прямо утверждается презумпция действительности данного акта, для любой частно-правовой сделки. Ее сила рапространяется и на всех лиц, перечисленных в данном акте, даже в том случае, если, впоследствии, они подверглись родительскому произволу при разделе общей собственности[4]. Данное условие распространяется и на благоприобретенное имущество[5]. А в 353–354-ой статьях указано, что: «Когда при пожаловании имения в грамоте означены будут имена детей или родственников, тогда власть родительская не может распространяться на распоряжение оного по воле своей. То же самое сохраняется и в имениях благоприобретенных, когда впишутся в купчей крепости имена детей»[6].

Экономический прогресс общества неразрывно связан с правом свободного приобретения и отчуждения имущества, при строгом соблюдении надлежащего порядка купли-продажи движимого и недвижимого имущества. Согласно 717–720-ой статьям *Обозрения*..., если имущество не является спорным или не подвержено запрету на отчуждение, допускалась его свободная купля-продажа, по доброй воле продавца и покупателя, с соблюдением установленных предписаний. Первым делом, в судебном порядке выяснялся статус имущества. Суд, путем письменного запроса, наводил справки: не было ли оно спорным, неразделенным между наследниками собственника,

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[3] Тамже, с. 357–358.
[4] Тамже, с. 280–281.
[5] Тамже, с. 281.
[6] Тамже.

заложенным под кредиты, подверженным запрету на отчуждение по царскому указу. Удовлетворив эти требования, допускалось свободное отчуждение имений. Эти же требования закреплялись и за родовыми и наследственными имениями. Однако, необходимым условием отчуждения родовых и наследственных имений было оповещание всех родственников и потенциальных наследников данного имущества, поскольку они пользовались приоритетным правом его приобретения. Нарушение или даже – должное несоблюдение данных требований, позвовяло недовольному родичу или наследнику, оспаривать куплю-продажу имения, с утверждением его за собою. А покупателю имения возвращались, уплаченные им за покупку деньги. Строгость данного порядка распродажи родовой и наследственной собственности, существенно смягчалась лишь в том случае, если речь шла об имениях, подверженных опустошению, в результате вторжения иноземных захватчиков. В 720 статье *Обозрения*... оговорен порядок приобретения этой категории недвижимости, принадлежащей грузинской знати[7]. Законодатель установил режим неограниченного отчуждения такой недвижимости, дабы не допустить ее превращения в пустошь.

Право собственности передавалось по наследству. Согдасно 196-ой статьи *Обозрения*...: «Все княжеские и дворянские фамилии мужеского пола право наследия удерживают через четыре колена по линии нисходщей»[8].

Самой прочной формой приобретения права собственности законодатель считал купчую, на основе которой любое лицо, без ограничений, могло приобретать как движимое имущество, так и недвижимость – при соблюдении определенных условий (предворительного обращения в местные органы управления и в суд, для выяснения правового статуса недвижимой вещи). В 642–647 статьях *Обозрения*... подробно описан круг лиц, за которыми закреплено право собственности на благоприобретенное имущество[9]. Приобретение данного вида собственности предначерталось для всех сословий грузинского общества. Благоприобретенное имущество сохраняло твердость и незыблемость за его владельцем как при светской форме утверждения, так и при духовном отказе. Детям и наследникам собственника благоприобретенного имущества воспрещалось нарушать волю их предшественника. Лишь царский указ узаконивал порядок передачи этого имущества в распоряжение другого рода. В случае возникновения судебной тяжбы по поводу возмещения ущерба и ареста благоприобретенного имущества, в счет взыскания долга, спор разрешался только в судебном порядке, с участием беспристрастных судей. Если притязания истца были справедливы, долг взыскивался с ответчика, а арестованное имение возвращалось ее хозяину.

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[7] Тамже, с. 341.

[8] Тамже, с. 255.

[9] Тамже, с. 329–330.

Особенностью благоприобретенного имущества была возможность его передачи по наследству жене. Данное право законодательно регулировалось в 613–615-ой статьях *Обозрения*...[10]. Жена становилась наследницей благоприобретенного имущества мужа и могла им распоряжаться, как собственным приданым, если передача имущества осуществлялась в законном порядке и при надлежащем оформлении соответствующего акта. Несоблюдение вышеуказанных условий действительности передачи благоприобретенного имущества, исключало право передачи данного вида имущества жене и оно становилось общеродовой собственностью фамилии ее бывшего мужа. В случае утверждения благоприобретенного имущества за детьми его приобретателя, оно оставалось в их неотъемлемом владении и не подлежало разделу в порядке, предусмотренном для общей собственности. Согласно 621-ой статье, в случае раздела имущества, благоприобретенное имение также делилось между наследниками поровну, если при его покупке собственник вписывал в купчую имена всех его наследников[11]. Однако, 618-ая статья устанавливала правило, которое позволяло лицу, своим трудом приобретшему капиталы или другое имение до раздела общего имущества, по собственной воле решать вопрос владения и пользования всем благоприобретенным, не включая его в общий раздел[12].

Второй формой права собственности была общеродовая собственность, которой посвящены 342–351 статьи *Обозрения*.... Царевич Давид указывал, что общеродовая собственность в Грузии сущест-вовала издавна и правами на нее распоряжался весь род. Поэтому, автор строго ограничил порядок отчуждения этой формы собственности, в частности: для включения этого имущества в торговый оборот, необходимо было согласие всего рода. Общеродовая собственность тормозила развитие интенсивного хозяйства. Кроме этого, в Грузии издавна существовал особый порядок раздела общеродовой собственности, предусматривающий различие в долях, старших и младших по возрасту, сородичей – т. н. «саупросо» (майорат) и «саумцросо» (минорат). Автор отрицательно относился к этому пережитку прошлого, как противоречащему естественному праву и требовал его искоренения. В 345 статье *Обозрения*... прямо указано, что «При разделе имений должны быть безобидно уравняемы между наследниками все выгоды и угодья, исполнение чего возлагается на благоразумие безпристрастных судей и разрешается жребием». Более того, законодатель подверг критике, укоренившийся в обществе порядок, обделения наследниц женского пола, при разделе общеродовой собственности, в случае кончины наследодателя. Согласно 933 статье *Обозрения*..., «Когда после раздела имения умрет дворянин, и после него не останется детей мужеска пола, тогда может быть допущена до наследства дочь покойного. А когда

[10] Тамже, с. 323.
[11] Тамже, с. 324.
[12] Тамже.

имение будет нераздельное, тогда дочь получает узаконенную 14-ю часть из родового, пользуется всем благоприобретенным отцовым имением и материным приданым»[13].

В то же время, следует учесть, что автор вынужден отдать дань многовековым традиция и законодательно закрепить обычай уважения старшего поколения в грузинской семье. Детям строго воспрещалось неуважительное отношение к родителям; на них возлагалась прямая обязанность достойного содержания престарелых родителей, повиновение их воле: «814. Когда родители при жизни своей сделают раздел имению, тогда будет непременною обязанностию детей дать им приличное содержание и успокоение и отделить деньги на погребение родителей. То же должно наблюдать и тогда, естьли бы родители не имели и никакого стяжания, особенно во время старости, дряхлости и болезненных припадков»[14].

При исследовании права собственности, целесообразно коснуться и правового режима бесхозного имущества. В 204–205 статьях *Обозрения*... законодатель оговорил условия превращения недвижимости в бесхозное имущество и указал, что если собственник, при жизни, не успел составить завещание и, тем более, скончался, не оставив прямых наследников по закону, все имущество покойного превращается в бесхозное, правом распоряжения которым пользуются его сородичи. Но если и тех нет на лицо, бесхозное имущество переходит в распоряжение господ, скончавшихся крестьян. Бесхозное имущество знати зачисляется в казенное имущество. Оставшаяся в живых супруга знатного лица, после смерти мужа, получает лишь 1/8 часть имущества. Вдове казенного крестьянина полагается лишь половина движимого бесхозного имущества, а недвижимость поступает в распоряжение царя. О бесхозном имуществе епископов и других высокопоставленных чинов церкви, заботится сама церковь.

Незыблемость права собственности – главное достижение эпохи Просвещения. Любое незаконное посягательство на право собственности, должно пресекаться жесткими мерами воздействия. В 358–360-х статьях *Обозрения*... законодатель строжайше запретил помещикам лишать собственности своих крепостных без виновного деяния (ст. 358 *Обозрения*...)[15]. Даже в том случае, если лицо долгое время было в отлучке, или попало в плен к неприятелю, он не лишался имущества, которое, за весь период его отсутствия, надлежащим образом обрабатывалось и приносило доход. Однако, законодатель установил справедливый порядок возмещения расходов на ведение доходного хозяйства. Обязательство возмещения расходов возлагалось на хозяина недвижимости (ст. ст. 359–360 *Обозрения*...)[16] .

[13] Тамже, с. 78.
[14] Тамже, с. 355.
[15] Тамже, с. 281.
[16] Тамже, с. 281–282.

Законодательного закрепления подлежит и вопрос лишения права собственности, как исключительное мероприятие. В данном случае, согласно 459-ой статье *Обозрения*..., речь идет о замужестве женщины благородного происхождения за лицом более низкого сословия, с последующим отрешением от имущественных прав на все виды недвижимости и крестьян, права на которые, законодательно, присваивались лишь грузинскому дворянству[17]. Правопреемником отрешенной особы считались ее дети, а в их отсутствие – родственники (460-ая статья)[18]. В том случае, отрешенная особа не имела прямых наследников по нисходящей, восходящей или боковой линии родства, все имущество описывалось и зачислялось в царскую казну. Женщина же получает приличное вознаграждение из казны (461-ая статья)[19]. При отрешении от благоприобретенного имущества, которое поступает в счет родственников данной особы, она сохраняет за собой право пользования его доходами (462-ая статья)[20].

В 948-ой статье *Обозрения*... предусмотрена ответственность как судей, так и наделенного судебными полномочиями чиновника, в частности представителя местной администрации – моурава, за предоставление лицу права отчуждения запрещенного имущества, в результате которого будет причинен ущерб кредиторам. Судьи и чиновники, виновные в вынесении незаконных решений, несут ответственность за неправомерное снятие подобного запрета[21]. А в следующей, 949-ой статье *Обозрения*... установлен порядок рассмотрения судьями иска, внесенного от имени нескольких истцов. В данном случае законодатель вводил порядок примирения всех сторон, участвующих в субедном разбирательстве и запрещал судье принимать мировую только от одной стороны, имеющей право лишь на определенную долю имущества и, соответственно, правомочную на частичное притязяние[22]. 1019-ая статья вводит императивный порядок подсудности дел о той недвижимости, которая служит средством обеспечения долговых претязаний кредитора. Автор запрещает оценивать и отчуждать данное имущество без ведома кредитора[23].

Кроме этого, во многих статьях *Обозрения*... царевич Давид перечислил преступления, посягающие на право собственности: кража (ст. 190; 884–888); сокрытие краденного (ст. 714–716); нахождение потерянной скотины и неоглашение находки (ст. 746); разбой (ст. 370–377); купля-продажа чужих крепостных, без ведома их господ (ст. 638–639). За совершение данных

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17 Тамже, с. 298.
18 Тамже.
19 Тамже.
20 Тамже.
21 Тамже, с. 382.
22 Тамже.
23 Тамже, с. 400.

преступлений, с учетом степени тяжести преступного деяния, законодатель установил следующие наказания: 1) общественное порицание; 2) штраф; 3) телесные наказания – порка, отсечение верхней конечности; 4) смертная казнь.

Судопроизводство по делам недвижимости, долговым обязательствам, спорам по имениям и, вообще, по всем имущественным тяжбам устанавливало давдцатилетний срок исковой давности, по истечении которого истец терял право на судебное разбирательство по спорному делу и не мог инициировать процесс (ст.ст. 624–625)[24]. Однако, принцип справедливого и равного судопроизводства предусматривал исключение из общего правила и, в качестве уважительной причиной продления срока исковой давности, устанавливал долговременное отсутствие пострадавшего, в виду нахождения в непрятельском плену. К тому же законодательство запрещало вводить какой-либо срок исковой давности, по поводу тяжб о церковных и казенных имениях (ст. 626)[25].

B) Раздел имущества

При регулировании права собственности особый интерес вызывает раздел имущества, которого касаются 342–357 статьи *Обозрения*...[26]. Автор особо отмечал, что раздел имущества – многовековая правовая традиция Грузии. Следовательно, при разделе движимого и недвижимого имущества, законодатель аппелировал на правопреемство Законов картлийского царя Вахтанга VI-го[27]. Разделу подлежало как движимое, так и недвижимое имущество. В то же время, законодательно закреплялись как порядок раздела имущества, так и статус лиц – по степени их старшинства, участвовавших в процессе его раздела. При разделе имений, автор строжайше преписывал судьям соблюдение беспристрастности и благоразумия: все заинтересованные в разделе имущества лица, лишь по жребию и при безобидном уравнение всех наследников, могли получить все доходы и угодия[28]. В свою очередь, наследникам воспрещалось требовать излишние доходы и поборы с неразделенных крестьян, сверх меры получаемых ими в результате раздела имений; кроме этого, наследники не вправе были разорять неразделенную часть общей недвижимости и движимого имущества (ст. 344–345 *Обозрения*...)[29].

Выше, при рассмотрении видов права собственности, указывалось наличие т.н. благоприобретенного имущества, право собственности на которое принадлежало только его хозяину. В 346-ой статье законодатель предписывает собственнику, произвольное разрешение вопроса включения этого вида

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[24] Тамже, с. 325.
[25] Тамже.
[26] Тамже, с. 279–281.
[27] Тамже, с. 279.
[28] Тамже.
[29] Тамже.

имущества в процесс раздела собственности, и сторого воспрещал остальным лицам принуждать его к разделу благоприобретенного имущества[30].

Заслуживает внимания позиция автора по поводу включения в общий раздел между наследниками того имущества, которое было приобретено одним из них или поступало на его счет, задолго до начала раздела имущества: «195. Когда между наследниками прежде раздела имения заключено будет взаимное условие о приумножении общего наследия, тогда те, кои будут в отсутствии по делам торговли или по другим обстоятельствам, все расходы и издержки, на содержание имения употребляемые, должны принять на общий щет; равно и долги, какие могут быть сделаны для обстройки заведений и на содержение общего семейства, разделятся по равным частям»[31]. Аналогичное содержание имеют и другие статьи *Обозрения*..., в частности: «617. Когда прежде общего имению раздела между наследниками на счет оного или его доходов что-либо приобретено будет, тогда все сие, при случае раздела, также поступает в общую операцию делимого наследства. 619. Но когда между наследниками будет заключен акт, например, чтоб одному вести дела торговые, а другому заниматься хозяйством и стараться о поддержании и приумножении общего имения, тогда вся прибыль разделится по равным частям»[32].

Законодательной регуляции подлежит и формальная сторона раздела имущества[33]. В частности, в 347–348 статьях *Обозрения*..., автор предписывает наличие того документа, который на суде послужит беспорным доказательством участия лица в процессе раздела имущества и получения им причисляемой доли из общей собственности. Таковым является т.н. «барат» или уравнительная расписка[34]. Данный барат содержит полное описание полученного им наследства при разделе общего имущества и, следовательно, обеспечивает правовую защиту лица от необоснованных притязаний недобросовестных сонаследников.

Порядок раздела имущества подразумевает и полномочия родителей при распределении общей собственности среди своих наследников. В 349–350 статьях *Обозрения*... законодатель предоставляет родителям неограниченное прижизненное право распределения имущества между наследниками. При этом, строго воспрещается осуществление раздела имущества в случае душевной болезни одного из наследников до его полного выздоровления, с предоставлением ему средств на лечение[35]. Законодательного закрепления подлежит и вопрос неотчуждаемости спорных имений (ст. ст. 355–357

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30 Тамже.
31 Тамже, с. 255.
32 Тамже, с. 324
33 Тамже, с. 280.
34 Тамже.
35 Тамже.

Обозрения...)[36]. До окончания судебного процесса по поводу спорных имений строжайше запрещалось продавать, дарить, закладывать или делить спорные имения. Все сделки, связанные с данным видом имущества, признаются недействительными и не имеют юридической силы. Лица, изобличенные в реализации подобного имущества, облагаются штрафом и, вырученные от таких сделок доходы, возвращают собственнику спорного имущества. В 471-ой статье *Обозрения*... речь идет о разделе приданого матери, которое поровну делится между ее детьми, независимо от их пола[37]. Согласно 735-ой статье *Обозрения*..., к условиям действительности раздела недвижимого имущества относится и требование отчисления в царскую казну т.н. «гасамкрело» – части имущества, предусмотренного еще Законами царя Вахтанга VI-го[38].

Некоторым отступлением от идей Просветительства и, своеобразным противоречием взглядам самого автора памятника, служит дефиниция 472-ой статьи, в которой указано, что если один из потенциальных наследников уйдет из жизни до раздела общего имущества, его долю получат лишь «наследники мужского пола; наследницы же женского пола получают приличное приданое из отцовского наследия, сверх приданого своей матери»[39]. Данное предписание свидетельствует о дискриминации прав наследниц женского пола и рассматривается, как нежелательный пережиток средневековья.

К перечню условий действительности раздела имущества относится и строгое соблюдение братьями своих прав и обязанностей. По 975–976 статьям *Обозрения*... предписано, что «975.Старшим братьям запрещается продавать и променивать собственность меньших братьев, которые также не обязаны отвечать за преступления старших или принимать участие в их процессах, и не платят за них долгов, разве сами того пожелают. 976. Если кто [нибудь] из братьев до раздела оставит свой дом и приобретет за границею или получит по службе от милостей царских имение и деньги, тогда при общем разделе впишется все им приобретенное и разделится на три равныя части, из коих получит одну за труды, а другую по разделу, третья же останется в пользу других наследников»[40].

Альтернативой институту раздела имущества служит институт соединеня однажды уже разделенной собственности[41]. В 946-ой статье *Обозрения*... автор называл те условия, которые способствовали узаконению последствий соединения уже разделенного имущества. В частности: «Когда, после общего раздела, родные пожелают соединить свои имения, сие не возбраняется, но должно быть утверждено в суде. Бывали случаи, что на подобное соединение

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[36] Тамже, с. 281.
[37] Тамже, с. 300.
[38] Тамже, с. 344
[39] Тамже.
[40] Тамже, с. 389–390.
[41] Тамже, с. 381.

испрашивалось даже и царское соизволение»[42]. Не менее важно отметить, что хозяевам и вновь соединенных имений не воспрещался повторный раздел имущества, поскольку причиной данного акта могли быть различные обстоятельства, в частности: экономическое состояние большой семьи; наличие нескольких поколений родственников (демографический взрыв в обществе), которые уже не могли жить под одной крышей; воля (произвол) главы большой семьи; смерть главы семейства и последовавший за ней раздел имущества между наследниками умершего и т.д. Но, и в этих случаях законодатель предписывал необходимость соблюдения установленных правил: «946. Они также могут безприпятственно и по воле своей разойтиться вновь, но также по судейскому утверждению, во избежании всяких споров об имении»[43]. Интерес вызывает еще одна заметка автора памятника, в которой он регулирует порядок присоединения имущества преклонного лица к имению родственника и, впоследствии, право старца на возвращение своей доли вещей в виду возникшей между ними тяжбы, по поводу несоблюдения родственником обговоренных условий соединения имений: «947. Но если кто[нибудь] по преклонности лет пожелает присовокупить собственность свою к имению своих родственников с тем, чтобы иметь от них презрение и успокоение, но после будет чувствовать угнетение или произойдет несогласие и раздор, таковый имеет полное право по воле своей отделить свои имения или перевести их на того, кто лучше обяжется покоить его старость»[44].

В виде заключения, целесообразно отметить, что важнейший институт частного права – право собственности, издревле получило правовое упорядочение в грузинских источниках права. Соответственно, законодатели разных эпох могли использовать опыт своих предшественников и, с учетом социально-политических и экономических условий жизни грузинского общества, вностить в собственные правовые акты конкретные предписания. Процесс правового регулирования права собственности, условия его действительности и правовой защиты стал наиболее актуальным в позднее средневековье, поскольку на повестку дня встали не только соблюдение многовековой традиции путей возникновения права собственности и механизма его правового обеспечения, но и учет той правовой новизны, которую в правосознание грузинского общества привнесла идеология европейского Просвещения. Наиболее последовательным приверженцем просветительских взглядов был царевич Давид Георгиевич Багратиони, правотворчество которого оставило неизгладимый след в древнегрузинской правовой культуре, о чем свидетельствуют основные положения темы нашего выступления.

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[42] Тамже.
[43] Тамже, с. 381.
[44] Тамже, с. 382.

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Рогав А.А. (ред.), *Багратиони Давид. «Обозрение Грузии по части прав и законоведения»*, Изд-во АН ГССР, Тбилиси 1959.

Резюме

Ключевые слова: частное право, право собственности, субъект права собственности, виды права собственности, возникновение и защита права собственности, царские грамоты и указы («цкалобис цигни» и «окмиса»), формы приобретения права собственности, купчая, общеродовая собственность, бесхозное имущество, защита права собственности, лишение права собственности, раздел имущества, субъекты раздела имущества.

В статье автор анализирует институт права собственности в позднесредневековой Грузии, виды права собственности – общеродовую собственность, бесхозное имущество, порядок приобретения имущества на основе царского указа и путем договора купли-продажи, особенности грузинской общеродовой собственности и порядок ее распоряжения сородичами, основания возникновения и правовой защиты данного института. Исследован процесс раздела имущества, полномочия родителей при распределении общей собственности среди своих наследников как при жизни родителей, так и после их смерти. Автор касается соединения уже разделенного имущества.

Summary

Institute of the Property Right on “A Review of Georgia in the field of Rights and Jurisprudence” by David Bagrationi

Key words: private law, property right, subject of property right, types of the property right, emergence and protection of the property right, imperial diplomas and decrees (“Tskalobis Tsigni” and “Okmisa”), forms of acquisition of property right, bill of sale, all-patrimonial property, derelict property, protection of the property right, deprivation of the property right, property division, subjects of property division.

In this article the author analyzes institute of the property right of late medieval Georgia, types of the property right – all-patrimonial property, derelict property, an order of acquisition of property on the basis of the imperial decree and by the contract of purchase and sale, features of the Georgian all-patrimonial property and dispose it, the bases of emergence and legal protection of this institute. Process of property division, rights of parents at distribution of the general property among the successors both during lifetime of parents, and after their death is investigated. The author concerns connection of already divided property.

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Октроированный характер Конституций Великого герцогства Варшавского и Царства Польского

Вступление

Одновременно с появлением требования создать письменную конституцию[1], сформировалась практика, согласно которой, определение государственного строя посредством этого особого закона закреплялось за сувереном. Тот, в руках которого сосредоточивалась верховная власть, мог создать конституцию и навязать ее подданным. Именно таким образом сложилась судьба у Великого герцогства Варшавского и Царства Польского, в которых монархи, осуществляющие верховную власть, путем одностороннего властного веления навязали польскому обществу конституцию. Соответственно, оба эти документы имеют октроированный характер. Однако, это не обозначает, что они были одинаковы с точки зрения способов и обстоятельств их принятия.

Конституция Великого герцогства Варшавского

5 августа 1772 г. Австрия, Пруссия и Россия заключили в Петербурге первую конвенцию о разделе Польши, в которой разделили они между собой часть польских земель. Второй раздел состоялся 1793 г. Правовую силу придали ему конвенция о втором разделе Польши между Россией и Пруссией от 23 января 1793 г., польско-русская конвенция от 17 августа, а также польско-прусское соглашение от 25 сентября 1793 г. Окончательная ликвидация польской государственности наступила в 1795 г., когда государства, принимающие участие в разделах Польши, разделили между собой остальную территорию Польши. Созданная таким образом территориальная конфигурация[2] сохра-

[1] См.: S. Bożyk, *Konsytucja*, Белосток 1999, с. 9–16.

[2] В результате своих действий государства, ответственные за разделы Польши, захватили: Пруссия – 141, 4 тыс. кв. и около 2,6 млн. населения, Австрия – 128,9 тыс. кв. и около 4,2 млн.

нялась чуть более 10 лет. Она изменилась вследствие победо-носного похода армии Наполеона.

На основе договоров, заключенных в 1807 г. в Тильзите между Наполеоном, императором Александром I и королем Пруссии Фридрихом Вильгельмом III, на территориях, оторванных от Польши Пруссией во время II и III раздела, а также на южной части территорий, присоединенных к ней при первом разделе, было образовано Великое герцогство Варшавское площадью в 104 тыс. кв.[3]

Тильзитский мир гарантировал дарование Конституции герцогству, но одновременно решал вопрос его юридической зависимости от Франции, так как Великое герцогство Варшавское должно было объединиться реальной унией с Саксонией. Монарх и зарубежная политика должны были быть общими для участников унии. Договор предопределил также то, что королем герцогства стал Наполеон, осуществлявший свою власть посредством саксонского короля и своего резидента в Варшаве[4]. Это означало, что сувереном Великого герцогства Варшавского в конституционно-правовом смысле был Фридрих Август, а действительным королем – Наполеон. Поэтому в случае Великого герцогства Варшавского мы можем говорить о «редком примере дарования конституции государству королем другого государства, не учитывая позиции суверена, которым в этом случае был Фридрих Август»[5]. Именно Наполеон даровал герцогству Конституцию.

По поводу создания Конституции распространялись разные истории. Юзеф Выбицкий [Józef Wybicki] вспоминал, что Наполеон продиктовал Конституцию в течение одного часа, ходя по комнате. Каетан Козьмиан [Kajetan Koźmian] полагал, что Конституцию на скорую руку записывал со слов Наполеона Станислав Потоцкий [Stanisław Potocki][6]. Владислав Собоциньский [Władysław Sobociński] полагает, что проект документа был разработан

населения, Россия – 463,2 тыс. кв. и свыше 5,4 млн. жителей. См.: J. Bardach, M. Senkowska-Gluck (ред.), *Historia państwa i prawa Polski*, т. III: *Od rozbiorów do uwłaszczenia*, Варшава 1981, с. 13.

[3] После войны 1809 г. территорию расширили за счет части земель, отобранных в I и III разделах Австрией, тогда она составляла 151 тыс. кв. См. там же, с. 11–14. В. Собоциньский полагает, что территория Великого герцогства Варшавского была еще больше. По его словам, площадь Великого герцогства Варшавского после Тильзитского мира составляла 102 747 кв., а после войны с Австрией в 1809 г. территория герцогства расширилась до 155 430 кв. W. Sobociński, *Historia ustroju i prawa Księstwa Warszawskiego*, «Roczniki Towarzystwa Naukowego w Toruniu» 1964, № 70, т. 1, с. 18.

[4] См.: W. Sobociński, *Księstwo Warszawskie a Cesarstwo Francuskie* (*Zależność faktyczna i prawno-międzynarodowa. Rezultaty przeobrażeń wewnętrznych*) «Przegląd Historyczny» 1965, № 1, с. 55.

[5] M. Kallas, *Ustawa konstytucyjna Księstwa Warszawskiego z 1807 r.*, [в:] M. Kallas (ред.), *Konstytucje Polski*, Варшава 1990, т. 1, с. 111; M. Kallas, *Ustrój konstytucyjny Księstwa Warszawskiego*, «Przegląd Sejmowy» 2007, № 5, с. 14.

[6] См.: A. Rembowski, *Przyczynek do dziejów konstytucyjnych Księstwa Warszawskiego. Studium historycznoprawne*, Краков 1896, с. 21–22.

в императорской канцелярии на основе правил, продиктованных лично самим Наполеоном, а желания членов Правящей Комиссии [Komisja rządząca] были учтены только в небольшой степени[7]. Марян Каллас [Marian Kallas] утверждает, что предварительный проект Конституции был разработан французской стороной еще до аудиенции поляков у Наполеона и далее был подвергнут редакционным работам императорскими служащими, но уже при участи польской стороны[8].

Нет сомнений, что Наполеон подписал оригинал Конституции Великого герцогства Варшавского на французском языке 22 июля 1807 г., который получил король Саксонии. Сначала текст был опубликован в Париже, а потом в варшавских газетах (на французском языке и с переводом на польский язык), а после учреждения конституционных органов герцогства имела место очередная публикация, на этот раз государственная, в «Дзеннике Прав» [Dziennik praw – официальный орган печати][9]. В Конституцию вошло 89 статей, распределенных по 12 группам. Не содержала она вступления. Была подписана Наполеоном и государственным секретарем Юг-Бернаром Маре [Hugon B. Mareta], на оригинале Конституции присутствовали также подписи Правящей Комиссии.

Постановления Конституции, касающиеся возможности внесения поправок, а также ее интерпретации, ярко подчеркивали ее октроированный характер. Конституцией не предусматривалось введение поправок, а только возможность «дополнения» положений при помощи, так называемых «инструментов, берущих начало у короля, а подробно анализированных Государственным Советом (ст. 86 Конституции). В Париже также развеивали интерпретационные сомнения, связанные с конституцией[10].

Дарованная полякам Конституция Великого герцогства Варшавского не являлась продолжением принятой во время Четырехлетнего сейма Конституции 3 мая и не означала восстановления польской государственности. Созданная по образцу французских конституционных актов, считалась составной частью французского конституционного законодательства, поэтому были случаи, когда ссылались на положения иностранных конституций по вопросам, которые не регулировались Конституцией герцогства[11]. Она была пропитана идеями, провозглашаемыми Наполеоном. На французских образцах формировались административное деление, судебная система, а также некоторые правила функционирования государства. В администрацию введено

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[7] W. Sobociński, *Historia ustroju*..., c. 30.

[8] M. Kallas, *Konstytucja Księstwa Warszawskiego. Jej powstanie, systematyka i główne instytucje w związku z normami szczegółowymi i praktyką*, «Studia Iuridica», Towarzystwo Naukowe w Toruniu 1970, т. 9, ч. 3, c. 35–38.

[9] W. Sobociński, *Historia ustroju*..., c. 30.

[10] Ср.: M. Kallas, *Ustrój konstytucyjny Księstwa Warszawskiego*..., c. 19.

[11] *Historia państwa i prawa Polski*, т. III, c. 73.

ведомственное деление, иерархическую организацию, а также централизацию власти. Ведомства возглавлялись, по образцу Франции, министрами, даже с характеристическим для эпохи Наполеона особым министром полиции. Среди перечисленных Конституцией министров отсутствовал министр иностранных дел. Зарубежная политика Великого герцогства Варшавского была зависимой от Наполеона и управлял ей французский резидент в Варшаве[12].

Герцогство было разделено на шесть департаментов. Каждый из них возглавлял префект. По французскому образцу действовали такие органы как Государственный совет, департаментские советы, советы повятов, а также совет префектуры. Что касается области судебной системы, были введены мировые суды, произведено деление судов по гражданским и уголовным делам, которые объединялись стоящей выше кассационной инстанцией, до сих пор неизвестной польскому законодательству. Действовало французское личное законодательство – Гражданский кодекс Наполеона, Коммерческий кодекс от 1807 г., а также Гражданский процессуальный кодекс Франции от 1806 г.

Из Франции пришел также, введен в Конституцию Великого герцогства Варшавского, принцип равенства перед законом и судом[13] (значение ст. 4 отражено во всех присвоенных Императором конституциях)[14]. Веление Наполеона прослеживается также в том, что обществу не были присвоены никакие гражданские свободы, в том, что не была воссоздана давняя польская традиция, т. е. *neminem captivabimus*, свобода собраний и печати. Эффектом работы Наполеона были также ограничения сейма, который должен был напоминать прошлый польский сейм лишь своим наименованием. Не обладал он даже свободой дискуссии и правом законодательной инициативы[15].

Несмотря на то, что Конституцию «проник дух Наполеона», она учитывала некоторые польские народные особенности, натуру локального общества и его традиций[16]. Это, напр., Сейм, состоящий из двух палат, с сильной позицией шляхты (в Сенат герцогства входила только шляхта, в посольскую избу на 100 послов (депутатов) 60 от шляхты, Совет Министров состоял исключительно из шляхты, а в Государственном совете был только один представитель мещан)[17], а также польские наименования органов, т. е. сейм, сенат, сеймик, воевода, каштелян.

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[12] Ср.: L. Mażewski, *Księstwo Warszawskie i Królestwo Polskie z punktu widzenia prawa międzynarodowego*, «Państwo i Prawo» 2014, № 2, с. 64.

[13] Согласно ст. 4 Конституции: «Упраздняется крепостную зависимость. Все граждане равны перед законом».

[14] Ср. A. Rembowski, ук. соч., с. 28.

[15] Ср. *Myśl państwowa Napoleona i Polska*. Доклад о Наполеоне прочитан 6 мая 1921 г. профессором Станиславом Кутшебом, Краков 1921, с. 2–3.

[16] M. Handelsman, *Trzy konstytucje (1791, 1807, 1815)*, Краков 1905, с. 12. Ср. также: A. Rembowski, ук. соч., с. 26.

[17] Это был одни из выдающихся деятелей Просвещения в Польше – Станислав Сташиц. Ср. M. Handelsman, ук. соч., с. 13.

Подводя итог, создание Великого герцогства Варшавского было для польского общества большим разочарованием. Поляки надеялись, что Наполеон по-другому решит польский вопрос. Тем временем было создано геополитическое творение, навязанное полякам извне, являющееся *de facto* протекторатом Наполеона[18]. Согласно постановлениям дарованной конституции, так как Великое герцогство Варшавское не обладало правом на дипломатическое представительство, не устанавливались консульские отношения. В Варшаве находился по принципу эксклюзивности представитель Франции, сначала в звании резидента, а потом посла. Кроме того, в свете международного права герцогства не являлось государством[19]. Оно было тесно связано с судьбой Наполеона, им созданное, одновременно с его концом перестало существовать.

Все-таки следует заметить, что несмотря на созданное геополитическое творение, которое не смогло возродить польской государственности, а действующая на территории Великого герцогства Варшавского Конституция была навязана внешним сувереном, то она имела передовой характер и принесла поляком пользу. Конституция ввела современные формы общественного и государственного строя, упразднила деление на сословия, крепостную зависимость и патримониальную юрисдикцию. Пользу принесли также перемены в судебной системе, особенно гражданский и коммерческий кодексы Наполеона. Кроме этого Конституция, хотя скудна с точки зрения гражданских свобод, разрешала высказываться на своем родном языке, так как во всех государственных образованиях возобновлено использование польского языка[20].

Конституция Царства Польского

После поражения Наполеона, когда формально Великое герцогство Варшавское не перестало еще существовать, Александр I предпринимал шаги, направленные на перехват наследия Наполеона и удерживание польских земель в состоянии зависимости от России. Уже в феврале 1813 г. он овладел Великим герцогством Варшавским и организовал в нем вреМменные органы государственной власти, поставив Европу перед фактом[21]. Результатом предпринятых действий и политической игры Александра I было заключение 3 мая 1815 г. в Вене союзных договоров между императором России и императором Австрии, а также прусским королем. Вследствие этого три

[18] Л. Мажевский полагает, что это был протекторат о пирамидальной структуре. L. Mażewski, *Księstwo Warszawskie i Królestwo Polskie*..., c. 66.

[19] Там же, с. 64–66.

[20] M. Handelsman, ук. соч., с. 14.

[21] *Historia państwa i prawa Polski*, т. III, с. 168–169.

государства, принимающие участие в разделах Польши, в очередной раз организовали деление польских земель, создавая из их части Царство Польское площадью в 128,5 тыс. кв. Эту информацию обнародовали 20 июня 1815. По замыслу Царство Польское «в силу своей конституции» должно было быть в «неразрывной связи» с Россией[22].

Обнародованный Александром 13 мая 1815 г. Манифест, обращенный к полякам, также констатировал, что Царство Польское будет соединено с Россией путем конституции и «неразрывной унии»[23]. Несмотря на то, что договоры, заключенные в Вене, вспоминали о конституции и отдельной администрации Царства[24], то Император России ловко избегал придания Конституции законной силы в международном контексте, что в будущем могло бы стать законной основой для протестов государств, подписавших Заключительный акт Венского Конгресса от 9 июня 1815 г. В изданной Александром Конституции отсутствовала запись, подтверждающая положение из договора, говорящая о том, что узел, соединяющий Царство Польское с Россией, есть конституция.

Прежде чем Александр I даровал Конституцию Царству Польскому, 25 мая 1815 г. он подписал в Вене «Основы конституции Царства Польского», подготовленные находящимися в это время в Вене князем Адамом Чарторыйским [Adam Czartoryski]. Они должны были определить направление, к которому надлежало стремиться, создавая новую конституцию, и одновременно они представляли собой указания для создания новых правительственных органов Царства Польского. Несмотря на то, что Александр I пригласил совместно разрабатывать конституцию представителя польской стороны – Станислава Потоцкего [Stanisiaw Potocki], Председателя Государственного совета и Совета Министров при Великом герцогстве Варшавском, то окончательное содержание Конституции – это творение Александра I и Новосильцева. Конституцию Царства Польского Александр I подписал с датой 27 ноября 1815 г. в Королевском замке в Варшаве, а была она

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[22] См.: ст. 5 Союзного договора, заключенного в Вене 21 апреля/3 мая 1815 г. между Его Величеством Императором Всероссийским, Его Величеством Императором Австрийским, королем Венгрии и Чехии, в: *Królestwo Polskie. Dokumenty historyczne dotyczące prawno-politycznego stosunku Królestwa Polskiego do cesarstwa Rosyjskiego*, Мацей Радзивил и Богдан Виниарский, Варшава – Люблин – Лодзь, с. 39.

[23] Там же, Манифест Александра I, обращенный к полякам.

[24] Статья 1 Заключительного акта Венского Конгресса от 9 июня 1815, дословно повторяющая ст. 5 договора России с Австрией от 3 мая 1815 г. и ст. 3 российско-прусского договора, заключенного того же дня, гласит: «Герцогство Варшавское, за исключением тех областей и округов, коим в нижеследующих статьях положено иное назначение, навсегда присоединяется к Российской империи. Оно в силу своей конституции будет в неразрывной с Россией связи и во владении е. в. имп. всероссийского, наследников его и преемников на вечные времена. Е. и. в. предполагает даровать, по своему благоусмотрению, внутреннее устройство сему государству, имеющему состоять под особенным управлением».

обнародована 24 декабря того же года[25]. Не появились в ней многие обещанные раньше «Основы». Кроме этого, в конце текса Конституции Император России сам определил октроированный характер, подписанного документа, указывая, что присваивает Царству Польскому Конституционную Хартию[26]. В тайной переписке прямо указывал, что «вытекающие из конституции привилегии не являются необратимыми, а закон обязывает народ, а не его самого, а также, что он является судьей, а не стороной конституции[27].

Кроме того, царь признал самого себя единственным интерпретатором Конституции. Из рескрипта Александра I от 13/25 мая 1821 г. следует: «если основной текст нуждался бы в объяснении, только я сам имею право судить как следует его понимать, так как автор каждого произведения сам лучше всех знает какими были его настоящие интенции»[28].

Конституцией Царства Польского не предусматривались процедуры ее изменения, а лишь «развития» постановлений путем Органического статуса, согласно ст. 161 Конституционной Хартии[29]. И хотя говорилось о том, что «органические статуты и уложения не могут быть изменяемы или заменяемы иначе как Царем и двумя палатами сейма»[30], то в феврале 1825 г. Александр I в одностороннем порядке дополнил содержание текста Конституции Царства Польского Дополнительной статьей, в которой объяснял причины установления тайны сеймовых заседаний за исключением открытия и закрытия заседаний. В преамбуле этой статьи император в очередной раз напомнил полякам, что Конституция Царства Польского была создана «на основе нашего собственного высокодушия». Император также словом и действиями напомнил

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[25] Текст Конституционной Хартии – см. S. Kieniewicz, *Przemiany społeczne i gospodarcze w Królestwie Polskim (1815–1830). Wybór tekstów źródłowych*, Варшава 1951, с. 56–84.

[26] В конце текста Конституции, после основной части, состоящей из статей, содержится следующая формулировка: «Признав в Нашей совести, что настоящая Конституционная Хартия отвечает Нашим отеческим видам, направленным к сохранению во всех классах Наших поданных Царства Польского мира, согласия и единения, столь необходимого для их благосостояния, и к укреплению счастья, которое Мы желаем им предоставить: Мы даровали и даруем им настоящую Конституционную Хартию, которую Мы признаем за Себя и за Наших наследников».

[27] В письме Министра, государственного советника, наместнику от 16 августа 1817 г. по поводу отношения императора Александра I к конституции Царства Польского, читаем: «Император отнюдь не считает вытекающих из конституции привилегий, которые он даровал стране, необратимыми, он полагает, что положения и законы являются обязательными для народа, но не для него самого; в документе, который он даровал народу, он считает самого себе судьей, а не стороной и будет выполнять свои обязательства так долго, как он будет считать их полезными для народа». Цит. по W. Tokarz, *Dwie karty historyi ustroju Królestwa Polskiego (1815–1855)*, Краков 1905, с. 531.

[28] См.: S. Kieniewicz, ук. соч., с. 85.

[29] Ст. 161: «Настоящая Конституционная Хартия будет развита органическими статутами. Те из них, которые не будут установлены непосредственно по опубликовании Конституционной Хартии, должны обсуждаться предварительно в государственном совете».

[30] Ст. 163 Конституционной Хартии Царства Польского.

полякам, что в любое время Конституцию можно отменить[31]. Окончательно он это сделал 14 февраля 1832, когда несколько месяцев спустя от подавления польского восстания 1830–1831 гг., издал Органический статут Царства Польского[32].

Подводя итог, порядок установления обсуждаемой конституции, как и процесс «развития ее постановлений», определяли характер действующей в Царстве Польском Конституционной Хартии. Октроированный характер этого нормативного акта подтверждается также практикой его применения, прежде всего, сдержанным обещанием Александра о том, что он может отменить Конституцию.

Стоит, однако, подчеркнуть, что с формальной точки зрения Конституция была весьма прогрессивной. Она гарантировала, учитывая особенности эпохи, широко понимаемую неприкосновенность личности, определяла правила лишения свободы и отбывания наказания[33]. Принципы этой либеральной конституции, к сожалению, уже с самого начала нарушались. По сравнению с Конституцией Великого герцогства Варшавского, Конституционная Хартия Царства Польского расширяла политические полномочия, которые понимались как активное избирательное право, позволяющие быть избранным в Сейм и в воеводскую комиссию.

Заключение

Как и Конституция Великого герцогства Варшавского от 1807 г., так и Конституция Царства Польского от 1815 г., они находили основы своего существования в международных договорах. Обе были навязаны поляком силами извне, но они отличались друг от друга своим октроированным характером. Конституционный устав Царства был дарован не осуществляющим власть в Варшаве Фридрихом Августом, а Наполеоном, который являлся действительным сувереном. Что касается герцогства, то там не различались понятия *de iure* и *de facto* по отношению к осуществляющему власть. Кроме этого, октроированный характер основного закона подчеркивался посредством дополнения конституции, что в деле подтвердилось способом принятия в Конституцию, так называемой Дополнительной статьи. Стоит заметить, что обе конституции гарантировали преимущество власти исполнительной над законодательной.

Если речь идет о правовом характере обеих навязанных полякам геополитических творений, то следует заметить, что каждое из этих явлений

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[31] См.: Дополнительная статья, устанавливающая тайну сеймовых заседаний от 1/13 февраля 1825 г., в: S. Kieniewicz, ук. соч., с. 92–93; Ср.: W. Łukomski, *Pamiętnik*..., с. 70.

[32] Текст статута см.: *Królestwo Polskie. Dokumenty historyczne*..., с.122–136.

[33] См.: W. Tokarz, ук. соч., с. 519.

не было самостоятельным. Однако Царство, в противоположность герцогству, обладало некоторыми признаками государства[34] . Согласно ст. 41 Конституции король обладал возможностью назначать «дипломатических и торговых агентов». Из Конституции (ст. 9) вытекает также право (на самом деле об условном характере и в ограниченном объеме), позволяющее заключать договоры, в связи с которыми Царство получало выгоду[35]. Был предусмотрен орган по делам внешней политики Царства. Определенные таким образом в Конституции возможности и осуществление некоторых из них на практике доказывает, что о государственности Царства Польского можем говорить шире, чем только с точки зрения внутреннего законодательства. Можем считать его неполноценным субъектом международного законодательства[36].

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[35] Л. Мажевский называет 8 международных договоров (1815–1830), в которых стороной было Царство Польское. L. Mażewski, *Księstwo Warszawskie i Królestwo Polskie*..., с. 66–67.

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Summary

The character of the imposed constitution of the Duchy of Warsaw and the Kingdom of Poland

Key words: constitution, the imposed constitution, the Duchy of Warsaw, the Kingdom of Poland.

Two Polish constitutions, namely, the constitution of the Duchy of Warsaw and the constitution of the Kingdom of Poland are characterized in the article. The author concentrates on the manner and the circumstances of promulgating of the above mentioned constitutions to the Polish society, and emphasizes the imposed character of the two acts. She acknowledges simultaneously that in spite of the fact that both constitutions were imposed, there were some differences in terms of circumstances and the way of their promulgation. These discrepancies are the most emphasised by the author.

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Смертность от умышленных убийств населения Европейской части Российской империи во второй половине XIX в.: масштабы, тенденции, территориальные особенности

Введение

Проблематика насильственной смертности в современной России продолжает сохранять свою актуальность. Воспроизводство достаточно высокого уровня убийств свидетельствует о наличии в обществе серьезных социальных проблем и напряжений внутрисистемного характера. Это также формирует негативный образ государства в мировом сообществе. В соответствии с докладом экспертов ООН, посвященного анализу распространенности убийств в мире, Российская Федерация по данному показателю отнесена к странам с очень высоким уровнем смертности населения от данной причины[1].

Существует еще одно обстоятельство, которое стимулирует необходимость всестороннего изучения историко-демографических аспектов насильственной смертности. Несмотря на вполне очевидные успехи отечественных исторических исследований последних десятилетий, тем не менее, ряд проблем продолжают оставаться недостаточно изученными. Одной из таковых является смертность населения Российской Империи от умышленных убийств в условиях глубоких социально-экономических, политико-правовых и морально-психологических трансформаций, явившихся неизбежным следствием освобождения российского общества от крепостничества.

[1] *Global study on homicide: trends, contexts, data*, United Nations Office on Drugs and Crime (UNODC), Vienna 2011, c. 95, 111.

Материалы и методы

В 1882 г. в России впервые были опубликованы относительно полные сведения о насильственных и внезапных смертях по 49 губерниям Европейской части страны за 1870–1874 гг.[2]

Спустя 12 лет, в 1894 г. читающая общественность получила возможность ознакомиться с очередным «Временником Центрального Статистического Комитета МВД» № 35: *Умершие насильственно и внезапно в Европейской России в 1875–1887 гг.*[3]

В отличие от своего предшественника, в данном издании содержались сведения о насильственных и внезапных смертях уже по 59 губерниям Европейской России вместе с Царством Польским. Увеличение произошло за счет включения сведений по десяти Привислянским губерниям.

В 1897 г. вышло из печати еще одно издание Центрального Статистического Комитета МВД: *Умершие насильственно и внезапно в Российской империи в 1888–1893 гг.*[4]

В сравнении с двумя предшествующими статистическим сборниками, посвященным насильственным и внезапным смертям, это издание содержало сведения за 1885–1893 гг. по всем губерниям и областям Российской империи за исключением областей Войска Донского, Карской, Терской и Закаспийской, округов Закатальского и Черноморского.

Данный «Временник» имел еще одну особенность – в нем впервые были обобщены статистические данные о насильственных и внезапных смертях по десяти главнейшим городам Европейской России за период с 1870 по 1893 гг.

Таким образом, благодаря официальным статистическим публикациям, а также различным научным исследованиям в контексте рассматриваемой темы преимущественно второй половины XIX – начала XX столетия мы имеем возможность составить собственную картину развития ситуации со смертностью населения от убийств в Европейской части страны в пореформенный период.

В то же время различное число губерний, сведения по которым на протяжении второй половины XIX столетия обобщались в МВД, создает определенные сложности. Для получения сопоставимых статистических показателей по количеству погибших от убийств автором был проведен анализ по 49 губерниям Европейской части России, т.е. по тем территориям, сведения по которым имеются во всех трех статистических сборниках.

Основной проблемой исследования выступает выявление взаимосвязи между модернизационными процессами и уровнем насильственной

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[2] *Статистический временник Российской Империи*, серия II, вып. 19, ЦСК МВД, Санкт-Петербург 1882.

[3] «Временник ЦСК МВД» № 35, Санкт-Петербург 1894, 67 с.

[4] «Временник ЦСК МВД» № 41, Санкт-Петербург 1897, 95 с.

смертности среди населения Европейской части Российской империи в пореформенные десятилетия. Произведены расчеты коэффициентов смертности населения от умышленных убийств в крупнейших городах Российской империи за 1870–1893 гг.

В настоящем исследовании использован метод количественного анализа массива официальной статической информации, собираемой органами внутренних дел Российской империи. Безусловно, при анализе официальных сведений о зарегистрованных случаях умышленных убийств необходимо учитывать проблемы недоучета реального количества жертв насильственной смертности. Однако этот вопрос заслуживает отдельного развернутого исследования.

Обсуждение

После отмены крепостного права в России проблематика насильственной смертности населения в России стала одной из наиболее часто обсуждаемых. На протяжении всех пореформенных десятилетий статьи, различные книги, посвященные этому вопросу, неоднократно попадали в поле зрения читающей общественности. Душегубство, смертоубийство (убийство в терминологии дореволюционного российского общества) неоднократно становилось предметом художественных произведений классиков русской литературы Ф.М. Достоевского, Л.Н. Толстого, Н.С. Лескова. Выход данной острейшей проблемы российского общества за рамки исключительно научной дискуссии узких интеллектуальных кругов и придание ей художественной формы свидетельствовало о том, что насилие пустило глубокие корни в российском обществе и приковывает к себе внимание широких слоев общественности.

Безусловно, это не явилось случайным стечением обстоятельств, а, напротив, было вызвано масштабными сдвигами, которые выступали в качестве одного из следствий одномоментной ликвидации многовекового рабства.

В этих условиях и российское общество, и государство испытывали серьезную потребность в глубоких научных изысканиях, посвященных проблемам насильственной смертности среди подданных Российской империи.

Анализ степени научной разработанности данной проблемы свидетельствует о том, что былой интерес дореволюционных авторов Е. Анучина, Д. Дриля, С.Н. Трегубова, Е.Н. Тарновского, П.Н. Тарновской[5], сменился

[5] Е. Анучин, *Материалы уголовной статистики России*, Тобольск 1866; Д. Дриль, *Убийства и убийцы*, «Журнал юридического общества при Императорском С.-Петербургском университете» Апрель 1895, кн. 4, с. 1–51; С.Н. Трегубов, *Покушение на убийство с негодными средствами*, «Журнал Министерства юстиции» 1899, № 2, с. 1–25; Е.Н. Тарновский, *Данные*

фактическим молчанием на протяжении всего советского периода (исключение составила лишь работа С.С. Остроумова[6]) и незначительным оживлением с начала 1990-х гг. преимущественно в рамках небольшого числа диссертационных исследований историко-правого характера[7].

Определенный интерес в контексте рассматриваемой темы представляют статьи профессора Стокгольмского университета Эндрю Стиклея, его финского коллеги Икки Хенрика Маккинена, американского криминолога Алекса Придмора[8].

Как видим, проблематика смертности от убийств в Российской империи во второй половине XIX столетия до настоящего времени остается изученной весьма фрагментарно, довольно поверхностно и к тому же преимущественно в правовом ключе. Историко-демографические исследования по-прежнему остаются редким явлением.

Результаты

Целью настоящего исследования является рассмотрение динамики, территориальных особенностей умышленных убийств (непредумышленные убийства учитывались отдельно), основных характеристик погибших от данного преступления на материалах официальной статистики Министерства внутренних дел Российской империи (далее – МВД).

Хронологические рамки исследования: 1870–1893 гг. – выбраны не случайно и обусловлены двумя обстоятельствами.

русской уголовной статистики, «Юридический вестник. Издание Московского Юридического Общества» 1885, № 1, с. 83–93; П.Н. Тарновская, *Женщины-убийцы. Со 163 рисунками и 8 антропометрическими таблицами*, Издание Т-ва Художественной Печати, Санкт-Петербург 1902 (Антропологич. исследование).

[6] С.С. Остроумов, *Преступность и ее причины в дореволюционной России*, Изд-во МГУ, Москва 1960.

[7] М.А. Смирнов, *Отечественная преступность и общественно–политическая ситуация в России во второй половине XIX – начале XX века 1861–1917 гг.*, дис. ... канд. ист. наук., Кострома 2006; Е.Н. Косарецкая, *Женская преступность в Орловской губернии во второй половине XIX – начале XX вв.*: дис. ... канд. ист. наук., Орел 2007; В.Е. Политов, *Криминогенная ситуация в Тамбовской губернии на рубеже XIX–XX веков*, дис. ... канд. ист. наук., Тамбов 2007; И.М. Тетюхин, *Становление и развитие мировой юстиции в Тамбовской губернии (вторая половина XIX – начало XX вв.): историко-правовое исследование*, дис. … канд. юрид. наук, Тамбов 2009; М.П. Шепелева, *Состояние уголовной преступности в российской провинции за 1861–1917 гг. на примере Курской губернии*, дис. … канд. ист. наук., Курск 2012.

[8] A. Stickley, I.H. Makinen, *Homicide in the Russian Empire and Soviet Union: Continuity or change?*, "British Journal of Criminology" 2005, № 45 (5), с. 647–670; A. Stickley, W.A. Pridemore, *The social-structural correlates of homicide in late-tsarist Russia*, "British Journal of Criminology" 2007, № 47 (1), с. 80–99.

Первое – пореформенные десятилетия характеризуются масштабными изменениями в правовой, социально–экономической, политической, духовно-нравственной сферах жизнедеятельности российского общества. Последствия данных трансформаций оказались очень противоречивыми, в том числе и в плане развития различных видов преступности.

Второе – относительная полнота статистических сведений о насильственной смертности населения губерний Европейской части страны в пореформенные десятилетия. В категории «Умершие насильственной смертью» учитывались три группы погибших: в результате убийств; детоубийств (выделялись отдельно в общем числе погибших от убийств); самоубийств.

Обобщенная в первом сборнике МВД статистика насильственных и внезапных смертей за 1870–1874 гг. дает нам следующее. В это пятилетие пореформенного развития всего от убийств в 49 губерниях Европейской части Российской империи погибло 11 665 человек.

За период с 1875 по 1887 гг. количество погибших от убийств в 49 губерниях Европейской части страны составило 39 592 человека. Подсчеты показывают, что в среднегодовом исчислении количество погибших от данной причины выглядит следующим образом: в губерниях – 3,045 человек, в городах – 408,3 человек, в селениях – 2 635 человек.

В следующие пять лет (1888–1893) в Европейской части страны было зарегистрировано 19 989 жертв умышленных убийств.

Таблица 1

Динамика количества погибших от убийств в 49 губерниях Европейской части Российской империи в 1870–1893 гг.

Годы	Количество погибших от убийств [человек]	Прирост/Снижение к предыдущему году [%]	Прирост/Снижение к 1870 г. [%]	Годы	Количество погибших от убийств [человек]	Прирост/Снижение к предыдущему году [%]	Прирост/Снижение к 1870 г. [%]
1870	2027	–	–	1882	3095	+2,85	+52,68
1871	2290	+12,97	+12,97	1883	3380	+9,21	+66,74
1872	2399	+4,75	+18,35	1884	3445	+1,92	+69,95
1873	2416	+0,70	+19,10	1885	3256	–5,48	+60,63
1874	2533	+4,80	+24,90	1886	3262	+0,36	+61,22
1875	2424	–4,30	+19,58	1887	3381	+3,45	+66,79
1876	2600	+7,26	+28,26	1888	3306	–2,21	+63,09
1877	2630	+1,15	+29,70	1889	3474	+5,08	+71,30
1878	2915	+10,83	+43,80	1890	3320	+4,43	+63,78
1879	3057	+4,87	+50,81	1891	3502	+5,48	+72,76
1880	3132	+1,02	+54,50	1892	3185	–3,05	+57,12
1881	3009	–3,92	+48,44	1893	3202	+0,53	+57,96

Всего за 23 года пореформенного развития в 49 губерниях Европейской части страны погибло от умышленных убийств 71 240 человек

Динамика погибших от убийств по 49 губерниям Европейской части Российской империи представлена в табл. 1.

Как видно, количество погибших от убийств в городах и селениях Европейской части страны год от года постоянно увеличивалось. Прирост погибших от данной причины смерти в 1893 г. в сравнении с 1870 г. составил 1 175 человек или 57,9%. Этот показатель опережал рост численности населения по сопоставимой территории в 1,2 раза, т.к., согласно подсчетам А.Г. Рашина, численность населения 50 губерний Европейской части России за период с 1863 по 1897 гг. увеличилась на 47,9%[9].

Остановимся подробнее на распределении по полу погибших от убийств в Российской империи в 1870-1893 гг. (табл. 2).

Таблица 2

Распределение по полу погибших от убийств в 49 губерниях Европейской части России в 1870–1893 гг. [человек]

Годы	Количество погибших обоего пола от убийств	В том числе:		Доля погибших от убийств в общем количестве умерших насильственно и внезапно [%]	
		муж.	жен.	муж.	жен.
1870	2027	1504	523	6,1	7,6
1871	2290	1721	569	6,2	7,5
1872	2399	1817	582	6,9	8,5
1873	2416	1796	620	6,9	8,6
1874	2533	1883	650	7,6	9,5
1875	2424	1842	582	6,2	7,1
1876	2570	1953	617	6,6	7,5
1877	2630	2024	606	6,8	7,1
1878	2915	2172	743	7,6	8,8
1879	3057	2309	748	6,7	8,0
1880	3132	2390	742	6,7	7,4
1881	3009	2224	785	6,9	8,1
1882	3095	2328	767	6,9	7,4
1883	3410	2570	840	7,5	8,1
1884	3445	2612	833	8,0	8,4
1885	3256	2423	833	7,3	8,0
1886	3268	2356	912	7,7	9,3
1887	3381	2481	900	7,8	9,1
1888	3306	2420	886	7,2	8,0
1889	3474	2531	943	7,3	8,4
1890*	3320	2183	925	6,4	7,9
1891	3502	2343	940	7,2	8,4
1892	3185	2121	858	6,5	7,5
1893	3202	2093	903	6,3	7,8

* В связи с тем, что по Курляндской и Уфимской губерниям с 1890 по 1893 гг. сведения о погибших от убийств в МВД поступили без разбивки по полу, возможно, некоторое занижение данных показателей (по мужчинам – на 130–150 человек, по женщинам – на 15–20 человек ежегодно).

[9] А.Г. Рашин, *Население России за 100 лет (1813–1913)*, [в:] *Статистические очерки*, под ред. акад. С.Г. Струмилина, *Государственное статистическое издательство*, Москва 1956, с. 44–45.

Итак, за пять лет, 1870–1874 гг. из общего количества погибших от преступного умысла мужчин оказалось 8 721 человек и женщин – 2 944 человека. По такому показателю, как число погибших от убийств на 100 умерших обоего пола насильственными и внезапными смертями в 49 губерниях Европейской России в этот период, выявилась значительная дифференциация между группами губерний. Наибольшие значения этого показателя среди женщин были зафиксированы в Северо-Восточных, Новороссийских и Прибалтийских губерниях. Наибольшие значения этого показателя среди мужчин были отмечены в Южно–Уральских, Северо-Восточных и Новороссийских губерниях.

В 1875–1887 гг. в Европейской части страны доля погибших от убийств в общем количестве умерших насильственно и внезапно среди мужчин составила 7,1%, среди женщин – 8,1%. Таким образом, на 100 умерших каждого пола в результате насильственных и внезапных смертей от убийств погибло мужчин – 12,6 человек, женщин – 13,1. Число женщин в расчете на 100 мужчин, умиравших от убийств в среднем по стране, составило 34,5 человека.

В 1888–1893 гг. динамика смертности от убийств среди мужчин и женщин продолжала развиваться в рамках тех же трендов, что и предшествующие годы. Если воспользоваться отношением численности мужского населения к численности женского в городах и сельской местности, то смертность женского населения к смертности мужского населения от убийств, принятой за 100, в Европейских губерниях Российской империи, составила 38,8. Это оказалось несколько выше, чем в целом по империи – 31,4.

Итак, число погибших от убийств женщин по отношению к общему итогу умерших неестественной смертью женщин на протяжении всего рассматриваемого периода оказалось больше, нежели аналогичное соотношение у мужчин.

Анализ статистических показателей позволяет нам распределить все территории, на которых велся учет смертности от убийств, по следующим группам: I группа – регионы с наименьшим числом убийств (20 человек погибших в среднегодовом исчислении); II группа – регионы с небольшим числом убийств (от 20 до 40 человек погибших в среднегодовом исчислении); III группа – регионы со средним числом убийств (от 41 до 60 человек погибших в среднегодовом исчислении); IV группа – регионы с большим количеством убийств (от 61 до 99 человек погибших в среднегодовом исчислении); V группа – регионы с наибольшим количеством убийств (свыше 100 погибших в среднегодовом исчислении).

В 1870–1874 гг. среди губерний Европейской части Российской империи с наибольшим числом погибших от убийств в среднегодовом исчислении (пятая группа) оказалось две – Пермская и Вятская. К четвертой группе нами были отнесены 13 губерний. В третьей группе – 14. Во второй – 13. В первой

– 7 губерний. Наименьшие показатели смертности от убийств по стране в этот период были зафиксированы в Прибалтийских губерниях.

В последующее 13-летие произошло увеличение числа губерний, в которых были зарегистрированы наибольшие показатели погибших от убийств – более 100 погибших в среднегодовом исчислении – с двух до семи. В четвертой группе оказалось 12 губерний. В третьей группе – 16 губерний, Во второй – 9. Количество губерний с наименьшим числом погибших от убийств несколько сократилось: с 7-ми до 5-ти.

В 1888–1893 гг. в Европейской части страны оказалось 6 губерний (снижение на одну губернию в сравнении с 1875-1887 гг.), в которых было зафиксировано наибольшее количество убитых «по злому умыслу». В четвертой группе – 19 (увеличение на семь губерний в сравнении с 1875–1887 гг.). В третьей группе – 14 (снижение на одну губернию в сравнении с 1875–1887 гг.). Во второй группе – 7 (снижение на две губернии в сравнении с 1875–1887 гг.). В первой группе – 3 (сокращение на две губернии в сравнении с 1875–1887 гг.).

В каждой из групп оказались губернии Европейской России достаточно географически удаленные друг от друга, с различным уровнем экономического развития, плотностью населения, этнического и религиозного состава проживавших. В этой связи выявление особенностей детерминации смертности от убийств в различных губерниях страны является задачей будущих специальных исследований.

Безусловно, использование всего лишь абсолютных показателей количества погибших от убийств не позволяют нам выделить те территории, на которых действительно существовала наиболее опасная для жизни криминальная ситуация. В этом плане необходимо проанализировать коэффициент смертности населения губернии (уезда, города) в расчете на 1 000 или более человек населения соответствующей территории. Однако здесь возникает объективная сложность. Дело в том, что фактически до Первой всеобщей переписи населения Российской империи 1897 г., мы имеем, по признанию подавляющего большинства статистов, неудовлетворительное состояние учета численности населения по губерниям.

Остановимся подробнее на особенностях смертности населения от убийств в наиболее крупных городах Европейской части Российской империи.

Смертность от убийств в наиболее крупных городах Европейской части России имела тенденцию к постоянному увеличению. Это было закономерным следствием усиливавшихся процессов оттока населения из сельской местности в города, который получил мощный импульс после Манифеста от 19 февраля 1861 г.

После отмены крепостного права численность городского населения начала стремительно увеличиваться. Если в 1867 г. в 50-ти губерниях Европейской части страны насчитывалось 6543,4 тыс. человек, в 1885 г.

– 9964,8 тыс. человек, то первая всероссийская перепись населения 1897 г. зафиксировала уже 12064,8 тыс. человек[10].

С другой стороны, в самих городах усилились процессы имущественной и социальной дифференциации. Духовно-нравственную атмосферу городов пронизал дух стяжательства с неизбежным его спутником – девальвацией духовных ценностей и собственно человеческой жизни. После отмены крепостного права значительные массы населения пришли в движение и в поисках заработков двинулись в города. Именно в первые десятилетия великих реформ в Европейской части Российской империи фиксировались наиболее интенсивные миграционные процессы. Данные обстоятельства способствовали росту различных видов и форм преступности, в т.ч. и умышленных убийств.

Анализ смертности городских и сельских жителей Европейской России в первой половине 1870-х гг. обнаружил следующее.

Количество погибших от убийств в сельской местности оказалось значительно больше, чем в городах. Для сравнения: общее число погибших от данного вида насильственной смерти составило 1613 человек, в то время как в селениях – 10052 человека. Таким образом, количество погибших от убийств селян более чем в 6 раз превысило количество погибших от данной причины горожан. Безусловно, это отражало географическую и социальную стратификацию российского общества второй половины XIX столетия.

В подавляющем большинстве губерний этой части страны от преступного умысла погибали преимущественно жители сельской местности. Только в губерниях Северо-Восточных, Юго-Западных и Архангельской смертность от убийств в расчете на 100 умерших обоего пола от насильственных и внезапных причин оказалась выше у горожан, нежели у селян. Особенностью Белорусских губерний явилось то, что там смертность от убийств горожан и селян оказалась фактически одинаковой.

За 1875–1887 гг. в городах от умышленных убийств погибло 5305 человек, в т.ч. мужчин – 3678 (69,3%) и женщин – 1627 (30,7%) человек. Такой показатель, как количество погибших от убийств в расчете на 100 умерших насильственно внезапно оказался выше у женщин. Значение этого показателя в губерниях среди женщин составило 8,1 человек, среди мужчин – 7,2 человека; в городах – 9,1 и 5,9 человек; в селениях – 8,0 и 7,4 человек соответственно.

Таким образом, на 100 умерших каждого пола от убийств в городах погибало мужчин – 6,1 человек, женщин – 9,2 человека; в селениях: мужчин – 7,5 человек и женщин – 8,2 человека. Число женщин в расчете на 100 мужчин,

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[10] *Статистический временник Российской империи*, серия 2, вып. 1, Санкт-Петербург 1871; *Сборник сведений по России за 1884-1885 гг.*, Санкт-Петербург 1887; *Окончательно установленное при разработке переписи наличное население городов*, Изд-во «Общественная польза», Санкт-Петербург 1905.

погибавших от убийств в этот период, в городах составило 44,6 человек, в сельской местности – 33,1 человека.

В последние шесть лет рассматриваемого хронологического периода смертность от убийств в городах продолжала оставаться ниже, чем в сельской местности. Так, в Европейской части страны смертность от убийств в городах составила 98,6% относительно таковой в уездах.

В следующей диаграмме содержатся сведения о количестве погибших от убийств в крупнейших городах Российской империи за период 1870–1893 гг. (рис. 1).

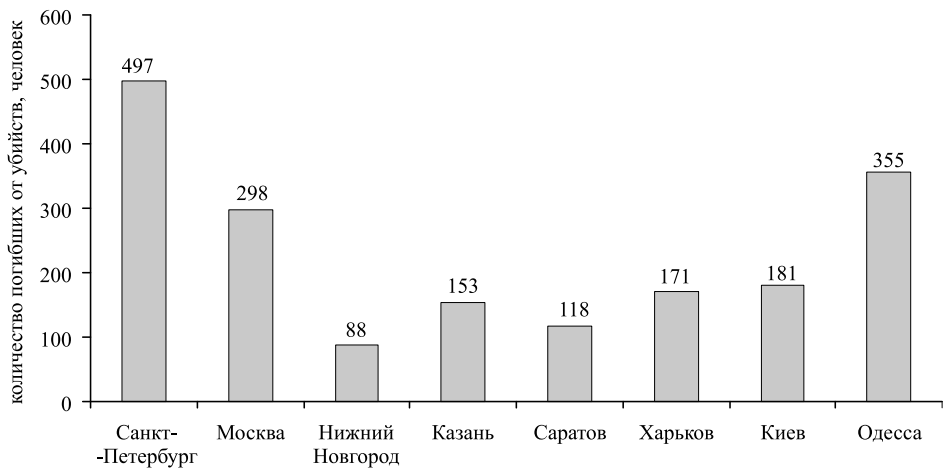

Рис. 1. Количество погибших от убийств в крупнейших городах Европейской части Российской империи в 1870–1893 гг. [человек]

Как видно, наибольшее количество погибших от убийств за данные 24 года пореформенного развития страны было зарегистрировано в столице Российской империи – Санкт-Петербурге, затем следует Одесса. Москва замыкала тройку лидеров по данному показателю.

В отношении насильственной смертности в Москве в период с 1872 по 1889 гг., городская статистика отмечала, что она крайне незначительна во всех группах населения. Опасность насильственной смерти оказалась почти одинаковой для населения всех возрастов, начиная с 30-ти летнего. В этой возрастной группе она колебалась от 5,11 до 5,63 смертей на 10 тыс. жителей. Практически такой же уровень смертности был отмечен в возрасте от 1 до 5 лет. Из остальных возрастных групп, наименьший показатель смертности от данного вида причин приходился на группу 5–10 лет, где он составил 1,97 смертей на 10 тыс. населения. Значение насильственной смертности в ряду других причин смертности оказалось наибольшим для возрастов 10–20 лет, где

на ее долю пришлось 4,8% всего числа смертей во втором по значению городе Российской империи[11].

Рост смертности от убийств в Одессе был связан с высокой долей детоубийств в общем количестве зарегистрированных убийств. Так, общее число погибших от преступного умысла младенцев в 1870–1893 гг. в Одессе составило 138 человек, в то время как в Москве 56 человек. При этом по Одессе были учтены показатели за 23 года – сведения о численности умерших насильственно и внезапно за 1878 и 1881 гг. в МВД не поступили. В Москве, напротив, были учтены все факты детоубийств, имевшие место в городе за эти два с половиной десятилетия.

Более конкретные сведения о масштабах смертности от убийств в крупнейших городах Российской империи в пореформенный период можно получить, если проанализировать такой показатель, как коэффициент смертности от убийств в расчете на 100 человек городских жителей, умерших насильственно и внезапно (табл. 3).

Таблица 3

Коэффициенты смертности от убийств в крупнейших городах Российской империи в 1870–1893 гг.

Города	Количество погибших от убийств в расчете на 100 умерших насильственно и внезапно									
	1870–1874		1875–1879		1880–1884		1885–1889		1890–1893	
	муж.	жен.	муж.	жен.	муж.	жен.	муж.	жен.	муж.	жен.
Санкт-Петербург	3,0	6,6	3,0	5,4	2,4	6,7	2,6	6,0	2,8	6,3
Москва	1,4	3,4	1,9	3,5	1,3	3,7	0,8	1,5	1,5	1,9
Н. Новгород	2,3	1,6	3,9	9,7	4,3	9,3	2,9	8,4	0,8	5,3
Казань	9,5	6,8	4,3	6,5	4,9	4,9	4,8	3,8	3,5	7,4
Саратов	3,0	18,5	7,0	14,2	9,8	12,0	3,3	9,0	3,4	6,5
Харьков	3,4	4,0	4,7	6,0	6,4	9,4	4,8	6,7	4,3	5,6
Киев	1,9	8,0	5,0	9,3	3,3	4,7	4,1	8,9	4,8	7,3
Одесса	6,4	10,9	8,2	14,3	8,5	23,2	7,8	13,7	4,2	6,3

Полицейская статистика констатировала, что в период с 1870 по 1893 гг. в крупнейших городах Европейской России число погибших от умышленных убийств в расчете на 100 умерших насильственно и внезапно постоянно увеличивалось. Если в 1870–1874 гг. оно составило 5,1, то в 1890–1893 гг. – 6,6.

На протяжении всего изучаемого хронологического периода наибольшие показатели дифференциации погибших от убийств женщин и мужчин в расчете на 100 умерших насильственно и внезапно были зафиксированы в Саратове и Одессе. Отличительными особенностями этих двух городов являлись полиэтнический характер населения, а также довольно интенсивные миграционные потоки.

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[11] *Смертность населения города Москвы. 1872–1889 г.*, Городская типография, Москва 1891, с. 68.

В целом, во всех крупных городах Европейской части страны коэффициент смертности от убийств среди женщин в расчете на 100 человек, умерших от насильственных и внезапных причин, оказался выше, чем среди мужчин.

Заключение

Статистические сведения о насильственных и внезапных смертях в России начали систематически собираться и обобщаться с начала 1870-х гг. Это во многом стало возможным из-за повышенного внимания правящей монархии и руководства МВД к смертности населения именно от данного класса причин. Вплоть до свержения самодержавия в стране данные о смертности населения широко публиковались и были доступны широкой общественности.

Анализ динамики смертности населения по 49 губерниям Европейской части Российской империи свидетельствует о постоянном увеличении на протяжении всего пореформенного периода численности погибших от данного вида преступлений. При этом необходимо принимать во внимание одно обстоятельство. Цифры официальной статистики не всегда совпадали с земской санитарной статистикой умерших от насильственной смерти, как правило, в сторону занижения данного показателя в полицейских отчетах. Проблемам недоучета погибших от убийств в России во второй половине XIX – начале XX вв. посвящено отдельное исследование автора.

Насильственная смертность в губерниях Европейской части страны в этот период имела свои гендерные особенности. На протяжении 1870–1893 гг. число случаев насильственной смерти среди женщин оказалось больше, чем среди мужчин, по отношению к общим итогам случаев неестественной смерти среди того и другого пола. В этот период выявилась значительная дифференциация губерний Европейской части страны по такому показателю, как отношение числа женщин к числу мужчин, погибших от убийств.

Экономическая, социальная и духовно-психологическая атмосфера жизнедеятельности крупных российских городов способствовала воспроизводству значительного числа рисков для граждан, в них проживавших. Несмотря на то, что абсолютные показатели смертности в городах от убийств на протяжении 1870–1893 гг. были ниже, чем в сельской местности, тем не менее, в самой структуре насильственной смертности усиливались тревожные тенденции: увеличение числа самоубийств и детоубийств, устойчивые темпы роста этих явлений.

Динамика как насильственной смертности в целом, так и ее составляющих свидетельствовала о наличии в российском обществе глубоких социально-деструктивных факторов, способствовавших устойчивому воспроизводству различных видов преступлений, в т.ч. и наиболее опасных – против жизни и здоровья граждан.

Естественно, в рамках одной статьи вряд ли возможно выявить весь причинно-следственный комплекс смертности населения Российской империи от умышленных убийств. Это во многом обусловлено неполнотой статистических сведений (отсутствуют сведения о возрасте погибших, их социальном статусе, профессиональных занятиях, образовательном уровне, вероисповедании и пр.), обширностью и разнообразием территории, отдельными проблемами методологического характера и т.д. Это в свою очередь стимулирует дальнейшие научные изыскания на данном направлении.

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Global study on homicide: trends, contexts, United Nations Office on Drugs and Crime (UNODC), Vienna 2011 [in English].

Резюме

Ключевые слова: насильственная смертность, смертность от убийств, городское население, сельское население, социальные реформы, Российская империя.

Рассматривается динамика, основные тенденции и территориальные особенности смертности от умышленных убийств в губерниях Европейской части России за период 1870–1893 гг. В статье представлен научный обзор литературы, посвященной проблемам и состоянию гибели населения Российской империи от убийств. В качестве эмпирической базы исследования выступают издания Центрального Статистического Комитета МВД – Временники «Умершие насильственно и внезапно в Российской Империи». Анализируется распределение погибших от умышленных убийств по полу, месту жительства (городская и сельская местность). Содержатся сведения о погибших в результате убийств по наиболее крупным городам Европейской части страны. Осуществляется группировка губерний Российской империи по уровню погибших от умышленных убийств в среднегодовом исчислении. Сопоставляются темпы роста численности городского и сельского населения губерний Европейской части страны с темпами роста умышленных убийств по сопоставимой территории в условиях масштабных и глубоких социальных изменений, последовавших после отмены крепостного права. Высказывается предположение, что цифры официальной уголовной статистики не всегда совпадали с земской санитарной статистикой умерших от насильственной

смерти, как правило, в сторону занижения данного показателя в полицейских отчетах. В заключении содержатся выводы о существовании зависимости между уровнем умышленных убийств и общественной модернизацией, развернувшейся в стране после падения крепостного права.

Summary

Deaths from homicides population of the European part of the Russian Empire in the second half of XIX century: scope, trends, territorial features

Key words: violent deaths, deaths from homicide, the urban population, rural population, social reforms, the Russian Empire.

The dynamics, key trends and territorial peculiarities of deaths from homicides in the provinces of the European part of Russia for the period 1870–1893. The article presents an overview of the scientific literature on the problems and the death of the Russian Empire, the population of the killings. As an empirical basis of research are the publications of the Central Statistical Committee of the Ministry of Interior – Annals „Who died suddenly and violently in the Russian Empire". We analyze the distribution of deaths from homicides by sex, place of residence (urban and rural). Contains information about the victims of the murders on the largest cities of the European part of the country. Implemented by the grouping of provinces of the Russian Empire in the level of deaths from homicides on an annualized basis. We compare the growth rate of the urban and rural provinces of the European part of the country with a growth rate of homicides for a comparable area in terms of scale and profound social changes that followed the abolition of serfdom. It is suggested that the numbers of official crime statistics do not always coincide with the County health statistics of deaths from violent death, usually in the direction of underestimation of this indicator in the police reports. In conclusion, presents the findings of the existence of the relationship between the level of homicides and social modernization, unfolding in the country after the fall of serfdom.

Public and Private Law

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The concept of fundamental breach in comparative perspective and its impact on Georgian Contract Law*

I. Introduction

Common and Civil Law traditions display divergences both on legislative and the doctrinal level towards the legal regime of contract termination. Generally speaking, in these legal systems, dogmatic basis of contract avoidance differ significantly[1]. Despite this, they still share certain conceptual similarities which mostly refer to remedial system. "In every social system and, hence, in every legal system – the question arises of the consequences which a party of a contract has to bear in the event of breach of that contract. The possibilities, for the innocent party to obtain legal protection, are generally manifold"[2]. Breach of contract always gives parties access to the scheme of remedies, but not always the right to termination[3]. Legal systems do not grant the right of avoidance immediately after foundation of contractual breach, which is a material prerequisite of contract termination. Its application is depended on the familiar threshold: the non-performance has to reach determined extent of gravity[4]. "Every system recognizes that not every breach should be dealt with similarly, but every system chooses its own way to deal with this issue"[5].

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[1] T. Wagner, *Limitations of Damages for Breach of Contract in German and Scots Law, A Comparative Law Study in View of a Possible European Unification of Law*, "Comparative Law / Rechtsvergleichung, Hahnse Law Review" 2014, vol. 10, No. 1, p. 95.

[2] Ibidem p. 73.

[3] M.V. Kogelenberg, *Motive Matters, An Exploration of the Notion "Deliberate Breach of Contract" and its Consequences for the Application of Remedies*, Intersentia, Metro 2013, p. 30.

[4] A. Ciacchi, *Contents and Effects of Contracts – Lessons to Learn from The Common European Sales Law*, "Studies in European Economic Law and Regulation" 2016, vol. 7, p. 62.

[5] M.V. Kogelenberg, op. cit., p. 24.

While damages are the normal and automatic remedy in Common Law[6], Civil Law generally aims at performance of obligations under the contract[7]. Term "termination" as found in the uniform projects, describes the same concept as avoidance in this paper[8].

Termination brings the contract to an end prospectively and releases parties from primary obligations of the contract. But it does not annihilate the contract retrospectively[9]. Due to this nature, termination is not regarded strictly as a remedy in legal doctrine[10].

Establishment of a fundamental breach of the contract gives rise to significant contractual rights for the aggrieved party[11]. The effect of such a breach is to give the non-breaching party the option of treatment the contract as repudiated, so that future primary obligations are discharged and do not need to be performed. However, the contract itself does not come to an end. The secondary obligations (e.g. to pay damages for loss caused by breach) remain in existence[12].

That termination should be of an exceptional character is reflected both in the Common and the Civil Law traditions. In Common Law, termination is conditional upon fundamental non-performance or breach of a contractual condition[13]. While within the Civilian tradition contract avoidance is generally possible after unsuccessful lapse of additional time[14] – *nachfrist*[15] given for secondary performance to the obligor. Despite differences in both Common and Civilian solutions, irrespective of

[6] J. Cartwright, *Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer*, 3rd ed., Hart 2016; S. Atkins, *Equity and Trusts*, 2nd ed., Routledge 2015.

[7] A. Ciacchi, op. cit., p. 60.

[8] I. Schwenzer, P. Hachem, K. Kee, *Global Sales and Contract Law*, Oxford University Press, New York 2012, p. 709. Compare term "rescission" in: R. Abbey, M. Richards, *Property Law 2016–2017*, Oxford University Press 2016, p. 196.

[9] N. Andrews, *Contract Law*, 2nd ed., Cambridge University Press, Cambridge 2015, p. 472.

[10] S.A. Smith, *Atiyah's Introduction to the Law of Contract*, 6th ed., Clarendon Press, Oxford 2005, p. 371.

[11] Under CISG these remedies are: substitution of non-conforming goods by the seller (Art. 46(2)), avoidance of the contract on the ground of non-performance by the other party (Art. 49(1)(a), 64(1)(a) and 73, avoidance of the contract for partial delivery (Art. 51) and Transfer of risk (Art. 70). In Civil Law countries aggrieved party may require performance in additional time, claim damages, terminate contract , reduce price according to hierarchy of remedies established by law. See R. Zimmermann, *The Law of Obligations-Roman Foundations of the Civilian Tradition, Breach of Contract*, Chapter 24, Oxford University Press 1996, p. 748.

[12] J. Poole, *Textbook on Contract Law*, Online Resource Center, 13th ed., Oxford University Press 2016, p. 253.

[13] M.V. Kogelenberg, op. cit., p. 30; K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, vol. II: *The Institutions of Private Law*, 2nd revised ed., Clarendon Press Oxford, 1987, p. 194–195.

[14] This approach is typical e.g. for the BGB (§ 323 (1)), as well for the Netherlands (Civil Code Art. 265 (2)). See New Netherlands Civil Code-Patrimonial Law, transl. P.P.C. Haanappel, E. Mackaay, under the Auspices of the Ministry of Justice of the Netherlands, Kluwer Law and Taxation Publishers, Boston.

[15] I. Schwenzer, Ch. Fountoulakis, M. Dimsey, *International Sales Law, A Guide to the CISG*, 2nd ed., Hart Publishing, Oxford – Portland 2012, p. 171.

their individual approach to the subject matter, goal of protection of sanctity of contracts and making termination as the extreme and exceptional mechanism can be identified. Commitment to abovementioned goals is mirrored on the international level, where "hierarchy of remedies has been introduced or the requirement of fundamental breach has been adopted as a condition for termination[16].

Diverse legal mechanisms serve the same function of Contract Law – to prevent unreasonable avoidance of the agreement and loss of contractual balance between parties' counter interests; and, also, authorize party to abandon the agreement with no prospect of the application of contractual legitimate expectations.

This paper examines fundamental breach category, its analogue conceptions in comparative legal context, as well as its interaction with the right of termination and its impact on Georgian Contract Law.

II. CISG model of fundamental breach

1. General essence

"The idea that a party could avoid a contract only where the disturbance is significant, whilst restricting it to damages where the breach is only minor, was first propagated by Tabel – whose work *Recht des warenkaufs* laid foundations for the unification of international sales law – and was found in the 1956 and 1962 drafts, and expressed in Article ULIS as what the parties would have regarded as fundamental had they put their minds to it"[17].

The concept of fundamental breach in the drafting of the CISG was a product of Common and Civil Law thinking[18]. The doctrine of fundamental breach is chiefly predicated on the facts or assumption that a party to a contract or contract of sale has committed a misnomer in the contract that goes to the root of the contract, thereby knocking the bottom off its commercial relevance[19].

While stipulated in various provisions[20] of CISG, its Article 25 expressly defines the concept of fundamental (essential) breach as a precondition of termination of the contract[21] and for a right to request a substitute performance – for substitution of non-conforming goods[22]. According to the mentioned Article, breach of contract committed by one of the parties is fundamental if it results in such detriment to the

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16 A. Ciacchi, op. cit., p. 61.

17 I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 172.

18 L.A. DiMatteo, *International Sales Law, a Global Challenge*, Cambridge University Press 2014, p. 241.

19 A. Rajora, *Contract of Adhesion and Doctrine of Fundamental Breach*, "Lawctopus' Law Journal Knowledge Center" 2015, No. 1.

20 CISG Articles 46, 49, 51, 64, 70, 72, 73.

21 See also, CISG Art. 49 (1) (a), 51 (2), 64 (1) (a), 72 (1), 73 (1) (2).

22 CISG Art. 46 (2).

other party as substantially to deprive him of what he is entitled to expect under the contract unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result[23]. Accordingly, CISG definition requires that the breach of contract cause a detriment that substantially deprives the contracting party of what is reasonably expected from the contract. Second, liability for that detriment is conditional, allowing the contracting party who committed the breach, to prevent termination of the contract if he or she proves that such a result could not have reasonable been foreseen at the time of contract formation. The first part of the definition refers to the injured party and the second part refers to the breaching party[24].

"Breach must concern the essential content of the contract, the goods, or the payment of the price concerned, and it must lead to serious consequences to the economic goal pursued by the parties. The importance of the breach is not determinative; only consequences of the breach to the damaged party are determinative. This means that a principal obligation must have been breached in such a way that the economic goal of the contract cannot be achieved; the damaged party being interested no longer in the performance of the contract. Absolute loss of all objective interests of the creditor is not required"[25]. "The breach of the ancillary obligation can only constitute a fundamental breach if it has some repercussions on the performance of the principal obligations in such a way that the interest of the creditor in the performance is lost, without the necessity that the latter suffers some monetary damage"[26].

The provision focuses on the cause of the breach and its impact on the interest of the other party which is the leading criteria in this case[27]. It requires an almost full or severe deprivation of the contractual expectation[28]. Key criteria of assessment and interpretation are flexible but quite vague terms: "fundamental", "substantial" and "reasonable". "Generally, the circumstances of the individual case decide whether a breach is of such weight that a reasonable person would have lost the interest in the contract and would have terminated the contractual relationship"[29]. This objective criteria should be examined together with individual circumstances and stipulations of the concrete agreement[30].

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[23] B. Kozolchyk, *Comparative Commercial Contracts, Law, Culture and Economic Development*, Hornbook Series, West Academic Publishing 2014, p. 1161.

[24] L.A. DiMatteo, *International Sales Law...*, p. 41 with further references.

[25] Bundesgericht (Switzerland), 15 September 2000, CISG-online 770, Neumayer/Ming, n. 3 ad Art. 25 CISG cited in: I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 173.

[26] Ibidem.

[27] S.B. Markesinis, H. Unberath, A. Johnston, *The German Law of Contract*, Hart Publishing, Oxford – Portland 2006, p. 386.

[28] L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, *International Sales Law*, C.H. Beck, Hart, Nomos, München 2016, p. 472.

[29] Ibidem.

[30] Ibidem.

Final non-performance (non-delivery or non-payment) as well as final refusal to perform always constitutes a fundamental breach[31]. Delayed performance is generally no fundamental breach unless the parties or the circumstances make time of the essence[32]. In case of delay the aggrieved party can set an additional (reasonable) period of time for performance. After unsuccessful *nachfrist* a non-fundamental breach is transformed into a fundamental one[33].

In legal doctrine it acknowledged that "fundamental breach provision should be interpreted in a restrictive way and, in case of doubt, it must be considered that conditions of such breach are not fulfilled"[34] . This approach reveals the exceptional nature of contract termination as a remedy of last resort[35] which requires high standard of proof to ground existence of all its legal prerequisites.

2. Legal construction

Legal nature and essence of fundamental breach may be better comprehended through analysis of its legal construction. Generally, three components are identified in this concept: a)breach b) detriment of contractual expectation c) foreseeability[36].

a) Breach

Under CISG, party not performing its obligation, faces remedies[37]. Regardless gravity of non-performance, any kind of breach triggers legal remedies. Substantial nature of different types of breaches influences and triggers corresponding remedy the aggrieved party is entitled to[38], but the contract can be avoided only if the non-performance amounts to a fundamental breach[39]. The objective fact of non-performance of stipulated and/or implied obligations constitutes breach. In the context of good faith, breach must be of such significance that fair and reasonable party would have neglect this[40]. Breach and its fundamentality are independent preconditions for

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[31] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 5 October, 1998, Clout No. 468, OLG Celle 24 May 1995, Clout No. 136.

[32] M. Macharadze, *Avoidance and Repudiation of Contract – Difference and Legal Consequences (According to Georgian and German Law)*, "Georgian Law Review, Special Edition" 2008, p. 129 [in Georgian].

[33] CISG Art. 49 (1) (b) and 64 (1) (b).

[34] Bundesgericht (Switzerland), 15 September 2000, CISG-online 770, Neumayer/Ming, n. 2 ad Art 25 CISG cited in: I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 173.

[35] D. Saidov, *Conformity of Goods and Documents, Vienna Sales Convention*, Hart Publishing, Oxford – Portland 2015, p. 15.

[36] D. Peacock, *Avoidance and the Notion of Fundamental Breach Under the CISG: An English Perspective*, "International Trade and Business Law Review" 2003, vol. 4, p. 67.

[37] Remedy of damages is excluded in case the breach is excluded. Under CISG Art. 79, See also, H.C. Aksoy, *Impossibility in Modern Private Law, A Comparative Study of German, Swiss and Turkish Laws and the Unification Instruments of Private Law*, Springer Int. Publishing Switzerland, London 2014, p. 126.

[38] L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 471.

[39] H.C. Aksoy, op. cit., p. 126–129.

[40] L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 471.

termination and they should be assessed separately. Fault is not a precondition[41] for forming contractual breach[42], but its absence is not an enough ground to consider that non-performance is excused[43]. Absence of fault excludes the right to damages[44] but a right to termination remains unaffected[45].

An investigation into the legal nature of breach is of high practical importance for transformation of contractual relationship into remedial regime of termination and enactment of other secondary rights by the aggrieved party.

First of all, criterion for assessment of significant breach is not the degree of damage[46] as such but the importance of the violated contractual interest and negative consequences of the aggrieved party. At the stage of drafting ULIS in 1956 and 1962 drafts, "dispute existed as to whether a subjective or an objective standard should be applied in determining the "fundamental" nature of a breach. Ultimately it was decided that the seriousness of the breach should not be defined by reference to the (objective) extent of the damages, but rather to the (subjective) interests of the promisee as actually set out by the contract[47]. This is true because contractual breach does not always entail damages and it is not a prerequisite for foundation of the legal category of breach. The reason is also that different criteria gain significant relevance in the process of evaluation of breach fundamentality. Therefore theory and practice, courts and legislation place more emphasis on the injured party's interest in the fulfillment of the obligation in question, independent of objectively measurable (and provable) damages[48].

If damage is at hand it authorizes party to claim its compensation but not mandatorily the termination of contract if breach does not meet additional prerequisites of substantiality and significance. Damages may be compensated and contract still may be maintained for specific performance or price reduction for example. And vice versa, damages can be reimbursed but it may not be sufficient for recovery of aggrieved party's injured contractual interests and expectations. Accordingly, significant violation does not depend on damage but on whether the injured party was substantially deprived from main contractual legitimate expectation[49].

This approach is especially familiar to Common Law tradition. The assessment criteria of fundamental breach should be underlined in the essence of purpose of this

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41 CISG Art. 45, 61.

42 About this approach in comparative legal systems and "Soft Law" see: M.V. Kogelenberg, op. cit.

43 PICC Art. 7.1.7 (2). PICC prerequisites for exemption see in Art. 7.1.7. (1) to the respective CISG provision 79 (1).

44 See PICC, Art. 7.4.1.

45 PICC Art. 7.1.7 (4).

46 Furthermore that damage cannot be incurred at all in all contractual relationship.

47 I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cir., p. 172.

48 P. Schlechtriem, *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods*, Vienna 1986, p. 58, <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html>. See also, CISG Art. 25.

49 G. Moens (ed.), *International Trade and Business Law Annual*, vol. VIII, Portland 2003, p. 102.

conception. Precisely, as fundamental breach is considered to justify the termination, it means that it should be such kind of category that will nullify the purpose of contract performance. Accordingly, injured party should lose its interest in fulfillment of contract to such extent that this interest cannot be compensated by reimbursement of damages, price reduction, cure of the defect or any other legal remedy stipulated by law. Due to this condition the aggrieved party can no longer be expected to be bound with primary obligation and by the contract, as a whole. "An avoidance sharply contradicts the very notion of *pacta sunt servanda,* it represents the most severe interference with the contractual relationship established between parties[50]. The conception that termination is a *ultima ratio* remedy[51] – remedy of last resort[52], is supported and followed by Georgian doctrine and court practice where termination is granted only if it is unreasonable and unconscionable to maintain binding force of the contract. Hence, it is possible to restrict a right of avoidance by contractual clauses or grant this right upon contract[53], providing instances which amounts to essential breach[54], but in Civil Law countries it is only permissible to the extent stipulated by imperative rules of law and moreover it is subject to the tests of contractual fairness and justice. Whereas in common law countries a judge is who determines the permissible scope of regulation of right of avoidance by contractual clauses[55], to what extant parties may "waive"[56] their rights of contract termination.

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[50] I. Schwenzer, P. Hachem, K. Kee, op. cit., p. 709 with further references.

[51] I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 171.

[52] I. Schwenzer, P. Hachem, K. Kee, op. cit., p. 709; U. Magnus, *The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases*, "Journal of Law and Commerce" 2005, vol. 25, p. 424.

[53] In Georgian practice sometimes these clauses are so general that they do not stipulate any specific grounds for avoidance different from the law. Sometimes contractual clauses provide specific regime of avoidance. See, Decision of 27.01.2015 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case No. AS-44-43-2014.

[54] Decision of 10.06.2016 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case No. AS-343-328-2016, <http://prg.supremecourt.ge/DetailView-Civil.aspx>.

[55] On subject matter of exclusion of avoidance by contractual clauses while existence of fundamental breach see: S.J. Beatson, A. Burrows, J. Cartwright, *Anson's Law of Contract*, 30th ed., Oxford University Press 2016, p. 202; J. Poole, *Textbook on Contract Law*, p. 252–254; R. Taylor, D. Taylor, *Contract Law Directions*, 5th ed., Online Resource Center, Oxford University Press 2015, p. 128–131; T. Grace, F.E. Grace, *The Termination of Contracts for Breach*, 2010, 10, <http://www.feg.com.au/documents/TerminationpaperTRG10.10.pdf>; E. Macdonald in: L. DiMatteo, M. Hogg, *Comparative Contract Law: British and American* Perspectives, Oxford University Press 2016.

[56] Where a party promises to relinquish some or all if his rights, under a contract, he is sometimes said to have waived those rights. See E. Peel, *Treitel on the Law of Contract*, London, 12. Aufl. 2007, Rn. 3-066, mit Verweis auf The Laconia [1977], AC 850, p. 871 (HL), cited in S. Grundmann, B. Haar, H. Merkt, P. O. Mülbert, M. Wellenhofer, H. Baum, J.V. Hein, Th. Hippel, K. Pistor, M. Roth, H. Wchwetzer, *Festschrift für Klaus J. Hopt zum 70*, Geburtstag am 24. August 2010, Unternehmen, Markt und Verantwortung, Band 1, De Gruyter, Berlin – New York 2010, p. 249.

b) Detriment

As breach of an obligation is a separate precondition, breach of a fundamental obligation may occur but not cause injury. For example, the seller disregarded his duty to package or insure the goods, but they arrived safely nevertheless; if, however, the buyer would lose a resale possibility or a customer, there would be detriment[57]. Accordingly, "It is not always necessary that damage in case of detriment be calculated and proved. The present test of detriment emphasizes the qualitative importance of the injured party's lost or compromised interest as determined under the contract, not the quantum of the loss. Moreover, as detriment is not a static element, the plaintiff may be required to establish the point at which a continuing breach satisfies the requisite degree of substantiality to justify avoidance"[58].

Thus, detriment cannot equal damages as they include all actual and potential negative consequences of a breach of contract. Therefore a party claiming fundamental breach of contract does not have to show that he suffered damages or did not receive benefits[59].

c) Foreseeability

The CISG concept of fundamental breach is founded by objective and subjective elements. The objective criteria of assessment is that for considering breach to be fundamental it should deprive the party from substantial contractual interest and this should be identified with objective reasoning. Subjective element indicates at party's approach to his breach: the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. Even this subjective element can be proved in combination with objective criterion and a reasonable person of the same kind in the same circumstances would not have foreseen such a result[60].

Foreseeability criterion includes that "the motivation of the creditor must be identifiable by the debtor who could have known or it would be possible to know that the creditor considered the performance of the breached contractual clause so essential that he would have refused the contract if he had known such future breach"[61]. "Mere possibility of a breach in the future does not suffice. It must be "clear" under the circumstances that the other party will commit the required fundamental breach"[62].

"The notion of reasonable expectations of an obligee is not measured subjectively, but it rather requires a full analysis of the text of the contract, any practices

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[57] D. Peacock, op. cit., p. 44.

[58] Ibidem, p. 53.

[59] I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 174.

[60] R. Folsom, M. Gordon, M. V. Alstine, M. Ramsey, *International Business Transactions in a Nutshell*, Nutshell Series, 10th ed., West Academic Publishing, USA, 2016, p. 102.

[61] Bundesgericht (Switzerland), 15 September 2000, CISG-online 770, Neumayer/Ming, op. cit., n. 4 and 7 ad Art. 25 CISG, cited in: I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 173.

[62] R. Folsom, M. Gordon, M. V. Alstine, M. Ramsey, op. cit., p. 103.

which the parties have established between themselves, usages negotiations and all relevant circumstances of the case. Therefore, the concrete and ascertained legal relationship is crucial for this determination. The burden of proof is placed on the party seeking relief under the Convention"[63].

"At the place and at the time of the conclusion of the contract, the determining interest of each of the parties must be identifiable by the other"[64]. Finally the damage must be foreseeable by the breaching party or by any other reasonable person of the same kind in the same circumstances at the time the breach of contract is committed. The contract determines if there existed a risk of a substantial detriment to the reasons and interests of the affected party, which had encouraged that party to conclude the contract[65].

German court in one of its decisions[66] interpreted the objective element of fundamental breach. According to the court's position, fundamental breach in sales contract under CISG "is the case when the purchaser essentially does not receive what he could have expected under the contract, and can be caused by a delivery of goods that do not conform with the contract"[67]. Also, the court referred to subjective element of fundamental breach: "there is no evidence that the parties implicitly agreed to comply with the ZEBS-standards. Even if [seller] knew that [buyer] wanted to market the goods in Germany, one cannot make such an assumption, especially since the standards [in the country] do not have legal character"[68]. In this part court focused whether the party could have acknowledged from contract, certain standards of conformity should be applicable for goods and whether it was purchased to be resolved in Germany. Court focused whether from seller's perspective the goods and its standards could have been acceptable for the buyer. In interpreting so, court focused on the subjective approach of the obligor towards the performance quality and acknowledged duties derived from the contract. It also should be mentioned that "the relevant time for assessing this question of foreseeability is the conclusion of the contract"[69].

3. Fundamental breach in the context of delivery of defective goods

The concept of fundamental breach is also identified in the context of non-conforming performance under CISG. Article 35 describes the characteristics goods

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[63] I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 174.

[64] Bundesgericht (Switzerland), 15 September 2000, CISG-online 770, Neumayer/Ming, op. cit., n. 6 ad Art. 25 CISG, cited in: I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 173.

[65] Bundesgericht (Switzerland), 15 September 2000, CISG-online 770, Neumayer/Ming, op. cit., n. 4 and 7 ad Art. 25 CISG, cited in: I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 173.

[66] Bundesgerichtshof 8 March 1995 [VIII ZR 159/94], BGHZ 129, 75, Translated Alston & Bird LL.P., Editors: W.M. Barron, B. Kurtz, T. Carlé (Referendar), Translators (Referendars): T. Carlé; N. Heraeus; C. Schmelzer; U. Springer.

[67] Ibidem.

[68] Ibidem.

[69] R. Folsom, M. Gordon, M.V. Alstine, M. Ramsey, op. cit., p. 102–103.

should have in order to conform to the contract. Failure to fulfill those characteristics amount to non-conformity. However, mere non-conformity does not entitle the buyer to require delivery of substitute goods under Article 46 (2) of the Convention. According to Article 25 this remedy is only available if the lack of conformity constitutes a fundamental breach of contract.

"Article 25 is one of the most important provisions because the matter of fundamental breach [...] determines which remedies are available, especially delivery of substitute goods and avoidance of contract without the requirement to give an additional time to perform"[70]. The threshold meeting abovementioned definition has been set at a high level by courts. According to German courts' official position if the buyer can still use or resale non-conforming goods for business purposes (even if at a discount)[71] this legal situation would not represent a case of fundamental breach[72].

There is no fundamental breach even in the case when only repair makes the goods useable[73] or when it is possible to postpone the repair[74]. It should be outlined that, in context of defective performance, goods should be neither repairable nor useable for considering breach as a fundamental one[75]. The possibility of repair and usage of the goods, both by a buyer or a seller, does not constitute fundamental breach and does not give rise to a right to terminate the contract.

Delivery of goods for human consumption fundamentally breaches the contract if the goods are dangerous for health or where a serious suspicion in this direction exists[76]. Also, where the seller cannot provide the property title to the goods, this constitutes a fundamental breach[77].

"First of all, it is up to the parties to make sufficiently clear – and in the ideal case to do so in means suitable for proof – that the very feature of the goods is so important to them, that the non-conformity would amount to fundamental breach of the contract, entitling the innocent party to avoid. In some cases, the expectations of the parties and the weight they allocated to certain features of the goods, can only be established after interpreting and/or supplementing the contract [...]. When interpreting the contract and when establishing whether there was a fundamental breach of contract, the purpose for which the goods are bought is of special relevance"[78].

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[70] I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 174.

[71] Supreme Court, 4C.179/1998/odi, 28 October 1998 (Switzerland) in: D. Saidov, op. cit., p. 15.

[72] See BGH 24 September 2014 (2015) NJW 867; BG 28 October 1998, Clout No. 248; BGH 3 April 1996, Clout No. 171. On criterion of future usage of goods for initially intended purpose, see also official comment on PICC Art. 7.3.1. (2), UNIDROIT principles of International Commercial Contracts, International Institute for the Unification of Private Law, Rome 2004, p. 221.

[73] BGH 24 September 2014 (2015) NJW 867.

[74] S.B. Markesinis, H. Unberath, A. Johnston, op. cit., p. 428.

[75] OLG Cologne in (2003), IHR 15.

[76] BGH 2 March 2005, CISG-online, 999, Cited L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 472.

[77] LG Freiburg in (203), IHR 22.

[78] B. Leisinger, *Fundamental Breach Considering Non-Conformity of Goods*, Sellier, European Law Publishers, München 2007, p. 153.

If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes fundamental breach of contract and a request for substitute goods is made either in conjunction with a notice given under Article 39 or within a reasonable time thereafter[79]. Minor non-conformities may allow the buyer a remedy for the difference in value, between what was promised and what was received, but the buyer cannot simply send the goods back"[80]. The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract[81].

"Having the freedom to choose remedies, the buyer however is bound to contract and should not, acting in good faith and as a reasonable person, first request delivery of substitute goods and then, not waiting for delivery, declare the contract avoided"[82].

There is an important interrelation between buyer's right to cure and avoidance based on fundamental breach. If the seller committed fundamental breach by delivering non-conforming goods, the buyer usually has a right to avoidance of the contract. But, if the seller can cure the non-conformities prior to the time that the buyer will suffer loss[83] from the initial non-conforming delivery, then the buyer cannot avoid the contract since he has not suffered a substantial depreciation of its contractual expectations[84]. In this case, as one of the prerequisities of fundamental breach – substantial deprivation – is not still at hand, party should not be authorized to avoid the contract. Accoringly, the seller has the right to cure non-conformity until this deprivation is established. Whereas, Article 49[85] provides that the buyer may avoid the contract upon fundamental breach. The language suggests that determination of a right to avoid precedes right to cure. Though, right to cure depends on seller's willingness and ability in this regard. Accordingly, reasonable interpretation of Articles 48 should be given advantage compared with its literal one[86].

4. Fundamentality of anticipatory breach

Fundamentality of future breach is not uniformly recognized in all legal systems as a prerequisite of the contract avoidance. But criterion fundamentality is included in anticipatory breach conception specifically regulated by CISG[87].

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[79] CISG Art. 46 (2) in: F.D. Rose, *Blackstone's Statues on Commercial and Consumer Law*, 24th ed., Oxford University Press 2015–2016, p. 646.

[80] C.P. Gillette, *Advanced Introduction to International Sales Law*, Edward Edgar Publishing 2016, p. 69.

[81] CISG Art. 51 (2) in: F.D. Rose, op. cit., p. 647.

[82] I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 174.

[83] Under "loss" deprivation should be meant with broader essence and not only specifically damages.

[84] C.P. Gillette, op. cit., p. 71–72.

[85] Except CISG Art. 49 (1) (b) CISG is not an classical expression of Common Law conceptualism.

[86] C.P. Gillette, op. cit., p. 71–72.

[87] CISG Art. 71–73 in: F.D. Rose, op. cit., p. 650.

Under Convention[88] for foundation of anticipatory breach, it must be feasible that a party will not perform "a substantial part of his obligation". Substantiality is a wider conception than just "insignificant" and it should be interpreted broadly.

If non-performance of a substantial part of the obligation threatens, the other party can suspend the own obligations[89]. Where a fundamental breach threatens the aggrieved party can terminate the contract[90]. Accordingly, there are two categories of anticipatory breach stipulated in CISG: the first one is suspending the performance and the second – warranting avoidance of the contract.

A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part[91] of his obligations[92]. And if prior to the date for performance it is clear that one of the parties will commit a fundamental breach of an agreement, the other party may declare the contract avoided[93]. The party must prove that the anticipated breach meets the criteria for "fundamental breach" set out in CISG Article 25.

For the purpose of termination the anticipated future breach must be of fundamental nature; but for suspension of the contract future non-performance of substantial part of party's obligation is sufficient. The fact that CISG, terminologically, differentiates the prerequisites for suspension from the preconditions required for termination indicates its purpose to distinguish the gravity of future non-performance required for different legal outcomes: "substantial" for suspension and "fundamental" for termination.

"The CISG has special rules for breach of an »instalment« contract" – that is, where the contract involves at least two successive deliveries of the goods. With respect to a breach of such contracts CISG Article 73 defines different rules for an individual installment as opposed to a breach that effects the whole contract. For an individual installment, if a party fails to perform in such a way as to constitute "a fundamental breach of contract with respect to that installment". The other party may declare the contract avoided "with respect to that installment" – Art. 73(1). If, in addition, such breach gives the aggrieved party "good grounds" to conclude that a fundamental breach will occur in the future installments, it may declare the contract avoided for the future as well (provided it does so within a reasonable time) – Art. 73(2)[94].

Unlike CISG, in GCC non-performance of the essential, significant part of the obligation is equalized with fundamental breach by giving rise to termination rather than triggering suspension.

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[88] Art. 71 (1).

[89] CISG Art. 71 in: J.W. Kuney, D.C. Looper, S.L. Weakley, *California Law of Contracts*, CEB California, Oakland 2016, p. 13–27.

[90] CISG Art. 7.2 (1).

[91] Whether „substantial part of party's obligation" is less material breach or not compared with PICC and PECL, is debated in scientific doctrine. See, Flechtner and Honnold on CISG, 553 [388.1].

[92] CISG Art. 71 (1).

[93] CISG Art. 72 (1).

[94] R. Folsom, M. Gordon, M.V. Alstine, M. Ramsey, op. cit., p. 103–104.

CESL provides that immediate avoidance is permissible if the non-performance would be such as to justify termination[95]. "This covers the situation where the right of avoidance arises from the parties agreement"[96]. BGB approach is considerably similar: it declares immediate withdrawal possible when there are special circumstances justifying it for balancing the interests of both parties[97].

III. UNIDROIT principles of international commercial contracts

The PICC do not specifically comprise the category of breach of contract. It define the notion of "non-performance" which combines conceptions of breach of contract and any excused non-performance which may not be qualified as breach. The non-performance which is a broader category, is any failure to fulfill a contractual duty and covers also defective performance as well as late performance[98].

Only non-performance of a serious nature (fundamental)[99] entitles the aggrieved party to termination of the contract[100] under PICC regulation[101]. The concept of fundamental breach is not defined and stipulated in a separate Article of PICC, but it is merged with the right to termination of the contract[102]. The rules of PICC on fundamental non-performance apply both to cases where the non-performing party is liable[103] for the non-performance and to those where the non-performance is excused and right to damages is excluded.

Despite the fact that relevant Article in PICC[104] shares some terminology and formulation similarities with CISG[105] in this regard, PICC has more precise approach when stipulating what criteria and considerations should be taken into account to determine whether breach is fundamental or not[106]. Generally, performance may be so late or so defective that the aggrieved party cannot use it for its intended purpose, or the behaviour of the non-performing party may in other respects be such that the aggrieved party should be permitted to terminate the contract[107].

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95 CESL Art. 116 and 136.

96 L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 522.

97 BGB § 323 (2) (3). *Compare* Lord Diplock: it is to fundamental breaches alone that the doctrine of anticipatory breach is applicable (Afovos Shipping CO SA v Romano pagnan and Pietro Pagnan [1983] 1 WLR 195, (HL) 203 in: L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 522.

98 PICC Art. 7.1.1.

99 PICC Art. 7.3.1. (1).

100 H.C. Aksoy, op. cit., p. 129.

101 PICC Art. (1) states: A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

102 Respectively, see PICC Art. 7.3.1 (1) (2) (3).

103 Obligor is responsible in terms of fault.

104 Art. 7.3.1.

105 CISG Art. 25.

106 See PICC Art. 7.3.1. (2) (a)-(e).

107 UNIDROIT Principles of International Commercial Contracts, International Institute for the Unification of Private Law, Rome, 2004, 221.

Whether in a case of non-performance by one party the other party should have the right to terminate the contract depends upon the weighing of a number of considerations[108]. The following criteria[109] are: whether (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result; (b) strict compliance with the obligation which has not been performed is of essence under the contract; (c) the non-performance is intentional[110] or reckless; (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance; (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated[111].

The PICC stipulates *Nachfrist*[112] procedure, obligation to fix additional time for fulfillment before termination of the contract. Unless non-performance does not yet constitute a fundamental breach, in case of delayed performance[113], an authorized party shall fix additional reasonable time for performance. Termination would only be possible at the end of the period of extension if the extension was reasonable in length. It also should be underlined that termination through *nachfrist* procedure[114] is not possible if the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party[115].

This means that breach before fixing additional time for performance is not required to be fundamental but it shall be material and not merely of minor importance. Such kind of important breach is transformed in fundamental one after party fails to perform in additional period (*nachfrist*)[116] and gives rise to the right of termination.

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[108] Ibidem.

[109] These criteria comprise similarity to DCFR regulation: (1) A creditor may terminate if the debtor's non-performance of a contractual obligation is fundamental. (2) A non-performance of a contractual obligation is fundamental if: a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or (b) it is intentional or reckless and gives the creditor reason to believe that the debtor's future performance cannot be relied on. See related articles on fundamental non-performance in DCFR § III. – 2:105 2 (a) (b) – Alternative obligations or methods of performance; § III. – 3:203(a) When creditor need not allow debtor an opportunity to cure.

[110] On interrelation of fundamental breach and fault category, also whether fundamental breach is a rule of law or a construction, see S.J. Beatson, A. Burrows, J. Cartwright, op. cit., p. 202; J. Poole, *Textbook on Contract Law*, p. 252–254; R. Taylor, D. Taylor, op. cit., p. 128–131; E. Macdonald [in:] L. DiMatteo, M. Hogg, *Comparative Contract Law...*

[111] PICC Art. 7.3.1 (2) (a)-(e) – Right to Terminate the Contract.

[112] It is inspired by the German concept of *Nachfrist* (BGB) § 323 (1), 440. Similar legal results are achieved by different conceptual mechanisms in other legal systems.

[113] Not in case of defective performance. See PICC Art. 7.1.5 (additional period for Performance), para. 3.

[114] PICC Art. 7.1.5 (3).

[115] PICC Art. 7.1.5.(4).

[116] R. Zimmermann, *Breach of Contract and Remedies Under the New German Law of Obligations*, Saggi, Conferenze e Seminari 48, Roma 2002, p. 8.

Future and anticipated fundamental non-performance serves as a precondition for termination of contract in PICC before the day of performance lapses[117]. It is acknowledged that high standard burden of proof and reasonable degree of precision is required to testify the prerequisite of fundamentality of future non-performance.

In case of a permanent and partial impediment which causes fundamental breach, the obligee should be given the choice of terminating the contract if partial performance will not be of any value of him[118]. Failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed[119].

IV. Principles of European Contract Law

PECL contains the definition of fundamental breach[120] which is at hand when (a) strict compliance with the obligation is of the essence of the contract; or (b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance[121]. PECL also envisages the so called *nachfrist* procedure for termination of contract in case of delayed performance[122].

PECL regulates[123] anticipatory fundamental non-performance which threatens performance of contract by intermediary. Precisely, in case of indirect representation the principal may exercise against the third party the rights acquired on the princi-

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[117] PICC Art. 7.3.3. (Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract).

[118] H.C. Aksoy, op. cit., p. 130.

[119] J. Poole, *Casebook on Contract Law*, 13th ed., Oxford University Press 2016, p. 330.

[120] As a prerequisite of contract termination, see PECL Art. 9.301 (ex Art. 4.301) – Right to Terminate the Contract.

[121] PECL Art. 8.103 (ex Art. 3.103) (a)-(c) – Fundamental Non-Performance.

[122] PECL Art. 8.106 (ex Art. 3.106) – Notice Fixing Additional Period for Performance together with PECL Art. 9.301 (2) (ex Art. 4.301) – Right to Terminate the Contract. See respectively PICC Art. 7.3.3 and CISG Art. 72 (1).

[123] PECL Art. 3.303 – Intermediary's Insolvency or Fundamental Non-performance to Principal: If the intermediary becomes insolvent, or if it commits a fundamental non-performance towards the principal, or if prior to the time for performance it is clear that there will be a fundamental non-performance: (a) on the principal's demand, the intermediary shall communicate the name and address of the third party to the principal; and (b) the principal may exercise against the third party the rights acquired on the principal's behalf by the intermediary, subject to any defenses which the third party may set up against the intermediary.

pal's behalf by the intermediary in the event of a (threatened) fundamental non-performance by the intermediary[124].

The regulation on termination of the contract in case of anticipatory breach provided by PECL and CESL[125] is identical to CISG and PICC approach. In this case the termination is still depended on future occurrence of fundamental non-performance[126]. Both PICC[127] and PECL[128] require existence of future fundamental non-performance as a prerequisite for anticipatory breach.

V. Common European Sales Law

Under CESL, any kind of non-performance entitles the creditor to remedies even if the non-performance is excused[129]. Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists[130]. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such[131]. The concept of fundamental breach dealt with CESL[132] is substantially similar to CISG, PICC and PECL regulative approach. A buyer may terminate the contract within the meaning of Article 8 if the seller's non-performance under the contract is fundamental within the meaning of Article 87 (2)[133].

CESL envisages specificity of termination in the context of consumer sales contract. Precisely, under CESL consumer buyer's rights are generally not subject to cure by the seller[134]. Consumer has wide right of termination for non-conformity as it is entitled to terminate in case of defective performance without giving the seller opportunity to cure[135]. The right of termination exists unless the breach is not insignificant. Precisely under CESL: In a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-

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[124] D. Bush, L. Macgregor, P. Watts (eds.), *Agency Law in Commercial Practice*, Oxford University Press 2016, p. 88.

[125] CESL Art. 87 (2) (b) in: F.D. Rose, op. cit., p. 609.

[126] PECL 9:304 (ex. Art. 4.304) – Anticipatory Non-Performance; CESL Art. 87 (2) (b).

[127] Art. 7.3.4.

[128] Art. 8:105, 8:103.

[129] See CESL Art. 106 for the buyer's remedies and Art. 131 for the seller's remedies.

[130] Art. 88 (2): Excused Non-performance.

[131] H.C. Aksoy, op. cit., p. 99–100.

[132] According to CESL Art. 87 (2)(a), any non-performance including the delivery of non-conforming goods is fundamental „if it substantially deprives the other party of what that party was entitled to expect under the contract unless at the time of conclusion of contract the non-performing party did not foresee and could not be expected to have foreseen that result. See also CESL Arts. 114–115, 134, 136.

[133] CESL Art. 114 (1).

[134] CESL Art. 106 (3) (b).

[135] CESL Art. 106 (3) states: If the buyer is a consumer: (a) the buyer's rights are not subject to cure by the seller; and (b) the requirements of examination and notification set out in Section 7 of this Chapter do not apply.

performance because the goods do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is insignificant[136]. This provision significantly lowers the preconditions for termination as general acknowledgement of right to cure is absent[137]. CESL presumes that any non-conformity is significant and shift the burden to prove otherwise to seller[138]. Without prior notification of the non-conformity itself contract may easily be terminated, leaving it to the commercial seller to prove that the lack of conformity was in fact insignificant or related to a tailor-made product[139]. In this case no reference is made for existence and relevance of fundamental breach.

Due to interpretation of above-mentioned, it should be underlined that test of fundamentality of non-performance by the seller is not determined to be a prerequisite in the context of termination for non-conformity by the consumer. Accordingly, the general rule of CESL[140] stipulating mandatory fundamentality of the breach shall not be used in this case. Though termination is not possible even in case of minor non-conformity in consumer sales contract[141] . In this way EU Consumer Sales Directive balances Civil Law approach by declaring termination impossible due to minor lack of conformity[142].

VI. German Civil Code

BGB does not envisage the concept of fundamental breach as such, but legal solutions found in judicial practice are too close to legal consequences of fundamental breach. Under German law a fundamental breach as such is not regularly and not necessarily exempt from the necessity to set a *Nachfrist*[143]. And vice versa, even if the creditor has set a reasonable but unsuccessful *Nachfrist*, he is not entitled to terminate the contract if the breach is insignificant, immaterial[144] (uner-

[136] CESL Art. 114 (2).

[137] A. Ciacchi, op. cit., p. 64.

[138] M. Kossak, *The Remedial System under the Proposed Common European Sales Law (CESL)*, "European Journal of Commercial Contract Law" 2013, vol. 1, p. 10.

[139] A. Ciacchi, op. cit., p. 64.

[140] According to CESL Art. 114 (1) a buyer may terminate the contract within the meaning of Art. 8 if the seller's non-performance under the contract is fundamental within the meaning of Art. 87 (2).

[141] L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 491. See also, Swedish New Consumer Sales Act (KKL), 1990, [in:] H. Sivesand, *The Buyer's Remedies for Non-conforming Goods, Should there be a Free Choice or are Restrictions Necessary?*, Sellier, European Law Publisher, Band 2, vol. 2, München 2007.

[142] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees**,** Art. 3 (6) states: the consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

[143] G. Dannemann, S. Vogenauer, *The Common European Sales Law in Context, Interactions with English and German Law*, DFC, Oxford University Press 2013, p. 662.

[144] German Civil Code – Bürgerliches Gesetzbuch, Bundesministerium der Justiz, Juris GmbH, Saarbrücken 2005.

heblich)[145]. German law thus excludes the remedy of termination altogether if the breach is of minor importance and weight[146]. In this regard, the costs for remedying the breach, the burden of any remaining impairment and also the fault of the party in breach have in particular to be taken into consideration. Generally, again fraud (*Arglist*) on the part of the debtor makes any breach significant and gives rise to an entitlement to termination[147]. In case of defective performance traditional *nachfrist* procedure is not required to justify the contract avoidance. In this case fundamental non-conformity of goods itself serves as a requirement of avoidance[148].

Irrespective of the gravity of the breach, creditor is required to fix additional reasonable time for performance: (1) If under a synallagmatic contract the obligor fails to effect performance when due or to perform in accordance with the contract, the obligee may withdraw from the contract, if he has fixed, to no avail, an additional period of time for performance[149]. Only after unsuccessful lapse of that period aggrieved party is authorized to declare the contract terminated again notwithstanding the gravity of the breach. But it should also be stressed that the significance of the breach is not ignored and the code declares termination invalid in case of non-significant non-performance[150]. If the obligor has failed to perform in accordance with the contract, the obligee may not withdraw from the contract, if there has been no more than *an immaterial breach* of duty[151]. Insignificance has been accepted where the breach impaired 5% or less of the value of the good[152].

BGB states grounds excluding *Nachfrist* procedure: 1. the obligor seriously and definitely refuses performance 2) the obligor does not affect performance by the date specified in the contract or within a specific period of time and the obligee has bound the continuation of his interest in performance to timely performance, or 3) there are special circumstances justifying, in balancing the interests of both parties, immediate withdrawal[153].

In sales contract it is not necessary to set a period of time if the seller has refused to perform both kinds of cure (repair and replacement) or if the kind of cure to which the buyer is entitled has failed or could not reasonably be expected from him. A cure is deemed to have failed after two unsuccessful attempts, unless other-

[145] BGB § 323 5 (sent. 2). See, S. B. Markesinis, H. Unberath, A. Johnston, op. cit., p. 422.

[146] This approach is also underlined in the New Netherlands Civil Code – Art. 625 (1).

[147] G. Dannemann, S. Vogenauer, op. cit., p. 662.

[148] BGB § 323 5 (sent. 2).

[149] BGB § 323 (1).

[150] Compare A. Pipia, *Basic Characteristics of Civil and Anglo-American Legal Regulation of Contract Avoidance and its Impact on Georgian Law*, "Georgian Law Review, Special Edition" 2008, p. 77 [in Georgian].

[151] BGB § 323 (5) sent. 2.

[152] BGH 14 September 2005, NJW 2005, 3490 (1 per cent); LG Düsseldorf 27 February 2004, NJW-RR 2004, 1060 (2–3 per cent); LG Kiel 3 November 2004, MDR 2005, 384 (4.5 per cent) cited in: G. Dannemann, S. Vogenauer, op. cit., p. 662; See also, L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 484.

[153] BGB § 323 (2). See also Art. 80 of Civil Code of Netherlands.

wise emerges, in particular, from the nature of the thing or of the defect or the other circumstances[154].

Taking above-mentioned into account in legal doctrine it is asserted that BGB together with CISG- oriented Laws is based on the conception of fundamental breach[155].

VII. American Uniform Commercial Code

The U.C.C. stipulates termination of the contract in case of tender of defective goods without requiring and defining the fundamentality of the breach[156]. However, under the code where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender[157]. "This means in cases where the seller could have expected the acceptance of the delivery the seller can avoid the cancellation by prompt cure. Only if the non-conformity of the tender is such that its acceptance could not be expected – and that comes close to fundamental non-performance – can the buyer immediately terminate the contract"[158].

It should not be understood that the essence of additional performance is ignored in Common Law system. It exists but it is not given the supremacy in the system of remedies. For instance, under U.C.C., the seller's right to cure exists if he had reasonable grounds to believe that goods would be acceptable with or without money allowance to the seller[159] and he seasonably notifies the buyer[160]. Similarly, if the lessee rejects a non-conforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he [or she] seasonably notifies the lessee[161]. Due to interpretation of Article at hand, lessor's right to cure in additional time does not always exist, as it usually happens in Civil law[162] but only in case if there is not fundamental breach on her [or his] side[163].

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154 See BGB § 440.

155 I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 171–172.

156 U.C.C. Art. § 2–711(1) (2) (c) states: A breach of contract by the seller includes the seller's wrongful failure to deliver or to perform a contractual obligation, making of a nonconforming tender of delivery or performance, and repudiation. (2) If the seller is in breach of contract under subsection (1), the buyer, to the extent provided for by this Act or other law, may: (c) cancel.

157 U.C.C. § 2–508 (2).

158 L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 486.

159 Aspect of fundamental breach.

160 U.C.C. § 2–508 (2) – Cure by Seller of Improper Tender or Delivery. Replacement.

161 U.C.C. § 2A–513(2) – Cure by Lessor of Improper Tender of Delivery. Replacement.

162 Some exceptions are stipulated by consumer sale directive for consumer contracts.

163 Element of fundamental breach is the following: „…lessor or the supplier had reasonable grounds to believe that goods would be acceptable with or without money allowance to lessee" – U.C.C. § 2A–513(1).

Similarly, lessor or supplier have a further reasonable time to substitute a conforming tender if he [or she] seasonably notifies the lessee and if lessor or the supplier had reasonable grounds to believe goods would be acceptable with or without money allowance to the lessee[164].

Another Article indicating possible reception of fundamental breach by U.C.C. states: in installment contracts (2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment[165] .

Under the U.C.C. failure to deliver clean documents on time amounts to fundamental breach[166]. This means that substantial impairment of the value of installment, no possibility of cure and a defect in the required documents, justify buyer's right to termination (rejection of the installment as far as it cannot be cured). The above-mentioned grounds of rejection reveal profound similarity with the prerequisites of fundamental breach in general and, precisely, with those stipulated in PICC. Criterion "no possibility of cure" comes close to the important prerequisite of fundamental breach stated in PICC: the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance[167]. Only if "seller gives adequate assurance of its cure the buyer must accept that installment". It means that the seller may avoid termination by giving guarantee, assurance of cure that comes close again to fundamental non-performance.

The stipulation of the U.C.C. "substantial impairment of the value of the whole contract is a breach of the whole" comes close to another criterion of fundamental breach stated in PICC. Precisely, the following: "non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract"[168]. What the party is entitled to expect under the contract is closely connected to the value of the whole contract, frustration of which forms ground for fundamentality of non-performance.

Existence of the fundamentality breach conception in the U.C.C. can be diagnosed as well through interpretation of anticipatory repudiation category. Under the U.C.C. when either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may for a commercially reasonable time await performance by the repudiating party[169].

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164 U.C.C. § 2A–513 – Cure by Lessor of Improper Tender or Delivery, Replacement.

165 U.C.C. § 2–612 – Installment Contract, Breach.

166 L.A. DiMatteo, *International Sales Law*..., p. 171.

167 PICC Art. 7.3.1 (2) (d) – Right to Terminate the Contract.

168 PICC Art. 7.3.1 (2) (a) – Right to Terminate the Contract.

169 U.C.C. § 2–610 (a) – Anticipatory Repudiation.

"The U.C.C. grants an action for extrajudicial termination of the contract against a defendant's anticipatory repudiation. This action is intended to terminate the duty to carry out performances not yet due. However, for the anticipatory repudiation to be effective against the defendant, it has to be easily and clearly proven. Additionally, plaintiff has to prove that he will be substantially impaired as a consequence of the non-performance of the other party"[170]. "Substantial impairment of the value of the contract" is a prerequisite of fundamental non-performance as it "substantially deprives the aggrieved party of what it was entitled to expect under the contract"[171].

PICC considers "intentional and reckless non-performance"[172] as one of the indications of the fundamental breach as it gives the "aggrieved party reason to believe that it cannot rely on the other party's future performance"[173]. But it should not be understood that any intentional breach constitutes fundamental breach as such. Lord Wilberforce in the Suisse Atlantique Case (1966) made clear that deliberate breach of contract is not a special category of breach amounting to fundamental breach[174]. In the same way the U.C.C. "requires an overt communication of intention or an action by the repudiating party that renders performance impossible or demonstrates a clear intention not to continue to perform or counter-perform"[175].

Despite not stipulating formal definition of fundamental non-performance like CISG, essence of this conception is implied in several Articles of the U.C.C.

VIII. English sales of good act

Origins of fundamental breach conception in English law can be traced to the doctrine of substantial violation/substantial performance. Because of the terminological correspondence between the English concept of fundamental breach and the CISG concept, the English doctrine has been falsely identified as the precursor of the CISG doctrine[176].

"In Common Law seriousness of the breach is closely connected to the nature of the term"[177]. The buyer can terminate the contract if the other party has breached a condition[178] of the contract[179], and can only claim damages[180] if the breach concerned a warranty[181]. Conditions are considered to form the root of the con-

[170] B. Kozolchyk, op. cit., p. 1196.
[171] PICC Art. 7.3.1 (2) (a) – Right to Terminate the Contract.
[172] PICC Art. 7.3.1(2)(c).
[173] PICC Art. 7.3.1(2)(d).
[174] N. Andrews, *Contract Law*, Cambridge University Press 2011, p. 484.
[175] B. Kozolchyk, op. cit., p. 1196.
[176] L.A. DiMatteo, *International Sales Law...*, p. 241.
[177] M.V. Kogelenberg, op. cit., p. 30.
[178] N. Andrews, *Contract Law* (2015), p. 455.
[179] A. Burrows, *Principles of the English Law of Obligations*, Oxford University Press 2015, p. 107.
[180] N. Andrews, *Contract Law* (2015), p. 455.

tract[182]. But even if the breach is of an implied condition not the warranty, the buyer (being no consumer), cannot terminate the contract if "the breach is so slight that it would be unreasonable for him to reject the goods"[183]. The breach must reach a certain degree of gravity that allows termination. It means that breach should be "substantial", "material"[184].

It is suggested that in developing the law, English courts now have – with the new and improved German *Nachfrist*-model and the "fundamental breach" model of the CISG – two consistent theories of the right to terminate a contract[185]. In English law court is granted power[186] to determine importance and essentiality of the contractual condition for the contract performance in case parties did not ascertain essential conditions in the agreement[187]. Even if term is stipulated in the contract by the parties as an essential condition, breach of such a condition sometimes should not be regarded as substantial failure by court due to examination of all relevant circumstances and gravity of the breach[188].

With respect to consumer sales the consumer buyer is generally obliged first to request repair or replacement (and thus give the seller a second chance). He can only turn to the remedy of termination (rescission) if any remedying was impossible, disproportionate or unsuccessful[189].

IX. French Civil Code

Determination of significant breach as a prerequisite of contract termination belongs to the scope of court's discretionary power in France. The French Civil Code does not contain the definition of fundamental breach. Buyer's right to avoid sales contract[190], do not depend on gravity of the defect of the goods[191]. The rights

[181] SGA – s 11 (3) (Year 1979). See also, A. Burrows, *Principles of the English Law...*, p. 107; M.V. Kogelenberg, op. cit., p. 30. Regarding required quality see SGA – s 14, unencumbered property title – s 12 which are considered as conditions. which the act stamps as conditions. See also, s 12 (5A), s 14 (6).

[182] I. Schwenzer, P. Hachem, K. Kee, op. cit., p. 715.

[183] SGA – s 15 A (1) in: L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 488.

[184] N. Andrews, *Contract Rules, Decoding English Law*, Intersentia, Cambridge – Antwerp – Portland 2016, p. 300.

[185] S.B. Markesinis, H. Unberath, A. Johnston, op. cit., p. 426.

[186] Due to the broad discretionary power granted to courts in English law, in legal doctrine it is asserted that the so-called „fundamental breach doctrine'' has been developed by English courts. See: A. Burrows, *Principles of the English Law...*, p. 34.

[187] G.H. Treitel, *The Law of Contract*, 9th ed., Sweet and Maxwell, London 1995, p. 706–709.

[188] A. Pipia, op. cit., p. 79–80.

[189] SGA s 48 C (1) and (2) in: L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 489.

[190] See French Civil Code, Arts: 1642–1, 1643.

[191] French Civil Code, Art. 1644: In the cases of Articles 1641 and 1643, the buyer has the choice either of returning the thing and having the price repaid to him or of keeping the thing and having a part of the price repaid to him, as appraised by experts.

to claim performance either avoidance alternatively exist[192] on the same level without hierarchy and even when the performance costs are high the obligee may require avoidance instead of fixing additional time[193]. The courts have adopted power to *~souverainement"* to decide whether the non-conformity justifies the termination of the contract or only damages or a price reduction[194].

X. Consumer sales directive

Contract termination of B2B transactions is conditional upon the presence of fundamental breach. Quite the opposite approach may be observed in B2C transactions[195]. The directive states: in case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods[196]. In case of defective performance, consumer may require the seller to repair the goods or he *may* require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate[197]. Thus the consumer may require an appropriate reduction of the price or have the contract rescinded[198]. Here, Commission chose to depart from the hierarchy under the Consumer Sales Directive[199] and to return to the traditional patterns by awarding the consumer an almost absolute freedom to choose between the different remedies for non-conformity[200].

XI. The Chinese Contract Law

The Chinese Contract Law does not contain an express provision on fundamental breach. Conception of contractual interest is a leading principle and criterion[201] for essential breach interpretation, though.

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[192] Art. 1184 (2) Civil Code of France, Translated by G. Rouhette with the assistance of A. Rouhette-Berton, 2006.

[193] K. Zweigert, H. Kötz, op. cit., p. 186–187.

[194] Com. 6 March 1990, Bull Civ 1990. IV. No. 75, in: L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 491.

[195] A. Ciacchi, op. cit., p. 71.

[196] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Art. 3 (2).

[197] European Sales Directive, Art. 3 (3).

[198] European Sales Directive, Art. 3 (5).

[199] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees**.**

[200] A. Ciacchi, op. cit., p. 71.

[201] S.B. Markesinis, H.Unberath, A. Johnston, op. cit., p. 386.

The right of termination is granted to the parties under specific circumstances: (1) force majeure frustrated the purpose of the contract; (2) before the time of performance, the other party expressly stated or indicated by its conduct that it will not perform its main obligations; (3) the other party delayed performance of its main obligations, and failed to perform within a reasonable time after receiving demand for performance; (4) the other party delayed performance or otherwise breached the contract, thereby frustrating the purpose of the contract; (5) any other circumstance provided by law occurred[202].

In all above-mentioned grounds the gravity of the non-performance is evidently underlined: (1) frustration of purpose entails annulment of main contractual interest and discharges what party is entitled to expect under the contract; (2) obvious future non-performance; (3) non-performance in additional time (*nachfrist*); (4) due to essentiality of in-time performance, delay frustrates the common purpose of the contract.

According to Chinese Contract Law where the purpose of the contract is frustrated due to failure of the subject matter to meet the quality requirements, the buyer may reject the subject matter or terminate the contract[203]. But it should be apparent that non-conformity of goods that could justify the termination should be of fundamental extent. The quality and gravity of non-conformity should be as high as the importance of contractual purpose generally is.

XII. Uniform Law on International Sales Act

Under Uniform Law on International Sales Act[204] a breach of contract shall be regarded as fundamental, wherever the party in breach knew, or ought to have known at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects[205]. "The party in breach is deemed to expect the normal consequences of the breach, whether they actually expected them or not. [...] The party in breach can only be held liable for abnormal consequences where they have actual knowledge that the abnormal consequences might follow"[206].

The utmost interesting approach towards fundamentality of breach is envisaged by the Act in the context of delayed performance. Precisely, where failure to deliver the goods at the date fixed, does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to

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[202] *Chinese Contract Law*, Art. 94, <www.wipo.int/edocs/lexdocs/laws/en/cn/cn137en.pdf>.

[203] Art. 148 *Chinese Contract Law*, ibidem.

[204] Uniform Law on International Sales Act, 1967, Art. 10.

[205] I. Carr, M. Goldby, *International Trade Law Statutes and Conventions,* 2013–2015, 3rd ed., Routledge, London – New York 2014, p. 105.

[206] G. Slapper, D. Kelly, *The English Legal System*, 16th ed., 2015–2016, Routledge, London – New York 2015, p. 265.

require performance of the contract by the seller[207]. The buyer may, however, grant the seller an additional period of time of reasonable length. Failure to deliver within this period shall amount to a fundamental breach of the contract[208]. Unsuccessful lapse of additional period fixed for performance, transforms breach into fundamental one and this forms another essential criterion for legal essence of fundamental breach. The Act refers to the concept of fundamental breach in other contexts as well: where failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract, and failure to deliver the goods at the date fixed would also amount to a fundamental breach, the buyer may either require performance of the contract by the seller or declare the contract avoided[209].

XIII. Interpretation of Georgian concept of significant breach

1. General perspective

GCC does not envisage the term "fundamental breach" itself, but stipulates insignificant/significant non-performance and substantiality/essentiality of breach. This chapter analyzes the way the Georgian concept of significant breach is construed, what impact the fundamental breach conception has on it and how it interacts with the mechanism of contract avoidance.

One of the recent court decisions of Georgian Supreme Court provides general interpretation of significant breach. In this decision the court established the criterion for assessment of substantial non-performance: "Generally, breach of contract is considered to be significant when it negatively impacts on the result to which party was entitled and the one it expected to receive upon performance of the contract"[210]. Silence of Georgian legislation on definition of significant breach is filled with court interpretation that is essentially similar to fundamental breach conception[211]. In legal doctrine, it is acknowledged that significant breach is at hand when it is impossible to use already completed performance for predetermined purpose[212].

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[207] Uniform Law on International Sales Act, 1967, Art. 27 (1), <http://www.legislation.gov.uk/ukpga/1967/45>.

[208] I. Carr, M. Goldby, op. cit., p. 108; Hadley & Anor v Baxendale & Ors [1854] EWHC Exch J70 (23 February 1854), England and Wales High Court (Exchequer Court) Decisions, <http://www.bailii.org/ew/cases/EWHC/Exch/1854/J70.html>; P. Schlechtriem, *The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe*, 2002, <http:/ouclf.iuscomp.org/articles/schlechtriem2.shtml>.

[209] Uniform Law on International Sales Act, 1967, Art. 30 (1) in I. Carr, M. Goldby, op. cit., p. 108.

[210] Decision of 18.12.2015 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case No. AS-1019-962-2015, <http://prg.supremecourt.ge/DetailView-Civil.aspx>.

[211] See DCFR Art. 305 (2) (a), CISG Art. 25, PICC Art. 7.3.1 (2) (a)-(e), etc.

[212] B. Zoidze, L. Chanturia, T. Ninidze, R. Shengelia, J. Khetsuriani (eds.), *Commentary on Georgian Civil Code of Georgia*, Book III, Tbilisi 2001, p. 441.

Generally, a breach is material, it is substantial (not trivial) if it involves a serious matter[213]. The essence of significant breach should be analyzed in lieu of circumstances due to which injured party loses interest in fulfilling the contract. Analysis one of the Georgian Supreme Court decisions reveals considerable similarities to the subjective element of fundamental breach: "Subjective element indicates at party's approach to his breach: *the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.* Even this subjective element can be proved in combination with objective criterion: [...] *and a reasonable person of the same kind in the same circumstances would not have foreseen such a result*"[214]. Georgian Court states that placing contractual responsibility on the party for the breach of obligation not deriving[215] from the contract[216] contradicts the principle that a civil right shall be exercised lawfully and according to good faith[217]. The contractual breach is at hand when non-fulfilled obligation can be regarded as such from interpreting essence of the contract[218].

Subjective element of fundamental breach introduces a greater requirement than simply the acknowledgement that is stipulated in the contract. It also means that may be the quality of the goods and specific requirements have not been directly stipulated in the agreement, but nor should specific quality be an implied term so that party could anticipate them. Thus, a fundamental breach requires more than a failure of a party to perform a contractual obligation, whether from the terms of the contract itself or from the default rules[219].

GCC establishes a particular hierarchy in the system of remedies and indicates that priority should be given to the performance in additional time fixed by the creditor. In this regard Georgian law follows the approach of German[220] and Dutch[221] civil regulation. According to GCC if one of the parties to a bilateral transaction breaches an obligation arising from the contract, then the other party to the agreement may repudiate the contract after the unavailing lapse of an additional period of time fixed by him for performance of the obligation. If, proceeding from

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213 N. Andrews, *Contract Rules...*, p. 300.

214 R. Folsom, M. Gordon, M. V. Alstine, M. Ramsey, op. cit., p. 102.

215 Directly or in an implied manner.

216 About inadmissibility of granting party a right not derived from the contract see: Decision of 10.06.2016 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case No. AS-343-328-2016, <http://prg.supremecourt.ge/DetailViewCivil.aspx>.

217 Decision of 14.02.2014 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case No. AS-935-893-2013, <http://prg.supremecourt.ge/DetailViewCivil.aspx>.

218 G. Vashakidze, *The Law of Remedies for Non-Performance of Contractual Obligations – Leistungsstörungsrecht*, GTZ 2010, No. 39 [in Georgian].

219 R. Folsom, M. Gordon, M. V. Alstine, M. Ramsey, op. cit., p. 102.

220 § 323 (1).

221 New Netherlands Civil Code – Art. 625 (2), Translated by P.P.C. Haanappel, E. Mackaay, under the Auspices of the Ministry of Justice of the Netherlands, Quebec Centre of Private and Comparative Law, Kluwer Law and Taxation Publishers, Boston.

the nature of the breach of obligation, an additional period of time for performance is not afforded to the breaching party, then a warning shall be equivalent to the fixing of an additional period of time. If the obligation has been breached only in part, then the obligee may repudiate the contract only if the performance of the remaining part of the obligation is no longer of interest to him[222]. Accordingly, in the hierarchy of remedies claiming additional performance the first priority is given to the one that is enacted by foundation of the breach[223]. It should be stressed that GCC contains combination of *nachfrist* and significant breach conceptions. While not stipulating the fundamental breach with this terminology as a prerequisite, it still declares termination inadmissible if the breach is insignificant. This means that expiration of the additional period does not allow a contractual breach; as it is not significant enough to be a sufficient foundation for contract avoidance[224]. Therefore Article 405 (1) should be analyzed with its counterpart – Article 405 (3) (a) which sets general requirement to contract repudiation: *the contract may not be avoided if: a. the breach of the obligation is insignificant* [not material].

Accordingly, the contract may not be repudiated if the breach of the obligation is insignificant[225]. On the basis of systemic analysis of corresponding stipulations of GCC, significance of the breach is given the essence of general precondition. That means that, even if the obligor is granted additional time for performance and all other prerequisites are at hand, the avoidance is not permissible when breach is of minor importance or "insignificant"[226].

Quite different from Georgian law in German model more accent is made on fixing additional period of time, and "significance" of breach is examined by whether it is cured in additional time or not[227]. The concept of *nachfrist* takes a predominant position in BGB, it is an imperative milestone of contract avoidance of German law and therefore, this term is widely used in scientific doctrine in other legal models to express the conception of assignment of additional time.

2. The concept of significant breach in particular types and instances of non-performance

The concept of significant breach gains specific content in particular types of breach of contract. Its essence can be identified in the context of pre-contractual[228]

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[222] GCC Art. 405 (1).

[223] GCC Art. 405 (1).

[224] Similar regulation see CISG Art. 49 (1) (b) together with Art. 64 (1). See L.A. DiMatteo, *International Sales Law...*, p. 381.

[225] GCC Art. 405 (3) (a).

[226] Compare GCC Art. 405 (3) (a) with BGB § 323 (5) (2).

[227] L.A. DiMatteo, *International Sales Law...*, p. 385.

[228] For example, breach of good faith principle by not informing the other party about essential facts in difference from English and Scotland Law. See D. Kereselidze, *The Most General Systemic Concepts of Private Law*, Tbilisi 2009, p. 90 [in Georgian].

and protective duties not related to contract performance[229]. Still, significant breach is established as general precondition for all types of non-performance[230], a legal fact[231] that gives rise to creditor's right of avoidance stipulated by law.

2.1. Delay of performance

Late delivery of the goods by the seller may be deemed as a fundamental breach of contract only if specific requirements are fulfilled. In principle, mere delay does not give rise to a right of avoidance under CISG[232]. Sometimes importance of the timely delivery is implied in the essence of the obligation itself. For example, in doctrine it is discussed that the fixed-date nature can also arise if seasonal goods are sold and not delivered on time[233]. However, a right of avoidance may arise if it can be deduced from the contract that the buyer has a particular interest in the delivery taking place on a particular date[234]. In this case, due to essential importance of timely delivery, the general precondition about significance of breach has already been met[235]; so that the common requirement of significance maintains its importance towards any type of contractual non-performance for contract avoidance purposes.

According to GCC fixing an additional period of time or issuing a warning is not required when: the obligation has not been performed within the time period fixed under the contract, and the creditor has tied in the contract the continuation of the relation to the timely performance of the obligation [i.e. stipulated or implied that time is of the essence][236]. In international practice court decisions have held that exceeding the delivery date can only be a fundamental breach when "the buyer prefers not to receive the delivery at all than receiving delayed delivery"[237].

2.2. Defective performance

GCC stipulates that the seller must transfer to the buyer the object of the sale free of material defects or defects of rights[238]. This is considered to be the most basic and fundamental obligation of the seller[239]. Code also contains the criteria according to which the conformity of the goods are evaluated. Precisely, if the quality is not agreed than it is a subject to interpretation and predetermined purpose of use by the parties in the contract is taken into account when determining conformity[240].

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229 M. Macharadze, op. cit., p. 56.
230 Ibidem, p. 128.
231 A. Pipia, op. cit., p. 77 [in Georgian].
232 CISG Art. 49 (1) (a).
233 L.A. DiMatteo, *International Sales Law*..., p. 382, with further notes.
234 Ibidem, p. 381.
235 M. Macharadze, op. cit., p. 129.
236 GCC Art. 405 (2) (b).
237 L.A. DiMatteo, *International Sales Law*.... p. 381.
238 GCC Art. 487, duty to transfer a thing without defects.
239 See D. Saidov, op. cit., p. 202.
240 GCC Art. 488, A thing is without material defects if it is of the agreed quality. If the quality is not agreed in advance then the thing shall be deemed without defect if it is suitable for the use stipulated in the contract or for ordinary use.

The requirement of essentiality of defect is considered to be a precondition of the right of avoidance[241]. The main criteria that differentiate the applicability of contract avoidance and price reduction are the significance and essentiality of the breach[242].

Important similarity with the concept of fundamental breach is revealed by the analysis of GCC, namely Article 465[243] which states: (1) If the buyer is an entrepreneur, he is obliged to inspect the good immediately; if after detecting the defect he fails to assert a complaint against the seller within an appropriate[244] period of time, or within the period of time during which he ought to have known of the defect, then he shall be deprived of the right to complain on the grounds of the defect of the good. (2) If the seller intentionally kept silent about the defect of the thing, he may not enjoy the right provided for in this Article[245].

The question is whether, if taking the abovementioned provisions into account, it can be asserted that intentional breach is always fundamental. It can be asserted that intentional breach may be estimated as fundamental provided that it meets the rest of the prerequisites necessary for foundation of this conception. But GCC Article 465 (2) definitely means that when the seller intentionally keeps silent about the defect of the thing, he believes that goods would not be acceptable for the buyer, i.e. he acknowledges the loss of the contractual performance interest by the other party. This characteristic, considered to be a precondition of fundamental breach[246] in legal doctrine[247] and legislation, is evidently comprised in GCC above-mentioned provision.

Taking this consideration into account, it may be concluded that GCC comprises fundamental breach conception in the context of defective performance. Just as a foreseeability criterion can be identified in the context of fundamental breach the foreseeability principle is excluded as precondition for remuneration of damages[248].

2.3. Partial performance

Creditor's contractual interest in future performance, as one of the essential criterion of fundamental breach, determines the existence of the right of avoidance

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241 See GCC Art. 644 with reference to Art. 405.

242 V. Bachiashvili, *Rights of Specific Performance, Contract Avoidance and Price Reduction in Sales Contract (According to Georgian and German Law)*, "Georgian Law Review, Special Edition" 2008, p. 181.

243 Acceptance of a Defective good by the Buyer.

244 Time which may be considered reasonable in the given case or period which is stipulated by the contract.

245 BGH vom 24.03.2006, V ZR 173/05.

246 Element of fundamental breach is the following: „lessor or the supplier had reasonable grounds to believe that goods would be acceptable with or without money allowance to lessee" – U.C.C. § 2A-513(1) (U.C.C. § 2A-513 Cure by Lessor of Improper Tender or Delivery, Replacement).

247 S. B. Markesinis, H. Unberath, A. Johnston, op. cit., p. 428.

248 S. Machaladze, *Compensation of Damages caused by Breach of Contract*, Analysis of Georgian and German Legislation, "Georgian Law Review, Special Edition" 2004, p. 624 [in Georgian].

when partial performance is at hand. Particularly, as stated in GCC: if the obligation has been breached only in part, then the obligee may repudiate the contract only if the performance of the remaining part of the obligation is no longer of interest to him[249]. Therefore, despite the fact that GCC does not envisage the term and concept of fundamental breach as such, it establishes similar assessment tool for justifying the avoidance[250]. Namely, essential is a partial non-performance if it fundamentally affects performance in general[251].

Delay of the obligation to take delivery, e.g. accept performance is not considered to be a breach of contract under GCC. However, the German court held that a seller was justified in declaring avoidance where the buyer only accepted delivery of 83.4 tons of frozen bacon instead of 200 tons purchased[252]. One can assume that a breach of the obligation to take delivery can amount to a fundamental breach if, for example, the seller has a particular interest in the timely clearing of his storage facilities[253].

It also should be underlined that not only breach of the main obligation can be regarded as fundamental, but non-performance of an auxiliary obligation can also be interpreted as significant in terms of authorizing party with the right of avoidance. This is true as very often the role of auxiliary obligation is too important for performance of main contractual duties[254].

2.4. Impossibility of performance

Impossibility of performance without having perspective to perform in additional time accounts for fundamental breach and justifies the avoidance of the contract[255]. In this case avoidance of the contract is considered to be a means of self-defense[256]. The ineffectuality of fixing additional time for contract performance in case of impossibility is stipulated in GCC Art. 405 (2) (a), according to which fixing an additional period of time or a warning notice is not required (for contract avoidance) when it is obvious that it will yield no results[257]. Non-performance which cannot be resolved in additional time obviously amounts to fundamental breach.

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[249] S.B. Markesinis, H. Unberath, A. Johnston, op. cit., p. 422. On the issue of contract avoidance in case of partial performance, see G.H. Treitel, op. cit., p. 676.

[250] Art. 405 (1).

[251] See GCC Art. 488 (2): The following are equivalent to defects: if the seller transfers only one part of the thing or an entirely different thing, or he transfers it in insufficient quantity, or if one part of the thing is defective, except for such cases where the defect will not materially affect the performance of the thing.

[252] OLG Hamm, September 22, 1992, 19 U 97/91.

[253] L.A. DiMatteo, *International Sales Law...*, p. 382, with further notes.

[254] H. Bioling, P. Lutringhous, L. Shatberashvili, *Systemic Analysis of Particular Grounds of Request of Georgian Civil Code*, Bremen, Tbilisi, 2005, 183 [in Georgian].

[255] See BGB § 326 (5), GCC Art. 405 (2) (a).

[256] M. Macharadze, op. cit., p. 138.

[257] GCC Art. 405 (2) (a).

2.5. Breach of duty of diligence

"The principle of acting towards the participant of legal relationship in good-faith, as well as diligence and taking counter party's rights and interests into consideration, is considered to be a milestone of the civil turnover. This is acknowledged by GCC Article 8 (3): "participants in a legal relationship shall be bound to exercise their rights and duties in good faith"[258]. "With its legal essence, a corporation, to some extent, can be regarded as an obligation-legal category based on contractual relationship. Accordingly, defense of rights of its participants should be considered as a central obligation of the parties"[259]. "Transaction by foundation of a corporation, establishes duty of respect to other participants' rights and obligations and its execution in good faith"[260]. As a consequence, the breach of the above-mentioned obligation encompasses legal sanctions[261] in Corporate Law. Though breach of duty of diligence is not expressly stipulated by Georgian Contract Law as an independent type of non-performance it may, still, be asserted to be as such through interpretation of the provision regulating excluding grounds of avoidance. GCC envisages the parties' general obligation of diligence, which may be regarded as an expression of good faith principle in law of obligations. Precisely, with regard to its content and nature, an obligation may bind each party to act with extraordinary diligence with regard to the rights and property of the other party[262].

According to GCC the contract may not be avoided if: the requirements of paragraph (2) of Article 316 [duty of diligence] have been violated and, in spite of that, the obligee may be required to leave the contract in force[263]. This Article should be analyzed in connection with the previous provision[264] which declares the termination inadmissible in case of insignificant breach[265]. Accordingly, it may be asserted that the situation where creditor may be required to maintain the contract can only be the instance where termination would be unreasonable in terms of its minor significance. From this interpretation the following conclusion can be drown: even if termination due to breach of duty of diligence is not justified in case of minor gravity of the breach, avoidance should be permissible if the breach reaches considerable, essential degree. In this case the formula: termination upon non-performance of duty of diligence will exist and this will, again, be conditional on fundamental, essential nature of the breach.

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[258] I. Burduli, *The Commitment Obligation – Scale of Action of the Majority and the Minority within Corporate Law*, No. 4 (35')12, p. 50.

[259] Ibidem.

[260] Ibidem, p. 51.

[261] Ibidem.

[262] GCC Art. 316 (2).

[263] GCC Art. 405 (3) (a).

[264] Ibidem.

[265] According to GCC Art. 405 (3) (a) the contract may not be avoided if: the breach of the obligation is insignificant.

In one of its decisions[266] Georgian Supreme Court, through interpretation of the contract, evaluated party's main interest as an expectation that constitutes motivation for him to conclude the contract. Accordingly, non-performance of the counter obligation by the other party that impacts the former party's contractual expectation was considered by the court to be an "essential breach". With this interpretation court established the term "essential breach", the essence of which can be defined as non-performance depriving the party from main contractual interest. This served as a ground for contract formation for him and importance of this interest was acknowledgeable for the other party. In this decision depreciation from the main contractual interest is evaluated to be the "essential breach" conception. This is closely related to the non-performance of the essential condition of the contract, directly stipulated or implied. According to GCC[267], circumstances that might influence the decision of the insurer to repudiate the contract or to conclude it on altered terms shall be deemed essential and material. Essential is the term which impacts on party's reasonable motive to stay in the contract. Accordingly, change or breach of such circumstances may deemed to be an essential breach.

According to GCC[268], goods are not considered to be defective[269] if the defect will not materially or essentially affect the performance of the contract. In this case gravity of the impact on performance is considered to be a determinative criterion. In this regard GCC comes close to the concept of fundamental breach, where the result of non-performance is, basically, taken into consideration[270]. The main emphasis is put by the CISG on the result of non-performance to the injured party[271].

According to GCC term of the contract is regarded to be essential, agreement on which is a precondition for contract formation and its validity[272]. This entails conclusion that performance of that condition forms the essential motive for party to enter the agreement. By receiving performance from the counter-party of the essential term, party achieves realization of its main contractual interest.

2.6. Anticipatory breach

GCC stipulates the concept of anticipatory breach[273] not as a separate type of non-performance but a concept that may be attributable to any kind of contractual

[266] Decision of 1.11.2013 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case No. AS-223-215-2013, <http://prg.supremecourt.ge/DetailViewCivil.aspx>.

[267] GCC Art. 808 (1).

[268] GCC Art. 488 (2).

[269] With the sense of the breach of contract.

[270] „The importance of the breach is not determinative; only the consequences of the breach to the damaged party are determinative", see: Bundesgericht (Switzerland), 15 September 2000, CISG-online 770, Neumayer/Ming, op. cit., n. 3 ad Art. 25 CISG cited in: I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 173.

[271] CISG Art. 25: [...] a breach of contract committed by one of the parties is fundamental if it *results in*...

[272] See GCC Art. 327 (1).

[273] GCC comprises only conception but not the term of anticipatory breach itself.

deviation. The obligee is entitled to avoid the contract prior to the date when [the obligor's] performance is due, if it is obvious that grounds for avoidance will occur[274]. This provision itself does not directly indicate any substantiality of future non-performance but this requirement is implied in its essence. "Under grounds of avoidance", in particular, all requirements, including essentiality requirement of breach stipulated by GCC, are incorporated. Accordingly, essentiality of future breach, like instances of typical non-performance, still remains to be a precondition of avoidance of the contract in cases before performance becomes due.

Another, a rather specific provision stipulating concept of anticipatory breach is included in the GCC provisions regulating sales contract. Precisely, each party to the contract may refuse to perform its obligations if it turns out after execution of the contract that there is a real danger of non-performance by the other party of a *significant part* of its obligations[275]. In this case Georgian law considers future non-performance of significant part of obligation as substantial ground for contract termination. Partial non-performance which constitutes to significant part may be regarded as substantial non-performance. In theory "»fundamental« denotes the very essence of a thing, whilst »substantial« is of lesser importance, meaning of considerable amount or intensity"[276]. This Article should be analyzed with its counterpart provision envisaged in general part of law of obligations[277]. This general provision states that if the obligation has been breached only in part, then the obligee may avoid the contract only if the performance of the remaining part of the obligation is no longer of interest to him[278]. Accordingly, non-performance of significant part of the obligation may be interpreted as such deviation which substantially frustrates party's contractual expectations and interest[279]. For example, a German court held that a seller was justified in declaring avoidance where the buyer only accepted delivery of 83.4 tons of frozen bacon instead of 200 tons purchased[280]. It was discussed above that in German court practice insignificance has been accepted where the breach impaired 5% or less of the value of the good[281].

Discussion above makes it clear that essentiality of non-performance is underlined in both provisions of GCC regulating anticipatory breach. Fixing additional time

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274 GCC Art. 405 (4).

275 GCC Art. 484 (1); CISG, Anticipatory Breach, Art. 73 (2). See also, R. Folsom, M. Gordon, M.V. Alstine, M. Ramsey, op. cit., p. 104.

276 D. Peacock, op. cit., p. 46.

277 GCC Art. 405 (1).

278 On this issue see *Principles of the Existing EC Contract Law (Acquis Principles), Contract II, General Provisions, Delivery of Goods, Package Travel and Payment Services*, Research Group on the Existing EC Private Law (Acquis Group), "European Law Publishers" 2009, p. 373.

279 See also GCC 405 (1).

280 OLG Hamm, 22 September, 1992, 19 U 97/91.

281 BGH 14 September 2005, NJW 2005, 3490 (1 per cent); LG Düsseldorf 27 February 2004, NJW-RR 2004, 1060 (2–3 per cent); LG Kiel 3 November 2004, MDR 2005, 384 (4.5 per cent) cited in G. Dannemann, S. Vogenauer, op. cit., p. 662. See also, L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 484; V. Bachiashvili, op. cit., p. 182.

is definitely senseless in the situation when party refuses to perform in the future. Accordingly, for justification of the avoidance the whole emphasis is put on the significant nature of upcoming breach. In case of anticipatory non-performance *nachfrist* procedure, which could transform the breach into fundamental one, quite naturally cannot be applicable. Therefore, the only requirement is essentiality of future breach that should be proved to justify avoidance. As a result, importance of "substantiality" requirement is significantly increased in the context of anticipatory breach.

In case of already established impossibility a party may avoid the contract if he/she proves that fixing additional time is useless[282]. It may be asserted that the same logic could be applicable in the context of anticipatory breach. This means that when there is predictable future impossibility threatening performance, avoiding party should claim that even if he/she waited until due date of performance, he would not be able to overcome impediments and impossibility would occur anyway. In this case high standard of burden of proof is required to certify that party's future inability to perform is profoundly apparent.

Despite the fact GCC is silent about this matter, it may be concluded that Artice 405 (2) (a) should be applicable in case of anticipatory impossibility in order to determine the required content and extent of burden of proof.

It is justifiable and reasonable that the law declares preliminary avoidance of the contract[283] conditional upon future breach of significant part of contract, as both parties have legitimate interests that require careful examination for maintaining contractual balance. Creditor has a reasonable interest to prevent anticipating breach and loss of expected contractual interest; also to seek another performance outside the contract. The obligor has a well-grounded right to have possibility of performance before time for performance stipulated by contract lapses. Moreover, it is the obligor's legitimate right that is stipulated by law and not only reasonable interest[284].

BGB envisages the utmost interesting provision on anticipatory breach: (1) A person bound by a synallagmatic contract to perform first may refuse to perform his part, if after conclusion of the contract it becomes apparent that his claim for counter-performance is endangered by the other party's lack of ability to perform. The right to refuse to perform ceases, if counter-performance is effected or security provided for it. 2) The person required to perform first may specify a reasonable period within which the other party must, at his option, effect counter-performance or provide security concurrently with performance. If the period expires to no avail the person required to perform first may withdraw from the contract[285].

[282] GCC Art. 405 (2) (a).

[283] Before performance is due.

[284] GCC Art. 364 states: The obligor may perform the obligation earlier than the due date, unless the obligee refuses to accept the performance for a valid reason.

[285] BGB § 321 (1) (2).

Interpretation of this Article means that provision of security can be regarded as substitutive institute of *nachfrist* which becomes a powerful tool in the hands of the obligor to discard the probability of future breach occurrence. Not identical but relevantly similar articles can be found in GCC: 1. Each party to the contract may refuse to perform its obligations if it turns out after execution of the contract that there is a real danger of non-performance by the other party of a significant part of its obligations. 2. Such refusal shall not be allowed if the safety [performance] of this party is secured[286]. Whether this "security" can be regarded as having similar meaning to §321 in BGB is a matter of interpretation. Moreover, GCC does not directly envisage possibility of giving additional time for issuing that security. That is a significant difference between GCC and BGB Articles. Another provision in GCC can also be taken into account: if for the performance of an obligation some period of time is fixed in favor of the obligor, then the obligee may claim performance immediately in the case when the obligor has become insolvent, has reduced the promised security or has failed to submit it at all[287]. It may be asserted that in this Article the emphasis is on the reduction of security which was agreed at the beginning of contractual relationship. In this Article it is hard and almost impossible to identify that the legislator wanted to regulate the situation when party would reduce or would not submit security that was agreed in additional time given to the obligor.

CISG envisages that, if time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance[288]. PECL[289], more imperatively, stipulates the obligation of the party to fix additional period of time for presenting the security of performance that can be regarded as a substitutive of *nachfrist.* The concept of security of performance is not endowed with the same importance in Georgian law as it is in BGB, CISG or PECL. Therefore, major focus is made on the significance of anticipatory breach warranting performance rather than submitting security of performance in additional time. Finally, abovementioned discussion entails conclusion that in the context of anticipatory breach Georgian model is more oriented on the fundamentality of threatening non-performance which justifies avoidance without fixing additional time.

3. Excluding grounds of additional time for performance and similarity with fundamental breach

GCC envisages excluding grounds of specific performance in additional time[290]. In this paper it has already been argued that *nachfrist* in Civil Law system serves the function of transformation of non-performance into material and funda-

[286] GCC Art. 484 (1) (2).
[287] GCC Art. 367.
[288] CISG Art. 72 (2).
[289] PECL Art. 8:105.
[290] GCC Art.405 (2) (a)-(c).

mental breach. This idea can also be supported with the following argumentation: grounds excluding obligation of fixing additional time reveal substantial similarity to assessment criteria of fundamental breach. The similarity is as follows: according to GCC fixing an additional period of time or a warning notice is not required when: a) it is obvious that it will cause no results.[291]. This is a broader provision compared with German analogue conception stipulated in BGB[292] stating that the setting of a period of time can be dispensed with, if the obligor seriously and definitely refuses performance. It should be pointed out that Georgian corresponding provision exceeds the scope of BGB mentioned provision and comprises two possible instances: first, when the obligor refuses to perform and the second, the impossibility of performance. In both cases it is evidenced that contract performance may not have prospect of application and avoidance can be claimed.

Discussed excluding ground of additional performance reveals great similarity with PICC criteria of fundamental breach. Namely, PICC considers a non-performance to be fundamental if it is intentional or reckless[293] or the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance[294]. Similarity with GCC provision is apparent in the fact that when non-performance is "intentional or reckless" or that there is a high level of probability that additional performance will not take place, it is obvious that it will yield no results in additional time[295]. Accordingly, Article 405 (2) (A) of GCC, being an excluding ground of additional performance with its legal nature, can be regarded as a prerequisite of fundamental breach as well.

Another similarity with fundamental breach is evident in another excluding ground of additional performance stipulated by GCC[296]: the obligation has not been performed within the time period fixed under the contract, and the creditor has tied in the contract the continuation of the relation to the timely performance of the obligation [i.e. stipulated/implied that time is of the essence]. Counterparts of this provision can be found in PICC: fundamental breach is at hand when: (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result; (b) strict compliance with the obligation which has not been performed is of essence under the contract[297]. The connection between Georgian and PICC Articles can be made through this argumentation: when timely performance is an essential interest of the party[298], than strict compliance with the

[291] GCC Art. 405 (2) (a).
[292] BGB § 323 (2.1).
[293] PICC Art. 7.3.1 (2) (c).
[294] PICC Art. 7.3.1 (2) (d).
[295] GCC Art. 405 (2) (a).
[296] GCC Art. 405 (2) (b).
[297] PICC 7.3.1. (2) (a) (b).
[298] GCC Art. 405 (2) (b).

obligation is required[299]. And when essential condition which constitutes party's utmost interest, like timely performance, is not fulfilled, then the non-performance substantially deprives the aggrieved party of what it was entitled under the contract[300]. As for the criteria stipulated in PICC: "unless the other party did not foresee and could not reasonably have foreseen such result", it is also reflected in GCC: if creditor has tied in the contract the continuation of the relation to the timely performance of the obligation than main contractual interest – timely performance is likely to be stipulated directly or implied in the contract. Accordingly, the party could have foreseen that strict adherence to the contract formed main contractual expectation for the counter party. In this way another criteria of fundamental breach is met: "unless the other party did not foresee and could not reasonably have foreseen such result".

One more resemblance with fundamental breach should be analyzed below. GCC considers that proceeding from specific grounds and taking into account the mutual interests of the parties, the immediate termination of the contract is justified[301]. This Article is reasoned by principles of cost and time efficiency, "procedural economy" and goal of prevention substantial damages to the parties. Permissibility of contract avoidance is interrelated with the parties' counter contractual interests. Inspired by the same goal, PICC Article considers breach to be fundamental and sufficient precondition for termination if the non-performing party will suffer disproportionate loss as a result of the preparation or performance of the contract is terminated[302]. This Article is oriented on protection of the interest of non-conforming party, which may suffer from execution of the contract, which would be unreasonable burden in comparison with creditor's general right to have contract avoided. In this case the idea of maintaining balance between parties' contractual interests is ascertained. In this regard GCC envisages even broader discretion for courts to determine whether breach is substantial enough in terms of future anticipated losses and all other negative effects for the involved parties that could justify the immediate termination. By granting power to the courts to determine the existence of significant, I would say fundamental breach reveals similarity of Georgian approach with Common Law system where judge holds predominant power in this regard.

Whether in a case of non-performance by one party the other party should have the right to terminate the contract depends upon the weighing of a number of considerations[303]. The following criteria are: whether (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have forese-

299 PICC 7.3.1. (2) (b).
300 PICC 7.3.1. (2) (a).
301 GCC 405 (2) (c).
302 PICC Art. 7.3.1 (2) (e).
303 UNIDROIT Principles of International Commercial Contracts, International Institute for the Unification of Private Law, Rome 2004, p. 221.

en such result; (b) strict compliance with the obligation which has not been performed is of essence under the contract; (c) the non-performance is intentional[304] or reckless; (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance; (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated[305].

Based on the above-mentioned arguments it should be concluded that grounds excluding fixing time for additional performance[306] constitute themselves to be prerequisites of fundamental breach. It means that fixing additional time in order to see whether breach is cured by performance or fundamental breach is established is not necessary in the case when fundamentality of performance is already at hand. Legal grounds stated in GCC Article 405 (2) (a)-(c) can be interpreted as prerequisites constituting the fundamental breach and therefore fixing additional time is not required.

The abovementioned grounds excluding the obligation of fixing additional time for performance can be interpreted as substitution of fundamental breach conception in Georgian Contract Law, as these grounds justify termination of contract without *Nachfrist* and serve to consider breach significant and essential – fundamental enough for immediate avoidance.

XIV. Conclusion

The remedy of termination is a powerful remedy which serves the contractual security of the creditor faced with a fundamental non-performance by the debtor. However, the powerful nature of the remedy is also a threat to the debtor's contractual safety and, at least potentially and contrary to the idea of maintaining contractual relationships whenever possible, termination will often leave the debtor with a loss (for example, wasted costs incurred in preparing to perform; or loss caused by a change in the market, etc.). The rules governing termination in many legal systems, therefore, restrict termination of the cases in which the creditor's interests will be seriously affected[307] by the fundamental non-performance.

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[304] On interrelation of fundamental breach and fault category, also whether fundamental breach is a rule of law or a construction, see S.J. Beatson, A. Burrows, J. Cartwright, op. cit., p. 202; A. Burrows, *Principles of the English Law...*, p. 34; J. Poole, *Textbook on Contract Law*, p. 252–254; R. Taylor, D. Taylor, op. cit., p. 128–131; E. Macdonald in: L. DiMatteo, M. Hogg, *Comparative Contract Law...*

[305] PICC Art. 7.3.1 (2) (a)-(e) – Right to Terminate the Contract.

[306] GCC Art.405 (2) (a)-(c).

[307] Ch. Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, M. Storme, S. Swann, P. Varul, A. Vaneziano, F. Zoll (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference*, Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), Sellier, European Law Publishers GmbH, Munich 2009, p. 78.

Unrestricted application of termination threatens the principles of sanctity of contract, contractual freedom and legal stabilization. Different legal systems have implemented more or less diverse legal mechanisms for preventing such unreasonable results and the above-mentioned risks.

Inclusion of fundamental breach requirement in any legal system serves the goal of minimization of negative effects of contract breach for both parties as immediate termination may cause severe results, waste of unreasonable time, extra transportation and other expenses. Existence of fundamental breach is also justified by the principle of *Pacta sund servanda.*

Despite the fact that legal systems envisage different regimes for termination regulative approaches in Common and Civil Law, countries still reveal significant conceptual similarities in this regard. "In any case, a common feature of most legal systems is that a breach must acquire a certain degree of seriousness before avoidance by the non-breaching party may be justified[308]. Accordingly, all reviewed legal systems differentiate kind of breaches which justify termination and those which do not form enough ground for contract avoidance.

"The Common Law jurisdictions generally provide that termination requires a severe violation of contract. The breach must violate a condition which a reasonable party would regard as a fundamental of the contract. Under the Civil Law in particular any defect of the delivered goods entitles the buyer to terminate"[309] as far as breach is not of minor importance.

Comparative analysis of Civilian and Common law regulation makes it clear that, on one hand, Common Law system envisages immediate contract avoidance which is justified by fundamentality of breach. Therefore, Common Law system does not initially establish priority of additional time. But this system is oriented to balance contractual interests of both parties in every particular case by granting the court the right to determine the reasonability of avoidance. The judge weighs all relevant circumstances: costs of additional performance, creditor's contractual interest and perspective of its future realization, the expenses already incurred by the parties for performance of the contract, legal affects and possible severe results of termination for both parties including obligor, time necessary to carry out avoidance, etc.

On the other hand, in Civil Law System essentiality of breach is proved in additional time granted for secondary performance. Both systems have common goal but different mechanisms to prove extent and gravity of non-performance warranting termination. The CISG PICC, PECL and CESL apply the approach that termination requires a breach of considerable fundamentality, in order to avoid the waste transport and other costs that a termination of the contract often causes. As CISG is considered to be a bridge between Common and Civil law systems, it does not fully deny the *nachfrist* conception and stipulates it as a precondition of contract

[308] I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 171.
[309] L.A. DiMatteo, A. Janssen, U. Magnus, R. Schulze, op. cit., p. 497.

avoidance[310] in case of non-delivery of goods[311], while fundamentality of breach remains to be a central requirement in all other category of breaches.

Despite the fact that GCC envisages the concept of *nachfrist,* termination regime is considerably similar of fundamental breach category envisaged in PICC model. In legal doctrine it is asserted that PICC and New German Civil Code together with CISG oriented Laws: Scandinavian Sales Law, Dutch Wetboek, are based on the conception of fundamental breach[312]. Accordingly, classification of legal systems in two categories: following fundamental breach and *nachfrist* models, remains true almost only with regard to stipulating terminology.

Analysis of GCC model of termination contains significant features of fundamentality breach requirement, though it does not envisage the concept and terminology of fundamental non-performance as such. This solution merged with the requirement of fixing additional time provides rather balanced approach as it contains a fundamentality breach prerequisite and at the same time gives preference to the specific performance in additional time. This can be regarded as a distinctive and rather original feature of Georgian model of termination.

Accordingly, rather courageous conclusion can be made: by stipulating the combination of fundamental breach and *nachfrist* conceptions, GCC envisages rather distinctive and peculiar model of contract termination. This combination means that when breach is not fundamental at the initial starting point of breach fixing additional time is imperative. When non-performance amounts to fundamental breach which satisfies the requirements and prerequisites, stated in Article 405 (2) (b), then immediate termination of contract is justified. Ability of termination of contract without necessity of granting additional time is imminent legal nature of fundamental breach.

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[310] CISG Art. 49 (1) (b): (1) The buyer may declare the contract avoided: (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Art. 47 or declares that he will not deliver within the period so fixed.

[311] Requirement of additional time does not exist in case of defective or delayed performance.

[312] I. Schwenzer, Ch. Fountoulakis, M. Dimsey, op. cit., p. 171–172.

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Summary

Key words: termination, breach of contract, contract avoidance, significant breach, fundamental breach, legal remedy, specific performance

The present paper introduces Common and Civil Law conceptual divergences and similarities towards the legal regime of contract termination. Diverse legal mechanisms and remedial systems serve the same function of Contract Law – to prevent unreasonable avoidance of the agreement and loss of contractual balance between parties' counter interests; and, also, authorize party to abandon the agreement with no prospect of the application of contractual legitimate expectations. Unrestricted application of termination threatens the principles of sanctity of contract, contractual freedom and legal stabilization. Therefore different legal systems have implemented more or less different legal mechanisms for preventing such unreasonable results and the above-mentioned risks.

Legal systems do not grant the right of avoidance immediately after foundation of contractual breach, which is a material prerequisite of contract termination. Its application is depended on the familiar threshold: the non-performance has to reach determined extent of gravity.

Taking above-mentioned into consideration this article is devoted to analysis of fundamental breach category, its analogue conceptions in comparative legal context, as well as its interaction with the right of termination and impact on Georgian Contract Law. Investigation of Georgian Civil Code model of termination contains significant features of fundamental breach conception. This solution merged with the requirement of fixing additional time provides rather balanced approach as it contains a fundamentality breach prerequisite and at the same time gives preference to the specific performance in additional time. This can be regarded as a distinctive and rather original feature of Georgian model of termination regime.

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Prospects of development of parliamentary electoral system in Georgia

Historical development of electoral systems in Georgia

The history of development of electoral systems in Georgia dates back to 1918. After gaining independence "the Regulation of the Election of the Constituent Assembly"[1] was adopted on November 22, 1918, under which Regulation the members of the Founding Assembly were elected through equal, direct and secret balloting, according to proportional representation system. The question of lists was determined; specifically, the elections were held through voting for one of the published lists of candidates. The balloting was done via polling cards. It was prescribed that "Each polling card should contain one of the announced lists of candidates; no changes are allowed in this list, no candidate can be moved from one place to another. The card should bear the number of candidates list and the name of the organization representing the list concerned, provided that the name of the organization is annexed". Equal number of polling cards were to be made for each list of candidates.

It can be said, that Government opted for rather democratic solution not only for that period, but for current reality as well, specifically, the whole country constituted a single constituency and the supreme legislative body was to be formed through proportional electoral system with opened lists.

Proportional electoral system was acknowledged by the first Constitution of Georgia of 1921. Under Article 46 of this Constitution the Parliament of Georgia was elected on the basis of proportional electoral system. However this rule never came to effect due to occupation of Georgia by Russia within several days after its adoption. After regaining independence the first elections in Georgia were held in

[1] See Regulation of the Election of Founding Meeting of 22 November 1918, adopted by the National Council of Georgia and the Government of the Republic of Georgia, in: *Collection of Legal Acts of the Democratic Republic of Georgia 1918–1921*, compiled by E. Gurgenidze, Tbilisi 1990, pp. 85–109 [in Georgian].

1990. The establishment of the still operating mixed electoral system in Georgia dates back to that very period.

125 out of 250 deputies of the Supreme Council elected on October 28, 1990 were elected through proportional and 125 through majoritarian rule[2]. During the elections of October 11, 1992 75 of 235 deputies were elected from single-member constituencies on the basis of majoritarian electoral system and 150 deputies – from multi-member constituencies, through proportional system[3]. In this case different constituencies were allocated for majoritarian and for proportional elections. 10 large multi-member constituencies were created for proportional elections, where the number of population fluctuated between 230 000 and 250 000. According to proportional system each elector enjoyed 3 votes. The quotas were determined and the votes were counted at the level of large multi-member constituencies and the remaining votes were distributed at national level according to the rule of preference.

In Parliamentary elections of 1995 and 1999 85 of 235 deputies were elected according to majoritarian system in single-member constituencies and 150 – according to proportional system with one difference – unlike 1992 the elections were held with the unified party lists[4].

Since 2003 the number of the Members of the Parliament was limited to 150 what conditioned the change of the number of deputies, to be elected through the majoritarian rule in 2005 – 50 majoritarian deputies were to be elected instead of 75 and 19 multi-member constituencies were to be created instead of single-member constituencies for Parliamentary elections, where the constituencies would have been granted with different number of mandates: 5–5 for Tbilisi and Abkhazia and Adjara Autonomous Republics and 2 or 3 mandates for other constituencies, depending on the number of population. This rule was again changed in March 2008, before the Parliamentary elections and the Parliament was elected according to the old rule: 75 deputies through proportional rule in single-member constituencies[5] and 75 – according to majoritarian rule. The elections of 2008 and 2012 were again held according to mixed system.

Hence, during the period between 1995 and 2012 the Parliament of Georgia was elected through mixed system – majoritarian and proportional. The deputies subject to election according to majoritarian system were elected in single-member constituencies, which coincided with the boundaries of administrative-territorial units, irrespective of the number of population thereof, and proportional elections were held throughout the country on the basis of unified party lists.

[2] L. Tarkhnishvili, N. Chkheidze, N. Kvantrishvili, *History of Elections, Central Election Commission of Georgia*, Tbilisi 2008, p. 38 [in Georgian].

[3] Ibidem, p. 39.

[4] See ibidem, pp. 42–45.

[5] The first map depicts the constituencies of Georgia and the second one – those of Tbilisi and the number of registered electors therein. The constituencies coincide with administrative-territorial division and have different number of electors – from minimum 5000 electors to maximum 135 000 electors, what is an apparent violation of the equality principle of elections.

Constituencies for majoritarian electoral system

Since 1992 single-member constituencies have been used in Georgia for holding elections through majoritarian system, which constituencies are created not according to the number of population, but rather according to the administrative-territorial boundaries[6].

[6] Article 5 Law of the Republic of Georgia on State Government, 1992; Article 1 Organic Law of Georgia on the Elections of the Parliament of Georgia, 1995; Article 91 Election Code, 2001; Article 110 Election Code, 2011.

The Constitutional Court ruled unconstitutional such division of constituencies in 2015[7]. The Constitutional Court of Georgia deliberated on the protection of the equality of rights of the electorate based on the boundaries of the constituencies. The Court stated that current departure was so high, that resulted in disproportional and inadequate representation of Georgian citizens in the supreme representative body. It is practically impossible to ensure the absolutely equal "weight" of votes of the electorate in majoritarian elections, as there will always be the relatively small and large constituencies electing equal number of deputies. However, the Constitutional Court states, that the electoral geography and determination of constituencies has a major impact on the entire process of elections and the enjoyment of suffrage. Equality of votes and provision of the electorate with equal opportunities should be the main principle of determination of the electoral geography. Election law should aim at the determination of the boundaries of the constituencies in a manner as to ensure the equality of votes and adequate representation, meaning that the number of electors in constituencies should be equal as far as possible, to ensure the equal "weight" of votes to maximum practicable extent[8].

The introduction of the element of territorial representation should not result in explicit and unjustified misbalance of votes, the impact of the votes of the electors registered within territorial units should not be diminished in a manner as to essentially limit the participation of the citizens in the formation of the government.

As per the interpretation of the Constitutional Court of Georgia, based on the idea of public sovereignty, the mandatory requirement of the Constitution of Georgia is for each and every elector to have the equal opportunity to participate in (have impact on) the decision-making process of the government. Certain departure from the principle of the equality of votes may be reasonable when there are some urgent circumstances, or relevant constitutional grounds and not in any case, for ensuring the representation of any territorial unit. The Court also accounted for specific features of Georgia and other countries and stated that "Both administrative boundaries and geographical specificities, as well as other socially important criteria can be taken into account. In certain cases, based on the specificity of some region, it may become necessary to allow for moderate disproportion between the constituencies". However, any such regulation will be subject to constitutional review in the light of both suffrage and equality principle[9].

The Constitutional Court also deliberated about the threshold departure from equal suffrage and stated that according to 2002 Code of Good Practice in Electoral Matters of the Venice Commission the equality of voting power is one of the basic election principles, meaning that constituencies should be determined in a manner as

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[7] Judgement of the Constitutional Court of Georgia: *Citizens or Georgia – Ucha Nanuashvili and Micheil Sharashidze v. Parliament of Georgia*, № 1/3/547, 28 May 2015.

[8] Ibidem, Paragraph 22.

[9] Ibidem, Paragraph 24.

to provide for equal distribution of relevant mandates according to the number of electors. As the same time the maximum admissible departure from the distribution should seldom exceed 10% and never 15%, except in really exceptional circumstances (protection of the concentration of a specific national minority, a demographically weak administrative unit)[10].

It is said in the Opinion of Venice Commission on draft election code of Georgia that "The mixed electoral system chosen in Georgia, as such, is in line with international standards. However, it has hitherto not been possible to provide for constituencies of an approximately equal size in Georgia and, thus, to guarantee the equality of the vote within the framework of the mixed system. The Venice Commission and OSCE/ODIHR recommend that the electoral system for both parliamentary and local self-government elections be reviewed in order to ensure the equality of suffrage. The Parliament could consider the work of the Venice Commission on electoral systems, with a view to identifying an optimum relationship between genuine representation and stability of government, while respecting the principle of equal suffrage"[11]. The Venice Commission does not require total equalization of the number of population in constituencies. The amplitude, set thereby, fluctuates between 10–15%. At the same time, some exceptional cases are also envisaged, when the departure from set requirements is permissible[12].

Quite similar is the recommendation of the Venice Commission of 2010, which contains a slightly different position from the Constitutional Court Judgement. It says that departure from the established rule should not exceed 10%, maximum 15%, except for exceptional cases[13]. I.e. the Constitutional Court ruled for maximum 15% departure from the threshold even in exceptional cases, whilst the Venice Commission does not provide for a maximum departure in exceptional cases.

The reference to the principle of equality of votes is contained in the recommendations of the Organization for Security and Cooperation in Europe (OSCE), related to Georgian election law[14]. Paragraph 7.3 of 1990 OSCE Copenhagen Document requires for the signatory states to guarantee universal and equal suffrage[15].

Similar case was discussed by the United States Supreme Court and it explained, that geographical boundaries should not be of major importance upon determi-

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[10] Ibidem, Paragraph 25.

[11] Joint Opinion on the Draft Election Code of Georgia, Adopted by the Council for Democratic Elections at its 39th meeting (Venice, 15 December 2011) and by the Venice Commission at its 89th plenary session, CDL-AD(2011)043, Opinion No. 617/2011, Venice 2011, Paragraph 22.

[12] Code of Good Practice in Electoral Matters, Guidelines Explanatory Report, CDL-AD (2002)023rev, Venice 2002, Article 2,2 (15).

[13] Joint Opinion on the Election Code of Georgia as amended through March 2010, Strasbourg – Warsaw, 9 June 2010, Opinion No. 571/2010, p. 14.

[14] Judgement of the Constitutional Court of Georgia: *Citizens or Georgia – Ucha Nanuashvili and Micheil Sharashidze v. Parliament of Georgia*, № 1/3/547, 28 May 2015. Paragraph 25.

[15] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990.

nation of a constituency. The only substantive element of delimitation of a constituency should be the number of population. The main argument, supporting this idea, is that the legislators represent people and not trees or lands. They are elected by voters, not farms or cities or economic interests. As long as the country has a representative form of government, and the legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of country political system[16].

Accounting for the fact, that the overall number of electors registered in Georgia for 2014 self-government elections amounted to 3 429 748[17], and the number of deputies to be elected through majoritarian system is 73, it turns out, that about 47 000 electors should be electing one deputy and departure according to the standard, established by the Constitutional Court, can be maximum 10%, i.e. 4700 electors and in exceptional cases 15%, or 7000 electors.

Respectively, the question of changing the electoral systems or otherwise formation of constituencies became the topic of agenda. Due to this reason the boundaries of the constituencies were changed by the end of 2015[18] and as a result some constituencies, where the number of population coincided with the threshold set by the Constitutional Court, remained unchanged, some were divided and in the majority of constituencies, the boundaries were changed and the settlements, forming the part of the other municipalities were annexed thereto[19].

According to changes the departure from this number does not exceed 10% in 61 constituencies and 15% in 12 constituencies[20]. At the same time, according to Article 110^1 22 majoritarian constituencies are to be created within the boundaries of Tbilisi Municipality and Martkopi local majoritarian constituency of Gargabani Municipality, 2 – within Rustavi municipality, 3 – within Kutaisi Municipality and Terjola Municipality (Kvakhchiri, Chognari and Godogni), 3 – within Batumi and Kobuleti Municipalities (Khala, Chaisubani, Sachino, Chakvi and Tsikhisdziri). According to part 5 of Article 110 of the Election Code "Pursuant to CEC decree the majoritarian constituencies shall be created and their boundaries shall be defined according to his Article and Article 110^1 of this Law, in municipalities, where the

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[16] *Reynolds v. Sims*, 377 U.S. 533 (1964), Paragraph 562.

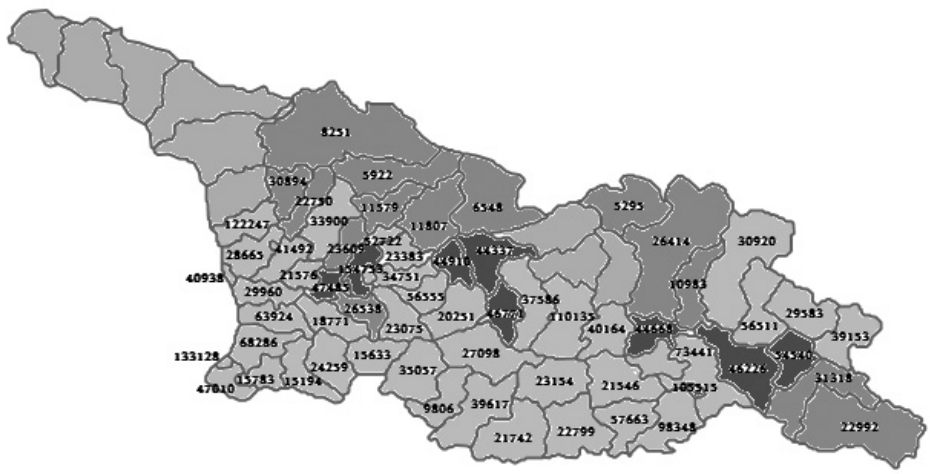
[17] Elections of local self-government representative body – Sakrebulo, Mayor of self-governing city and Gamgebeli of self-governing community of 15 June 2014 [online] <http://map.cec.gov.ge/>.

[18] The Law of Georgia of December 23 on Amendment of the Organic Law of Georgia "Election Code of Georgia".

[19] Brown color depicts amalgamated constituencies, the red one – divided, light-red – unchanged, and blue – divided and amalgamated with the other constituencies.

[20] The documents provided by the Parliament of Georgia, Appendix № 2. Also see these data in: Joint Opinion on Amendments to the Election Code of Georgia as of 8 January 2016, adopted by the Council of democratic Elections at its 54th Meeting (Venice, 10 March 2016) and by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), CDL-AD(2016)003, Opinion No. 834/2016, Strasbourg, 14 March, 2016, p. 5.

formation of two or more constituencies is planned, unless the boundaries of the majoritarian constituencies are defined by this Law". This means that in the above discussed four cases the legislator delegated the task of delimitation of constituencies upon CEC and did not provide for a general method of determination of the boundaries – the basic guidelines. It should be mentioned, that in this case the changes adopted by the legislator are rather risky; the Election Code does not offer the legal leverages, which guarantee the fair delimitation of the constituencies by CEC, abiding by the principle of equality of votes and minimization the risk of gerrymandering. It is inadmissible for the crucial issue, like delimitation of constituencies, not to be regulated by a legislative act.



It is a really a good progress that the boundaries of the constituencies on the whole territory of Georgia (except for Tbilisi) were defined by the Election Code, which is an Organic Law and it cannot by changed by the election commissions. However, it should as well be mentioned, that in Tbilisi, where 22 constituencies are to be created instead of 10 and some aforementioned self-governing cities (Rustavi, Kutaisi and Batumi) the right of delimitation of their boundaries was rested with the Central Election Commission[21]. Respectively, the jeopardy of electoral geography – frivolous division of constituencies, the so-called gerrymandering – is very high in these cities.

The jeopardy of electoral geography was discussed by the Constitutional Court of Georgia as well[22]. It admitted that "In general, there are risks in the administration of the elections that some political power may create a desirable electoral

[21] Article 110.5 Organic Law of Georgia "Election Code of Georgia".

[22] Judgement of the Constitutional Court of Georgia: *Citizens or Georgia – Ucha Nanuashvili and Micheil Sharashidze v. Parliament of Georgia*, № 1/3/547, 28 May 2015.

geography and set boundaries of the constituencies in a manner beneficial for some political subject. Of course, the legislator is required to create sufficient legal guarantees and prevent any possibility of such a manipulation. This jeopardy should be evaded through a medium proportional to the legitimate purpose. At the same time, the difference between the constituencies should not be more, than what is absolutely necessary for efficient administration of elections. A legislator is required to prevent any manipulation with the electoral boundaries and, on the other hand, should ensure for the electorate to have equal opportunities to influence the final outcomes of the elections".

With regard to amendments made to the Election Code on 14 March 2016 the joint opinion of the Venice Commission and OSCE was published[23], which is rather critical. According to this Opinion, the amendments do not provide a specific method for establishing constituencies within the specifications described in the general guidelines of Article 110(1) of the Election Code, do not specify criteria for permitted deviations in the number of voters, and do not sufficiently address the issue of managing future boundary reviews[24]. While the legislation establishes the boundaries for the 73 single-member constituencies, the detailed delineation of 30 constituencies located within the four largest cities has yet to be finalised. This task is under the responsibility of the CEC. According to the figures included in the annex of the law, the deviation from the norm does not exceed 10% in 61 of 73 constituencies and does not exceed 15% in the other 12 constituencies. The Election Code requires the size of the constituencies to be in accordance with international standards and be equal in the number of voters. However, it does not provide clear rules for the delimitation of constituencies and does not specify any criteria for legally permissible deviations among electoral constituencies, and justification for any exceptional cases[25].

In light of the above, the OSCE/ODIHR and the Venice Commission made the following key recommendations for the improvement of the Election Code:

a) to ensure that fundamental provisions, including delimitation of boundaries, are finalised no less than one year before an election;

b) to define in the law the method for distributing single-mandate constituencies (if maintained after the forthcoming parliamentary elections) as well as to note a clear timeline for any future review of all boundaries;

c) to define in the law the maximum permitted deviation among electoral constituencies, and justification for any exceptional cases;

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[23] European Commission for Democracy Through Law (Venice Commission) Osce Office for Democratic Institutions and Human Rights (Osce/Odihr). Joint Opinion on Amendments to The Election Code Of Georgia as of 8 January 2016, Strasbourg, 14 March 2016, Opinion No. 834/2016, [online] <www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29003-e>.

[24] Ibidem, point 10.

[25] Ibidem, point 21.

d) to ensure inclusive consultation to increase public confidence in the boundary delimitation process, in line with international obligations and standards and good practice, which could include establishing an independent ad hoc or permanent commission in charge of drawing electoral constituency boundaries[26].

International other countries' experience with creating constituencies

Many countries create constituencies in proportion to the number of population, some try for the boundaries of the constituencies and administrative units of the country to coincide. For instance, it is characteristic for federal states for federal units to be equalized in the upper house of the Parliament – Senate, where all the states have the equal number of senators regardless of the number of population of federal units. Specifically in the USA each state elects 2 members to the Senate despite the different number of their population. The situation is quite similar in Argentina, where each federal unit elects the equal number of representatives – 3, and in Australia, where each state elects 12 representatives. Although in this case the interest of the states and their equality in the upper house is the first priority, it is a fact, that the equality of suffrage of the electors is violated.

In some countries the boundaries of the constituencies coincide with the boundaries of lower level administrative-territorial units – municipalities. e.g., in Guinea, Palau, Gabon, Armenia, Azerbaijan, Micronesia states, Saint Lucia, Seashell Islands, Zambia, etc.

The analysis of 193 UN Member States the following distribution of electoral systems in the world: the majoritarian system is being employed by 71 countries, proportional – by 68 countries and mixed – by 44 countries[27]. In 10 countries the Parliament is either not elected through direct balloting or there is a transitional legislative authority and no procedure of election of the Parliament is prescribed.

In its 2010 Report the Parliamentary Assembly did not give a preference to any of the electoral system and just made a general statement, that "The choice of electoral system is one of the most important institutional decisions for any democracy. This system has an obvious impact on representatively and a profound effect on the whole political life of the country concerned. Different voting systems may give very different results. The voting system determines to a great extent a number of administrative issues, including the forming of a government. There is a variety of types of electoral systems throughout Council of Europe member states, and each of

[26] Ibidem, point 13.

[27] Election Guide, Democracy Assistance and Elections News, [online] <www.electionguide.org/>; Table of Electoral Systems Worldwide, [online] <www.idea.int/esd/world.cfm>; Proportional Electoral Systems: The Allocation of Seats Inside the Lists (Open/Closed Lists) Strasbourg, 23 March 2015, Study No. 764/2014, [online] <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282015%29001-e>.

them has advantages and disadvantages. There is no unique model which could be recommended to all countries as the best one. The choice depends on a number of factors including historical background and political and party systems"[28].

In its comparative study of 2008 the Venice Commission stated, that "In one of its Resolutions the Parliamentary Assembly mentioned that the elected Assembly should reflect the political composition of the electorate, as well as take account of other important aspects such as geographic distribution, gender or ethnicity and specificities of other groups, amongst them, of aged persons and other vulnerable groups"[29].

With this regard the mention should be made of 2015 Report of the Venice Commission regarding Hungary. It is stated therein, that „The Venice Commission and the OSCE/ODIHR do not recommend any specific electoral system. Similarly, there are no international standards recommending a specific method or degree of proportionality regarding the distribution of seats. The States enjoy a broad margin of appreciation as these choices are political decisions.

The choice of an electoral system as well as a method of seat allocation remain both a sensitive constitutional issue and have to be carefully considered, including their adoption by a large consensus among political parties. While it is a sovereign choice of any democracy to determine its appropriate electoral system, there is the assumption that this latter has to reflect the will of the people. In other words, people have to trust the chosen system and its implementation. All electoral systems are at the same time grounded in the particularities of the history and the politic al culture of the country. This can be seen from the Estonian and Norwegian examples[30].

Proportional electoral system

Of 150 Members of Georgian Parliament 77 are elected through proportional electoral system – on the basis of unified closed party lists.

Although the Parliamentary Assembly of the Council of Europe and Venice Commission consider it necessary to take account of specific features of each country before issuing recommendations on electoral matters and believe, that there is no standard, acceptable for every country model of electoral system, they still recom-

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[28] Thresholds and other features of electoral systems which have an impact on representativity of parliaments in Council of Europe member states, [online] <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17808&lang=en 2010, 1705>, Paragraph 6.7.

[29] Comparative Report on Thresholds and Other Features of Electoral Systems which Bar Parties fFrom Access to Parliament, [online] <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282008%29037-e>.

[30] Report on Proportional Electoral Systems: The Allocation of Seats Inside the Lists (Open/Closed Lists), Study No. 764/2014, Strasbourg, 23 March 2015, p. 8,9,10. [online] <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282015%29001-e>.

mend to opt for proportional electoral system. In its Resolution of 2014 regarding Georgia the Parliamentary Assembly stated, that: „With regard to the reform of the constitution, the Assembly urges all political forces to agree on an election system that can count on a broad consensus and that strengthens the pluralism of the country's political institutions. In this respect, the Assembly invites all stakeholders to consider the proportional-regional election system, based on open lists, which seems to have the agreement of most, if not all, political forces in the country"[31].

It happens quite frequently in Georgia, that unknown to the society persons are elected to the Parliament. Their majority is elected just through closed electoral lists as the electorate is not in the position to choose the desirable candidate within the party. Thus, accounting for the opinion of the Parliamentary Assembly, in the case of opening up of the electoral lists, the electorate will vote not only for the desirable party, but also for the desirable candidate within the party. Respectively, the winner will not be the candidate, who has guaranteed leading place in the party list despite the antipathy of the electorate, but rather the one, who is the most acceptable for the electors.

There are different types of open lists. Of 61 countries, studied by the Venice Commission, 31 use open lists. Among the 31 countries using an open-list system, there are considerable differences. Seven countries use a one-preference system whereas 24 countries use a system with several preferences, either a fixed or a variable number of preferences. Among these 24 countries, 7 countries use a fixed number of preferences; 10 countries use a system of several preferences; Liechtenstein, Luxembourg, Monaco and Switzerland use cross-voting (also called *panachage*) whereas Sweden uses the system of *adjustment seats* (also called *apparentements*); finally, Ireland and Malta use a single-transferable-vote system[32]. In the open-list systems, the seat allocation within candidate lists can be done in many ways. While seven countries use one-preference systems (Austria, Denmark, Estonia, Finland, the Netherlands, Poland and Sweden), many other countries use several-preference systems. In this last category, 7 countries have a fixed number of preferences (Cyprus, Czech Republic, Greece, Kosovo, Lithuania, Peru and Slovakia) whereas ten countries have a variable number of preferences, depending on the number of seats to allocate in the constituency (Armenia, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Iceland, Kyrgyzstan, Latvia, Norway and San Marino)[33]. There are countries with open-list systems where the voters can cross out candidates (Iceland, Latvia, Monaco, Norway and Switzerland); countries with a cross-voting system, i.e. where the voters can mix candidates from lists of different parties (Liechtenstein, Luxembourg, Monaco and Switzerland). There are also coun-

[31] The functioning of democratic institutions in Georgia, [online] <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21275&lang=en>, p. 4.2.

[32] Proportional Electoral Systems: The Allocation of Seats Inside the Lists (Open/Closed Lists), Strasbourg, 23 March 2015, Study No. 764/2014, p. 30.

[33] Ibidem, p. 68.

tries where the candidates are nominated in single-member constituencies (nomination districts; Denmark, Romania); and countries using the single-transferable-vote system (Ireland and Malta)[34].

Electoral threshold

The electoral threshold was first introduced in Georgia for 1992 elections, when it amounted to 2% and the result was the most multi-party Parliamentary elections, specifically, of 36 parties, participating in the elections, 24 entered the Parliament[35]. Under the Constitution, adopted in 1995 this threshold was raised and totalled 5%. Before the elections of 1999 it was again raised up to 7%[36] and in 2008 the threshold was again lowered to 5%[37]. As of to date, commensurate with Paragraph 2 of Article 50 of the Constitution of Georgia and Part 4 of Article 125 of the Election Code after the elections, held through proportional system, the mandates of the Members of the Parliament are allocated only between the political associations and electoral blocks, which receive at least 5% of the electorate, participating in the elections.

International recommendations and those of the institutions of other countries and approaches with regard to electoral threshold

In most cases the opinions regarding electoral threshold are articulated by the Parliamentary Assembly of the Council of Europe and Venice Commission. They prefer rather tentative approach and express their opinions in urgent cases, with regard to minimal or maximum thresholds of the electoral threshold.

In its resolution of 2007 regarding the state human rights and democracy in Europe, the European Council stated, that "In well-established democracies, there should be no thresholds higher than 3% during the parliamentary elections. It should thus be possible to express a maximum number of opinions. Excluding numerous groups of people from the right to be represented is detrimental to a democratic system. In well-established democracies, a balance has to be found between fair representation of views in the community and effectiveness in Parliament and government"[38].

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[34] Ibidem, p. 69.

[35] *Georgia – History of Elections 1990–2010*, Tbilisi 2010, p. 8.

[36] Constitutional Law of Georgia on Amendment of the Constitution of Georgia, № 2221-RS, 20 July 1999.

[37] Constitutional Law of Georgia on Amendment of the Constitution of Georgia, № 5853-IS, 12 March 2008.

[38] European Court of Human Rights, Case of *Yumak and Sadak v. Turkey*, Paragraph 52, [online] <http://hudoc.echr.coe.int/eng?i=001-87363&amp%3B%7B%22itemid>, also Resolution 1547 (2007), Paragraph 58.

In one of its recommendations of 2010 the Parliamentary Assembly of the Council of Europe stated, that "The Council of Europe repeatedly invited Turkey to lower the electoral threshold"[39]. It makes 10% in Turkey. The Parliamentary Assembly also stressed that "3% legal electoral threshold is quite reasonable in countries with stable democratic system".

In 2008 in Council of Europe the Assembly welcomed the lowering of the electoral threshold to 3% in Bosnia and Herzegovina and to 5% in Georgia[40].

In one of its recommendatory proposals, which is signed by 10 Members of the Assembly and concerns the level of electoral thresholds in the Council of Europe Member States, the Parliamentary Assembly of the Council of Europe stated, that in Georgia, following the recent crisis, a 7% threshold has been lowered to 5% which is still relatively high. It is also said therein, that "It is stated in one of the recommendatory proposals of the Parliamentary Assembly of the Council of Europe, which is signed by 10 Members of the Assembly and which concerns the level of electoral thresholds in the Council of Europe Member States that in several other Council of Europe member states, there are similar thresholds"[41].

With regard to Moldova the Parliamentary Assembly stated in 2015, that: "In May 2013, the minimum thresholds for representation in parliament were raised to 6% (from 4%) for political parties, to 9% (from 7%) for electoral blocs composed of two parties, and to 11% (from 9%) for blocs composed of three parties or more. These thresholds had already been changed several times in the past. The OSCE/ODIHR and the Venice Commission have repeatedly recommended lowering them. The ad hoc committee regrets that, contrary to the Venice Commission's recommendations, the electoral law was recently amended to raise the election threshold"[42].

In its comments on the Election Code of Moldova the Venice Commission stated in 2008, that the new 6% threshold is rather high (even though there are countries with even higher thresholds). Such a high threshold may lead to a high number of wasted votes. It is therefore recommended to keep the threshold lower than this[43].

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[39] Thresholds and Other Features of Electoral Systems Which Have an Impact on Representativity of Parliaments in Council of Europe Member States, Council of Europe Parliamentary Assembly, 11 January 2010.

[40] The state of democracy in Europe, The functioning of democratic institutions in Europe and progress of the Assembly's monitoring procedure, Doc.11628. 9 June 2008, p. 5.3.1, [online] <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11939&lang=EN>.

[41] Threshold Levels in Parliamentary Elections, and Their Impact on Representatively of Parliaments in Council of Europe Member States, Doc.11481. 9 January 2008, [online] <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11888&lang=en>.

[42] Observation of the parliamentary elections in the Republic of Moldova (30 November 2014), Doc. 13671. 26 January 2015, Paragraphs 15, 45, [online] <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21347&lang=en>.

[43] Joint Opinion on the Election Code Of Moldova as of 10 April 2008, Strasbourg, 23 October 2008, Opinion No. 484/2008, Paragraph 15, [online] <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282008%29022-e>.

The European Court of Human Rights documented its position with regard to electoral threshold in 2008, in one of its judgments. It stated that "The large variety of situations provided for in the electoral legislation of the member States of the Council of Europe shows the diversity of the possible options. It also shows that the Court cannot assess any particular threshold without taking into account the electoral system of which it forms a part, although the Court can agree with the applicants' contention that an electoral threshold of about 5% corresponds more closely to the member States' common practice"[44]. With this paragraph the Court has only reiterated the general practice adopted by the other countries. However, in the other paragraphs it also stated: "In conclusion the court believes, that in general a 10% electoral threshold appears excessive". 10% threshold makes political parties to recourse to different manipulations, what does not promote the transparency of the election process at all"[45].

The Parliamentary Assembly also articulated its opinion with regard to electoral threshold in 2013 upon assessing the provision of the Hungarian election law, which imposes 10% threshold for two-party coalitions and 15% threshold for coalitions of more than two parties. It regarded the threshold, imposed in Hungary as „too high, which should be lowered"[46].

To conclude with, according to the assessments of international organizations the threshold of 3% is acceptable, whilst over 6% threshold is already high and is should be lowered. It should be mentioned that no negative attitude has been recorded with regard to 4 and 5% thresholds.

The international and foreign courts have twofold attitude towards threshold problem – for it to "reconcile «fair representation» with «governmental stability»"[47] in a manner as to mutually balance and complement each other. Fair representation means the expression of the political will of the people, equal suffrage and minimal loss of votes of the electorate (certain part of the votes of the electorate is lost when there is a threshold), and the governmental stability implies the correction of negative outcomes of proportional elections – creation of stable majority in the Parliament and prevention of Parliamentary fragmentation – splitting of forces. After that the courts establish whether or not the proportionality principle was violated – whether the intervention and imposition of the threshold was proportional when the legislator introduced the rule.

The Czech Constitutional Court relied on the assessment of these criteria on May 19, 2015 when it ruled unconstitutional the provision of the Law on the Elections of the European Parliament, which provision concerned the 5% threshold set

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[44] European Court of Human Rights, Case of *Yumak and Sadak v. Turkey*, Paragraph 132.

[45] Ibidem, Paragraph 147.

[46] Request for the Opening of a Monitoring Procedure in Respect of Hungary, Doc. 13229, 10 June 2013, Paragraph 72, [online] <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19777&lang=en>.

[47] European Court of Human Rights, Case of *Yumak and Sadak v. Turkey*, Paragraph 15.

for the election of Czech deputies to the European Parliament. The Constitutional Court considered that the threshold constitutes the interference with the equal right to vote, the free competition among political parties and the equal access to public office. However the interference is compatible with principles of the democratic constitutional state, it is proportionate, in accordance with the system of proportional representation and capable of effective contribution to reaching of the pursued aim – the effective representation of the will of citizens in the European Parliament. It is also necessary for the proper exercise of the powers conferred upon the European Parliament on the basis of Article 10a of the Czech Constitution.

The natural electoral threshold, which lies below the imposed five-percent electoral threshold and which would otherwise affected two seats in the European Parliament, also contributes to the integration of political forces in the European Parliament, it is unforeseeable and dependent on numerous conditions. The five-percent threshold has not in the recent Czech history lead to the restriction of variety of political forces in the European Parliament. Moreover, the stability of electoral results is fundamental for the public confidence in the representative democracy both at the domestic and the transnational level[48].

Quite opposite was the decision of the German Constitutional Court of February 2014 with regard to 3% threshold, when it ruled the provision unconstitutional. The Court said in a press release, "under the current legal and factual circumstances, the serious interference with the principles of electoral equality and equal opportunities which the three-percent threshold entails cannot be justified". But the Court also made it clear that, pending further developments "a different constitutional assessment may be warranted if the conditions change significantly"[49]. The Constitutional Court provided the following interpretation of the position of the opponents, that the existence of many factions, and political fragmentation would have obstructed the European Parliament from the discharge of its duties: An actual impact on the European Parliament's ability to function is currently not foreseeable, which means that there is no basis for the legislature's prognosis that, without the three-percent electoral threshold, an impairment of the European Parliament's functioning is looming[50].

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[48] Judgment Pl. ÚS 14/14 – Five-Percent Electoral Threshold in the Law Governing European Elections Is Constitutional, [online] <www.usoud.cz/en/current-affairs/?tx_ttnews[tt_news]=4331&cHash=9ea9c2e559159810b1dca73e682d9661>.

[49] Germany's top court annuls 3% threshold for EU election,

[online] <www.euractiv.com/sections/eu-elections-2014/germanys-top-court-annuls-3-threshold-eu-election-300927>.

[50] The German Constitutional Court's Latest Decision on European Elections: No Protection Needed, [online] <www.iconnectblog.com/2014/02/the-german-constitutional-courts-latest-decision-on-european-elections-no-protection-needed/>.

Different thresholds for parties and blocks

There are many differences between the parties and electoral blocks, specifically:

a) political party is a stable organizational formation intended for the participation in long-term political life, which is created for an indefinite period of time. A electoral block is to be created just for the elections, at least 43 days prior to elections;

b) party is an association created on common ideological and organizational basis. Its members have common political visions and goals. A electoral block may comprise the parties with different ideologies;

c) party is an association of citizens, created on the basis of Article 5 of the Constitution, through direct democracy and submission of at least 1000-member list is mandatory for registration purposes. A electoral block is formed on the basis of the signatures of only the authorized representatives of the parties, irrespective of whether or not the members of the parties approve the joining of the electoral block by the party concerned;

d) the party charter is approved by the founding congress and the creation of a block is signed only by the authorized representatives of the parties without any need to convoke a congress;

e) the law provides for rather strict requirements for the creation of a party as a stable and long-term organizational formation: it is inadmissible to create a party according to regional or territorial features, the founding congress is attended and congress minutes is endorsed by a notary;

f) party can be banned only by the decision of the Constitutional Court of Georgia. The legislator views a block as such a temporary and unorganized association, that the law does not even provide for a procedure for banning a block. The Election Code provides only for the cancellation of the registration of a block, strictly in exceptional cases and not for its banning;

g) party registration is subject to strict control. It is prohibited to create or operate such a political association which aims at subversion or forced change of the constitutional arrangement of Georgia, violation of country independence, violation of territorial integrity or which advocates was or violence, raises national, provincial, religious or social hatred. No such critical basic principles are provided for the refusal of registration of an electoral block;

h) the organizational status of a party is also stressed by the fact, that a party is a legal entity, subject to the provisions of the Election Code of Georgia. The status of an electoral block is not defined by law and it is not clear whether what kind of formation it is. Neither the possible legal form is prescribed for the existence of a block after the elections.

Hence a political party and an electoral block are two formations with absolutely unequal statuses: a political party is created for the formation of stable government and political system, for guaranteeing the stable political environment and

competition with a view to concentration on political safety, for the citizens to make reasonable and well-thought-of political choice, for the citizens to exercise their suffrage through direct participation in the elections. An electoral block is actually a spontaneous, temporary, narrow, unorganized formation without any legal status, created six weeks prior to the elections for the occurrence of current results of the elections, in order to oppose the already formed will of the society regarding parties. Although a political party and an electoral block have common political goal, this interest is still very different in time span: a party has far-reaching political purposes, whilst the main goal of a block is to participate in current elections.

The imposition of 5% threshold for both – the political parties and electoral blocks – is the manifestation of unequal treatment, or, so to say, equal treatment of essentially unequal entities – the electoral blocks should not be equal to political parties. Hence, this is the violation of Paragraph 2 of Article 26 of the Constitution of Georgia. The established rule obstructs the establishment of stable political institutions and political pluralism, insofar as owing to the formation of electoral blocks just before the elections the parties with different political values will easily manage to gain more votes than single parties. Respectively, all the political parties, irrespective of their will, become obliged to form various electoral blocks with the persons and parties with different political platforms.

Particularly important and noteworthy is the resolution of the Constitutional Court of Rumania of 1992 with regard to increasing threshold. There was 3% threshold in Rumania for parties in 1992, and one percent was added for each party for coalitions, up to 8%. The Constitutional Court explained, that the electoral process is not only a means to allow for the exercise of the individual rights of citizens but that is also represents a method of establishing democratic institutions with a coherent capacity for expression, and of creating efficient centres of political decision making. Too many small parties in the parliament would hamper the democratic process, and thus a threshold is reasonable and constitutional. Concerning the thresholds for coalitions of the parties, the Court referred to the constitutional provisions on pluralism and on the functions of political parties. From this latter provision, the Court derived the principle of equality of opportunity of all political parties. However, the Court stated that the position of parties is weaker than the position of coalitions: hence, it is not unreasonable to require coalitions to face higher electoral thresholds than single parties do[51].

[51] W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer 2014, p. 214.

Observance of gender equality while forming party lists

A strict delimitation should be made between formal and substantive understanding of the principle of gender Equality[52]. According to formal equality men and women deserve equal and similar treatment, manifested in constitutional stipulation, which bans the discrimination according to sex or under which a right cannot be refused on the grounds of sex or gender identity[53]. The substance of formal equality excludes the existence of gender quotas as the imposition of any differentiation on the grounds of sex is incompatible with its essence. According to the concept of substantive equality formal equality may result in inequality in case if persons enjoying similar treatment are not provided with similar opportunities[54], hence the equality benchmark is attained through differentiated treatment. The negative obligation of the state, prohibiting discrimination on the grounds of sex, *de jure* created by formal equality, actually reflects *de facto* situation with gender inequality, and the substantive equality doctrine tries to overcome this inequality through special measures.

Georgian law unconditionally recognizes formal equality: as per Georgian Constitution everyone is free by birth and is equal before the law regardless of sex[55]. According to the Law of Georgia on the Elimination of All forms of Discrimination "Any form of discrimination shall be prohibited in Georgia"[56]. The Law of Georgia on Gender Equality guarantees gender equality, including the part of human rights meaning equal rights and obligations, responsibility of men and women and their equal participation in every area of personal and public life. The state promotes and guarantees equal rights of men and women in political, economic and cultural life[57].

The observance of constitutional reflection of international algorithm with regard to substantive equality allows for assertion, that Article 14 of the Constitution of Georgia does not guarantee substantive equality, on the contrary, it is its antipode. Insofar as substantive equality is not covered by the shell of formal equality concept its normative content is formed independently.

Various methods are applied to guarantee substantive equality, of which the most efficient and globally recognized model is setting quotas.

Certain provisions of Georgian legislation serve the purpose of establishment of substantive equality. Specifically, according to the Law of Georgia on Gender Equality "In the course of employment and performance of labour duties the individuals may be subjected to unequal or preferential treatment on the basis of sex owing to

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[52] "Formal", "liberal", "symmetrical", "static" approach is based on "individual equity" whilst "essential", "asymmetrical", "dynamic" "group equity" is focused on specific features of a group.

[53] Irving H., *Gender and the Constitution, Equity and Agency in Comparative Constitutional Design*, New York 2008, p. 2.

[54] Ibidem.

[55] Article 14 Constitution of Georgia.

[56] Law of Georgia on the Elimination of All forms of Discrimination, Article 2, Paragraph 1.

[57] Law of Georgia on Gender Equality, Article 3, Paragraph 1(b), Article 4, Paragraph 1.

the essence or specificity of the work to be done or conditions of its performance, serves the legitimate purpose and constitutes adequate and necessary means for its attainment". "The Georgian legislation guarantees the creation of favourable conditions for pregnant women and breastfeeding mothers, what excludes their employment in extreme, harmful or hazardous conditions, also at night-time"[58].

According to Organic Law of Georgia on Political Unions of Citizens, a party entitled to funding according to procedure, prescribed by this article, will receive additional resources in amount of 30% of basic funding if at least 30% of the candidates in the first, second and every next score of the party list of the party concerned or the respective electoral block (in the case of elections of local self-governance bodies – of every party list) submitted during the election on the basis of the results of which the funding was granted, should be the representatives of different sexes[59].

To guarantee the substantive equality, it is necessary for the law to provide for additional mechanisms. Human Rights Committee[60] is concerned with underrepresentation of women in the decision-making positions in legislative and executive bodies of Georgia. According to the recommendations of Human Rights Committee Georgia, being a signatory party to the International Covenant on Civil and Political Rights, is required to develop strategies to combat patriarchal attitudes and stereotypes on the roles and responsibilities of women and men in the family, on the one part, and, on the other, to strengthen efforts to achieve equitable representation of women in decision-making positions in legislative and executive bodies of Georgia[61].

Pursuant to recommendation of the Committee regarding the elimination of all forms of women discrimination, the abundance of stereotypes accumulated in public should be eliminated through substantive equality in order to achieve full and equal participation of women in political and public life[62].

The substantive equality justifies gender quota as a certain provisional special measure guaranteeing the equal representation of men and women and regulation of the balance of forces on political arena. Formal equality implies equal treatment, whilst substantive equality – both the equal opportunities and equal consequences (the right to claim an equal share of state benefits)[63].

The European Parliament calls on political parties, at national as well as European level, to review their party structures and procedures so as to remove all

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[58] Law of Georgia on Gender Equality, Article 6, Paragraphs 3 and 4.

[59] Organic Law of Georgia on Political Unions of Citizens, Article 30 71.

[60] Concluding observations on the Fourth Periodic Report of Georgia, Human Rights Committee, 2014, & 7 (a).

[61] Concluding Observations on the Fourth Periodic Report of Georgia, Human Rights Committee, 2014, & 7(a), (b).

[62] Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Georgia, Committee on the Elimination on Discrimination against Women, 2014 & 19.

[63] Affirmative Action Policies and Judicial Review Worldwide, Chapter 2 The Moral Question: Interacting with Traditional Values, IUS Gentium, 2016, 3.

barriers that directly or indirectly discriminate against the participation of women[64]. The parties, which achieve the aim of a minimum 40% representation of women in the party's decision-making bodies and amongst candidates elected, should be given financial incentives[65].

Together with universal prohibition of discrimination the Charter on Fundamental Rights of the European Union provides for the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented persons[66].

As per Paragraph 4 of Article 2 of the European Council Directive of 1976[67] the Directive promotes equal opportunity for men and women by removing existing inequalities which affect the development of equal opportunities of men and women. The latter is the departure from the principle of equality and is subject to *stricto sensu* interpretation. It was created specifically and exclusively for the authorization of implementation of measures, which, being visually discriminatory, in fact aim at the elimination or reduction of the cases of inequalities reflected in social life[68].

According to Paragraph 4 of Article 141 of the Treaty of Amsterdam, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

According to the established trend in judicial practice of the European Court of Justice, measures, promoting the development of equal opportunities for men and women, does not mean automatically giving priority to women in sectors where they are underrepresented (when women do not make up at least half of the staff) where candidates of different sexes shortlisted for promotion are equally qualified[69], and failure to meet the proportionality test[70]. Granting absolute primacy to women candidates by the state exceeds the admissibility threshold of implementation of positive measures and results in discrimination according to sex. The European Court of

[64] European Parliament Report on Equality between Women and Men in the European Union (2004/2159), Paragraph 5, see [online] <www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/578/578414/578414en.pdf>.

[65] Mechanisms to ensure women's participation in decision-making, Resolution1489 (2006), Parliamentary Assembly of Council of Europe, Paragraph 6.10.

[66] Charter on Fundamental Rights of the European Union II-81, II-83, [online] <www.europarl.europa.eu/charter/pdf/text_en.pdf>.

[67] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working.

[68] Case 312/86 Commission v. France [1988] ECR 1-6315, 15.

[69] Case C-450/93, Kalanke v. Bremen [1995] ECR 1-3069, 24.

[70] Proportionality principle requires for the departure for equal treatment to be adequate and necessary medium for the attainment of the goal, whilst the principle of equal treatment should be compatible with the requirements of the goal to maximum practicable extent.

Justice explained, that giving priority to women in sectors of public service, where they are underrepresented is compatible with the Community law if:

1. The women are not automatically and unconditionally given priority when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates[71];

2. That proves necessary for ensuring compliance with the objectives of the women's advancement plan, if no reasons of greater legal weight are opposed (social aspects)[72];

3. The male and female candidates possess equivalent or substantially equivalent merits, where the purpose is an objective assessment of candidates and not filling up the predetermined vacancies[73];

4. There are false opinions, stereotypes about the role and potential of women and in the case of objective assessment there are not special "overweighting" circumstances in favour of male candidates, which feed on criterion or criteria containing discrimination against women[74].

Hence the European Court of Justice establishes certain limits, when additional measures can be implemented with a view to ensuring substantive equality.

Setting quotas

The efficient mechanism of establishing substantive equality is setting quotas, according to which mechanism the minimal number of representatives of both sexes in electoral lists is determined in advance. The quotas constitute the departure from the fundamental rule of equal treatment, being justified only in cases, when it aims at the elimination of obstacles in the light of women opportunities[75].

It its turn, there are several models of setting quotas. Of 27 EU Members States 14 use the voluntary party quota, 8 – mandatory quota and in 5 Member States there is no quota at all, amongst them in Finland and Denmark, where the rate of women representation is rather high[76].

[71] Case C-158/97 Georg Badeck and Others [2000] ECR I-1875, 23.

[72] Ibidem, 34, 38.

[73] The Court of Justice of the European Union ruled that the provisions of Swedish law on positive discrimination were incompatible with the EU *aquis*, under which provisions underrepresented candidates to public posts were automatically given preference if they were duly qualified, and the difference between merits of the candidates of different sex was not so big as to result in the violation of the criteria of objective assessment upon their appointment, 62,

[74] Case C-409/95 Hellmut Marschall and Land Nordrhein-Westfalen, [1997] ECR I-6363, 31, 35.

[75] C.J. Suk, *Gender Quotas after the End of Men*, "Boston University Law Review" 2013, vol. 93, p. 1128.

[76] During 2011 Parliamentary Elections in Finland – 42,5%, in Denmark – 39,1%. 8. Electoral Gender Quota Systems and their Implementation in Europe (update 2013), Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 7–8.

As for the practice of other states – the share of women representation in the Parliament is relatively high in countries with proportional representation as compared with majoritarian and mixed systems[77]. Unlike single-member constituencies the multi-member electoral districts better promote the nomination of women candidacies and their representation[78]. Furthermore, bigger is the constituency, higher is the number of women nominees and their election[79]. Open, flexible lists let voters select a party as well as one or more candidates within that party; therefore they help determine which individual party candidates will be elected[80]. Unlike the procedure of formation of closed lists, what falls within the exclusive jurisdiction of a party leader "preferential voting enables the electorate to elect woman candidates, irrespective of sexist desires of party leader"[81]. Open list promotes meritocratic representation, as the electorate independently elects talented and worthy male and female representatives at their own discretion through granting preferences and neutralizes the façade connotation of woman as a mere "decorative element"[82].

Worth mentioning is the recommendation of the Venice Commission, where it states, that the legislator is required to create such legal frame, which will not depart from constitutionally legitimated principles. Legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis[83]. Hence the Venice Commission justified setting quotas according to sex; however, it still stresses the necessity of abiding by the rules of Constitution. The directly stipulated provision of the Constitution of Georgia on the equality of men and women constitutes the rule, providing for formal equality and obstructs setting quotas by law insofar as it does not provide for a special reservation about guaranteeing substantive equality.

The constitutional regulation of gender equality was also discussed by the Constitutional Courts of the European countries.

In 2004 an amendment was introduced into Article 43 of the Constitution of Slovenia with a view to setting gender quota in Slovenian law. Under this amend-

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[77] In the countries with proportional representation the female representation in the Parliament amounts to 24.6%, with majoritarian electoral system – 18.5%, and in the case of mixed electoral system – 21.5%. *Atlas of Electoral Gender Quotas*, International Institute for Democracy and Electoral Assistance, Inter-Parliamentary Union and Stockholm University 2013, p. 23.

[78] Impact of electoral systems on women's representation in politics, Revised Introductory Memorandum, Parliamentary Assembly, Council of Europe, 2009, p. 3.

[79] Ibidem.

[80] *Atlas of Electoral Gender Quotas*, p. 22.

[81] Cuotas de género: democracia y representación, Instituto Internacional para la Democracia y Asistencia Electoral (IDEA), Facultad Latinoamericana de Ciencias Sociales (FLACSO-Chile, 2006, 21.

[82] A. Sledzifiska-Simon, A. Bodnar, *Gender Equality from Beneath: Electoral Quotas in Poland*, "Canadian Journal of Law and Society" 2013, vol. 28, No. 2, p. 165.

[83] Code of Good Practice in Electoral Matters, Adopted by the Venice Commission at its 51th and 52nd sessions, Venice, 5–6 July and 18–19 October, 2002, 8.

ment "The law shall provide the measures for encouraging the equal opportunity of men and women in standing for election to state authorities and local community authorities"[84].

In 1982 the Constitutional Court of France held quotas unconstitutional stating that the constitutional principles of equality before the law, national sovereignty and indivisibility of the electorate[85] preclude any division of persons entitled to vote or stand for election into separate categories except for on grounds of age, incapacity or nationality, as this applies to all forms of political suffrage[86]. Hence, as a result of amendments made to the Constitution of France in 1999 the following paragraph was introduced into Article 3: "The Law shall favour equality among women and men to have access to electoral mandates and hold elective office", whilst Article 4 obliged the political parties the execution of this provision[87]. In 2000 the Senators appealed quotas introduced following the new constitutional provision with the Constitutional Council of France[88], however the Constitutional Council of France held the system of mandatory quoting to be concurrent with the new provision of Article 3 and did not find it unconstitutional. Another amendment was introduced into the Constitution of France with a view to introduction of gender quota for the directors of corporate councils and the provision regulating gender quota, moved to Article 1 from Article 3 with the following wording: "Statutes shall promote equal access by women and men to elective offices and posts as well as to position of professional and social responsibility"[89].

The Constitutional Court of Italy did not consider Article 3 and 51 of the Constitutional of Italy to cover substantive equality[90]. However the rhetoric of the Constitutional Court of Italy was changed by the additional stipulation introduced into Article 51 of the Constitution of Italian Republic: "To this end, the Republic

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[84] I. Selišnik, M. Antić Gaber, *From Voluntary Party to Party to Legal Electoral Gender Quotas in Slovenia: The Importance and Limitations of Legal and Institutional Mechanisms*, "EUI Working Paper Law" 2015, No. 31, p. 7.

[85] R. Rubio-Marin, *Evolutions in Antidiscrimination Law in Europe and North America: A New European Parity Democracy Sex Equality Model and Why it won't Fly in the Unites States*, "The American Journal of Comparative Law" 2012, No. 60 (99), p. 6.

[86] The Constitutional Council of France, Decision #82/146 DC, 18 November 1982, & 7.

[87] B. Rodriguez-Ruiz, R. Rubio-Marin, *The Gender of Representation: On Democracy, Equality and Parity*, "International Journal of Constitutional Law" 2008, vol. 6, issue 2, pp. 292–293.

[88] The Constitutional Council of France, Decision #2000-429 DC, 30 May of 2000, & 8.

[89] C.J. Suk, op. cit., p. 1132.

[90] According to Article 3 of the Italian Constitution "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country". According to first paragraph of Article 51 of Italian Constitution: "Any citizen of either sex is eligible for public offices and elected positions on equal terms, according to the conditions established by law".

shall adopt specific measures to promote equal opportunities between women and men", on the one part, and on the other – the addition made to Article 117: "Regional laws shall remove any hindrances to the full equality of men and women in social, cultural and economic life and promote equal access to elected offices for men and women"[91], as considered the new regulations as the grounds for setting gender quotas.

With this regard it should be mentioned that Article 8 of the Federal Constitution of Swiss Confederation, contains a direct reference to guaranteeing substantive equality: "The law shall ensure the equality of men and women, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women have the right to equal pay for work of equal value" and Article 3 of German Constitution, stating "The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist"[92].

Conclusion

Based on the analysis of Georgian electoral law and with due consideration of the recommendations of the other countries and international organizations we are of the opinion, that:

a) open electoral lists should be used during proportional elections, when the electorate will be able to vote for a specific candidate(s) within each electoral list;

b) in the case of majoritarian elections the constituencies should be created in full compliance with the resolution of the Constitutional Court, when the admissible departure from the threshold will be maximum 10% and in exceptional cases – 15%;

c) the boundaries of the constituencies should be defined by law and should not be dependent on the will of the Central Election Commission;

d) the electoral threshold should be lowered to 4%;

e) the electoral threshold should be different for parties and electoral blocks;

f) an amendment should be made to the Constitution of Georgia introducing a special stipulation, that law endures the substantive equality of women and men, what will later enable the legislator to freely introduce the necessary mechanisms for guaranteeing substantive gender parity, including quotas.

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Summary

Key words: electoral system, constituencies, threshold, lists, substantive equality.

One of the most topical and challenging issues facing Georgia today is the choice of a relevant electoral system. The main aim of this article is to examine the dynamics of the historical development of electoral systems in Georgia, to identify their advantages and disadvantages and as a result, suggest the best model of an electoral system based on the political as well as social context of Georgia. The given aim is achieved by the comparative analysis of Europe's electoral heritage regarding the formation of constituencies, the method of seat allocation, the types of electoral lists,the electoral thresholds and the observance of substantive equality.

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The regulation with the power of the Act as a element of martial law

Introduction

Regulations of constitutional and statutory rank concerning the martial law aim at assuring efficient functioning of the state in crisis situations and accomplishing restitution of the normal state as quickly as possible. From the legal perspective, the core of all extraordinary measures is that they are implemented in the situations of extraordinary threat when normal legal measures and systemic institutions prove insufficient and the freedoms and rights of the citizens have to be suspended or limited for some time and when constitutional competences of the constitutional authorities have to be changed by significant and extraordinary increasing the powers of the executive bodies[1].

John Locke, the precursor of the trend referred to as political liberalism maturing during the 17th c. wrote that in case of a threat to the State the laws in force could prove insufficient or even harmful to taking effective actions preventing the catastrophe[2]. In case of such a situation, Locke stipulated special powers, based on the prerogative of the Crown, to act at its discretion for the public good without the necessity of referring to the legal regulations or even contrary to it[3]. That opinion seems not to match the general principle supported by the author of the *Two Treatises of Government* that "the law and not the individuals rule". Locke explains that presenting the argument according to which the law by its nature is incapable of accomplishing the general good fully during the situation of a threat to the State and hence it has to give way to the executive power.

Also in France during the enlightenment period the opinions were encountered that noticed low flexibility of the law and hence the difficulties in applying it

[1] Z. Witkowski, A. Cieszyński, *Instytucje stanów nadzwyczajnych w porządku prawnym Federacji Rosyjskiej (na tle genezy konstytucji z 1993 r. i w świetle ustawodawstwa okresu 2001–2002)*, [in:] L. Garlicki, A. Szmyt (eds.), *Sześć lat Konstytucji Rzeczypospolitej Polskiej. Doświadczenia i inspiracje*, Warszawa 2003, p. 324.

[2] A. Sylwestrzak, *Historia doktryn politycznych i prawnych*, Warszawa 2002, p. 198–202.

[3] J. Locke, *Dwa traktaty o rządzie,* Warszawa 1992, p. 204.

under crisis situations. Jean-Jacques Rousseau claimed that: "Relentlessness of the Acts that cannot be bent to the situations may in certain cases make them disastrous and cause collapse of the state in a critical moment [...]. If the threat is such that the system of the Acts hinders avoiding it, then the highest chief is appointed who forces all the acts to be silent and suspends for a moment the superior power"[4].

The German doctrine, as of the mid-19th c., tried to support itself on the theory of necessity known from the other branches of the law[5]. The argumentation of the representatives of the German theory of necessity such as Rudolf von Ihering or Georg Jellinek, was based on three assumptions: 1. the state creates the law; 2. it subjects itself to its rules in its own interest; 3. if the interest of the state is threatened as a consequence of observing the law, subjection to that law cannot take place.

Despite the differences in treatment of the bases for exercising the extraordinary mandates that we encounter in the doctrine, they are all based on the common assumption that those mandates should be due to the executive body. Overcoming an internal crisis or organising defences against a sudden attack may be effective in case of taking rapid, firm actions while maintaining the centralised procedure for taking decisions only.

Martial law

Extraordinary situations were subject to regulation in the preceding constitutions of Poland although in none of them the subject was regulated in the holistic way in a single dedicated chapter. The individual issues were regulated in Art. VII of the Constitution of 3 May 179, in Art. 124 of the Constitution of 17 March 1921, in Art. 79 of the Constitutional Act of 23 April 1935, Art. 19 section 2 of the Constitutional Act of 19 February 1947, Art. 28 (33 after changes that were made in 1976) section 2 of the Constitution of 22 July 1952, Art. 32 section 1 of the Constitution of the Republic of Poland after the novella of 7 April 1989 and Arts. 36 and 37 of the Constitutional Act of 17 October 1992.

The Constitution of the Republic of Poland of 2 April 1997[6] differentiated three form of extraordinary measures. Those are: the martial law, a state of emergency or a state of natural disaster (Art. 228, section 1). Each of them has been regulated in the Arts. of Chapter XI.

Art. 228 of the Constitution of the Republic of Poland of 1997 contains a number of legal norms addresses to the bodies of the State[7]. Those are, first of all, the:

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[4] J.J. Rousseau, *Umowa społeczna,* Łódź 1948, p.109.

[5] K. Działocha, *Dekret z mocą ustawy w państwie burżuazyjnym*, Wrocław 1964, p. 94–102.

[6] Dz.U. No. 78, item 483 as later amended.

[7] W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Kraków 2000, p. 309–311.

- prohibition of introducing extraordinary measures in the situations when the treat is not of a special nature or it can be prevented by applying the ordinary constitutional measures,
- order of statutory regulation of the activity by organs of public authority as well as the degree to which the freedoms and rights of persons and citizens may be subject to limitation for the duration of a period requiring any extraordinary measures,
- order of implementing extraordinary measures by presidential decree issued based on the Act,
- order of maintaining adequacy of the measures applied to the level of threat,
- prohibition of changing certain legal acts during the martial law period (this applies to the Constitution, the Acts on Elections to the Sejm, the Senate and organs of local government, the Act on Elections to the Presidency, as well as statutes on extraordinary measures),
- prohibition of shortening the term of office of the Sejm, conducting the national referendum and elections during a period of extraordinary measures, as well as within the period of 90 days following its termination.

The issues of extraordinary measures regulated in Chapter XI of the Constitution of the Republic of Poland of 1997 belong to the domain of the internal activity of the state and thus the regulations governing implementation and functioning of extraordinary measures, in particular the martial law, do not cover the state of war that belongs to the domain of the external relations[8]. According to the solutions enacted in the current Constitution, the martial law is apply, if necessary, to the situation of war in the internal law while the state of war is to apply to the international relations only[9]. Such a regulation is consistent with the understanding of the state of war as the phenomenon from the domain of the international law and the martial law as a category of the internal law[10].

The martial law represents a set of measures regulated by the law representing a form of internal reaction to the internal threat to the security of the state and armed attack on its territory. The aim of those measures is to facilitate the defence against the existing threat and attack, frustration of them and, as a result, restoring the normal, desirable state of external security. Implementation of the martial law may take place also when the circumstances mentioned above had not occurred but the necessity of implementing it results from taking common – with another state or states – defence against aggression, when the obligation to do so is implied by an international treaty. As a result of the experiences resulting from implementation of the martial law in 1981, the constitutional legislator highlighted that the source of threat to the state must be positioned outside the borders of the Republic of Poland,

[8] K. Prokop, *Stan wojny a stan wojenny w Konstytucji RP*, „Państwo i Prawo" 2002, No. 3, p. 24.

[9] W.J. Wołpiuk, *Państwo wobec szczególnych zagrożeń*, Warszawa 2002, p. 74.

[10] J. Stembrowicz, *Z problematyki stanu nadzwyczajnego w prawie konstytucyjnym*, „Więź" 1998, No. 11–12, p. 11.

it must be independent of the authorities of the Republic of Poland and it must be of objective nature. Bogusław Banaszak stresses that the martial law may not be treated "by the legislator as the internal (in internal relations) emanation of the state of war or as its substitute but it assumes autonomous meaning that aims at reacting to the threats other than those occurring in case of the state of war"[11].

According to Piotr Winczorek, expert of the Constitutional Commission of the National Assembly, during the work on the chapter of the current Constitution dealing with extraordinary measures[12], the martial law is not an absolute consequence of the state of war with another country[13]. According to Art. 116 of the Constitution of the Republic of Poland, the decision concerning the state of war is taken by the Sejm (lower chamber of Parliament) on behalf of the Republic of Poland and if it cannot assemble for a session the decision on the state of war is taken by the President of the Republic of Poland. The Sejm may pass a resolution on the state of war only in case of a military attack on the territory of the Republic of Poland or when the commitment to joint defence against aggression results from international treaties. According to Piotr Winczorek, a situation may occur when Poland happens to be in the state of war with an enemy that is geographically distant and where the war actions do not encompass the territory of the Republic of Poland as a consequence of performance of the international commitments. In such a case, implementation of the martial law will probably not be necessary. On the other hand, implementation of the martial law might be inevitable not as a result of the already conducted military activities but as a consequence of occurrence of a serious threat with war. Implementation of martial law in the territory of the Republic of Poland may then precede taking the decision concerning the state of war.

Martial law, however, may not be understood as force majeure as its implementation does not cause exclusion of lodging claims against the State Treasury for damages caused by officers of the state[14]. Everybody that suffered a loss in property as a consequence of limitation of freedoms and rights of persons and citizens during the time of extraordinary measures (including martial law) has the right to claim damages. That claim covers reimbursement of losses to property, excluding benefits that the person harmed could have generates in case no loss had taken place. The compensation is due from the State Treasury. The compensation is awarded on application of the person harmed lodged with the competent voivod. The person harmed, dissatisfied with the decision in the proceedings for compensation may, within thirty days as of the service of the decision concerning the matter, lodge the

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[11] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, thesis 1 to Art. 229.

[12] Constitutional Commission of the National Assembly. Bulletin XXX , 1996, pp. 43–44.

[13] J. Majchrowski, P. Winczorek, *Ustrój konstytucyjny Rzeczypospolitej Polskiej z tekstem Konstytucji z 2 IV 1997 r.*, Warszawa 1998, p. 217.

[14] Judgment by the Court of Administration in Białystok of 20 September 1994, I ACr 210/94, LEX Nr 23679.

claim with the general court. The claim for damages is subject to limitation on expiration of one year as of the date on which the person harmed obtained knowledge of the loss in property, not later, however, than on expiration of three years as of the termination of the martial law[15].

According to Art. 229 of the Constitution of the Republic of Poland, the martial law can be declared by the President, however, not on his own initiative but on request by the Council of Ministers, on the entire territory of the country or a part of it. Both bodies of executive power must then act in agreement: the President may not declare martial law without the request by the Council of Ministers but he has no duty to act according to that request[16]. The martial law can be implemented in three situations only:

1) in the case of external threats to the State,
2) acts of armed aggression against the territory of the Republic of Poland,
3) when an obligation of common defence against aggression arises by virtue of international agreement.

Actually, satisfying just one of the premises (and not all of them cumulatively) is sufficient for declaring the martial law. The decision on requesting the President to issue the regulation declaring the martial law should be taken by the Council of Ministers at its session. The request by the Council of Ministers should cover: presentation of the circumstances justifying declaration of the martial law, territorial coverage and the scope of the necessary limitations of freedom and rights of persons and citizens. Art. 229 of the Constitution of the Republic of Poland indicates clearly that the President is not required to act according to the request by the Council of Ministers. This means that the President may refuse issuing the regulation declaring the martial law or, agreeing with the Council of Ministers in general as concerns the necessity for declaring the martial law he may refer to other causes than those presented by the cabinet in its request. If, however, he refuses declaring the martial law, he announces his decision as a resolution. The head of the state may also declare the martial law on the other territorial area and specify a different scope of limitations to freedom and rights of persons and citizens. According to Krzysztof Prokop, the President of the Republic of Poland may not go beyond the limits of the request by the Council of Ministers, i.e. declare martial law on territories not covered by the request or define a wider catalogue of limitations to freedom and rights of persons and citizens[17].

President should take position concerning the request by the Council of Ministers immediately. The regulation declaring the martial law is subject to countersi-

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[15] Act on compensation of losses in property resulting from limitation of freedoms and rights of persons and citizens during application of extraordinary measures of 22 November 2002, Dz.U. No. 233, item 1955.

[16] A. Cieszyński, *Stan wojny a stan wojenny w przeobrażającym się polskim prawie konstytucyjnym – rekonstrukcja historyczna oraz analiza regulacji współczesnych (1921–1997)*, [in:] E. Kustra (ed.), *Przemiany polskiego prawa (lata 1989–1999)*, Toruń 2001, p. 272.

[17] K. Prokop, op. cit., p. 30.

gnature by the President of the Council of Ministers who, by signing it, is responsible to the Sejm. Countersigned regulation declaring the martial law is published immediately in the Official Journal (Dziennik Ustaw) and, based on Art. 228 section 2 of the Constitution of the Republic of Poland, shall additionally require to be publicized. Absence of countersignature means that the martial law shall not be declared. As indicated by Leszek Wiśniewski, "The President of the Republic of Poland may take the decision on his own under conditions of the state of higher necessity. If he acts inconsiderately, he may be subject to constitutional liability in front of the Tribunal of State, however, he will not be subject to penal liability in front of that Tribunal (e.g. for exceeding his mandate), if his decision was justified by the state of higher necessity as defined in the penal code"[18].

The regulation on the martial law becomes effective immediately after publicizing. Next, not later than within 48 hours after signing the regulation, the President of the Republic shall submit the regulation on the introduction of martial law to the Sejm for approval. The Sejm shall immediately consider the regulation and it may confirm it or annul it by the absolute majority of votes taken in the presence of at least half the statutory number of Deputies[19]. The Senate does not participate in the proceedings of considering the regulation or the President according to the principle of *nemo iudex in causa sua*. That is why the Sejm presents its position in the form of a resolution and not an Act. The consequences of annulment of such regulations include termination of limitations concerning the freedom and rights of persons and citizens and return to normal functioning of the public authorities. Given the circumstances and causes for declaring the martial law and its character, the legislator resign determining time limitations for its duration. This it is implemented for an unspecified time[20].

Limitation of freedom and human rights

The consequence of the constitutional principle of legalism is that bodies of public authorities act based on and within the limits of the law. This means that the activity of the state authorities and other public-legal bodies to which the state delegated a part of its powers is determined by the law. Otherwise speaking, they take only such actions to which they are authorised by the disposition of the legal norm; *a contrario* the citizens and other entities of the law may do everything the law does not forbid. The domain of free behaviours of the people is not unconditional in its character, however. Frequently, the system formulator must solve the con-

[18] L. Wiśniewski, *Stan nadzwyczajne w projekcie nowej konstytucji RP*, [in:] T. Jasudowicz (ed.), *Prawa człowieka w sytuacjach nadzwyczajnych ze szczególnym uwzględnieniem prawa i praktyki polskiej*, Toruń 1997, p. 154.

[19] Art. 231 of the Constitution of the Republic of Poland.

[20] P. Winczorek, *Prawo konstytucyjne Rzeczypospolitej Polskiej*, Warszawa 2003, p. 346.

tradictions between interests of individuals, their rights and conflicts of different values. Thus, it must set the limits of exercising the freedoms approved by it (Jasudowicz, 1997, p. 45). The limits of exercising the rights and freedoms that are not of absolute nature have been determined by the Constitution of the Republic of Poland. They have the form of limiting clauses and the derogative clause[21].

Limitation of the freedoms and rights of the individual is always one of the fundamental consequences of implementation of extraordinary measures. Given their importance for every person and citizen, the Constitution of the Republic of Poland does not leave freedom in determining which rights and freedoms may be subject to limitation to the bodies of public authorities[22]. Art. 31 section 3 of the Constitution of the Republic of Poland of 2 April 1997 provides that "any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights". Referring to the specific definitions in the Acts concerning the individual extraordinary measures, the legislator enumerated the freedoms and rights that cannot be derogated by the Act on the martial law in Art. 233. They include:

– the dignity of the person (Art. 30),
– the constitutional principles of obtaining Polish citizenship (Art. 34),
– the right of citizens to protection of the State during stay abroad (Art. 36),
– the protection of life (Art. 38),
– the freedom of subjecting to scientific experiments without voluntarily expressed consent (Art. 39),
– the freedom from torture and inhumane treatment and punishment as well as corporal punishment (Art. 40 and 41 section 4),
– the principle of *nullum poena sine lege*, the right of the accused to defence and presumption of innocence (Art. 42),
– the right of access to court (Art. 45),
– the right to legal protection of private life and personal goods (Art. 47),
– the freedom of conscience and religion (Art. 53),
– the right to submit petitions (Art. 63), and
– the right of the parents to rear their children in accordance with their own convictions and respect the degree of maturity of a child and its convictions; protection of the rights of the child (Art. 48 and 72).

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[21] T. Jasudowicz, *Administracja wobec praw człowieka*, Toruń 1996, p. 31–33; T. Jasudowicz, *Studium substancjalnych przesłanek dopuszczalności środków derogacyjnych*, [w:] T. Jasudowicz (red.), *Prawa człowieka...*, p. 45.

[22] L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2003, p. 434; L. Wiśniewski, op. cit., p. 157.

[23] Dz.U. 1977 No. 38, item 167.

Comparing the above catalogue to the regulations of the international law it should be noticed that Art. 4 point 1 of the International Covenant on Civil and Political Rights of 19 December 1966[23] stipulated that „in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". This means that two conditions have to be satisfied jointly for the State Party to the Covenant to be able to limit the freedoms and civil rights, i.e. the situation which threatens the life of the nation must exist and the country must officially (and legally) proclaim extraordinary measures (e.g. the martial law). Only then it may limit the right to life (Art. 6), the prohibition of torture or to cruel, inhuman or degrading treatment and prohibition of medical or scientific experimentation without consent of the patient (Art. 7), the prohibition of imprisoned merely on the ground of inability to fulfil a contractual obligation (Art. 11), the prohibition of slavery and slave trade (Aart. 8 sections 1 and 2), the principle of legality in penal law (Art. 15), the right to recognition everywhere as a person before the law (Art. 16) and the right to freedom of thought, conscience and religion (Art. 18). Thus the norm of Art. 233, section 2 of the Constitution of the Republic of Poland repeats, although in a slightly modified way, the provision of the Covenant and represents the *lex specialis* in relation to the constitutional principle of equality to the law and non-discrimination. Roman Wieruszewski, analysing the information provided by governments of countries on the limitations applied concludes that personal freedom, freedom of movement, right to privacy, political rights (e.g. of participation in elections), freedom of assembly and freedom of association are limited the most frequently. Poland, on the other hand, implementing the martial law limited personal freedom, the freedom of movement and the right to leave the country, the right to court proceedings in two instances, the right to express opinions, freedom of assembly and freedom of association.

Art. 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950[24] states that „In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". Based on that article, however, the right to life, except in respect of deaths resulting from lawful

[24] Dz.U. 1993 No. 61, item 284 as later amended.
[25] W.J. Wołpiuk, op. cit., p. 102–105.
[26] Dz.U. 2002 No. 233, item 1955.

acts of war, the prohibition of torture and other inhuman or degrading treatment or punishment, prohibition of slavery or servitude, prohibition of punishment without law and the prohibition of retrial and punishment cannot be derogated.

Returning to the analysis of the provisions of the Constitution of the Republic of Poland it should be highlighted that the prohibition of enacting limitations covers the catalogue of 14 articles of the constitution concerning the fundamental freedoms and rights with the right to protection of life at the top[25]. Moreover, the additional prohibition of discrimination of the individual because of the race, sex, language, religion, social origin, birth and property exists. The principle of compensating for the losses in property resulting from limitation of freedoms and rights of the individual during the period of extraordinary measures has also been stipulated (Art. 228, section 4). The provisions of Art. 228 section 4 of the Constitution of the Republic of Poland are elaborated in more detail in the Act of 22 November 2002 on compensation for property losses resulting from limitation of freedoms and rights of persons and citizens[26]. The Act specifies the bases, scope and procedure for compensation of property losses incurred as a consequence of limitation of freedoms and rights of persons and citizens during the application of extraordinary measures: the martial law, a state of emergency or a state of natural disaster.

The regulation with the power of the Act – genesis and the present

If the Sejm cannot assemble during the martial law then the President, on request of the Council of Ministers issues regulations with the power of the Act to the extent and within the limits specified by the law. The regulations with the power of the Act may not be issued during other extraordinary measures (i.e. state of emergency or state of natural disaster) and during the martial law unless the martial law was implemented earlier. Usually the state of war and martial law occur simultaneously. When, however, war activities take place far away from the borders of the country and there is no threat to its territory, implementation of the martial law should be withheld[27].

The draft regulation presented by the Council of Ministers may not be a template and it must contain specific solutions[28]. The regulations of the President with the power of the Act are subject to approval by the Sejm during the nearest session of the Sejm, i.e. the first one held after issuance of them. The Constitution does not limit the subject scope of the regulations with the power of the Act and it does not stipulate any special procedure for approval of them. Thus the Sejm conducts that according to the procedure stipulated in Art. 120 of the Constitution, which says that „The Sejm shall pass bills by a simple majority vote, in the presence of at least half

[27] M. Grzesik-Kulesza, *Ustawodawstwo delegowane w Konstytucji RP z 1997r.*, „Studia Prawnicze KUL" 2010, No. 1, p. 47.

of the statutory number of Deputies, unless the Constitution provides for another majority. The same procedure shall be applied by the Sejm in adoption of resolutions, unless a statute or a resolution of the Sejm provide otherwise". The refusal of the Sejm to approve the regulation with the power of the Act means that it loses its legal power. Simultaneously, the Sejm should issue Acts regulating the complications related to that, including those regulating the possible compensations.

In practical terms, the problem arises whether the President is authorised to issue a regulation with the power of the Act when the Sejm may assemble (at least 231 representatives, but the Senate may not. It seems that if in that case the Parliament would not be capable of passing Acts anyway, the President possesses that competence. A different opinion is expressed by Małgorzata Grzesik-Kulesza, who believes that if the Sejm has assembled for the session and the Senate was absent for actual reasons only, the Council of Ministers is authorised to apply to the President for issuing a regulation with the power of the Act[29].

Extraordinary institution delegated legislation, which includes a modern institution of the regulation with the power of the Act, appeared in Polish constitutional law and was applied in practice in the interwar period, during World War II and immediately after. The basis for justifying their issuance by the executive is a unique situation inside the country. It was not until the creation of such facts, filling the statutory concept of martial law creates a legal prerequisite for adoption of the measure of emergency[30], which is the regulation with the power of the Act.

Polish legislator in the 1997 Constitution has established a monopoly in the making of laws[31]. The only exception relates to an emergency situation when, during martial law, the Sejm is unable to assemble for a meeting, the Polish President at the request of the Council of Ministers issued the regulations with the power of the Act in the scope and limits specified in Art. 228 § 3–5. Such regulations must be approved by the Sejm at its next meeting and have the character of universally binding law. Strictly limited area therefore possible to control, and at the same strictly defined way of using the President granted to it in this area of powers, the Parliament also granted the ability to control these acts. It is therefore extraordinary delegated legislation and legal acts issued by the President in the form of regulations with the force of law are acts of law-making exceptional issued are in fact in the circumstances comprehensive concept of martial law[32].

Legislation unique occurred already in the provisional state after independence by the Polish state in 1918 during before constitutional period. On the ground

[28] K. Prokop, op. cit., p. 182–183.

[29] M. Grzesik-Kulesza, op. cit., p. 50.

[30] K. Działocha, op. cit., p. 15.

[31] J. Trzciński, M. Masternak-Kubiak, *System rządów w Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. – analiza kompetencji Sejmu,* „Przegląd Sejmowy" 1997, No. 5, p. 50.

[32] B. Dzierżyński, *Rozporządzenia z mocą ustawy jako akty nadzwyczajnego ustawodawstwa delegowanego na tle konstytucji polskich – wybrane problemy*, „Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji" 2003, vol. LIV, p. 63–80.

passed by the Sejm Legislative resolution of February 20, 1919 entrust J. Pilsudski continue to hold office of Chief of State, known as Little constitution, the constitution of the legislature escorted by Decree of 22 November 1918 the highest authority and representative of the Polish Republic[33] has been through Polish Legislature abolished and replaced by the principle of the sovereignty of Parliament. From that moment the primary manifestation of the supreme authority of the Sejm was entrusting to him the exclusive legislative functions[34]. The first case of restriction of these rights occurred in July 1920 by creating a law of 1 July 1920 State Defence Council[35], which was due to failures in the war against the Soviet Union, and the grant of authority for issuing acts of exceptional-regulations and decrees – that could change or repeal laws[36]. From the moment the war began to threaten the foundations of statehood, the State Defence Council[37] seemed a regulation to regulate the exceptional situation prevailing in the country at war. These regulations were generally short acts. They often changed or evaded statutory provisions of the Sejm and the vast majority of regulated issues and problems that exist at the time when the state led war. Thus, they included military affairs, national defense and emergency measures to defend it. These regulations were published in the Official Gazette, and their normative nature and validity was indisputable.

The March Constitution of 1921[38] envisaged the possibility of interference of the executive in Parliament legislation in special situations which can be classified as extraordinary delegated legislation. It was namely the temporary suspension of civil rights provided for in Art. 124 of the Constitution. It related to: personal liberty (Art. 97), the inviolability of dwellings (Art. 100), the right coalition, assembly or to concatenate associations (Art. 109) and may take place for the entire area of the state or the locality where necessary with reasons of public security. The suspension of these rights could only order the Council of Ministers with the permission of the President during war or when the threatened outbreak of war, as well as during internal disturbances that threaten the Constitution of the State or the security of citizens (martial law and emergency). Diet control over these ordinances expressed the need for approval. It was the only stipulated in the Constitution of the March case of a quasi-emergency legislation allowing the issuance by the Council of Ministers with the permission of the President's decrees negative exceptional nature involving the suspension of certain provisions of the Constitution[39].

On the basis of the Constitution of April 1935[40] there were two kinds of acts of delegated legislation. The first were the decrees of the President (Art. 55 and 56),

[33] Dz. Pr. PP, No. 17, item 40.
[34] K. Działocha, op. cit., p. 49.
[35] Dz.U. No. 53, item 327.
[36] W. Komarnicki, *Polskie prawo polityczne (geneza i system)*, Warszawa 1922, p. 94.
[37] R. Kraczkowski, *Dekretowanie ustaw w Polsce w latach 1918–1926*, Warszawa 1994, p. 60.
[38] Dz.U. 1921 No. 44, item 267.
[39] K. Działocha, op. cit., p. 142–143.
[40] Dz.U. 1935 No. 30, item 227.

which had the force of law (Art. 57 § 1), while the second type of legislation this extraordinary legislation delegated (Art. 79 § 2), under which the President of Poland during martial law He has the right without the authorization of parliament to issue decrees in terms of national legislation with the exception of amending the Constitution. These constitutional provisions emphasized the strong position of the President, giving him the possibility of issuing special acts of law-making in such a wide range, without the simultaneous needs of their approval by Parliament[41]. It should be added that at the end of the interwar period in force Act of 23 June 1939 on martial law[42] under which the President of Poland on Sept. 1, 1939 ordered martial law throughout the country[43]. Then, based on Art. 79 § 2 of the Constitution of 1935, the President issued an 8 legislative decrees and emergency decrees so delegated legislation. Of this number, 7 decrees related to budgetary affairs of the state in time of war. President decrees signed and countersigned: The Prime Minister and Chancellor of the Exchequer, only the last decree on amnesty, in addition to the Prime Minister countersigned Minister of Justice. They were the only and last decrees extraordinary delegated legislation issued by the President on Polish territory after the outbreak of World War II, based on the April Constitution. Further legislation decrees pursuant to Art. 79 § 2 took place in exile. He performed them sworn in on Sept. 30, 1939 in Paris a new President of Poland Wladyslaw Raczkiewicz. By order of 2 November 1939, he dissolved both houses of parliament, which since September 2, 1939 pursuant to Art. 79 § 1 April Constitution functioned at reduced configurations.

After the end of World War II on the basis of the constitutional law of 19 February 1947 on the structure and scope of activity supreme laws of the Republic[44], there were no extraordinary delegated legislation. However, pending this legislation, the government voted a decrees under the Act of 3 January 1945 on the procedure for issuing decrees with the force of law. After the entry into force of the Act constitutional government announced in Journals of Law decrees enacted prior to the date of entry into force of the Constitutional Act and enacted pursuant to the Act on the procedure for issuing legislative decrees. Some decrees introduced regulations typical of the state of emergency, including the provisions related to ad-hoc mode is especially dangerous crimes during the country's reconstruction. They also regulated the length of sentences for war criminals.

Constitution of the People's Republic of July 22, 1952[45] did not provide for exceptional acts of law-making. Until the amendment of the Act of April 7, 1989[46] occurred on its soil acts delegated legislation in the form of decrees of the State

[41] B. Dzierżyński, op. cit., p. 70–71.
[42] Dz.U. No. 57, item 366.
[43] Dz.U. No. 86, item 544.
[44] Dz.U. No. 18, item 71.
[45] Dz.U. No. 33, item 232.
[46] Dz.U. No. 19, item 101.

Council issued directly on the basis of constitutional provisions (Art. 25 § 1 item 4 and Art. 26). They were only issued between sessions and cadences of the Sejm. The Act of 7 April 1989 repealing provisions granting the then Council of State powers to issue decrees with the force of law between sessions of the Sejm has not provided them or the Council of Ministers, or the President of the Republic. Only the provisions of Art. 23 Little Constitution dated 17 October 1992[47] restored the institution of delegated legislation in the form of legislation – regulations with the force of law. These were acts under the authority of the Act, which resulted from the wording of Art. 23 § 2, which provided that Parliament may by law may authorize the Council of Ministers to issue regulations with the force of law. However, this was not an extraordinary institution of delegated legislation.

Conclusion

The martial law is one of the types of extraordinary measures. Its nature involves, among others, temporary increase of the powers of the executive power, its concentration, temporary suspension of specified rights and freedoms of the citizens as well as increase of the mandate and role of the Armed Forces in the country. Protection of the values that are the most important for the legislators by means of the martial law sometimes takes place at the expense of the other, less previous values that are also guaranteed constitutionally. The state authorities agree with that already at the moment of enacting the legal regulations allowing such a possibility. Setting the hierarchy of the fundamental values is something natural, and sometimes necessary, from the perspective of social order, and the martial law offers such a possibility. The freedoms and human rights as well as the democratic mechanisms of governance are the values that the constitutional legislator is usually ready to sacrifice to save sovereignty of the country and security of the citizens. In both cases it sets the limits that cannot be transgressed even to save the most precious goods.

The 1997 Constitution does not provide for other forms of high-ranking law than the law emanating from Parliament. It does not allow so called. delegated legislation, when the acts with the force of law seem executive authorities (government or head of state). The only exception to this rule is that observed consistently Legislative activity of the President, consisting in issuing the regulations with the power of the Act (Art. 234). This is acceptable, as it was already mentioned, only in the case of one of the states of emergency – martial law – it is impossible to collect the Sejm, taking his work, holding meetings, and it will be necessary to regulate in this time of important issues in the form of legislation, parliamentary. President of the Republic may issue the regulations with the power of the Act to the extent specified in Art. 228 § 3–5. These regulations are not final and at the next sitting of

[47] Dz.U. No. 84, item 426.

the Sejm shall be subject to consideration and approval[48] . Those instruments must be classified as a separate group constitutionally legal acts identified as a source of universally binding law of the Polish Republic.

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Summary

Key words: Constitution of the Republic of Poland, the martial law, the regulation with the power of the Act; freedom and human rights.

The Constitution of the Republic of Poland of 2nd April 1997 differentiates three forms of extraordinary measures. These are: martial law, a state of emergency or a state of natural disaster (Art. 228, section 1). Each of them was regulated in the Arts. of Chapter XI. The constitution regulations covering the extraordinary measures are aimed at assuring the effective State functioning in the inner crisis situation and restitution of the normal situation as soon as possible. From the legal point of view, the essence of an extraordinary measure is that it is introduced in the situation of exceptional menace when normal, ordinary legal measures and State institutions are useless and freedom as well as human rights have to be suspended or restricted for some time and the competences of constitutional authority structures have to be changed through important and exceptional strengthening and providing more power for executive authorities. The 1997 Constitution does not provide for other forms of high-ranking law than the law emanating from Parliament. It does not allow so called. delegated legislation, when the acts with the force of law seem executive authorities (government or head of state). The only exception to this rule is that observed consistently Legislative activity of the President, consisting in issuing the regulation with the power of the Act (Art. 234).

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Operation of habitual law in contemporary Above-Bali Svaneti

(Scholarly-accounting report on field-ethnographical expedition of June 20–30, 2015)

Introduction

Habitual law is one of the means of regulation of social relations. Today it is less attributable to the field of conscious management of the society, but at the earlier stage of social development, when the state institutions were weak, the functions of positive law were largely discharged by customary law. Later, the strengthening of the state institutions and increasing importance of the rules of positive law somewhat narrowed the field of application of habitual law and it became more like an underground stream, which may not be visible on the surface, but is still alive[1]. An apparent example of the foregoing is Svaneti, where the customary law has a major impact on the regulation of social relations even in XXI century.

Above-Bali Svaneti is one of the high mountain regions of Georgia, located in the south-west part of the Caucasus mountain range. The habitual law is still maintained here, operating in parallel to positive law, complementing it and sometimes regulating certain issues in different from it and characteristic for this region original manner.

Historically several factors have promoted the viability of habitual law of Svaneti:

1. Lack or weakness of state institutions – what was characteristic not only for Georgian highlands, but also for the whole high mountain areas of the Caucasus for centuries.

2. Severe climate and underdeveloped agricultural equipment – what provided for the necessity of living in extended families (20–80 persons) and the strength of

[1] The paraphrase of Hovard Zehr quotation: "For some time the restorative justice stream was driven underground by our modern legal systems. In the last quarter century, however, that stream has resurfaced, growing into a widening river". See H. Zehr, *The Little Book of Restorative Justice*, Good Books 2002, p. 62.

patrimonial institutions: bigger was the population of a social unit (family, clan, village), higher was the probability of physical survival of an individual. Territorially the relatives generally lived rather close to each other, and their residential houses were not segmented in rooms[2], what provided for close social relationships between kindred and family members and their relations were closer than those of the members of a family raised in room-segmented houses since 1930s[3]. This is one of the reasons for the whole kinship to become the target of vengeance in old times and furthermore, the whole kindred were obliged to avenge for killing their kin. As of to date the circle of vengeance targets is substantially narrowed and it only extends to a brother, father and son of a killer. And likewise they are obliged to take revenge[4].

3. Provincial reticence, what was so characteristic for Georgia of Late Feudal period, split into kingdoms and principalities, and particularly for its mountainous part – nomadic way of life was not characteristic for Svans – a Svan would be born, grow up and live in the same place, outside of which area the physical survival of an individual was doubtful. Not only living outside Svaneti was a tragedy for a Svan, but also be buried in a foreign land after death. The relics of those who died outside Svaneti, would be brought to Svaneti for burial in the homeland. The foregoing concerned not only those, who died abroad, but in the other parts of Georgia as well, and even today many Svans try to bury their relatives in Svaneti, on family cemetery even though they spend their whole lives in the other regions of Georgia[5].

As living outside Svaneti was unimaginable for old Svans, there were three alternatives in the case of some controversy between two individuals (and respectively between their families and clans):

a) one of them had to physical destroy the other;

b) the weak family had to elude from the strong one and take refuge from Svaneti – what was equal to death for people of those times (expulsion – as a punishment is associated with this very philosophy);

c) in the case of certain balance of forces (when neither of the parties succeeded in the destruction of the other party and living outside Svaneti was equally unimaginable for both of them) a truce should have been concluded. The necessity of such a truce developed the strong institute of public mediation.

In XIX century, after Georgia's annexation to Russian Empire and establishment of Russian governance, the importance of habitual law has not diminished,

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[2] See A. Kaldani, *Svaneti Residential Complexes*, Thesis, Tbilisi 1973, p. 176 [in Georgian].

[3] See M. Chartolani, *New Type Residential Houses in Svaneti before 1961*, "For Ethnographical Study of Svaneti", Tbilisi 1970, p. 43, 68 [in Georgian].

[4] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti of June 20–30, 2015*, p. 20–21, 65, 111, 188, 228. Note: This expedition ledger was issued as an annex to the Report of field-ethnographical expedition of Above-Bali Svaneti of June 20–30, 2015. See G. Davitashvili, S. Oniani, *Operation of Customary Law in Modern Above-Bali Svaneti, Report of field-ethnographical expedition of Above-Bali Svaneti of June 20–30, 2015*, Tbilisi 2016 [in Georgian].

[5] Ibidem, p. 235.

what was promoted by the establishment of unknown to the majority of the population Russian language in official judicial proceedings. Furthermore, the Russian governance and Russian law were understood as some phenomena imposed by an enemy and incompatible with Svan character. The so-called "non-disclosure principle" was developed, according to which principle it was a shame to surrender a personal enemy to public enemy: when an investigator, sent by Russian government to Svaneti, would question a complainant, defendant and witnesses, all of them would unanimously testify in favour of a suspect, for the culprit not be punished by Russian law and the dispute to be settled according to Svanetian customs[6]. To a certain extent such attitude towards official government was maintained in XX century as well, after the establishment of Soviet governance: confinement in Soviet prison would not exempt a culprit from liability under habitual law and the reconciliation with the family of the aggrieved party was a must (otherwise, this would have given rise to vendetta) [7].

Many basic principles of the viability of customary law have weakened since 1930s:

The necessity of living in extended families was gradually gathered to the past owing to technical progress. Furthermore, the process of collectivization of the Soviet period was also another severe blow for this institution: the system of collective farms, against the background of scarcity of land resources, failed and totally disarranged the exiting social and economic relations. The Soviet government left the multi-member family of an individual proprietor peasant without cropland and wood, set the limit on live-stock population, etc. The destructive policy of Soviet collective farms was also manifested in the deforestation of the floodplains of the *Tskhenistskali* River and turning the area into cropland, what resulted in washing out of the land by the river, unprecedented floods and ecological disasters. The construction of the dam in the gorge of the river *Enguri* caused the displacement of the large number of population and change of climatic and hydrological-meteorological conditions of Svaneti.

Along with negative reasons (like the Acts of God) the transmigration of Svans to lowlands was conditioned by positive factors as well, e.g. – the introduction of benefits for highland population at higher education institutions during the Soviet period – the majority of young people who went to town driven by the desire to get higher education, got married in the lowlands and settled there. Little by little the stern position about burying dead outside Svaneti somewhat shattered and the attitude towards living and burying in some other places became more loyal. It should as well be mentioned, that another objective reason resulted in a very severe blow on many-centuries-standing tradition of burying dead people on family cemeteries – thousands of soldiers died and went missing during the World War II.

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[6] Gabliani E., *Free Svaneti*, Tbilisi 1927, p. 91–94 [in Georgian].

[7] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 27.

As of to date many old institutions of customary law have already disappeared, some of them are transformed, but customary law is still working and the respondents questioned during the field-ethnographical expedition of June 20–30, 2015 were the conciliators themselves – justice of peace (the so-called *morev*/ *morav*) guided by habitual law. The respondents have personally applied some of the rules of Svanetian customary law, declared thereby, in their mediation practice and other rules are known to them from the narratives of their ancestors or the decisions of the other panels, although, they have never applied them personally in their mediation practice as the necessity of settlement of respective litigations have never arisen. This is quite natural, as habitual law, in its essence, is the case-law, meaning that, evidently, there is no single code containing the mandatory for the whole Svaneti customary rules and we can only speak about some general principles of customary law. Upon settlement of a specific case the mediators rely not only on their intuition and wit, but also try to recall the old examples and decisions made by other contemporary mediation panels[8].

I. Organization of mediation court and proceedings

1. Some general aspects related to mediation court

1.1. Concept of a mediation court. "Mediation court" is an *ad hoc* panel set up by disputing parties at their own free will for the settlement of a specific issue. The members of this panel are elected either jointly or severely, on the basis of mutual agreement and they are the conciliators.

1.2. Jurisdiction of the mediation court. The jurisdiction of the mediation court extends to: homicide, wounding-maiming, beating, quarrelling, theft, burglary, women abduction, raping, abuse (disdain) cases; also to property disputes: disagreement about a boundary, disputes between neighbours, etc.[9]

Church burglary falls within the special competence of the whole clan or village. In old times the community meeting would consider the treason cases (leading in the enemy or the desire to become the sovereign of the community), however these types of crimes were gathered to the past upon the end of Feudal era[10].

Community decides on issues related to the faith of grasslands, forests and other property belonging thereto. Community is authorised to undertake measures (disgracing punishment or cursing) for regular stealing, set up a boycott against a family for immorality (incest, illegal sexual intercourse)[11].

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[8] Ibidem, p. 16, 67, 114, 191.
[9] Ibidem, p. 1, 2, 37, 84, 101, 132.
[10] Ibidem, p. 1, 18, 25, 116, 149, 160, 196, 202.
[11] Ibidem, p. 18, 58, 68–69, 113, 149, 160, 177, 196–197, 240, 241.

Community is capable of interfering into the resolution of questions attributable to the jurisdiction of the mediation court, whilst the trial of issues falling with the common competence of the community is no concern of the mediation court[12].

The homicide committed between the family members or close relatives does not falls within the jurisdiction of mediation court either. It does not leads to vendetta and is regarded as a tragedy of only the family concerned. Such a problem is resolved by the family clan itself[13].

1.3. Settlement without the mediation court. The mediation court is not assembled for minor cases. The parties may also come to an agreement without the mediation court even with regard to grave cases. This form of mediation is called *lagnazhi linge* ("stepping into his shoes") – a culprit makes a solemn oath at the church before the victimized party (together with co-jurors), that "he would have reconciled if he were in the aggrieved party's place". It should be mentioned that this form of reconciliation ("stepping into his shoes") can also be applied during the mediation proceedings[14].

1.4. Mediation court and the state power. These days the role of the state has greatly increased, expanded, although the population still believes, that the serving a sentence imposed by official court does not exempt an individual from the liability under customary law and it is necessary for the parties to reconcile for him not to become a target of vengeance[15].

As regards the attitude towards the sentence already served by a culprit at a penitentiary institution, the details of the case concerned are of paramount importance. As a general rule, serving a sentence will mitigate the situation with the culprit upon reconciliation, however, it may also happen that the fact of serving the sentence will not be taken into account[16].

2. Organization of the mediation court

2.1. The performance of the intermediaries. The first step is the intermediation – talking the parties into reconciliation[17].

The number of intermediaries is generally 3 or 4[18]. An intermediary should be a honourable person. He cannot be a brother or a cousin of the disputing parties[19]. It is possible to substitute an intermediary during the mediation proceedings under the

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12 Ibidem, p. 68.
13 Ibidem, p. 19, 102.
14 Ibidem, p. 1, 2, 4, 5, 7, 10, 37, 71, 121, 138–139, 199.
15 Ibidem, p. 27–28, 117, 123, 128, 157.
16 Ibidem, p. 79, 117, 128, 153, 169, 186, 220, 243.
17 Ibidem, p. 26, 71, 95, 164, 180, 191.
18 Ibidem, p. 141, 180, 197.
19 Ibidem, p. 204.

initiative of either party or the intermediary himself, i.e. challenging or self-challenging[20].

The intermediaries:

a) act at their own initiative[21];

b) are sent to the suspect by the aggrieved party to inform the former that he is being suspected[22];

c) are sent to the aggrieved party by the suspect, who finds out that he is being suspected but pleads not guilty and wants the trial of the case[23].

In the case of a petty crime, the intermediation can be launched the very day of commitment of the wrongdoing[24]. In the case of a graver crime, e.g. a homicide, the intermediaries do not approach the mourning family until the funeral of the deceased[25].

When the intermediaries talk the parties into the reconciliation, the selection of mediator judges (the so-called *more* / *morav*) starts[26].

2.2. Election of *morevs*. It is believed, that not everyone can be a *morev* and this pursuit requires special personal features – firmness, integrity and fairness[27].

The parties agree upon the candidacies of *morevs* either personally or through intermediaries. The *morevs* must be nominated by the parties. The right to select a *morev* cannot be delegated upon an intermediary, he can only be asked of his opinion regarding some *morev*[28].

The candidates are selected from amongst the *morevs* whose competence is well-known in the village[29]. A few *morevs* can also be selected from amongst the intermediaries[30]. Each party is entitled to challenge the candidate nominated by the other party. The reason for challenging can be the ties of relationship, friendship or vice versa – controversy with a party[31] . A *morev* can be challenged during the case proceedings only in case the latter divulges the confidential information or commits some moral turpitude[32].

Once the list of *morevs* is agreed between the parties, the intermediaries visit each candidate *morev* and inform them that the parties trust them and ask for their

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20 Ibidem, p. 96, 139.
21 Ibidem, p. 95, 180, 214.
22 Ibidem, p. 197, 205.
23 Ibidem, p. 164, 197.
24 Ibidem, p. 1, 204.
25 Ibidem, p. 39, 204.
26 Ibidem, p. 39, 104, 164.
27 Ibidem, p. 6, 8, 97, 119, 126.
28 Ibidem, p. 39, 104.
29 Ibidem.
30 Ibidem, p. 39, 71, 96, 138, 199.
31 Ibidem, p. 5–6, 39, 178, 219.
32 Ibidem, p. 8, 219.

assistance. Being a *morev* is a moral obligation and major responsibility, however if an individual categorically refuses to be a *morev*, he cannot be induced to act as such[33].

The intermediaries provide *morevs* with all the case details. They remain with *morevs* until the resolution of the dispute and assist them[34].

In old times the *morevs* were remunerated for their performance[35]. This was conditioned by the fact that the location of Svaneti in high mountain region and severe winter required the mobilization of each and every family member and strict observance of timelines. Tearing off a family member from economic activities was extremely detrimental for the family. Hence, the custom would remunerate *morevs* for forced idleness. Today *morevs* are not paid for trial a case, what is explained by improved living conditions[36] .

2.3. Number of *morevs* and correlation. Chief *morev*. Mediation court is a collegial body consisting of 2–12 *morevs*[37] , very rarely – of 24 *morevs*[38].

As regards the correlation, three are three main rules:

a) selection of equal number of *morevs* - this is the most common rule[39];

b) selection of unequal number of *morevs*, when the preference is given to the aggrieved party (as a general rule – 2:1)[40];

c) very rarely it may happen that the whole panel is selected by the aggrieved party[41].

The panel of *morevs* has a chairperson, who is in charge of court performance, enjoys the right to first and last speech. Announcement of the sentence is also his prerogative[42]. As a general rule he is older than the others, however this condition is not mandatory and wit and experience prevail over the age[43].

The chief *morev* can be elected by *morevs* themselves or directly by the parties. If the number of *morevs* in the panel is small, the chairperson is not elected separately[44].

2.4. Woman as an intermediary and *morev*. A woman always enjoyed the high level of freedom in Svaneti, the main reason of the foregoing being the equalization of labour duties between men and women due to severe living conditions in the

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[33] Ibidem, p. 6, 42, 100, 218.

[34] Ibidem, p. 3, 36, 95.

[35] A. Tsulukiani, *Deliverative-Mediation Court of Svaneti*, "The State and Law" 1990, No. 9, p. 62 [in Georgian].

[36] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 42, 83, 122, 143, 175, 220.

[37] Ibidem, p. 2, 70, 96, 98, 121, 139 164, 181, 216.

[38] Ibidem, p. 39, 119.

[39] Ibidem, p. 3, 40, 70, 96, 120, 139, 164.

[40] Ibidem, p. 2, 36, 120, 139, 140.

[41] Ibidem, p. 96–98, 139.

[42] Ibidem, p. 40, 69, 90, 164, 217.

[43] Ibidem, p. 69, 98, 141.

[44] Ibidem, p. 35, 40, 98, 119, 141, 164–165.

mountains. The expansion of social duty had a directly proportional impact on their rights, what was further promoted by the factor of Christianity (as compared with Islamic tribes of the North Caucasus).

The intermediary activities of women are unanimously confirmed by all the respondents. As regards women-*morevs*, there are different situations with this regard:

a) some respondents do not confirm the existence of women-*morevs* referring either to personal experience or past history[45];

b) the others have heard about it but have no personal experience with such a situation[46];

c) some say that they have not only heard about such cases, but have personally participated in case trials together with a woman-*morev*. However such cases were very rare[47].

Women-*morevs* participated only in those cases, which did not require taking an icon oath, and if the oath was a must a man-member of *morev* panel would make the oath instead of her[48].

Women-*morevs* never participated in homicide cases, except for the situations when the aggrieved party categorically demanded her participation[49]. As regards wounding-maiming, quarrels, stealing, especially the crimes against women (rape, beating, wounding, etc.), as well as civil disputes – women are not restricted in this respect. During the panel meeting no distinction is made between voices of a woman *morev* and a man *morev*[50]. Furthermore, the chief *morev* can never be a woman[51].

3. Litigation

3.1. Procedural oath. Along with the oath as the means of alleging (self-exculpation), Svanetian custom is still aware of procedural oath, which is the milestone of mediation proceedings.

The expedition of 2015 evidenced just the same types of procedural oath, as recorded in earlier materials[52]:

1. *Morevs*' oath to the parties – that they will treat both parties equally, will not differentiate between them like their own children, will be impartial, will step into the shoes of each of them and do their best to peacefully reconcile the parties and judge the case fairly[53].

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45 Ibidem, p. 73, 170, 191.

46 Ibidem, p. 37–38, 126, 142–143, 182.

47 Ibidem, p. 28, 101–102.

48 Ibidem, p. 28, 38–39, 101–102, 182.

49 Ibidem, p. 182.

50 Ibidem, p. 28, 101, 126.

51 Ibidem, p. 35.

52 M. Kekelia, *Oath in Svanetian Customary Law*, "For the History of Georgian Law" 1979, vol. III, p. 135–136 [in Georgian].

53 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 7, 43, 73, 76, 96, 119, 127, 140, 165, 167, 181, 198, 222.

If the contradiction between the parties is so fierce, that it is totally impossible to bring them together, the panel of *morevs* gives oath to each of the them separately. In this case it is possible for the authorised representative of the opposing party to attend the oath-taking ritual. If the contradiction between the parties is not fierce, the *morevs* give their oath to both parties simultaneously. As a general rule, this oath is made before the interrogation of the witnesses, and the oath of the parties regarding the enforcement of the sentence can also be made right then and there[54].

2. *Morevs*' oath to each other – this oath means the stipulation that they will not disclose the others' positions regarding the case, and also that they will not divulge the sentence before its announcement[55]. Nowadays this oath is seldom made between the *morevs*, and it goes without saying, that confidential information should not be divulged by anyone[56].

3. A *morev* adjures a party that he will not deceive the panel, admit the truth and say everything about the facts of the case, give truthful evidence and will not slander anyone. Sometimes it is possible for the text of the oath to specifically mention that the party will not invite a false witness and also a co-juror, who will give false evidence in his favour[57].

4. Oath of the parties to *morevs* – that they will agree to the sentence of the *morevs* and will enforce it[58]. This oath is taken before the trial of the case, often together with the oath given by *morevs* to the parties or after the meeting, when the *morevs* have already made a decision, but have not yet notified it to the parties[59].

5. Oath of the parties to each other – that they will be loyal to each other[60]. The parties should take the loyalty oath together[61].

In certain cases, when the case is of lesser gravity[62] and at the same time the *morevs* are very authoritative, they may not even take the oath[63]. Also when the regret of a culprit is so great, that he may not even demand the adjuring the *morevs* and surrender his case to their judgement[64]. However the case cannot be regarded resolved even under these circumstances, if the *morevs* have not adjured the parties to the enforcement of the sentence and mutual loyalty[65]. These two oath serve as the guarantee of the strength and enforcement of the mediation court decision.

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54 Ibidem, p. 40, 43, 73, 102, 119–120, 144, 167, 174, 178.
55 Ibidem, p. 7, 221.
56 Ibidem, p. 127, 146, 174, 221.
57 Ibidem, p. 43, 181, 198.
58 Ibidem, p. 7, 44, 76, 124, 140, 167, 168 181.
59 Ibidem, p. 144.
60 Ibidem, p. 8, 43, 124, 145, 166.
61 Ibidem, p. 8.
62 Ibidem, p. 168.
63 Ibidem, p. 120.
64 Ibidem, p. 81.
65 M. Kekelia *Oath in Svanetian...*, p. 161.

All the above oaths can be taken individually or some of them can be united in a single oath.

Every oath ritual is necessarily held at the church. There are several churches in every village, but traditionally one or several of them are selected for making the oath[66]. It is possible for the oath rituals to be held at different churches[67]. Such a necessity may arise when disputing parties live in different places. However the loyalty oath is an exemption – it should necessarily be made at one and the same church[68].

3.2. Trial of a case on merits. The next step of the litigation is the trial of a case on merits.

At this stage the whole panel of *morevs* visits first the family of the aggrieved party and then that of the culprit (when both parties are culpable, it is up to the panel to decide, which family to visit first, or which party was first victimized). The *morevs* listen to the claim of the family of the aggrieved party and ask questions about every detail of their interest. Then the family of the aggrieved party may invite the *morevs* to dinner/supper (however, nobody will blame the family if no invitation follows, as excessive disturbance of mourning family is not considered reasonable). Only three mandatory toasts[69] are made at the dinner table and then the *morevs* take leave. The *morevs* visit the culprit's family the same or next day, where again they will ask questions about everything, they are interested in (based on specific nature of the case concerned, they may even communicate the essence of the claim to the defendant; however, they mainly just ask questions). As s general rule, the culprit's family also lays the table, and again only three toasts are made. Following that the *morevs* may not need the further query in the details of the case and meet for discussion, or proceed with visiting families of the parties, until everything is cleared out[70].

Apart from the parties the *morevs* will also question the witnesses and other persons (on or without oath). The difference is that the *morevs* invite witnesses to take evidence from them. Confrontation of the parties is categorically excluded[71], however, in very seldom cases, and with regard to only relatively simple cases, the parties may even be confronted with each other or a witness[72].

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[66] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 11, 44, 74, 125, 139, 178, 182.

[67] Ibidem, p. 52.

[68] M. Kekelia, *Oath in Svanetian*..., p. 154.

[69] According to Svanetian tradition every feast begin with three mandatory toasts: to Great God, the Archangel of abundant and St. George.

[70] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 5, 8, 45–46, 73, 120, 124, 126, 143–144, 157, 174, 183, 224.

[71] Ibidem, p. 45, 80, 124.

[72] Ibidem, p. 8, 124.

3.3. Discussion of the Sentence and Delivering a Sentence

3.3.1. A place for deliberations. The custom is very strict about the confidentiality of *morevs*' meeting. They meet far away from the places of public resort – at a riverbank, in the forest, in the meadow, in a church, abandoned houses or in a separate room of one of the *morev's* house[73].

There is no designated building or place for *morevs*' meeting, however there are special places in every village, having suitable location to secure the confidentiality[74].

3.3.2. Priority of articafdthe chief *morev*[75], who is then followed by the other *morevs*: according to seniority[76], or the floor will necessarily be taken by the youngest[77].

The rule of giving floor to the youngest after the elders have articulated their opinion is based on the presumption, that a relatively inexperienced *morev* listens to the experienced one and studies from him[78] and the rule, when the panel first listens to its youngest member's opinion, is explained by the desire, not to make the young people get accustomed only to listening to the others and be influenced by the opinions of the others[79].

It is incorrect to interrupt the speaker, except for the cases, when he deviates from the point of issue too much. In this case, the chief *morev* addresses him respectfully and at the same time, tells him, that he has deviated from the subject matter[80].

3.3.3. The ways of attaining unanimity. There are cases, when the opinions cannot be collated and it takes *morevs* several days or even a month to come to a common resolution[81]. According to the custom, the sentence should be upheld by everyone[82].

There are the following ways of attaining unanimity:

a) The whole panel discusses the case together[83];

b) They can be divided, e.g. into six 2-member groups, when they are 12, in which groups one is elder and other is younger by age. These groups try to come to an agreement separately[84];

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73 Ibidem, p. 82, 98, 127, 135, 144, 218.
74 Ibidem, p. 35, 83, 144, 178.
75 Ibidem, p. 47, 127–128, 145.
76 Ibidem, p. 2, 47, 145.
77 Ibidem, p. 90, 127.
78 Ibidem, p. 90.
79 Ibidem, p. 128.
80 Ibidem, p. 217.
81 Ibidem, p. 47, 75, 89.
82 Ibidem, p. 47, 136, 145.
83 Ibidem, p. 136.
84 Ibidem, p. 35, 90.

c) It is possible for the *morevs* to specially designate two persons: an elder member of the panel and the younger, who will retire and make decision concerning the sentence. When the couple comes to an agreement, they will communicate their common opinion to the rest of the panel. If they fail to come to an agreement, each of them will offer their sentences to the panel. Then the whole panel will discuss the decision offered by the couple[85];

d) In very seldom cases, the right to make a decision can be delegated upon a single *morev* – as a general rule, to an elderly *morev*, selected by the aggrieved party, who enjoys particular authority and the others agree to his resolution[86].

If the *morevs* fails to come to any agreement, the panel is dissolved and the parties elect the new composition of the panel, whereto, at least, some of the members of the old panel can also be elected[87].

3.4. Announcement and enforcement of the sentence. Binding nature of the sentence. The sentence is declared by the chief *morev*. The sentence is announced in the presence of the morevs, parties, their families, relatives and co-jurors[88].

The sentence can be announced in the church or in the houses of the parties. Generally when the case is light the sentence is announced in the church and when the case is grave – in the houses of the parties, specifically, the sentence is first communicated to the aggrieved party and then to the culprit. When both parties are guilty the priority is of no importance[89].

If the sentence imposes the payment of some amount, it can be collected from the culprit on the spot or some period can be set for the payment thereof. In case of delay with the payment for some reason the culprit is required to approach the *morevs* and explain the situation to them – what is the reason of not meeting the set timelines. It is possible for the culprit to be sentence to the expulsion from the village for several years or to making apologies on his knees, together with the payment of some amount. Quite often the reconciliation is followed by baptizing ritual, also a table is laid in culprit's family, attended by all the parties to the reconciliation procedure[90].

The sentence of the mediation court is of binding nature. The main guarantee for the enforcement thereof is the oath given by the parties to the *morevs*, that they will abide by the sentence. The *morevs* personally participate in the enforcement of the sentence. They can take an ox, money, etc. brought by the culprit, to the aggrieved party[91].

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[85] Ibidem, p. 98–99.
[86] Ibidem, p. 35.
[87] Ibidem, p. 47, 75, 92, 145.
[88] Ibidem, p. 9, 48, 92, 131.
[89] Ibidem, p. 9, 48, 92, 130, 131, 146, 157, 175, 183, 225.
[90] Ibidem, p. 10, 19, 41, 49, 131, 154, 199.
[91] Ibidem, p. 49, 226–227.

II. Judicial evidences

1. Oath. Rules of Svanetian court procedure is very like Christian seal of confession. As the confessor tells a priest about his/her sins before the God, the parties and witnesses are likewise required to tell the truth to the *morev* in front of the God (Icon, church). Hence, Svanetian court procedure is based on evidences obtained under the oath of the parties[92].

According to its structure, an oath is a conditional sentence (if... – then...), the first part of which sentence contains a condition (declaration of some fact) and the other – t e sanction (imprecation) for non-fulfilment of this condition.

The custom prohibits the bringing of a women to oath. If a suspect is a woman, the oath should be taken by her family members: husband, son, father or brother, and whenever a woman is a witness - again by the above-nominated persons or the party, in whose favour the woman is testifying[93].

1.1. Co-juror. The oath, as the means of suspect self-vindication, is closely connected with the institute of co-juror. Sometimes there might be cases of individual adjuration but, as a general rule, such petty cases are not brought before the panel of *morevs*.

There are two types of co-jurors: non-substitutable and substitutable. The first one is the person, directly nominated by the victim, who should stand beside the suspect. The other one is the person selected by the suspect at his own free will[94].

The number of co-jurors, based on the complexity of the case, varies between 1 and 12[95]. In seldom cases the number of co-jurors may total 24[96].

A hostile to juror person cannot be nominated as a co-juror. A co-juror cannot be a person with a pregnant wife or a newborn child; also a person who has earlier taken an oath at the church, that "will never act as a co-juror in any case other than his own family affair"[97].

Generally, a person nominated as a co-juror may refuse to become a co-juror and he is not obliged to accept the proposal against his will. Based on the details of the case the refusal of a co-juror can be construed as condemnation of the person subject to adjuration or may just result in the protraction of the case - the victim may agree to the substitution of a "non-substitutable" co-juror with the other "non-substitutable" co-juror or the *morevs* may consider, that the number of remaining co-jurors is quite sufficient[98].

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92 Ibidem, p. 14, 55.
93 Ibidem, p. 28, 38–39, 47, 73, 101–102, 170, 182, 183.
94 Ibidem, p. 5, 50, 76, 125, 167, 206.
95 Ibidem, p. 11, 50, 121, 147.
96 Ibidem, p. 166, 180.
97 Ibidem, p. 11, 12, 51, 77, 114, 125, 159, 170, 231.
98 Ibidem, p. 13, 50, 171.

If the party fails to vindicate himself with the help of co-jurors, the whole burden of proof passes to the *morevs* and they make a different decision and would reconcile the parties in a manner different from the one, they would have opted if all the co-jurors would have taken the oath[99].

1.2. *M'g'rtsemi*. *M'g'rtsemi* is still very important for Svanetian mode of life. This is the person who articulates the text of the oath, who imprecates the oath-breaker. His main duty is to exclude ambiguity upon reading out the wording of the oath. He composes the text of the oath and the adjuror is required to confirm the wording offered by the *m'g'rtsemi* by the uttering the word "Amen!".

A *m'g'rtsemi* can be:

a) a specially invited person – publicly known *m'g'rtsemi* or a clergymen or custodian of the church, chosen for oath ritual;

b) a disputing party himself or his next-of-kin;

c) either of the *morevs* (the chairman, as a general rule).

All these alternatives are equally admissible for Svanetian litigation and depends on who is giving oath to whom and about what[100].

During the oath-taking ritual the *m'g'rtsemi* steps in between the parties, lights a candle, sometimes makes the adjurors to kneel down, however in most cases they give their oaths in a standing position. If the Icon is taken out of the church, the *m'g'rtsemi* may be holding it. A constituent part of oath-taking ritual is juror's shaking hands with *m'g'rtsemi* and kissing the Icon. The following procedure is also practiced: the *m'g'rtsemi* stretches out his hand holding a club and touches the church wall with it. The jurors have to crawl under it[101].

As a general rule, the choice of the church for the ritual of taking self-vindication oath by a suspect, depends on the desire of the victim, however this choice is not regarded as his absolute right and *morevs'* opinion is of major importance[102].

1.3. Oath through carrying the Icon around. Like old times[103], in the case of theft (no matter a family is being robbed or the church) the procedure of taking an oath by the victim through carrying the Icon around the whole village (or even whole Svaneti) is still widely practiced: one male of full age would take an oath from each family that "neither he nor his family member knows anything about this affair and neither of them is involved in it". Sometimes swearing is applied as a preventive measure as well, using the words: "If you steal or abet anyone to steal..." It is also possible for the ritual to be of warning nature: "If the culprit does

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99 Ibidem, p. 5, 9, 13, 52, 103, 171.

100 Ibidem, p. 40–41, 52, 100, 125, 147, 224–225.

101 Ibidem, p. 44, 53, 100, 107, 108, 132, 166.

102 Ibidem, p. 44, 74.

103 B. Nizharadze, *Historical-ethnographical Letters*, vol. I, Tbilisi 1962, p. 105 [in Georgian]; M. Kekelia, *Oath in Svanetian...*, p. 166.

not return the stolen thing...". During the oath-taking ritual everyone kisses the Icon, it is also possible for water used for ablution of the Icon to be poured into the dough of the housewife of the family, taking the oath or be directly given to the head of the family to drink[104].

2. Witness. A witness may not be brought to oath with regard to minor cases, but major cases necessarily imply the sworn testimony of a witness. In minor cases a witness may even be confronted with a party, but in the case of major cases, the foregoing is excluded as a general rul[105].

If a witness is afraid, that his/her testimony may jeopardise his/her safety, or if there is some other objective reason, the *morevs* will take him to the church secretly to take his/her sworn testimony. In this case the parties will be unaware of the existence of the witness concerned until the end of the proceedings, but the *morevs* will use the obtained testimony to make a fair decision. In this case it is possible for the witness to make the *morevs* swear, that they will never disclose his/her identity[106].

3. Narrator. It is worth mentioning that, one of the ancient institutions of the so-called "narrator" is still practiced – this is the person, who visits the victim and details him about the culprit, and following that he:

a) is ready to personally confront the culprit and make him confess; also testify under oath before the *morevs*, that the culprit committed some act[107];

b) offers the victim to nominated him as a "non-substitutable" co-juror, and following what he will not stand beside the suspect, thus will cause his condemnation[108].

In old time the narrator was remunerated and today he is not[109]. The main interest of the narrator is to preclude the repeated commitment of a similar crime[110].

If the narrator proves to be a slanderer, he will be punished according to *Talion* principle in line with both old rule[111] and the current custom[112]: if he slanders someone of stealing an ox, he will personally pay the value of the ox in favour of the acquitted person.

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104 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 11, 53, 104–105, 113, 148, 160, 178, 200.

105 Ibidem, p. 8, 54, 80, 124, 135, 208.

106 Ibidem, p. 46, 80–81, 198, 208.

107 Ibidem, p. 8.

108 Ibidem, p. 17.

109 M. Kekelia, *Court Organization and Proceedings in Georgia before Joining Russia*, vol. II, Tbilisi 1981, p. 207 [in Georgian].

110 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 17.

111 M. Kekelia, *Narrator in Customary Law of Above-Bali Svaneti*, "Soviet Law" 1973, No. 2, p. 71–73 [in Georgian].

112 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 30.

4. Other evidences: Of other evidences the mentioned should be made of the following:

a) confession – it mitigates the state of a culprit, but if the confession was not an act of regret, but rather the culprit presumed that his deeds would have been revealed anyway and made his confession only because of that – the confession then does not give him any allowance[113];

b) material evidence – e.g. a stolen thing, found in suspect's house (or catching red-handed while stealing), documents, historical records, traditional boundaries (in the case of neighbour disputes, disputes regarding the boundary) etc[114];

c) testimony of an attending doctor – has historically been one of the most important judicial evidences[115]. Nowadays its importance has considerably deteriorated, however it still may be applied in practice[116].

III. Criminal law

1. General characteristics of the institute of crime

Both old and contemporary Svanetian Customary laws are aware of the qualification of crimes as those against society and against individuals (clan, family). The violation of the interests of the whole society is reviewed by public assembly, whilst crimes against private interests – by mediation court. The first group of crimes comprises treason of the society, church burglary, shirking one's part in common cause, encroachment upon community property, etc. and the second one – homicide, wounding-maiming, abuse, burglary, rape, etc.[117]

The punishments are also divided into private and public punishments. Public punishments are provided for crimes against society and private ones – for private offence. The punishments of the first category are: death penalty, exile, boycott, public fine, etc. and private punishments are: repayment by property (or price of blood, the so-called *tsor*) and begging pardon on one's knees[118].

1.1. About the maintenance of the institution of blood feud. The institute of blood feud is still maintained, however its intensity is significantly reduced[119].

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[113] Ibidem, p. 14, 16, 25, 43, 47–48, 173, 181, 198, 236.

[114] Ibidem, p. 55, 240.

[115] M. Burduli, *Some Data about Svan Doctors*, "Materials for Georgian Ethnography" 1987, v. XXIII, p. 267, 270 [in Georgian].

[116] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 14, 56, 79, 106, 148, 244.

[117] Ibidem, p. 1, 37, 68, 194, 200.

[118] Ibidem, p. 20, 58, 116, 160, 178, 244.

[119] Ibidem, p. 20, 55, 228.

Both historical data[120] and the current expedition evidence, that blood feud has always been the manifestation of courage and valour and was subject to certain rules:

Upon burial of the killed, the person who was liable to blood feud would fire a gun meaning that the blood of the killer would have paid for his deeds. Until the accomplishment of his vendetta the man liable to blood feud, would wear a black hat, and would not shave. After revenging he would visit the grave of his next-of-kin (murdered person), would drive a stake into the ground and cry out: "You are revenged!" firing a gun into the air. Particularly honourable was killing a culprit before the burial of the killed. There are some data evidencing vengeance by women. This would happen when no avenging man was available[121].

These days the vengeance obligation is vested with a brother, father and a son of a murdered. The cousins and next-of-kin of the deceased may also participate in blood feud. Firing a gun is primarily the obligation of a brother (and if the deceased had no brother – of his father or son) and if he does not do this, this right is delegated upon a cousin. However it is possible for this priority not to be strictly abided by. In old times the kinsman of a killer may also have become the targets of blood feud. Now it is possible for a family member or a next-of-kin of a killer, specifically his brother, to be killed along with a killer. Like old times, the custom still prohibits the killing of a woman, a child or an elderly person for vengeance[122].

The vengeance is stopped if a killer commits suicide, demonstrating his repentance. The vengeance is also terminated when a killer is imprisoned for committed homicide and dies in a penitentiary facility.[123]

1.2. About the subjective part of a crime. Svanetian Customary law has been historically aware of the operation of the principles of objective imputation: wilful and unintentional homicide were subject to similar liability in the context of payment or retribution (blood money), however even in those times the victimized party would more easily agree to reconciliation in the case of unintentional homicide than in the case of the wilful one[124].

Over some time the principle of objective imputation gained dominance. The records made in 1960s clearly evidence, that upon the imposition of liability the *morevs* explicitly took account of the nature of homicide – whether it was committed wilfully or unintentionally. In the case of unintentional homicide a culprit was char-

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[120] E. Gabliani, *Old and New Svaneii*, Tbilisi 1925, p. 134 [in Georgian].

[121] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 14, 15, 27, 65, 114, 121, 188, 228, 230.

[122] Ibidem, p. 20–21, 65, 111, 188, 228.

[123] Ibidem, p. 21, 28, 229.

[124] E. Gabliani, *Free Svaneti*, p. 117; A. Davitiani, *Svaneti Ethnographically, Personal Archive*, "Ethnographical Ledger" 1969, No. 6, p. 73 [in Georgian].

ged by half *tsor* or a bit more. The account was also taken of the motive and reason of a wilful crime[125].

Contemporary Svanetian habitual law is mainly based on the principles of subjective imputation: upon imposition of liability the account is necessarily taken of whether the crime was committed wilfully or unintentionally. What is more, differentiated are two types of unintentional crime: totally unintentional (accident) and by negligence. The motive and reason of a crime are also very important[126].

1.3. Complicity. According to Svanetian habitual law complicity means: advising, aiding in covering up the crime, abetting in the commitment of a crime, finding out and communication of the location of a victim or the time of his entering or leaving the house, purposeful provision with a crime weapon[127].

For instance, if a lender of a weapon gave it to a murderer for hunting and not for killing purposes and the victim kills (or wounds) the lender of the weapon, this would not be regarded as a retaliatory killing (wounding) on the part of the killer (wound-inflictor). This will be regarded as an independent crime against the lender of the weapon[128].

In the case of theft an accomplice is a person who abetted a thief in some manner in carrying though his intention, knew the identity of the thief (e.g. witnessed the theft), but never denounced him[129].

1.4. Attempted crime. The blood money is half diminished for attempted crime. As a general rule, firing a gun from a distance in the direction of an individual is regarded as an attempted homicide and not attempted wounding if no one is killed or causes some bodily injury. This rule does not apply in the case of a point-blank short from a close distance, when the bullet hits a leg or some other specific part and slightly wounds a victim. This will be qualified as wounding and not as an attempted homicide[130].

1.5. Circumstances aggravating and extenuating (or exempting) liability. The circumstances aggravating liability are as follows:

a) commitment of a crime (e.g. homicide) through inhuman, degrading treatment or torture of a victim[131] ;

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[125] M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1967, No. 1, p. 12, 33, 58; 1968, No. 2, p. 42, 68, 87; 1968, No. 3, p. 1–4, 12–13, 44–45, 58, 83; 1968, No. 4, p. 36, 56; 1968–1969, No. 5, p. 28, 31, 38, 51, 70; 1969, No. 6, p. 3, 24 [in Georgian].

[126] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 13, 14, 19, 24, 32, 56, 58, 61, 63, 67, 70, 87, 88, 111, 128, 130, 184, 199, 243–244.

[127] Ibidem, p. 20, 61, 86, 110, 133, 171, 188, 202, 216.

[128] Ibidem, p. 215, 229–230.

[129] Ibidem, p. 53.

[130] Ibidem, p. 59, 71, 216, 227.

[131] Ibidem, p. 25–26, 64, 227.

b) homicide of a pregnant woman, mentally ill person, elderly person or a minor[132];

c) disrespect of the victim by the culprit (e.g. by murderer) after the commitment of the crime: laughing in the presence of the victim, inflicting some additional damage to the victim (e.g. stealing something from him), etc.[133];

d) commitment of some dishonourable act by the culprit during the fight, e.g. using some weapon, when the other party was not using any (despite having one), etc.[134];

e) commitment of a mercenary crime, specifically of homicide, e.g. by a hitman – generally hiring someone to commit a homicide, for blood feud purposes has always been regarded as a big shame and dishonesty in Svaneti as the person concerned failed to avenge personally and hired someone else. Hence they tried their best to hide that the homicide was committed by a mercenary. In this case the primary liability was vested with the individual who hired the mercenary[135];

f) commitment of a crime against a guest - a guest enjoys particular sacred honours in Svaneti and practically no such offence is committed, but if it still happens, it is qualified as a grave crime[136].

Circumstances extenuating (or exempting) crime are as follows:

1. Commitment of some crime unintentionally – in this situation the intermediation is also easier and the victim is easily talked into engagement of mediation proceedings. As a general rule, in the case of unintentional homicide no blood feud obligation arises (except for some exemptions)[137];

2. Repentance of a culprit (murderer) by action: attempted suicide on the basis of repentance, avoiding meeting with the representatives of the aggrieved party, giving way when meeting them, self-exile from the dwelling place[138].

3. Punishment of a murderer by the state – according to materials recorded in 1960s the *morevs* would explicitly reckon with serving a state sentence by a murderer in the prison. In the case of adjudication of people's punishment the payment was always reduced, sometimes even to the half amount[139]. The tendency, which developed in Soviet era is still maintained, however today the *morevs* are more reluctant about lighting liability and may reduce the liability only a bit, based on the facts of the case concerned or may not extenuate the liability at all and not to take account of the fact of imprisonment of the murderer. However, this trend

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132 Ibidem, p. 18, 25, 59, 62, 111, 188, 231.

133 Ibidem, p. 213–214.

134 Ibidem, p. 133, 214–215.

135 Ibidem, p. 26, 214.

136 Ibidem, p. 32.

137 Ibidem, p. 39, 114, 213.

138 Ibidem, p. 134, 213.

139 M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1969, No. 6, p. 6, 17–18.

is conditioned by the deterioration of the institution of *tsor*, what will be discussed in details later[140].

4. If a husband catches his wife with a lover and kills the latter, this is not regarded as an extenuating (or exempting) circumstance, while beating or wounding him – is[141].

5. As in old times[142], homicide or some other crime (except for incest) committed between close relatives is still regarded as an extenuating (or excluding) circumstance, meaning that, there will be no blood feud. The reconciliation proceedings will be conducted in a simplified manner. It is possible for the culpable party to be exiled from the clan (either permanently or temporarily)[143].

6. Commitment of crime (homicide, wounding-maiming) in self-defence – a homicide committed in self-defence is subject to certain indulgence or may even exclude the liability[144]. This rule does not extend to cases, when a person is attacked at his own house to be avenged for the homicide committed thereby and he defends himself[145].

7. In old time killing or wounding a thief entailed the same liability as was prescribed for ordinary homicide, only the payment for unauthorized penetration would have been deducted from the payment set for killing or wounding a thief[146]. Today the majority of respondents considers that killing a thief, who penetrated in someone else's house (if caught red-handed) is an extenuating circumstance[147]. Only one of them says, that a killer of a thief should be punished in the same manner as in the case of an ordinary homicide[148], what is the echo of the rule practiced in the past. It is evident, that the principle of objective imputation had an impact on this issue as well – there is a diversified attitude in public consciousness towards killing a thief and this had its impact on the rules of habitual law.

8. Commitment of a crime by a minor or an insane person still results in the liability of his guardian, as it was the case in old times[149]. Earlier blood feud was very rare in such cases – the murderer's family would pay the amount set for a homicide and if they failed to do so and it would come to blood feud, not the killer (minor, insane person) would have been killed, but rather the most prominent repre-

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[140] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 79, 117, 130, 169, 186, 220, 244.

[141] Ibidem, p. 214.

[142] B. Nizharadze, op. cit., p. 107; M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1968, No. 3, p. 61.

[143] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 19, 59, 103, 226.

[144] Ibidem, p. 18, 26, 86–87, 188.

[145] Ibidem, p. 87.

[146] B. Nizharadze, op. cit., p. 120.

[147] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 29, 64, 87.

[148] Ibidem, p. 188.

[149] G. Davitashvili, *Crime and Punishment in Georgian Customary Law*, Tbilisi 2011, p. 61–62 [in Georgian]; *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 48.

sentative of his kindred[150]. According to contemporary data the situation is essentially the same[151], however the respondents already say, that if a homicide is committed by a minor or an insane person nobody will be called to account instead of them or the *morevs* will mitigate the liability[152]. These data also evidence, that lately the these days consciousness is opting for individualization and the elements of collective responsibility are diminishing.

9. Both old[153] and contemporary Svanetian habitual laws do not regard alcoholic intoxication as an extenuating circumstance except for the case, when petty crime is committed under intoxication and quite unknowingly[154].

2. Types of punishment

2.1. Death penalty. Today the death penalty belongs to the history, but until 1930s it was applied for crimes against society, for treason of the community and church burglary. The most common type of public punishment was stoning. The respondents remember well the recitations of specific cases. The whole village would participate in stoning[155].

2.2. Exile and boycott. Historically exile was applied for: illegal marriage, illegal sexual intercourse, treason of the society, church robbery, etc. Excommunication was also practiced when public would impute death penalty to a culprit, but would substitute it by an alternative punishment –excommunication. In this case the culprit would be exiled for life and his entire movable and immovable property would have been expropriated[156].

Nowadays for-life exile is applied very rarely. More typical is the exile-excommunication for a definite period of time (3–4 years) and then the reconciliation. It is possible for only the culprit to be exiled or his whole family. It is possible for the culprit and his family to decamp at their own free will and leave the village[157]. Nowadays the respondents associate the exile not with the decision of public assembly, but rather with voluntary escape of the culprit and his family in the case of

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150 M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1968, No. 2, p. 43.

151 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 62, 111, 132, 172.

152 Ibidem, p. 82, 188.

153 M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1967, No. 1, p. 6, 33, 58; 1968, No. 2, p. 42; 1968, No. 4, p. 36; 1968–1969, No. 5, p. 31, 45, 70–71, 1969, No. 6, p. 23.

154 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 59, 130, 230.

155 Ibidem, p. 20, 32, 115–116, 200.

156 B. Nizharadze, op. cit., p. 86; E. Gabliani, *Free Svaneti*, p. 65; M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1968–1969, No. 5, p. 26, 80–81; G. Davitashvili, *Crime and Punishment...*, p. 333.

157 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 134, 241.

homicide or the demand of the victim (that "he will reconcile with the culprit only if the latter banishes from his dwelling place")[158].

Although very seldom, but boycott is still practiced, mainly for immoral behaviour or regular disrespect towards society. Initially the village will warn a culprit to stop acting in this manner, and if he fails to abide, he will be put under boycott, meaning ignoring him by co-villagers: nobody will go to funeral repast, nobody will give him water, nobody will talk to him, everyone will try to avoid him and finally the boycotted would become obliged to leave the dwelling place[159].

The respondents are well aware of the difference between the exile and boycotting. The fact that the public assembly does not apply exile as a punishment and someone is exiled only for a certain period of time and not for life means that the intensity of practicing the institution of exile has considerably diminished.

2.3. Cursing. Similar to old Svanetian custom[160], cursing is still not only a punishment, but a mean of detection a culprit (especially of a thief) and crime prevention.

A victim (e.g. whose house was robbed) or a church curator (if a church was burglarized) addresses the society with a claim. One male of full age from each family will then gather and the ritual of cursing starts. Cursing may be done in different manners: it may be of warning nature ("if the culprit does not return the stolen thing within a period of ..."), also a culprit may be directly cursed, without warning – if the identity of the culprit is not known, than "the one, who committed the crime" and "everybody, who is associated with the commitment of the crime in a way or other or knows the identity of the culprit and does not disclose it" is cursed and if the identity of the culprit is known, his full name is clearly mentioned. With a view to prevention of a crime those "who will commit burglary on the territory of the village or abet some other person in the commitment of a crime" are specially cursed during some all-village festival[161].

2.4. Disgracing punishments. The old custom of hanging the skin and guts of stolen ox on the neck of an ox-thief and taking him from village to village is still practiced. The respondents recall two cases, that happened back in 1970s: one culprit was caught when he was skinning the stolen ox and the other – when he had already cut the carcass and had it ready for sale[162].

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158 Ibidem, p. 103, 134.

159 Ibidem, p. 58, 68, 113, 134, 177, 241.

160 G. Gasviani, *From the History of West Georgia Highland*, Tbilisi 1973, p. 189 [in Georgian]; D. Davituliani, *Customary Law of Svaneti*, Tbilisi 1974–1975 [manuscript], p. 189–190 [in Georgian]; M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1968, No. 3, p. 11; 1968–1969, No. 5, p. 24–25, 91.

161 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 11, 53, 104, 113, 148, 160, 178, 194–201.

162 Ibidem, p. 55.

2.5. Property punishments. Svanetian habitual law provides for property payment (blood money) for homicide, wounding-maiming, burglary, etc. The payment for homicide is called *tsor* and the payment for the other crimes – *makvtsa*[163]. The *tsor* issue will be detailed below.

2.6. Bagging pardon on one's knees. This punishment is rarely applied today but is was a mandatory part of reconciliation ritual in the nearest past[164]. The culprit would kneel, cross the little fingers and beg pardon from the victim[165].

3. Individual crimes and punishments for them

3.1. Treason of the community and church burglary. In old times the gravest crimes against society were the parricide (leading in the enemy) and church burglary. Both crimes were punishable by death penalty (mainly, stoning), and in the case of some excusable reason the death penalty could have been substituted by expulsion of the whole family[166].

In modern era treason of the society does not include the leading in the enemy or abetting someone's dominance in the community as the elements of crime, as the social background of the foregoing does not exist anymore for a long time now. As regards church burglary the application of death penalty for this crime was practiced in XX century, even after the establishment of Soviet rule[167]. As of to date, the respondents regard the encroachment upon church property as a treason. The case should be reviewed at the assembly of village families. The respondents remember well the robbery of *Kvirike* Church in 1920s, when the culprits were stoned by the villagers, and one of the culprits was exiled from Svaneti for life. It is a fact, that the attitude towards church burglary as a crime has not changed even nowadays and application of the strictest legal remedy against a culprit on the basis of people's law is not excluded even in modern era[168].

3.2. Shirking common cause. Refusal to participate in an assembly or a joint event (road repair, fencing a grassland) without a sound reason (e.g. labour incapacitation) and disdaining the village does not result in the imposition of material sanctions these days, however the respondents remember that the village would even confiscate

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163 Ibidem, p. 42, 72, 105, 220, 244.

164 See N. Kvitsiani, *Supplication Related National Traditions in Svaneti*, "Enguri" 1991, No. 1, p. 222–225 [in Georgian].

165 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 43, 92.

166 B. Nizharadze, op. cit., p. 85–86; E. Gabliani, *Free Svaneti*, p. 65; R. Kharadze, *Remains of Extended Families in Svaneti*, Tbilisi 1939, p. 41 [in Georgian]; D. Davituliani, *Customary Law of Svaneti*, p. 100; M. Kovalevsky, *Law and Custom in the Caucasus*, vol. 2, Moscow 1890, p. 35 [in Russian].

167 D. Davituliani, *Customary Law of Svaneti*, p. 107; M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1968–1969, No. 5, p. 80.

168 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 18, 32, 37, 68, 115–116, 149, 194, 200.

some property of a disobedient villager to punish him. Today the most common sanction is a curse, and everyone, be it a potential culprit or disobedient villager, does his best to avoid the curse of the village[169].

3.3. Homicide. Destruction of human life (when the parties agree to reconciliation), results in the obligation to pay blood money, called *tsor*. The blood money is equal for men's and women's lives[170].

The respondents remember, that in old times *tsor* was mainly paid in terms of land, however live-stock and money could as well be have been used along with the land. The amount of *tsor* was pre-determined and varied slightly from a village to village, but it mainly amounted to 24 *naljoms* of land (one *naljom* land constituted 600 square meters of relatively poor and 500 square meters of more fertile land). In the case of payment with live-stock *tsor* amounted to 24 oxen. In the case of payment in cash, the value of the land should have been taken into account: in some places the land was fertile, and barren in others – important was also the location of the land and its valuation depended on the foregoing. Some respondents have even eye-witnessed the payment of *tsor* by land and live-stock, but for the past period *tsor* is mainly paid in cash, the amount being equal to the value of the land[171].

In old time the economic strength of a family mainly depended on the area of arable lands (also the live-stock population), what provided for the payment of *tsor* by land (and live-stock), whilst starting from the Soviet period the preference was given to payment of *tsor* in cash, the reason of the foregoing being the abolishment of private property[172].

Although these days *tsor* can be paid in any manner, it is mainly associated with the payment of money. Furthermore, the institution of *tsor* is considerably deteriorated, specifically:

1. *Morevs* try to establish truth and reconcile the parties, however, although they know well the exact amount of *tsor* in old times and also know that only the half amount of *tsor* was paid in the case of attempted homicide, etc. – today the institution of *tsor* has completely vanished in many villages, and in those villages, where it is still applied, the amount of *tsor* is no more strictly predefined and depends on the decision of *morevs*. What is more, sometimes the *morevs* would not even tell the exact amount of *tsor* to culpable party and leave the determination of the amount to their discretion (i.e. the culprit makes the determination of the amount payable to the victim a matter of his consciousness)[173].

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169 Ibidem, p. 18, 68.

170 Ibidem, p. 18, 86, 88, 110.

171 Ibidem, p. 41, 42, 70, 80, 168, 184, 199, 219, 227.

172 D. Davituliani, *Customary Law of Svaneti*, p. 24–25; B. Nizharadze, op. cit., p. 118; M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1968, No. 2, p. 88; 1968, No. 3, p. 3, 6, 66, 81–82; 1968, No. 4, p. 4, 8, 13; 1968–1969, No. 5, p. 62, 69; 1969, No. 6, p. 1, 23.

173 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 10, 100, 123, 131, 228.

2. An apparent demonstration of deterioration of the institution of *tsor* is the fact, that the relatives are no more obliged to assist the culprit in the payment of *tsor* and it depends solely on their good will, whether to help him or not[174]. Also the relatives of the victim are no more given a part of the *tsor* paid by the culprit. They can be given something only as a gift, on the initiative of the culprit[175].

In old time the kindred of the killer and killed person would necessarily participate in the payment and receipt-distribution of *tsor* – the value of *tsor* often exceeded the value of movable and immovable property of the culprit and it was unaffordable solely for the family of the culprit to pay it, thus making them the potential targets of blood feud. This jeopardy extended to their kindred as well and thus, it was in their interest to pay *tsor* in full, what would have saved them from the vengeance of the avengers. Consequently, the custom directly obliged the relatives of the killer to participate in the payment of *tsor* and the extent of their aid depended on the closeness of their relationship with the killer[176]. Likewise, in old times, the custom obliged the killer to give presents to the next-of-kin of the deceased and in this case as well, the amount of the gift depended on the closeness of the person concerned with the victim[177].

In time the circle of targets of blood feud narrowed, the majority of killer's kindred were relieved of the jeopardy of retaliatory killing and naturally, the motivation for assisting the culprit with the payment of *tsor* diminished in their consciousness. In its turn the deterioration of the mandatory nature of obligation to assist the culprit caused the deterioration of another rule, directly associated with it – distribution of *tsor* between the relatives.

There is an apparent tendency, that together with the deterioration of Svanetian customary law the practice of the institution of *tsor* is gradually fading and these days it is substituted by the other mechanism: conciliation without *tsor* with the help of the so-called *lagranzhi lignes* ("stepping into his shoes") when the killer takes an oath (together with co-jurors) before the aggrieved party that "I would have reconciled if I were you". Apart from that, in order to further strengthen the reconciliation, the culprit may give some present to the aggrieved party at his own discretion (and not by the decision of the *morevs*), also the baptizing may take place between the parties, etc.[178]

Both in old times and now the custom entitles the aggrieved party to fully or partially pardon the culprit and not to accept the payable *tsor*[179].

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174 Ibidem, p. 112–113.

175 Ibidem, p. 15.

176 R. Kharadze, *Remains of Extended Families*..., p. 34–36.

177 B. Nizharadze, op. cit., p. 118.

178 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 1–2, 10, 169–168, 184.

179 Ibidem, p. 59, 89.

3.3.1. Legal consequences of retaliatory murder. Both in old times and now, the reason of feud, which party was more culpable was/is necessarily taken into account upon the reconciliation of the parties in the case of retaliatory murders (meaning homicide under vengeance motivation) and only then the responsibility of the parties was/is defined. Generally, the reconciliation is easier when both parties have committed murders (when both parties have casualties)[180].

3.3.2. Responsibility for murdering or wounding a person pulling apart the scramblers. According to Svanetian customs it is a shame not to pull apart the scramblers, hence a third person often tries to make a peace between the rivals, however, while doing that, the person concerned can be injured or even killed. If the peace-maker is killed the responsibility is vested with the person who directly commits the crime and not upon both parties, however it is possible for the other party to bear certain responsibility, depending on the facts of the case[181].

3.4. Bodily injury. Both old[182] and modern customary law are aware of three types of bodily injury:

a) grave bodily injury – maiming an individual, making any of his body parts dysfunctional or making him lose some part of his body, also ineffaceable maiming of the face;

b) less grave bodily injury, the so-called "wet" injury – no maiming is done and an individual is just wounded either badly or slightly. This wound should be lighter than in the case of grave bodily injury and it should necessarily imply the shedding of victim's blood;

c) the lightest bodily injury, the so-called "dry" injury (i.e. without blood-shed) – meaning injuring through beating.

It should be mentioned, that inflicting blood-shedding injuries upon a victim does not always mean a graver injury than "dry" beating. E.g. causing brain concussion as a result of "dry" blow is a graver injury, than slight scratching with a knife (with little blood to come out of the wound).

In old times, the maiming of some part of the body was worth of half *tsor*[183]. However the predetermined amount of payment for wounding-maiming is well-forgotten and now the parties may be reconciled through the ritual of "stepping into his shoes", without the imposition of property payment or through the imposition of

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[180] Ibidem, p. 172, 206.

[181] Ibidem, p. 64, 87, 133, 172.

[182] B. Nizharadze, op. cit., p. 119; D. Davituliani, *Customary Law of Svaneti*, p. 178–179.

[183] B. Nizharadze, op. cit., p. 119; E. Gabliani, *Free Svaneti*, p. 112; M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1967, No. 1, p. 26, 55; 1968, No. 2, p. 68, 103; 1968, No. 3, p. 12, 42, 83; 1968, No. 4, p. 8, 57; 1968–1969, No. 5, p. 12, 37, 51, 79; 1969, No. 6, p. 93.

[184] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 15, 60, 93, 188, 203, 244.

some payment – but not according to predetermined amount (or within this amount) – but on a case-by-case basis, with due consideration of similar precedents[184].

As reported by respondents, in the case of death of the wounded individual after some time by reason of this wound, the person who inflicted this wound would have been called to account as a killer, but in the case of reconciliation before the person concerned was dead, the culprit would not have been called to account[185].

3.5. Theft. Upon the imposition of responsibility, the time of theft was of no importance[186]. Instead the place of theft mattered: for instance, stealing of an ox from a house was more derogatory/ insulting, than from a pasture and provided for higher remuneration. And if a stealer of an ox from the pasture knew whether whose livestock he was stealing, his action was equalised to stealing from a house[187].

The correlation between the payment for stealing from a house and from a pasture differed from a village to village:

a) from a house – double amount, from a pasture – single amount[188];
b) from a house – triple amount, from a pasture – double amount[189];
c) from a house – triple amount from a pasture – one and half[190].

3.6. Incest. Sexual intercourse between kindred, including the eighth generation, is prohibited. One of the respondents recalls that the cousins sinned in one of the villages, the whole family clan gathered and decided for the families of the sinners to clear the shame themselves and kill the culprits: and in fact the sinners were killed by their brothers respectively[191].

3.7. Raping. According to the gravity of crime raping is equalised to killing. Woman's family would kill the culprit by all means. If a married woman is raped, the avenger is her husband, as a general rule. In the case of reconciliation the *morevs* necessary take account of the fact, whether or not the victim was a virgin[192].

3.8. Illegal sexual intercourse. Illegal sexual intercourse (not incest, in this case) is not a grave crime and is mainly regarded as a disgrace of woman's family. Adultery is also an illegal sexual intercourse. Abandoning a spouse is not an offence in this case[193].

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185 Ibidem, p. 26, 64.
186 Ibidem, p. 29, 56.
187 Ibidem, p. 17, 82.
188 Ibidem, p. 175, 187.
189 Ibidem, p. 55, 82.
190 Ibidem, p. 17.
191 Ibidem, p. 201–202.
192 Ibidem, p. 29–30, 65, 71–72, 73, 116, 220.
193 Ibidem, p. 31.

3.9. Abandonment of a spouse. Abduction of engaged or not-engaged female. Historically, abandonment of a spouse, or abduction of an engaged female, or her marring someone else at her own free will was a grave crime. In old times this crime resulted in killing or wounding, and in the case of reconciliation the payment was equal to half *tsor*[194]. The modern habitual law also regards these actions as crimes and they may result in confrontation, with the respective consequences. The respondents are well aware, that the payment for this crime is equal to half *tsor* and both men and women are equally entitled to claim it, however, *tsor* practically is not paid for this crime and it is substituted by the other mechanisms of conciliation. Generally, the abandonment of a spouse by a woman could have been resulted in killing or wounding (e.g. of woman's brother). If a wife abandoned her husband to marry someone else, the husband would bring that very person to account and not his wife's family. The abandonment of a woman by a man was easier to understand and the woman's family would stop to be on speaking terms with the culprit. However, the parents or brother of a wife (*fiancée*) could have been stricter with the husband (*fiancé*) – e.g. beat or wound him[195].

As regard abduction of a woman, who was not engaged, this was not a grave crime. Abduction of a women may have resulted in the imposition of certain payment upon the abductor, by the decision of *morevs*, however, in the case of marriage of the abducted and abductor, the reasonability of the imposition of payment was no more a question[196].

3.10. Abuse. Like old times[197], along with damaging words, humiliating behaviour against an individual - slapping or whipping him - is also regarded as an abuse (and not as beating) these days as well[198].

3.11. Slander. Like old times[199], in the case of imputation of fault upon some person in public, when the person concerned proves that was wrongfully imputed, the slanderer will pay the amount, an accused would have paid in case the charges against him were proved to be true[200].

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194 E. Gabliani, *Free Svaneti*, p. 111; B. Nizharadze, op. cit., p. 111; M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1968, No. 3, p. 42–43, 46, 47; 1968, No. 4, p. 74; 1968–1969, No. 5, p. 23.

195 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 21, 54, 72, 105, 169, 188.

196 Ibidem, p. 3.

197 M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1968, No. 3, p. 12.

198 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 14, 188, 203.

199 M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1967, No. 1, p. 103–104; 1968, No. 3, p. 49, 68; 1968, No. 4, p. 40–41; 1968–1969, No. 5, p. 3, 82–83.

200 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 30.

3.12. Dog bite. Like old times[201], if someone's dog bites a man outside the boundaries of the owner's courtyard, the custom obliges him to kill a dog or revenge may arise[202].

3.13. Goring ox. Like old times[203], if the bull has already been seen in aggressive actions and the owner was told by villagers to kill or sell it, but he did nothing, the custom obliges him to take all the responsibility of any damage. If someone is hurt or was killed, revenge may arise[204].

IV. Civil law

4.1. Property law. Modern Svanetian customary law differentiates between several categories of things:

There are things, which belong to common property and they can equally be used by everyone:

a) an animal "belongs to nature" and is free to settle wherever it likes. Even if an animal arranges a den or lair in someone's family forest, the owner is not entitled to declare ownership upon this animal under this pretext or confront the catcher of this animal. The latter bears no responsibility before the forest owner[205];

b) the right to use a spring, stream or river water for drinking purposes can be enjoyed by any person irrespective of whether whose land parcel or forest it is flowing through. In some villages it is necessary to obtain the owner's permission before using water for boiling purposes[206], in some villages the right to irrigate is considered to be the common right[207], the right to walk on a road is also regarded as a common right[208].

There are holy, sacred things, that are removed from civil circulation:

1. A place where there was a church once and the land, grassland or forest, belonging to a church (the so-called *laltskhat*) – if the church was demolished or covered by landslide, the place still remains to be sacred and it is prohibited the territory for grass-mowing, live-stock pasturing or tillage, etc. The territory is inviolable[209]. It is prohibi-

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[201] E. Gabliani, *Free Svaneti*, p. 111; M. Kekelia, *Materials on Customary Law of Svaneti*, "Ethnographical Ledger" 1968, No. 3, p. 11.

[202] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 63, 79, 106, 177, 237.

[203] G. Davitashvili, *Crime and Punishment*..., p. 73–74.

[204] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 106, 129, 186, 236.

[205] Ibidem, p. 33, 85, 237.

[206] Ibidem, p. 33, 85, 186, 237.

[207] Ibidem, p. 149, 186.

[208] Ibidem, p. 186.

[209] Ibidem, p. 94, 176–177.

ted to log a tree in a church forest[210]. A *laltskhat* may also be a land, which was allocated to the church under a personal decision of a specific inhabitant. As a general rule, this is a part of land, owned thereby and "assigned" to the church in exchange for settlement of illness or some other problem. The land parcel becomes a preserve and mowing, tillage or pasture of live-stock is categorically prohibited there[211]. It should be mentioned, that the respondents are aware of the location of a number of old *laltskhats* but cannot recall even a single case of donation of a land parcel to the church in modern era. In some places the old *laltskhats* have disappeared and some buildings are erected on the lands, which earlier belonged to churches. This was conditioned by the confiscation of land from churches in the Soviet period and erection of buildings thereon[212].

b) Marked animals (the so-called *lalgena*, *uskhva*)[213] – marked for sacrifice purposes live-stock can be an ox, goat, he-goat or sheep. E.g. an ox would be raised for three years in the name of St. George and be butchered at *Giorgoba* (St. George's day) festivity. Then the new one will be raised in substitution. Even a thief makes his best efforts to avoid the stealing of a *lalgena*, as it is believed to be the church property[214].

There are tabooed territories, e.g. *Chakhi* Lake, where it is prohibited to bathe, even moving around the lake is inadmissible. The live-stock would not be purposefully driven there to drink water, however it is possible for the live-stock to go there unattended and drink water, as the taboo applies only to humans[215].

Some things are still subject to common-tribal or community ownership: church, cemetery, tower, forest, arable lands, grasslands, pastures[216].

No need to explain why a church or cemetery should belong to some clan or village. As regards traditional Svanetian fighting and residential towers, it is quite natural, that they have always been the private property of extended families and not of the whole clan. Gradual oblivion of the culture of tower construction provided for their transformation into common-tribal property[217].

According to materials, recorded 100–150 years ago, arable lands, grasslands, forests and pastures were privately owned by extended families, and they could have been freely alienated by the owner. The right of first refusal was enjoyed by a member of the same clan, however if the price was unaffordable for him, the seller was entitled to sell it to a close relative or some other person living in some other village. The situation was different in the case of sale of a house, which should have

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210 Ibidem, p. 32.
211 Ibidem, p. 54, 78, 95, 130, 176.
212 Ibidem, p. 176, 237.
213 Ibidem, p. 54, 78, 130, 176, 237.
214 Ibidem, p. 78, 206–207.
215 Ibidem, p. 238.
216 Ibidem, p. 22, 33, 85, 185–186, 237.
217 A. Kaldani, *Svaneti Residential Complexes*, p. 103.

necessarily be bought by a member of the clan, and if the price was unaffordable for a single family, the whole village would collect money to that end. There also existed common-tribal arable lands, grasslands and pastures. It was prohibited to log a tree in the forest, belonging some other clan[218]. Materials, recorded 60–80 years ago also evidence the same situation[219].

Even these days the situation has not changed much and along with private property (arable lands belonging to a family) there exist tribal forests and grasslands. Nobody is entitled to cut a tree in others' tribal forest[220] . As per the custom, the pre-emptive tight to buy a land parcel is still delegated upon the next-of-kin[221].

It should be mentioned, that quite a large portion of land and buildings in Svaneti still are subject only to traditional ownership and in most cases the real estate is not registered in Public Registry on behalf of their owners. After the collapse of the Soviet Union, numerous mediation proceedings and negotiations were held in Svaneti in 1990s regarding boundaries. Overall, as of to date, practically the whole territory of Svaneti is distributed between the local population according to habitual law and everyone knows perfectly, whether who is the owner of which land parcel (forest, arable land, grassland, personal plot).

Not only the modern demarcation means (walls, iron fence, etc.) and natural boundaries (a large immovable stone, rock, trees and bushes, etc.) are used as borderline delimitations, but historical abutments as well the so-called *haghvra*/*aghvra*. It is a prolonged stone (schist, flint, cobble-stone, pebble), the wide lower part of which is buried, and the upper, relatively narrow part is protruded from the ground. No-one will ever touch *aghvra* wilfully and pull it out from the ground[222].

The things of certain category also constitute the common property: ancestral gun, sward, dagger and treasure[223]. These things either remain under the ownership of the persons, who stay to live in a family house or are maintained by the eldest son[224].

These days a large solemn-ritual cauldron (*lelghen*) for boiling an ox is also a common-tribal property[225].

4.2. Law of obligations. For the past several decades the migration of Svaneti population to lowlands became very intensive. Many families live in cities, however they still have ancestral lands, grasslands and houses, which are difficult to manage

218 B. Nizharadze, op. cit., p. 114–115.

219 R. Kharadze, *Remains of Extended Families*..., p. 24, 114–115; M. Chartolani, *From the History of Material Culture of Georgian People*, Tbilisi 1961, p. 85 [in Georgian].

220 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 22, 33, 34, 85, 149, 186, 237.

221 Ibidem, p. 240.

222 Ibidem, p. 33, 173, 184, 240.

223 Ibidem, p. 85.

224 Ibidem, p. 161–162, 185.

225 Ibidem, p. 85.

distantly. Hence certain law-of-obligations relations have been established between the city-dwellers and rural population, which relations had no social-economical basis earlier, but are rather common now, specifically:

a) agreement on clearing snow from the rooftops of the city-dwellers by local population, to save rooftops from breaking down under heavy snow. Instead the villagers are entitled to use the yard for their benefit[226];

b) agreement on mowing the grasslands of city-dwellers, cultivation of their lands, fruit harvesting. In this case the harvest is divided into two equal parts[227].

Due to migration problems the population still living in Svaneti is suffering from the lack of workman force, what provides for particular popularity of live-stock feeding agreement. Owing to severe climatic conditions some families are unable to make enough hay for winter. Hence an agreement is made:

a) on feeding live-stock (ox, cow), when the owner either pays money or (in the case of an ox) entitles the other party to make use of animal labour[228];

b) on feeding a cow with a calf, when the calf and milk products (milk, *matsoni* (sour milk) and cheese) are retained by cattleman and it is possible for the latter to get some monetary remuneration as well. As a general rule an agreement on feeding a cow with a calf is made for a period from autumn till spring, mainly between two *Giorgobas* (St. George's day) (from November 23 – until May 6), or from November 28 until Easter. The custom does not prohibit agreement upon some other specific dates[229].

It is widely practiced to retain a calf and milk product in exchange for feeding a cow with a calf, but the foregoing depends on calving date: if this happens in autumn, the economic benefit of a cattleman is bigger than in the case of calving in springtime, when he is entitled to claim monetary remuneration as well. The foregoing is either specified in the terms and conditions of the agreement or the agreement may be revised if the calving date considerably exceeds the one, presumed by the parties. It is possible for the agreement to provide only for the payment of money to cattleman, and to return the whole surplus to the cow-owner[230].

4.3. Family law. Svaneti managed to maintain the institution of extended family for the longest period – until 1930s, then the tradition started to gradually fade away[231].

An extended family was a family unity composed on tens (20–80) of individuals of several generations based on the agnate kinship. A woman was regarded as a family member, who was to leave the family; she had some personal property but had no share in common-family property. "Brother's share" of a man of a family was

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226 Ibidem, p. 34.
227 Ibidem, p. 22, 131, 185.
228 Ibidem, p. 57, 185.
229 Ibidem, p. 57, 78, 112, 131, 176, 185, 238.
230 Ibidem, p. 57, 78, 176, 185.
231 R. Kharadze, *Remains of Extended Families...*, p. 108.

only an ideal share in family-collective property, which was realised in the case of division or separation[232].

Property rights of a man and a woman were mutually balancing in an extended family:

A woman had personal property – in the case of a daughter-in-law – the property brought from father's family, and in the case of a daughter – property inherited from her mother, which was not included into divisible estate[233].

The sources of private property of a woman were as follows:

a) the so-called *nakhdanuri* – the first mandatory payment to be taken to bride's family by groom's family;

b) the so-called *nachvlashi* – the last mandatory payment to be taken to bride's family by the groom;

c) dowry – gift donated by bride's family to the bride;

d) other property – things found by a woman or remuneration paid to the woman for some handwork (embroidery, knitting, sewing)[234] .

Although a man had no private property, he was the full and lawful co-owner and co-user of the material wealth of the extended family and at the same time, in the case family segmentation - the sole owner of his share.

An extended family was managed by the head of the family – the so-called *kora makhvshi*[235] and senior housewife – the so-called *kora makhvshi zuraal*[236]. They enjoyed rather wide powers with regard to family management and public relations. Family management did not mean only the management on the part of the spouses. Hence, the senior maid of the family could have been not only the wife of *kora makhvshi* but also some other lady of the family: daughter-in-law, sister-in-law, spinster sister, etc. Historically there have been recorded cases, when a woman, although having a son of full age, was so brave and wise, that would become the head of the family[237].

These days the institution of extended family does not exist anymore and the institutions of *kora makhvshi* and *kora makhvshi zuraal* are already buried in oblivion. The eldest members of the family may still be called in the old manner but their current status bears almost no resemblance with the old content of these names. Modern Svanetian family is just the same as a rural household in any other part of

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[232] R. Kharadze, *Georgian Family Community*, vol. 2, Tbilisi 1961, p. 44, 51 [in Russian]; idem, *Remains of Extended Families...*, p. 60.

[233] R. Kharadze, *Remains of Extended Families*..., p. 57–58.

[234] B. Nizharadze, op. cit., p. 83–84; R. Kharadze, *Remains of Extended Families*..., p. 96–97, 101–104; A. Davitiani, op. cit., p. 73.

[235] B. Nizharadze, op. cit., p. 108; R. Kharadze, *Remains of Extended Families*..., p. 47–48; A. Kaldani, *In the World of Towers*, "Soviet Georgia" 1987, p. 57 [in Georgian]; M. Chartolani, *From the History of Material Culture*..., p. 84–85.

[236] B. Nizharadze, op. cit., p. 81; R. Kharadze, *Remains of Extended Families*..., p. 50; M. Chartolani, *From the History of Material Culture*..., p. 100.

[237] R. Kharadze, *Georgian Family Community*, p. 182.

Georgia, however, that said, there still exist some customary rules, worth mentioning.

Amongst the institutions, already buried in oblivion, are *nakhdanuri* and *nachvlashi*[238]. The institution of dowry is somewhat weakened – the attitude is quite loyal towards situations, when a woman enters husband's family without a dowry[239].

The society still believes that voluntary sexual intercourse out of wedlock or adultery is immoral[240]. Husband's immorality and impotence still delegates a wife will the absolute right to divorce[241].

The old Svanetian institution of bigamous relations is still evidenced in real life. In old times it was an exception[242] and these days the cases of bigamy are very rare. Both then and now the custom allowed for marrying a second wife only when the couple was infertile. The necessary precondition is the consent of the first wife, in the case of absence of which marrying a second wife is absolutely excluded. As a general rule, the initiative to marrying a second wife belongs to the first wife herself and sometimes she even obliges the husband to do so. The first wife is more honoured in the family, than the one, who was married only to "give birth to a child"[243].

It is worth mentioning that men, who have two wives at a time, are only the representatives of elder generation, what makes us presume, that this rule is gradually fading in the past, as the mentality of today's young generation is quite different from that of their ancestors, what is conditioned by numerous new nuances of life brought about by globalization.

Due to such particular attitude towards procreation no institution of adoption existed in Svaneti. Very rarely it could happen that a member of an extended family or a close relative was adopted[244]. However the situation has changed today and the practice of adoption of non-relatives is evidenced[245].

4.4. Law of succession. Neither old nor modern Svanetian custom pays any attention to the institution of will[246] and is concentrated on legal succession. Together with the deterioration of the institution of extended family, the old Svanetian rule of succession is also weakening, however some principles are still maintained.

According to old Svanetian custom the heirs of ancestral property were only the male descendants, women were not entitled to a share and they were given a gift and dowry in the capacity of family-leavers. A non-married woman would stay in the

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238 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 21, 150.

239 Ibidem, p. 21.

240 Ibidem, p. 31.

241 Ibidem, p. 31, 238.

242 B. Nizharadze, op. cit., p. 111.

243 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 22, 108, 135, 238.

244 A. Stoianov, *Papers of Caucasian Division of Imperial Russian Geographical Society*, Book X, exc. 2, Tiflis 1876, p. 437 [in Russian].

245 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti*..., p. 111.

246 Ibidem, p. 34.

family with her bothers or (in the case of separation of family) with any of the brothers, however all the brothers equally participated in marrying her out (irrespective of which brother she was living with). The property given to a daughter by her mother was her private property and it was not divided between the brothers[247].

According to contemporary customary law the ancestral property (household, land, forest, etc.) is still left to male heirs and women, as a general rule, are not entitled to a share from family assets[248].

A female member of the family lives in her parents' house and uses family property until she gets married. If she is married, she will not be entitled to a share from ancestral property[249], she can be given something as a gift, but the custom does not allow her to claim a share equal to that of her bothers[250].

If a women never gets married and remains spinster, she either stays in paternal family or with any of her brothers and freely uses family property like any other member of the family[251]. If a spinster decides to live alone, she gets an ordinary share like a brother[252].

In the case of an extended family a spinster was not entitled to a separate share, she would stay in paternal family and casually use the common-family property. In the case of separation of brothers she would move with any of them but the other brothers were equally responsible for her[253].

Svanetian succession law provided for the opening of the estate not upon the death of the last member of the household, but rather of its last male member and respectively, in the case of death a father of only the daughters, the estate would pass not to the daughters but to agnates of the deceased male according to established priority: brother, nephew, uncle, cousins, clan, village – who, in turn, were obliged to take care and be guardians of orphaned daughters and still alive spouse[254]. This rule is now modified and if a deceased person has only a daughter or daughters, they get their father's patrimony[255].

It is still believed, that if a family member (parent, brother, unmarried sister) or a next-of-kin needs care owning to some illness, physical incapacity or old age, the heir will be the one, who takes care of him/her while they are still alive and buries them and arranges the funeral repast after their death[256].

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247 B. Nizharadze, op. cit., p. 113–114; R. Kharadze, *Remains of Extended Families*..., p. 57–58.

248 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 34, 152, 161, 185.

249 Ibidem, p. 34, 161, 185.

250 Ibidem, p. 161, 185.

251 Ibidem, p. 84, 134, 152, 185.

252 Ibidem.

253 B. Nizharadze, op. cit., p. 113–114; R. Kharadze, *Remains of Extended Families in Svaneti*, Tbilisi 1939, p. 57–58 [in Georgian]; idem, *Georgian Family Community*, vol. 1, Tbilisi 1961, p. 185 [in Russian].

254 B. Nizharadze, op. cit., p. 114.

255 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 152.

256 Ibidem, p. 34, 151, 152.

As a general rule, the eldest member of the family, father or elder brother will divide the estate and it will be agreed right away who is to inherit what, they may even employ the balloting procedure and the last ballot should be drawn by the one, who does the division. In the case of failure to come to an agreement a mediation court may as well be summoned[257]. It should be mentioned that in the case of separation of two brothers, a very wise ancient rule of old Svanetian custom may be applied: one brother divides the estate and the other chooses, whether which share he likes best[258].

V. Public self-governance

In old times state institutions were fully substituting self-governance[259]. Today's self-governance is just a shadow of the old one, but along with official self-governance authorities, there still are some bodies, which supervise certain aspects of public life to the extent practicable:

1. Council of Clan Elders – for instance in *Mestia* there is an association of four St. George standard-bearer clans (*Niguriani*, *Ratiani*, *Paliani* and *Mchedliani*) – the so-called *moljgrag*. The Council of Elders is a collegial body, consisting of 8 members. Each clan elects 2 members – en elder and a young ones. The Council members elect their chairman from among themselves, each of them voting only for the others or they may even opt for voting procedure. Once in 3 years the members change according to rotation principles. The new and old members meet and the cases are handed over: what was done, what is still pending, and what should be launched. These 8 persons act as mediators when case concerns some disagreement between mentioned family clans, also arrange for adequate celebration of festivals and supervise the performance of traditional rituals. Similar Councils of Elders still exist in several other villages as well[260].

2. Village Assembly – currently its jurisdiction extends to the faith of grasslands and forests belonging to the village, church burglary cases and those private offenses, as a result of which the victimized dweller is so insulted that the other villagers consider this offence as an abuse of the whole society. The village will curse or boycott any of its member (or his family), if he commits some grave crime or is caught red-handed upon commitment of some immoral act[261].

3. Assembly of larger units, associations of villages and moreover, of the whole Svaneti – e.g. in 1975–1976 and 1980s the Assembly of the whole Above-Bali Svaneti and in 1996–1997 – the Assembly of the whole Svaneti were held (the so-

257 Ibidem, p. 84, 101, 132.
258 Ibidem, p. 84.
259 B. Nizharadze, op. cit., p. 85–93.
260 *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 23, 194, 203.
261 Ibidem, p. 18, 58, 68–69, 113, 149, 160, 177, 240, 241.

called *lalkhor*), which aimed at the eradication of theft – Icon ablution water was carried around the villages and each and every thief or future thief was cursed. All-Svaneti Assembly, like the assemblies of separate villages, has judicial and administrative duties. Equal number of members are elected at the assembly from every territorial unit and they will gather to decide on problematic for a village or clan issues[262].

Like the old one[263], the Assembly (no matter, clan, village, village association or whole Svaneti Assembly) may be attended not only by the head of the family, but also by any family member over the age of 12 years; women are also equally authorised to participate in public assembly, as it has been the case historically, and enjoy the same right as males[264].

In old times, when a conflict between two opposing families was so complicated and complex, that there was not even a chance of reconciliation of the rivals, and there was no end to revenge and casualties – the worried village would arrange the Assembly and rule: some special measure would have been applied against both parties or both would have been exiled from Svaneti unless they reconciled[265]. Nowadays the village is no more enjoying such wide powers.

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[262] Ibidem, p. 22–23, 56.

[263] B. Nizharadze, op. cit., p. 85, 90; E. Gabliani, *Free Svaneti*, p. 64.

[264] *Expedition ledger of field-ethnographical expedition of Above-Bali Svaneti...*, p. 37, 57.

[265] B. Nizharadze, op. cit., p. 93.

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Summary

Key words: Caucasus, Georgia, Svaneti, customary law, blood feud, Mediation Court, oath, crime, death penalty, eExile, cursing, homicide, bodily injury, theft, family law, bigamous relationship.

Svaneti is one of the high mountain regions of Georgia, located in south-west part of the Caucasus mountain range. Customary law is still maintained here, operating in parallel to positive law. This study represents report reflecting field-ethnographic expedition that took place in June 2015, at Above-Bali Svaneti communities, through surveying respondents. Materials obtained during the expedition are systemized according to categories: Organization and process of Mediation Court, judicial evidences, criminal law, civil law, public self-governance.

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За фасадом общества «социального благоденствия» (Проблемы криминальных убийств в Финляндии и Швеции)

К скандинавским странам относят Финляндию, Швецию, Норвегию и Данию. Большое число сходных черт позволяет отнести эти государства в одну группу. Какие это общие черты.

Первая. Само население этих государств в большинстве своем считает, что проживает на «задворках» Европы, т.е. географически эти страны относительно удалены от центра Европейского континента.

Вторая. Все скандинавские страны, за исключением Дании, довольно малонаселенные. К началу 2010 г. общая численность населения Финляндии, Швеции, Норвегии и Дании составила около 25,2 млн. человек.

Третье. Все эти государства, кроме Финляндии, по форме правления представляют собой конституционные монархии.

Четвертая. Господствующая религия во всех странах Скандинавии – протестантизм. Это оказало огромное влияние на общий социокультурный фон развития общественного сознания в этих странах.

Пятая. Значительные затраты государств в странах Скандинавии на поддержание одного из самых высоких жизненных уровней населения в мире и целенаправленная социальная политика способствовали сокращению социальной пропасти между богатством и бедностью, обеспечению более полной занятости населения и решения проблем безработицы.

Шестая. С конца XX – начала XXI столетия государства Северной Европы испытывают значительный приток иммигрантов, что способствует обострению ряда социальных проблем для населения этих стран.

В то же время отдельные авторы считают, что в скандинавских государствах более широко распространена толерантная политическая культура, характерен более высокий уровень доверия широких слоев населения властным институтам[1].

[1] T. Lappi-Seppälä, *Explaining imprisonment in Europe*, "European Journal of Criminology" 2011, № 8 (4), с. 303–328.

В то же время в национальных средствах массовой информации, речах политических деятелей, криминологических исследованиях специалистов из скандинавских стран все чаще звучит озабоченность проблемами преступности.

Интерес к социальной сфере жизнедеятельности скандинавских государств в России то вспыхивал, то затухал. Данные колебания во многом определялись конъюнктурными тенденциями развития нашей страны. Однако проблемы преступности в странах Северной Европы предметом научных исследований становились довольно редко[2].

Иногда в советских изданиях появлялись переводные работы, которые в той или иной степени были созвучны с текущими мероприятиями в Советском Союзе: борьбе с пьянством в начале 1970-х гг., государственным программам по усилению работы различных ведомств по профилактике преступлений[3].

В период перестройки в СССР активно стали обсуждаться проблемы т.н. «шведской модели социализма», на волне антиалкогольной кампании начали появляться публикации, в которых освещался правовой опыт Финляндии по организации охраны общественного порядка, уголовно-исполнительной системы этой страны[4].

В первое десятилетие XXI в. спектр исследований, затрагивающих проблемы преступности в странах Скандинавии несколько расширился[5].

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[2] С. Боботов, Л. Пивоварова, *Преступность в Швеции*, «Советская юстиция» 1967, № 6, с. 28–29; Л.Л. Ананиан, *Скандинавские криминологи о причинах преступности несовершеннолетних*, «Советское государство и право» 1970, № 12, с. 130–133; *Преступность несовершеннолетних в Скандинавских странах*, ред. Н.Н. Кондрашков, Наука, Москва 1974.

[3] Э. Иммонен, *Проблема алкоголизма в Финляндии*, [в:] *Некоторые вопросы борьбы с алкоголизмом в капиталистических странах. Сборник реферативных переводов*, Изд-во ВНИИ МВД СССР, Москва 1971, № 22, с. 19–23; К. Бруун, *Разновидность пьянства в скандинавских странах*, [в:] там же, с. 25–27; Б. Свенсон, *Предупреждение преступлений в Швеции*, [в:] *Криминология и уголовная политика*, Изд-во ИГиП АН СССР, Москва 1985, с. 129–132.

[4] С.С. Яценко, *Уголовно-правовая охрана общественного порядка по законодательству Финляндии* [в:] *Проблемы правоведения. Республиканский междуведомственный научный сборник*, Вып. 46, Киев 1985, с. 76–85; А. Романов, *Уголовно-исполнительная система Финляндии*, «Социалистическая законность» 1991, № 12, с. 60–63.

[5] О.Н. Ведерникова, *Теория и практика борьбы с преступностью: скандинавская уголовно-правовая и криминологическая модель*, «Государство и право» 2008, № 7, с. 53–61; С.В. Петрикова, *Преступления против жизни по уголовному законодательству Швеции, Дании и Норвегии*, [в:] *Политико-правовые системы стран Европы и Северной Америки: сравнительные исследования. Межвузовский сборник научных статей*, Саранск 2008, с. 59–65; А.В. Внуков, *Государственная политика по борьбе со злоупотреблением наркотиками на примере Швеции*, [в:] *Деятельность правоохранительных органов и специальных служб в сфере борьбы с незаконным оборотом наркотиков: Материалы науч.-практ. конф. 18–19 декабря 2008 года*, ч. 2: *Профилактика преступлений в сфере незаконного оборота наркотиков: состояние, проблемы*, СЗИПК ФСКН России, Санкт-Петербург 2009, с. 67–70; В.И. Вершинин, *Борьба с организованной преступностью в Швеции*, [в:] *Борьба с преступностью за рубежом.*

Однако данная проблема, по всей видимости, находится на самом начальном этапе своего научного осмысления.

Естественно, что в условиях углубляющейся интеграции национальных экономик, социального, культурного и образовательного взаимодействия возникает интерес к тем или иным национальным особенностям. В этом плане интерес к вопросам преступности в государствах Скандинавии вполне закономерен и не случаен. Однако среди западноевропейских специалистов нет единства по вопросу качества результатов, получаемых после проведения сравнительно-криминологических исследований. Отдельные специалисты к данным исследованиям относятся скептически[6]. Другие считают проведение таких исследований возможным, благодаря статистике жертв преступности, которая собирается в странах Западной Европы с целью проведения межстрановых сравнений состояния преступности[7].

Так, в результате пяти опросов (1989, 1992, 1996, 2000, 2004/05 гг.), в которых приняло участие 22 европейских государства, была получена информация о жертвах преступлений в этих странах, которые были зарегистрированы национальными органами полиции. Из рассматриваемых стран Северной Европы, Финляндия участвовала во всех пяти, Швеция в четыре, а Норвегия и Дания в двух исследованиях.

Итак, не смотря на известные недостатки официальной статистики преступности, использование сведений о жертвах различных видов преступлений, регистрируемых в органах полиции государств Скандинавии, является в настоящее время одним из распространенных методов межстрановых сравнений, используемых государственными органами, западными криминологами[8] .

Согласно официальной полицейской статистике, во всех скандинавских странах с начала 1960-х гг. начался постепенный рост преступности.

Ежемесячный информационный бюллетень: по материалам иностранной печати, Изд-во ВИНИТИ, Москва 2009, № 6, с. 24–29; А.В. Лунева, *Особенности уголовно-правовой регламентации и статистического учета детоубийств в странах с наименьшим уровнем детской насильственной смертности: Германии, Норвегии, Швеции*, «Российский следователь» 2011, № 3, с. 32–35; С.И. Вейберт, *Уголовная политика скандинавских стран в области противодействия коррупции*, [в:] *Деятельность органов государственной власти по противодействию организованной преступности: материалы V Международной научно-практической интернет-конференции. Екатеринбург, 26 марта – 3 апреля 2013 г.*, Урал. ин-т филиал РАНХиГС при Президенте РФ, Екатеринбург 2013, с. 22–29.

[6] M.F. Aebi, *Measuring the Influence of Statistical Counting Rules on Cross-National Differences in Recorded Crime*, [в:] K. Aromaa, M. Heiskanen (eds.), *Crime and Criminal Justice Systems in Europe and North America 1995–2004*, Publication Series ą 55, HEUNI, Helsinki 2008, c. 196–214.

[7] J. van Dijk, *The World of Crime. Breaking the Silence on Problems of Security, Justice, and Development Across the World*, Sage Publications, Los Angeles – London – New Delhi – Singapore 2008, c. 41.

[8] C. Tavares, G. Thomas, F. Bulut, *Crime and Criminal Justice, 2006–2009*, "Focus" 2012, № 6, Statistics Eurostat 2012.

Наименьшее увеличение наблюдалось по такому виду преступлений, как умышленные убийства, одновременно стремительно увеличивалось количество грабежей. Это оказалось особенно заметным на фоне конца 1950-х гг., когда ограбления в странах Северной Европы в полицейских сводках встречались довольно редко. К примеру, в 1960 г. в четырех скандинавских странах было зарегистрировано 1200 грабежей. Но при этом необходимо отметить, что уровень зарегистрированных грабежей в государствах Скандинавии к началу 2010 г. оставался несколько ниже среднеевропейского.

Однако отдельные скандинавские специалисты предостерегают от оперирования исключительно агрегированными показателями уровня насильственной преступности в государствах Северной Европы[9].

Не случайно в последнее время в исследованиях шведских криминологов акцентируется внимание на необходимости выделения из общей массы преступников, совершивших насильственные преступления, представителей титульной массы, с одной стороны и иммигрантов – с другой.

Ограничим анализ проблем преступности в государствах Скандинавии рассмотрением ситуации с умышленными убийствами.

В статистику убийств в государствах Северной Европы включаются собственно убийства, под которым понимается преднамеренное преступное деяние, насилие со стороны одного или нескольких человек, приводящее к смерти жертвы или жертв; детоубийства; разбойные нападения, которые сопровождается гибелью того, на кого осуществлено нападение. Погибшие в результате непредумышленных убийств, гибель водителей, находившихся в состоянии алкогольного опьянения в момент управления автотранспортным средством, а также лица, посягнувшие на чужую жизнь или собственность и в результате чего погибшие, если это будет определено судом, в статистике криминальных убийств не учитываются.

На следующей диаграмме (рис. 1) представлена динамика зарегистрированных полицейскими органами умышленных убийств в Финляндии и Швеции за период с 1950 г. по 2010 г.[10]

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[9] P.L. Martens, *Immigrants, Crime, and Criminal Justice in Sweden*, [в:] *Crime and Justice*, vol. 21: M. Tonry (ed.), *Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives Crime and Justice*, University of Chicago Press, Chicago 1997, с. 183–255.

[10] H. von Hofer, T. Lappi-Seppälä, L. Westfelt, *Nordic Criminal Statistics 1950–2010. Summary of a report*, 8th revised edition, Kriminologiska institutionen, Stockholms universitet, Stockholm 2012, с. 31–32.

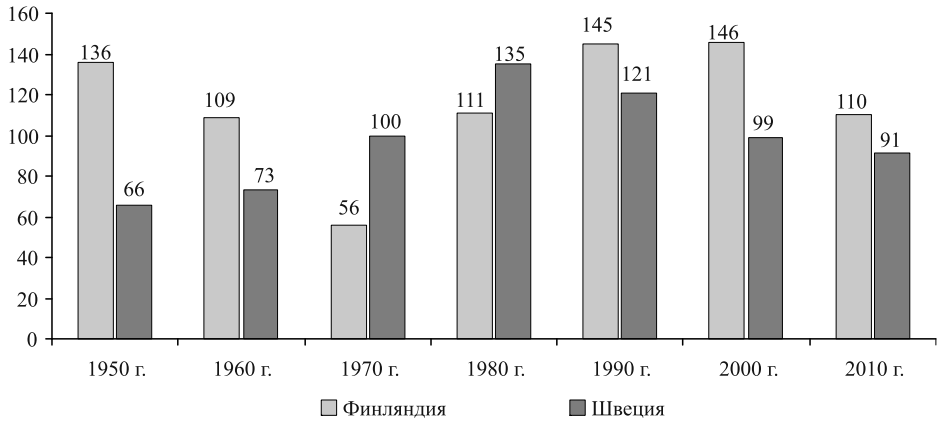

Рис. 1. Количество погибших в результате умышленных убийств в Финляндии и Швеции, 1950–2010 гг.

Источник: H. von Hofer, T. Lappi-Seppälä, L. Westfelt, *Nordic Criminal Statistics 1950–2010. Summary of a report*, 8th revised edition, Stockholm 2012, c. 31.

Итак, в статистике зарегистрированных убийств в Финляндии, как в зеркале отразились те большие социальные изменения, которые происходили в послевоенном финском обществе. Среди этих процессов наиболее значимую роль сыграла ускорившаяся в 1960–1970-е гг. урбанизация. На протяжении 1980-х гг. наблюдалась некоторая стабилизация уровня отдельных преступлений против собственности, что нашло свое выражение в сокращении числа зарегистрированных краж. В то же время полицейская статистика отмечает неуклонный рост преступлений против личности.

Например, с начала 2000-х гг. среднегодовое число убийств колебалось от 103 до 155. Убийства фиксировались среди безработных средних лет, мужчин – представителей социального «дна», имевших алкогольную зависимость. Еще одно следствие значительной межрегиональной социально-экономической дифференциации в Финляндии – наибольшее количество убийств регистрируется в северных и восточных регионах страны.

Одной из особенностей развития убийств в Швеции за обозначенный хронологический период явилось постоянное увеличение количества разбойных нападений с летальным исходом жертвы преступления. Также как и в Финляндии, данное преступление оказалось характерным для территорий с наиболее высоким уровнем урбанизации.

На следующем графике (рис. 2) отображены колебания уровня умышленных убийств в расчете на 100 000 человек населения в Финляндии и Швеции за период 1950–2010 гг.[11]

[11] Там же.

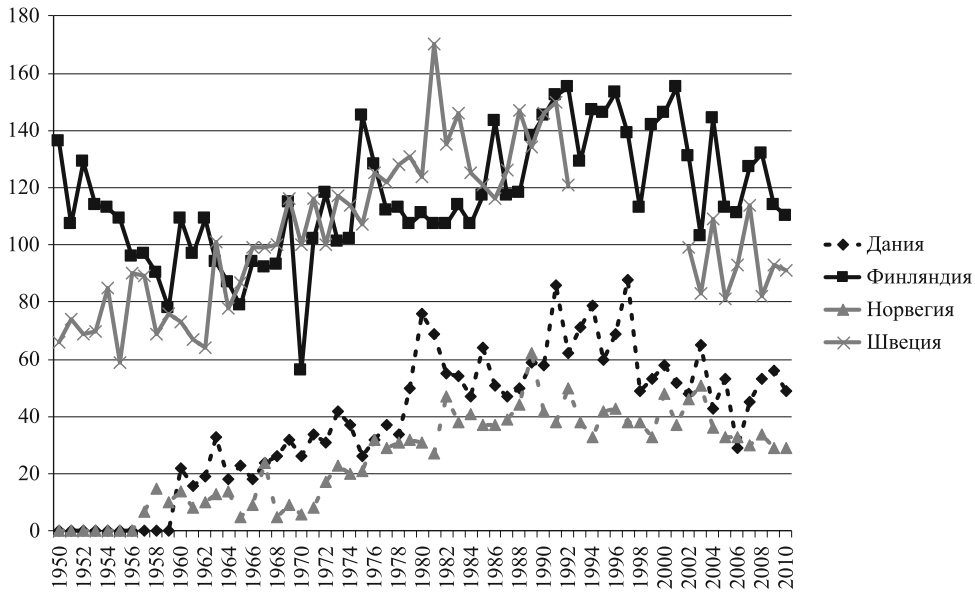

Рис. 2. Уровень умышленных убийств в расчете на 100 000 человек населения в странах Скандинавии, 1950–2010 гг.

*Сведения об уровне убийств в Швеции за 1993–2001 гг. отсутствуют.

Источник: H. von Hofer, T. Lappi-Seppälä, L. Westfelt, *Nordic Criminal Statistics 1950–2010. Summary of a report*, 8th revised edition, Stockholm 2012, c. 30.

На представленном выше графике выявлена динамика зарегистрированного уровня умышленных убийств в расчете на 100 000 человек населения в Дании, Норвегии, Швеции и Финляндии на протяжении относительно продолжительного хронологического отрезка времени. В целом, можно обратить внимание на то, что данные показатели в Финляндии и Швеции в обозначенный хронологический период были стабильно выше, нежели в Дании и Норвегии. В то же время уровень умышленных убийств в Финляндии чаще был выше в Финляндии, нежели в Швеции. Исключение составили только конец 1970 – начало 1980-х гг., когда шведская полицейская статистика зафиксировала непродолжительный всплеск криминальных убийств в стране.

Не случайно проблемы насильственной преступности вообще, а убийств в частности уже давно привлекают к себе внимание научного сообщества в скандинавских государствах. Весьма характерно в этом плане развивались криминологические исследования в Финляндии.

Без преувеличения можно сказать, что современные работы финских авторов, посвященные данному виду преступлений, восходят к трудам своего известного соотечественника, специалиста по проблемам преступности

В. Веркко (1893–1955), которые были опубликованы в 1930-х – начале 1950-х гг.[12]

В сфере его исследовательских интересов находились проблемы причинно-следственных связей общественного развития и насильственной преступности, потребление алкоголя и умышленные убийства. Но наибольшую известность ему принесли работы сравнительно-криминологического характера.

После смерти В. Веркко в финской криминологической науке возник своеобразный перерыв, по всей видимости, связанный с отсутствием в национальных масштабах ученого такого же уровня.

На рубеже XX–XXI вв. начинается новый период в развитии криминологической науки в Финляндии. Для работ финских авторов этого периода Х. Хакко, Д. Кививуори, М. Лехти, Д. Саволайнена, Т. Вилайнена характерны преимущественно эмпирический характер, многофакторный анализ преступности[13].

Благодаря этим и ряду других специалистов были выявлены особенности территориального распределения убийств в Финляндии и Швеции. В следующей таблице приводятся сведения о распределении мест совершения криминальных убийств в этих странах, зарегистрированных полицейскими органами в 2003–2006 гг. (табл. 1).

Скандинавские специалисты, характеризуя особенности умышленных убийств, зарегистрированные органами полиции Финляндии и Швеции, отмечают их большую частоту совершения в жилых помещениях, тогда как, например, в Нидерландах убийство гораздо чаще, чем в этих странах совершается на открытом пространстве: на улицах, в парках, лесах и др. общественных местах[14].

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[12] V. Verkko, *Henki-ja pahoinpitelyrikollisuuden kehityssuunnan ja tason määräämisestä I. Suomi ja sen naapurimaat. Tilastollis-metodologinen tutkimus*, Helsinki 1931; *Homicides and suicides in Finland and their dependence on national character*, "Scandinavian Studies in Sociology" 3, G. E. C. Gads Forlag, Copenhagen 1951.

[13] H. Hakko, *Seasonal Variation of Suicides and Homicides in Finland – with special attention to statistical techniques used in seasonality studies*, "Acta Universitatis Ouluensis" № 583, Oulu 2000; J. Kivivuori, *Sudden Increase of Homicide in Early 1970s Finland*, "Journal of Scandinavian Studies in Criminology and Crime Prevention" 2002, № 3 (1), с. 6–21; J. Kivivuori, *Suomalainen henkirikos. Teonpiirteet ja tekojen olosuhteet vuosina 1988 ja 1996*, "Oikeuspoliittisen tutkimuslaitoksen julkaisuja" vol. 159, Helsinki 1999; J. Kivivuori, M. Lehti, *Homicide Followed by Suicide in Finland: Trend and Social Locus*, "Journal of Scandinavian Studies in Criminology and Crime Prevention" 2003, vol. 4, с. 223–236; J. Savolainen, *Inequality, Welfare State, and Homicide: Further Support for the Institutional Anomie Theory*, "Criminology" 2000, № 38, с. 1021–1042; T. Viljanen, *Henkirikokset Suomessa vuosina 1970–79*, "Oikeuspoliittisen tutkimuslaitoksen julkaisuja" vol. 60, Helsinki 1983.

[14] J. Kivivuori, *Suomalainen henkirikos...*; M. Lehti, *Henkirikokset 1998–2000. Tutkimus poliisin tietoon vuosina 1998–2000 tulleista henkirikoksista*, Tilastokeskus, Helsinki 2002; M. Rying, *Dödligt våld i Sverige 1990–96*, Stockholm 2000.

Таблица 1

Места гибели от криминальных убийств мужчин и женщин в Финляндии и Швеции, 2003–2006 гг.

Место совершения убийства	Финляндия				Швеция			
	мужчины		женщины		мужчины		женщины	
	чел.	%	чел.	%	чел.	%	чел.	%
Дом жертвы	118	33	83	61	87	41	89	70
Другое, не собственное жилище	126	36	30	22	45	21	11	9
Учреждение, общежитие	7	2	1	1	7	3	3	2
Личный автомобиль	5	1	-	-	4	2	4	3
Магазин, ресторан	24	7	1	1	8	4	4	3
Рабочее место	–	–	–	–	4	2	2	2
Отель, мотель	1	0,3	–	–	1	0,5	–	–
Парк, лес	39	11	12	9	11	5	7	6
Улица, дорога	24	7	5	4	43	19	6	5
Другое	6	2	4	3	3	1	1	0,8
Всего установлено случаев	350	100	136	100	213	100	127	100
Осталось невыяснено	5	1	–	–	9	4	6	5
Общее количество погибших	355		136		222		133	

Источники: S. Ganpat, S. Granath, J. Hagstedt, J. Kivivuori, M. Lehti, M. Liem, P. Nieuwbeerta, *Homicide in Finland, the Netherlands and Sweden. A First Study on the European Homicide Monitor Data*, Stockholm 2011, c. 48, 49.

Обращает на себя внимание тот факт, что процент погибших от криминальных убийств в жилых помещениях был высоким в сравнении с другими местами убийств, установленных полицией. В то же время доля жертв, погибших от данной причины смерти, в собственном доме, была значительно выше в Швеции, чем в Финляндии.

Примечательно, что для финнов риск стать жертвой убийства не в собственном жилом помещении оказался в этот период значительно выше, нежели у шведов. Что касается умышленных убийств, зафиксированных против женщин в этих странах, то они произошли в большинстве своем в их собственных домах. Эти показатели оказались выше, чем у мужчин, погибших от убийств.

Проблема влияния злоупотребления алкоголя на уровень насильственной преступности, в том числе и убийств давно привлекает внимание научной криминологической общественности во всем мире. Специалисты из стран Северной Европы в этом плане не остались в стороне.

В качестве примера сошлемся на следующие довольно обстоятельные исследования по проблематике взаимосвязи между алкоголем и умышленными убийствами в Финляндии.

В статье М. Эронена, П. Наколы и Д. Тиихонена представлены результаты исследования, которое установило тесную взаимосвязь между употреблением алкоголя и социально-психологическими расстройствами, агрессивным поведением у 693 из 994 преступников, задержанных финской полицией за совершение криминальных убийств[15].

В 1998 г. Была опубликована работа Б. Брисмара и Б. Бергмана, в которой они продолжили изучение влияние алкоголя на рост криминальных убийств и ввели понятие «риск поведенческого расстройства»[16].

Финские криминологи Д. Кививуори, М. Лехти тщательному анализу подвергли проблемы алкоголизма, социально-демографические изменения, маргинализацию населения и их влияние на уровень умышленных убийств в стране[17].

Изучая работы финских специалистов, посвященные различным аспектам роли алкоголя на криминальную ситуацию в стране, нельзя обойти стороной еще одно исследование. В статье известных специалистов Ф. Лунетта, А. Пентила, С. Сарма на большом статистическом материале анализируется роль алкогольной интоксикации в различных видах насильственной смертности населения Финляндии в период с 1987 г. по 1996 г.: несчастных случаев, самоубийств, убийств.

Проведенное ими исследование позволило установить, что более 70% мужчин, погибших в результате разбойного нападения, в котором были использованы колюще-режущие предметы, стали жертвами преступников, находившихся на момент совершения преступления в состоянии алкогольного опьянения. 25% женщин погибших в результате разбойного нападения, в котором преступник использовал огнестрельное оружие, также стали жертвами лица, пребывавшего на момент совершения преступления в состоянии алкогольного опьянения[18].

В опубликованном в 2000 г. исследовании шведский криминолог М. Раинг, а затем и С. Гранат в своем обзоре за 2012 г. отмечали, что практически в 40% умышленных убийств, зарегистрированных шведской криминальной статистикой, преступники злоупотребляли алкоголем и 25% были наркоманами[19].

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[15] M. Eronen, P. Hakola, J. Tiihonen, *Mental Disorders and Homicidal Behavior in Finland*, "Archives of General Psychiatry" 1996, № 53, c. 497–501.

[16] B. Brismar, B. Bergman, *The Significance of Alcohol for Violence and Accidents*, "Alcoholism: Clinical and Experimental Research" 1998. (Suppl. 7), № 22, c. 299–306.

[17] J. Kivivuori, M. Lehti, *The Social Composition of Homicide in Finland, 1960–2000*, "Acta Sociologica" 2006, № 49 (1), c. 67–82.

[18] P. Lunetta, A. Penttila, S. Sarna, *The Role of Alcohol in Accident and Violent Deaths in Finland*, "Alcoholism Clinical and Experimental Research" 2001, № 25 (11), c. 1654–1661.

[19] M. Rying, *Utvecklingen av dödligt våld i nära relationer*, Stockholm 2007, c. 6; S. Granath, *Homicide in Sweden*, [â:] M. Liem, W. Pridemore (eds.), *Handbook of European Homicide Research: Patterns, Explanations, and Country Studies*, Springer, New York 2012, c. 405–420.

В 2008 г. шведский специалист ван Хофер опубликовал исследование, в котором он проследил взаимосвязь между объемами среднедушевого потребления алкоголя и уровнем зарегистрированных убийств в Швеции за период с 1750 по 2005 гг.[20]

Финские и шведские специалисты в качестве одного из факторов, который оказывает воздействие на колебания уровня насильственной преступности, в т.ч. и убийств, называют проблемы занятости и нарастание безработицы. В следующей таблице представлена информация о социально-трудовом статусе преступников, совершивших умышленные убийства в Финляндии и Швеции (табл. 2).

Таблица 2

Отношение к занятости лиц, совершивших умышленные убийства в Финляндии и Швеции

Социальный статус преступника	Финляндия				Швеция	
	1998–2000		2002		1990–1998	
	чел.	%	чел.	%	чел.	%
Занятые	76	16,7	14	19,4	194	29,3
Безработные	230	50,5	37	51,4	303	45,8
Состоящие на учете в агентствах по содействию занятости	72	15,8	10	13,9	88	13,3
Студенты	54	11,9	6	8,3	44	6,6
Пенсионеры по старости	23	5,1	5	6,9	29	4,4
Другие	–	–	–	–	4	0,6
Всего	455	100	72	100	662	100

Источники: J. Kivivuori, *Suomalainen henkirikos. Teonpiirteet ja tekojen olosuhteet vuosina 1988 ja 1996*, "Oikeuspoliittisen tutkimuslaitoksen julkaisuja" 159. Helsinki 1999; M. Rying, *Dödligt våld i Sverige 1990–1998. En deskriptiv studie*. Kriminologiska institutionen, Stockholms universitet, Stockholm 2000, c. 176.

Как видно из вышеприведенных статистических показателей, безработица в данных скандинавских странах оказывает довольно серьезное влияние не только на общую криминальную ситуацию, но катализирует в сознании отдельных граждан установки на социально-деструктивное поведение, вплоть до убийства другого человека.

Еще одной из особенностей развития криминологических исследований скандинавских авторов этого периода явилось появление работ, которые представляют собой своеобразный синтез криминологии и социально-исторического исследования. Например, финский специалист Х. Юликангас предпринял попытку объяснить колебания уровня умышленных убийств на протяжении относительно продолжительного хронологического периода[21] .

[20] H. von Hofer, *Brott och straff i Sverige. Historisk kriminalstatistik 1750–2010*, Kriminologiska institutionen Stockholms universitet, Stockholm 2011.

[21] H. Ylikangas, *Major Fluctuations in Crimes of Violence in Finland*, "Journal of Scandinavian History" 1976, № 1, c. 81–103.

Развитие криминологических исследований, посвященных насильственной преступности в Швеции во второй половине XX – начале XXI столетия, выявило свои особенности.

На протяжении последних десятилетий в этой стране было опубликовано значительное количество научных исследований, которые подвергают данное преступление многостороннему анализу. Так, М. Раинг в период с 2000 по 2007 гг. опубликовал три весьма содержательные работы, в которых он обстоятельно рассмотрел колебания уровня зарегистрированных убийств в Швеции в 1990–1996 гг., особенности убийств среди людей, находившихся в различной степени интимных отношениях[22].

В следующей таблице содержится статический материал, иллюстрирующий полицейскую статистику Финляндии и Швеции по вопросам взаимосвязей между лицом, совершившим убийство и его жертвой (табл. 3).

Таблица 3

Отношения между преступником, совершившим убийство, и его жертвой в Финляндии (1998–2000) и Швеции (1990–1998)

Отношения преступника и жертвы преступления	Финляндия		Швеция	
	в % от общего кол-ва	в расчете на 100 000 чел. населения в год	в % от общего кол-ва	в расчете на 100 000 чел. населения в год
Всего	100		100	
в том числе: сексуальный партнер	22,3	0,6	24,0	0,3
член семьи	12,9	0,3	17,0	0,2
не член семьи	63,9	1,7	59,0	0,7
знакомый	55,2	1,5	42,0	0,5
ранее не знакомый	8,8	0,2	17,0	0,2

Источники: J. Kivivuori, *Suomalainen henkirikos...*; M. Lehti, *Henkirikokset 1998–2000. Tutkimus poliisin tietoon vuosina 1998–2000 tulleista henkirikoksista*, „Oikeus" 14, Tilastokeskus, Helsinki 2002.

Итак, С. Гранат считает, что большинство из всех регистрируемых полицейскими органами Швеции случаев умышленных убийств происходит между людьми, которые в большинстве своем состояли либо в родственных связях, либо были близко знакомы или пребывали в интимно-партнерских отношениях[23].

Шведскими специалистами также было выявлено то, что за последние три десятилетия частота и основные характеристики убийств в Швеции не претерпели серьезных изменений, хотя количество женщин, погибших от рук бывших интимных партнеров в начале 2000-х гг. оказалась даже меньше, нежели в 1970-х гг.

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[22] M. Rying, *Dödligt våld*, [в:] *Brottsutvecklingen i Sverige fram till år 2007*, Stockholm 2008, c. 23–42; *Dödligt våld i nära relationer*, Stockholm 2001; *Dödligt våld i Sverige 1990–96*, Stockholm 2000.

[23] S. Ganpat, S. Granath, J. Hagstedt, J. Kivivuori, M. Lehti, M. Liem, P. Nieuwbeerta, *Homicide in Finland, the Netherlands and Sweden. A First Study on the European Homicide Monitor Data*, Stockholm 2011; S. Granath, *Homicide in Sweden...*, c. 405–420.

Еще в начале 1990-х гг. в работах П. Викстрёма и Х. ван Хофера[24] была предпринята попытка соединить два подхода – социологический и исторический – к выявлению причин и закономерностей колебания уровня зарегистрированных убийств в Швеции.

Так, П. Викстрём, анализируя динамику убийств в Стокгольме за 1951–1987 гг., нашел, что эти колебания во многом были связаны с притоком иммигрантов, отдельные представители которых были арестованы органами полиции за совершение насильственных преступлений. При этом большая часть из преступников-иммигрантов имела алкогольные проблемы[25].

В 1990–2009 гг. западная криминологическая мысль пополнилась довольно оригинальными работами шведского специалиста Л. Ленке, в которых он выдвинул концепцию, согласно которой уровень насильственной преступности в обществе в определенной степени зависит от общей политики властей[26].

Он утверждает, что политические обстоятельства, определяющие уровень насильственной преступности в обществе, могут быть разделены на два вида: создающие насилие напрямую и опосредованно.

К политическим обстоятельствами, которые способствуют воспроизводству насильственной преступности в обществе напрямую, он предлагает относить способы, методы и средства насильственного характера, используемые государством для решения острых социальных конфликтов.

Ко второму виду он относит политические обстоятельства, способствующие поддержанию определенного уровня насильственной преступности в обществе, но не напрямую, а опосредованно через механизм фрустрации личности. Она в свою очередь находит свое внешнее выражение в экономической, социальной, морально-психологической сфере жизнедеятельности общества и отдельного индивидуума.

Именно разочарованием в существующей политической системе Л. Ленке объясняет различия между Финляндией и Швецией в уровне зарегистрированных убийств[27].

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[24] P.-O. Wikström, *Cross-National Comparisons and Context-specifc Trends in Criminal Homicide*, "Journal of Crime and Justice" 1991, vol. XIV, № 2, с. 71–95; H. von Hofer, *Homicide in Swedish Statistics, 1750–1988*, "Criminal Violence in Scandinavia. Scandinavian Studies in Criminology" vol. 11, Norwegian University Press, Oslo 1990, с. 29–45.

[25] P.-O. Wikström, *Context-specifc Trends in Criminal Homicide in Stockholm 1951–1987*, "Studies on Crime Prevention" 1992, № 1 (1), с. 88–105.

[26] L. Lenke, *Alkohol och våldsbrottslighet. Tidsserieanalyser i komparativ perspektiv*, [в:] H. von Hofer (ed.), *Leif Lenke in memoriam*, Kriminologiska institutionen, Stockholm 2009, с. 15–20; *Totalkonsumptionens betydelse för alkoholskadeutvecklingen i Sverige*, [в:] там же, с. 59–76; *Våldsbrottsligheten i teoretisk belysning. Mot en politisk teori*, [в:] там же, с. 21–58.

[27] L. Lenke, *Alcohol and Criminal Violence. Time Series Analyses in a Comparative Perspective*, Almqvist & Wiksell, Stockholm 1990.

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Внуков А.В., *Государственная политика по борьбе со злоупотреблением наркотиками на примере Швеции*, [в:] *Деятельность правоохранительных органов и специальных служб в сфере борьбы с незаконным оборотом наркотиков: Материалы науч.-практ. конф. 18–19 декабря 2008 года*, ч. 2: *Профилактика преступлений в сфере незаконного оборота наркотиков: состояние, проблемы*, СЗИПК ФСКН России, Санкт-Петербург 2009.

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Резюме

Ключевые слова: умышленные убийства, насильственная преступность, иммиграция, места совершения убийств, алкоголь.

Данная статья посвящена двум взаимосвязанным темам. Изучаются основные этапы и особенности развития криминологических теорий и направлений конца XX – начала XXI столетий в Финляндии и Швеции, посвященных проблемам насильственной преступности. Рассматривается динамика абсолютных и относительных показателей умышленных убийств в этих странах в 1950–2010 гг. Выявляются территориальные особенности совершения данного вида преступления. Анализируются виктимологические особенности умышленных убийств на материалах уголовной статистики. Осуществляется группировка лиц, совершивших криминальные убийства, по отношению к трудовой деятельности. Представлены последние исследования финских и шведских специалистов, в которых отслежено воздействие алкоголя на уровень смертности населения от криминальных убийств.

Summary

Behind the face of "social welfare" society (Criminal problems of homicide in Finland and Sweden)

Key words: intentional homicide, violent crime, immigration, the scene of murder, alcohol.

This article focuses on two related topics. It studies the basic steps and features of the development of criminological theories and currents devoted to the problems of violent crime during late XX – beginning XXI centuries in Finland and Sweden. The article discusses the dynamics of absolute and relative indicators of homicides in these countries in 1950–2010. It also identifies territorial features of the following type of crime and analyses the victimological features of homicide based on criminal statistics. The article carries out the grouping of perpetrators in relation to employment and presents the latest research of Finnish and Swedish experts, who tracked the effects of alcohol on the mortality rate caused by criminal homicide.

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Some controversial issues of imposing sentences on a minor

I. When is a minor imposed a judgment sentence of fixed-term imprisonment under current legislation (on the basis of the Art. 73 § 1 of the Juvenile Justice Code)?

In particular, on the basis of the Art. 73 § 1 of the Juvenile Justice Code, "Fixed-term imprisonment may be imposed on a minor if he/she has committed a serious or a particularly serious crime, if he/she has avoided serving a non-custodial sentence, and/or a judgment of conviction has been delivered against him/her in the past".

As we can see, fixed-term imprisonment may be imposed on a minor by the court in following circumstances:

a) if he/she has committed a serious or a particularly serious crime;

b) if he/she has avoided serving a non-custodial sentence (even if it is imposed for a less serious crime);

c) a judgment of conviction has been delivered against him/her in the past (for any category of crime).

Before starting discussing each case, it should be noted that existence of these cases gives an opportunity of fixed-term imprisonment to be imposed on a minor and it never obliges the judge to impose fixed-term imprisonment.

1. What does it mean "If he/she has committed a serious or a particularly serious crime"?

If a minor committed acrime, including a serious or a particularly serious crime, this issue, of course, is decided by a court, which is considering this case.

A serious crime, committed by a minor, may not only be intentional, but also negligent. Since this unintentional crime is severe category (it is punishable by imprisonment by a term of 6–10 years), 14 years old teenager may be imposed fixed-term imprisonment under the Art. 73 § 2 of the Juvenile Justice Code.

As we see, in case of the less severe crime, committed by minors, deprivation of freedom has not been delivered against him/her**,** also in case of intentional crime.

Moreover, even this less serious intentional crime has nature of violence, imposing imprisonment on a minor is still unacceptable.

The introduction of such a ruling should be considered as a clear manifestation of the liberalization of criminal legislation.

Not disputed, that in case of the less serious crime, the imprisonment must not be imposed on a defendant as the preventive measure.

There is a question, related to the aforesaid issue: what form and measure of punishment may be used by the count against a minor, who committed such less serious crime, which must only be imposed the imprisonment under appropriate article of the Criminl Code, and the alternative punishment is not provided?

For example, a minor, who had not been convicted in the past, burnt neighbor's house by setting fire on the basis of vengeance. This action shall be qualified under the Art. 187 § 2 of the criminal code, which provides punishment of imprisonment for a term of three to five years. Thus, it is a less serious crime. Therefore, fixed-term imprisonment shall not be imposed on a minor for committing this crime.

But what kind of punishment shall the court impose in this case, if Art. 187 § 2 does not provide an alternative sentence? How possible for the court to impose such sentence, which is not provided in appropriate article of private part of Criminal Code, but provided for by the sentence system, listed in the Art. 66 of the juvenile justice code.

The question is, if such a situation is governed by the Art. 76 of the Juvenile Justice Code (imposing on a minor a lesser sentence than provided for by law)?

According to this article, the judge shall be entitled to impose on a minor a lesser sentence than provided for by law, or other, more lenient sentence, if a minor had not been convicted in the past and there is mitigating circumstances form, which makes it reasonable to impose on a minor a lesser sentence than provided for by law.

As we can see, the necessary precondition for using this article, is existence of mitigating circumstances in the case and therefore, the fact, that a minor had not been convicted in the past, is not enough. Any other provision, which would settle the posed question, does not exist in the Juvenile Justice Code.

Since the Juvenile Justice Code does not directly regulate such case, the general rule of imposing the sentence should be used to solve this issue, which is provided by the Art. 53 of the Criminal Code of Georgia and compare it to the general rule of juvenile sentencing, provided by the Art. 75 of the Juvenile Justice Code.

Interestingly, whether the Art. 53 (general principles of sentences) of the Criminal Code gives possibility to solve this issue?

According to the Art. 53 § 1, the court shall impose a fair sentence on an offender within the scope provided for by the relevant article of the special part of this Code and taking into consideration the provisions of the general part of this Code.

As we can see, the Art. 53 § 1 provides the general rule of punishment, which means ordinary (and not force majeure) cases. According to this rule, the punishment is imposed under special part of the relevant article of the Criminal Code, which means that the punishment is imposed under the article, by which the accused shall be sentenced.

In our case, however, there is an extraordinary case, when imposing the sentence (fixed-term imprisonment) under special part of the relevant article of the Criminal Code is not allowed under legislation (Juvenile Justice Code).

Thus, a situation is created when the court has a few alternatives: 1) not to impose punishment, despite the judgment of conviction; or 2) impose other punishment from sentence system of the Art. 66 of Juvenile Justice Code; or 3) to impose a house arrest as a form of punishment.

The use of the one from these three alternatives (judgment of conviction without imposing punishment) is a widespread practice in the GF[1]. But such practices have not been used in Georgia until recently, and the main reason of it is the lack of proper regulation in procedural law of the Criminal Law. Furthermore, in the present case it would not be justified to impose judgment of conviction without a sentence, because: first, such an approach may be somehow encouraging a juvenile of committing this kind of crime, since he/she has guarantee not to be sentenced. Second, no less important, the solution of issue in such way will conflict with the legislator, who had no purpose of exemption minors from any sentence under the Art. 73 of Juvenile Justice Code (by prohibiting imposing fixed-term sentence on minors with clean biography, who has committed the less serious crime). The purpose of the legislator is not to impose deprivation of freedom on a minor, but another alternative sentence.

As for the second solution of the problem (other sentence, which is not provided for by special part of the relevant article of the Criminal Code), it is more acceptable, because: firstly, this time a juvenile who commits a crime will not have the feeling of impunity, and it will not be a motivating factor for other minors for this kind of crime. Secondly, such solution of the issue will not conflict with the aim of the legislature, discussed above.

Let's see how the General Principles of sentencing minors is presented under the Art. 75 of Juvenile Justice Code.

Under the § 1of this article, when imposing a sentence on a minor, the judge shall take into account the best interests of the minor and an individual assessment report in the first place.

As we can see, in contrast to the Art. 53 of the Criminal Code, it is not emphasized, that the minor sentence must be imposed within special part of the relevant article of the Criminal Code. It is important, that the judge shall take into

[1] See K. Mchedlishvili-Hedrich, *Liberalization Trends of Criminal Law Legislation in Georgia*, Tbilisi. 2016, p. 723–724.

account the best interests of the minor and an individual assessment report in the first place.

Legislator indirectly imposed such regulations, that the judge in certain cases, taking into account the interests of the minor, may impose such sentence, which is not provided for by special part of the relevant article of the Criminal Code. In particular, to impose other less serious sentence, provided for by the Art. 66 of Juvenile Justice Code.

That is also proved by the Art. 69 of Juvenile Justice Code, which provides such juvenile sentence (house arrest), which is not provided by the Criminal Code.

But the question is, based on which provision of Juvenile Justice Code, Court can make such a decision?

Since there is no provision in the current legislation, which would directly regulate this situation, the court, in this case, should use the analogy in favor of a person, which is allowed by our legislation (Art. 32 and 38 of the Criminal Code).

It should be noted, that existance of the Art. 32 and 38 in Criminal Code does not mean, that possibility of using the analogy in favor of a person is exhausted only by this article. This article is just a sign that the using the analogy is allowed by legislator for solving such important issues (solution of issue of justification exempting circumstance and circumstance excluding guilt), which shall be followed by a release of a person from Criminal liability. Therefore, there's no doubt that use of analogy in favor of a person for solving less legal importance issues (for example, deciding on the sentence), is permissible.

In this case, the Court should apply Art. 76 of Juvenile Justice Code by analogy (imposing on a minor a lesser sentence than provided for by law) and for intentional destruction of another's property, caused by setting fire, the court should impose lighter sentence, which is not provided for by the Art. 187 § 2 of the Criminal Code, but is provided for by the Art. 66 of Juvenile Justice Code, which provides types of sentences of juveniles. For example, impose deprivation of freedom (3 years) within legal term.

Such decision of the issue may be disputed as in a practice, also in dogmatism by reference of the following argument: if so, why is the Art. 76 needed in Juvenile Justice Code (imposing on a minor a lesser sentence than provided for by law). Court has already had the opportunity to impose a lighter sentence in the case provided for by the Art. 75 § 1 (take into account the best interests of the minor and an individual assessment report in the first place).

As for the third solution of the problem, it is more easy to use and undeniable, because it is directly derived from legislative regulation. In particular, the one type of punishment, provided for by the Art. 69 of Juvenile Justice Code, is house arrest, which is not provided for by Criminal Code. According to the Art. 69 of the Juvenile Justice Code (§ 3), house arrest may be imposed on a minor in the case of the commission of a minor crime.

In conclusion, it should be noted that there are two alternative ways to solve the above-mentioned problem: a) by using the analogy of the Art. 76 of the Juvenile Justice Code, the court should impose on a minor, committing less serious crime, such alternative sentence, which is not provided for by special part of the relevant article of the Criminal Code, but is provided for by sentence system of Juvenile Justice Code; b) to impose house arrest on a minor, who has committed less serious crime.

2. The second case of the possibility of imposing on a minor fixed-term sentence as a judgement of conviction – if he avoids a non-custodial sentence

Initially, it should be noted that in this case it does not matter what category of crime was convicted a minor – this may be a less serious crime.

Avoidance of punishment occurs, when there is no excuse for minor not to obey the sentence serving procedure (for example, nothing prevents to pay the imposed fine or perform socially useful labour).

When non-custodial sentence is imposed on a minor (house arrest or socially useful labour), he/she is obliged to obey the rules of serving the sentence prescribed by law. In case of avoidance of this sentence, the court may (but is not obliged) change the imposed sentence in imprisonment in case, if special part of the relevant article of the Criminal Code provides such sentence. In discussed case, the court is authorized to change the imposed sentence by more serious sentence and not to use the fixed-term imprisonment.

During consideration of this case, one circumstance attracts our attention, which is related to the nature of the Juvenile Justice Code. In particular, by collation of the Art. 42 § 6 of the Criminal Code and the Art. 73 § 1 of Juvenile Justice Code, it is obvious that the legislator rules different standards for juveniles compared with adults, when a minor avoids serving the sentence as assigned fine.

Namely, according to the Art. 42 § 6 of the Criminal Code, changing the fine imposed on a minor by restriction of freedom may be implemented in two cases: a) if a convicted person avoids paying the fine, or b) if the payment cannot be enforced.

According to the Art. 73 of Juvenile Justice Code, the second case of imposing fixed-term imprisonment on a minor may be implemented only in one circumstance: if a minor has avoided serving a non-custodial sentence. This rule is related to avoidance of any non-custodial sentence, including fine.

Therefore, in case of condition, when a minor does not avoid imposed fine, but due to another reason (for example, due to sudden unexpected circumstance, he was left without any income) it is impossible to enforce the payment. This case, does not grant the court with right to replace the designated fine in imprisonment. It should replace the imposed fine into another alternative sentence.

In such a situation, the issue of replacement of imposed fine into term imprisonment may come only in special cases. In particular, then, when the article of Criminal Code provides only term imprisonment together with the fine and other alternati-

ve punishment is not given in its sanction or provides any other alternative punishment, which is not used against minors under current legislation (for example, corrective labour).

But the question is, is the court authorized to use term imprisonment against her/him in every case of such circumstance?

For example, a minor was convicted of illegal acquisition of psychotropic substance (Art. 261 § 1 of the Criminal Code) and was imposed a fine as a punishment. Before paying the fine within legal dealine, due to unforeseen situation, a minor turned out to be insolvent and payment was impossible to be enforced.

Since the 1 § of this article, along with the sanction of a fine provides corrective labour and term imprisonment, the question is: is the court authorized to replace imposed fine into term imprisonment, because it will be unable to use corrective labour against a minor.

As it comes to drug crime, according to current legal reality of Georgia, the court must not replace imposed fine into term imprisonment. In particular, the point is that according to the decision №1/5/592 24 October 2015 of the Constitutional Court of Georgia, the normative content of the words "shall be punished by imprisonment from seven to fourteen years" of the Art. 260 § 2 of the Criminal Code was declared unconstitutional with respect to the Art. 17 § 2 of the Constitution of Georgia. This normative content provides possibility of imposing deprivation of freedom "About drugs, psychoactive substance, precursors and drug-related assistance" underannex #2, horizontal row 92 defined by legislation of Georgia, the plaintiff's disputed amount (70 grams), drug – dried marijuana, the acquisition and possession for the purposes of personal use.

Thus, in accordance with the above-mentioned decisions of the Constitutional Court of Georgia, it was established unconstitutionality of custodial punishment for purchase/ storage of 70 grams of "dried marijuana" for the purpose of personal use.

Constitutional Court's decision will affect the issue of imposing punishment for illegal circulation of other remedies under special control, whose social danger is much less than the drugs. Such as psychotropic substance.

In particular, the question should be put this way: if conviction of deprivation of liberty for illegal purchase/ storage of 70 grams of dried marijuana (which is a large amount) is unconstitutional, such punishment cannot be used for illegal purchase/ storage of psychotropic substance (which is much less dangerous) even in case of a large amount (Art. 226 § 3). Therefore, in mentioned case, the court is not authorized to replace the imposed fine on a minor (which was impossible to be enforced) into term imprisonment under the Art. 261 § 1 of the Criminal Code. As a result, the judgment of conviction without punishment against minors should remain in force.

The practice of judgment of conviction without imposing sentence we already have in Georgia. In particular, on 5 April 2016 Tbilisi City Court delivered judgment of conviction without imposing sentence for illegal purchase and storage of drug

dried marijuana (Art. 260 § 1) by using analogy of the Art. 269 § 3 of Procedure Criminal Code[2].

In discused case, due to the impossibility of enforcement of imposed fine by a minor, the court is not authorized to replace the imposed fine into deprivation of freedom, although the Art. 261 § 1 provides this form of punishment.

3. The third case of imposing term imprisonment on a minor, when a judgment of conviction had been delivered against him/her in the past

What does this case mean (a person who had been imposed a judgment of conviction in the past) and how he/she differs from one hand with "a person with criminal records" and on the other hand a person who "has been convicted in the past"?

A person with criminal records is, who had been delivered judgement of conviction and his/her conviction is neither expunged nor cleared and this issue is controversial neither in doctrine nor in judicial practice. Accordingly, a person having no criminal records is not only a person, who had never been convicted, but also, whose conviction was expunged or cleared[3].

As for the person convicted in the past, this term is used in different articles (for example, Art. 63 § 4 of the Criminal Code – conditional sentence) by current legislation. As already noted in the legal literature, such a legal formulation creates threat of ambiguous interpretation of an issue. In particular, the question can be asked: Can a person considered convicted in the past who have a conviction expunged or cleared? Although according to present situation he/she is not considered as having criminal records (legally she/he has a clean record) but in the past, he/she was convicted?[4]

The answer to this quaetion can be ambiguous and it can be interpreted detriment of the individual. In particular, a person with conviction expunged or cleared may be considered "convicted in the past". And this will have a negative impact on the solution of legal fate of the individual.

Moreover, such decision of the issue will contradict the § 6 of the Art. 79 of the Criminal Code, according to which expunged or canceled conviction will not be considered at the time of deciding the issue of criminal liability, crime and criminal qualification measure. Thus, such a vague legal wording is not justified.

As for the relevant provision of the § 1 of the Art. 73 of Juvenile Justice Code: "A judgment of conviction was delivered in the past" – has not been applied in the criminal law. What is meant by it? It involves a case, when judgment of conviction

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[2] See Archive of Tbilisi City Court, case #1/4555-15 (#001140915003).

[3] See G. Nachkebia, N. Todua, *Criminal Law, general part about issue of expunged and cleared sentence*, Tbilisi 2016, p. 612–615.

[4] See additional sentence in case of conditional sentence (Art. 63 § 6 of the Criminal Code) in: N. Todua, *Criminal law liberalizing trends in Georgia*, Tbilisi 2016, p. 426–430; also G. Nachkebia, N. Todua, op. cit., p. 530–531.

was imposed on a person in any part of the past. At the same time, it does not matter whether this conviction is expunged or cleared. It also does not matter, whether this conviction is connected with intentional or unintentional offense, nor what category does the crime, committed in the past, belong to? (less serious, serious, or the most serious).

Moreover, at this time it does not matter what category of crime he has committed at this time (it may be less serious) or if he/she has committed intentional or unintentional crime.

It turns out that imposing term imprisonment on a minor is possible, if he/she had ever been convicted for any category crime, even if his/her conviction had already been expunged and at present he/she has committed a less serious negligent crime[5].

Such legislative regulation should not be considered fair, to say nothing of the fact, that it conflicts the content, which lies in expunge and clear of the criminal records.

Let's consider the following example: 14 years old Petre was sentenced with less grave bodily injury caused through negligence (Art. 124 of the Criminal Code) and he was punished by a fine, which he paid within a prescribed period.

On the basis of the Art. 12 § 1 of Juvenile Justice Code (a monor's sentence is considered expunged after serving a sentence), this person's conviction has been expunged.

3 years and 11 months after serving the sentence, when Petre was 17 years and 11 months old, he was judged for negligent damage or destruction of another person's property, committed by careless handling of fire – § 2 of the Art. 188 of the Criminal Code (he left a burning fire in the yard, the fire set to neighbor's shed and significantly damaged it).

According to discussed provision of the § 1 of the Art. 73 of the Juvenile Justice Code, the court may freely impose on a minor not the alternative sentence, prvided for by the § 2 of the Art. 188 of the Criminal Code (fine of restriction of freedom) but term imprisonment.

Such a solution odds not only with the general spirit of the Code of Juvenile Justice, but also a provision of § 6 of the Art. 79 of the Criminal Code, which states: "Expunged or cleared conviction will not be considered during solution of the issue of criminal liability, qualification of crime and measure of criminal influence".

As we can see**,** Expunged or cleared conviction will not be considered during solution of the issue of criminal liability, qualification of crime and measure of criminal influence.

What kind of punishment to be imposed on a person means a solution of the issue of criminal influence measure?

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[5] See goals and types of minor penalty, conditional sentence in: G. Nachkebia, N. Todua, op. cit., p. 658.

Therefore, the Art. 75 § 1 of the Juvenile Justice Code should be improved and it must be formed as follows: "If he has been convicted for committing an intentional crime".

II. When the court imposes imprisonment on a minor for 6 months' term as a judgment of conviction (or a minimum period prescribed by the law for this kind of sentence). Is this sentence subject to reduction under § 2 and 3 of the Art. 73 of Juvenile Justice Code?

Let's consider the following issue:

15 years old Petre who had crimnal records, was convicted of illegal storage of hunting firearms (§ 1 of the Art. 236 of the Criminal Code), which shall be punished by a fine or imprisonment for up to two years. Taking into account the case individual evaluation report and the best interests of the minor, the court imposed imprisonment for 6 months' term.

The question is, what rule should be used by the court to impose the final sentence against Petre?

Since Petre is not 16 years old yet, the court should use § 2 of the Art. 73 of Juvenile Justice Code for imposing the final sentence, according to which the imprisonment, imposed on a minor as a judgment of conviction is subject to two kinds of adjustments, from which the one is mandatory. It lies in the fact, that the imposed term of imprisonment should be reduced to one third. It is imperative requirement, that the court cannot ignore in any case. Therefore, the imposed 6 months' term imprisonment should be reduced to 2 months and the final sentence should be imprisonment for 4 months' term. Therefore, according to § 3 of the Art. 73 of Juvenile Justice Code, the imposed 6 months' term imprisonment should be reduced to 1/4, if we have a minor reached 16 years.

This is proved by the provision of § 4 of the same article, which provides: the § 2 and 3 of this article are used despite the existence of the circumstances provided for by the Art. 76 of this Code (imposing on a minor more lenient sentence than provided for by law), which menas, that for using the § 2 and 3 of the Art. 73 it is not necessary to have circumstances, which is required under the Art. 76 for imposing more lenient sentence on a minor (mitigating circumstances and etc.)

It should be noted that such concession of imposing the term of imprisonment on juveniles is not contrary to the general spirit of the Criminal Code of Georgia. In particular, the general rule of imposing the term imprisonment as a judgment of conviction. According to the § 2^1 of the Art. 50 of the Criminal Code,on the basis of legislative amendments, implemented even before the adoption of the Juvenile Justice Code. Therefore, the Court may impose a sentence that is less than the lowest limit of the sentence (for a term of from 6 months to 20 years) prescribed under § 2 of this article provided a plea bargain is concluded between the parties.

As we can see, the Criminal Code provides the possibility, the Court may impose a term imprisonment that is less than the lowest limit of the sentence (The question is the reasonability of the establishment of a plea agreement, as the essential precondition).

III. While imposing fixed term imprisonment on a minor, when it becomes necessary to correct this sentence for the second time, may the court reduce the imposed imprisonment less than the lowest limit of the sentence, provided for by the Art. 73 § 2 and 3 of the Juvenile Justice Code?

In particular, pull it down to 10 years for minors from 14 to 16 years old, and down to 12 years in case on minors from 16–18 years old.

Let's consider the following issue:

15 years old Petrewas sentenced with murder under aggravating circumstances (Art. 109 § 3 of the Criminal Code) and taking into account the case individual evaluation report and the best interests of the minor, the court imposed imprisonment for 18 years' term.

The § 2 and 3 of the Art. 73 of Juvenile Justice Code provides, that imposing the fixed term imprisonment on a minor as a judgment of conviction is a subject to two kinds of adjustments, from which the one is necessary, and the other – possible[6].

In particular, on the basis of the § 2 of the Art. 73, the term of deprivation of freedom imposed on a minor, is reduced to 1/3. At the same time, the final sentence shall not exceed 10 years. This is the maximum benefit, which lawmakers set against a minor under the age of 16. Therefore, if after the first adjustment a person has 10 years' imprisonment to be served, the sentence is not experiencing the second kind of adjustment.

In given issue, the 18 years' term imprisonment imposed against Petre should be reduced to 1/3 by the court, to 6 years. Therefore, the minor will be imposed the imprisonment for 12 years' term.

Since, the minor has more than 10 years left to serve imprisonment, the court should carry out the second kind of adjustment under the § 2 of the Art. 73.

That's the question: is the court authorizedto impose the final sentence less than 10 years' term against Petre? Or pull down the imprisonment bellow 10 years while experiencing the second kind of adjustment? For exapmle, impose the final sentence for a term of 9 years against Petre.

The answer should be the following: The Court has not such right, because, firstly, the individualization of punishment against juveniles should be carried out not in the final punishment, but at the time of imposing the original punishment

[6] See ibidem, p. 657–660.

(based on the § 1 of the Art. 75), secondly, under the § 2 of the Art. 73, the sentence should be secondly adjusted only if the left punishment term exceeds 10 years after the first adjustment ("The final sentence shall not exceed 10 years"). Therefore, if the left punishment term exceeds 10 years after the first adjustment, the court is not authorized to make second sentence correction.

For example, in the above case, the imprisonment for 15 years' term was imposed on 15 years old Petre, as the first judgment of conviction. The court may reduce this sentence to 1/3, which means that the final sentence shall be 10 years' term, because the remaining sentence is within maximum size of imprisonment under the § 2 of the Art. 73, the court has no right to amend it the second time.

We will have to face imprisonment less than 10 years' term, as the final sentence imposed on a minor under 16 years old, when the final sentence shall be less than 10 years' term of imprisonment after the first (necessary) correction of the first sentence. For example, in the above case, the court imposed 10-year term imprisonment on 15 years old Petre. After the required reduction to 1/3, the final sentence term shall ramain 8 years.

IV. Imposing sentence on juveniles (The Court Practice Analysis)

1. The rule of imposing on a minor a lesser sentence than it is provided for by law, is determined by the Art. 76 of Juvenile Justice Code.

The judge should have two conditions, in order to impose on a juvenile more lenient sentence, than provided for by law: 1) the juvenile should not have been convicted in the past and 2) there should be mitigating circumstances form.

The first prerequisite of imposing on a minor a lesser sentence than it is provided for by law, is that, the juvenile should not have been convicted in the past. What does this mean? It means, that the juvenile should have never been convicted before. I think, that if the juvenile had been convicted in the past, but his/her criminal record was expunged, he/she can be sentenced more lenient, than provided for by the law, whereas cleared or expunged criminal record shall be disregarded.I believe that the above-mentioned statutory definition to be detriment against juveniles, is unacceptable, since the Juvenile Justice is focused on protection of the best interests of the minor.

In my opinion, the Art. 76 of Juvenile Justice Code "If no judgement of conviction has been delivered against the minor in the past" should be changed in "He/she does not have any criminal record", which would be more correct in legal terms.

The second criterion of imposing on a juvenile more lenient sentence, than provided for by the law, is the existence of mitigating circumstances form in juvenile case.

"Mitigating circumstances form" must be understood, so that in the case there must be at least two mitigating circumstances, which does not include minority of a person[7].

[7] See ibidem, p. 664.

In this regard, it is interesting to discuss one case from the judicial practice:

According to the veridct (8th day of May 2016), made by Criminal Law Panel of Tbilisi City Court, I. Sh. Was found guilty under Art. 178 § 2 subparagraph "A", also § 3 subparagraph "A" of the Criminal Code (shall be punishable by prison sentences ranging from five to eight years in length) for committing the provided crime and on the basis of the Art. 76 of Juvenile Justice Code, shall be punishable by socially useful labour for 180 hours term[8].

Thus, the court imposed on a minor a lesser sentence (socially useful labour), than provided for by the law (imprisonment). As mentioned above, the judge may impose on a minor a sentence, which is less, than minimum provided for by the law, or a more lenient sentense, if no judgement of conviction has been delivered against the minor in the past and there are mitigating circumstances, which make it expedient to impose a more lenient sentence than provided for by the law.

In this case, as the case file shows, no judgement of conviction had been delivered against the minor in the past, as for mitigating circumstances, the court referred to the above-mentioned judgment, that the juvenile defendant admitted his guilt and sincerely repented it (any other mitigating circumstance does not appear from the judgement), and the court found it appropriate to impose on a minor a lesser sentence, than provided for by the law. Is pleading guilty and repentance one mitigating circumstance? Or they should be considered separately? In my opinion, the court should have substantiated if pleading guilty and repentance was one mitigating circumstance, otherwise, the court did not have right to impose a lesser sentence, than provided for by the law. It would be better, if the judge should have drawn attention on mentioned circumstances and discussed the judgement.

Judicial practice study suggest thatjudges sometimes incorrectly use the Art. 76 of Juvenile Justice Code (imposing on a minor a lesser sentence than provided for by the law). For example:

Based on the verdict (23 May 2016) made by Criminal Bench of Tbilisi City Court, S. K. was found guilty of committing a crime, provided by the Art. 239 § 2 subparagraph "a" of Criminal Code and under the Art. 76 of Juvenile Justice Code, the minor was punished by house arrest for up to a six months term, which was considered as conditional on the bases of the Art. 74 of Juvenile Justice Code, for one year probation period[9].

The case file shows, that S. K. was convicted for committing a crime, provided by the Art. 239 § 2 subparagraph "a" of Criminal Code, which is considered as less serious crime. According to the Art. 69 of Juvenile Justice Code, a house arrest shall be imposed on a minor in the case of commission of less serious crime. The court was authorised to impose house arrest on a minor S. K., whereas, the committed crime was less serious, and there was no need to use the Art. 76 of Juvenile Justice

[8] See case # 1/5708-15, the verdict (8 May 2016) of Criminal Pannel of Tbilisi City Court.

[9] See case # 1/3260-15, the verdict (23 May 2016) of Criminal Pannel of Tbilisi City Court.

Code.The Criminal Code of Georgia does not provide house arrest as a type of punishment for any commited crime. In case of committing less serious crime by a minor, the court is authorised to impose house arrest. The prerequisite for the use of house arrest is not the existence of circumstances in the Art. 76 of Juvenile Justice Code. Although Art. 76 of Juvenile Justice Code indicates, that the court is authorized to impose on a minor lesses sentence, than provided for by the law, if there are appropriate circumstances, but this does not apply to the appointment of house arrest. Imposing house arrest is made separately from this article, whereas, the house arrest, as the type of punishment, is not provided for by any article of The Criminal Code. Imposing house arrest depends on the category of a crime.Therefore, the court should not have referred to the Art. 76 of Juvenile Justice Code, while imposing the punishment (imposing on a minor a lesser sentence than provided for by the law). In addition, it should be emphasized that the one precondition of the above mentioned norm is the existence of mitigating circumstance form.

In judgement, imposed on S. K. the court considers mitigating circumstance in the fact, that the crime was committed in minority period. Other mitigating circumstances were not identified through case files. Therefore, there was no legal base to refer to the Art. 76 of Juvenile Justice Code.

2. Judicial practice study suggests, that house arrest, as one type of punishment, is often used against a minor. For example: Based on the verdict (1 April 2016) made by Criminal Bench of Tbilisi City Court, L. A. was imposed house arrest for up to a nine months term, based on the Art. 62 § 5 of Criminal Code of Georgia. Taking into account the term of his imprisonment from 30th day of October, 2014 until 20th day of January, 2015, he was completely released from serving the sentence[10].

According to the Art. 62 § 5 of Criminal Code of Georgia, if fine or deprivation of the right to occupy a position or pursue a particular activity was awarded as main punishment against the person held in detention pending trial, the court shall commute the awarded sentence in consideration of the time of detention or shall completely release such person from it. The court used the Art. 62 § 5 of Criminal Code of Georgia and L. A. was completely released from sentence in consideration of the time of detention. However, it should be noted that the Art. 62 § 5 of Criminal Code of Georgia, directly indicates imposing fine or deprivation of the right to occupy a position or pursue a particular activity, when the person is been mitigated a penalty or been completely released in consideration of the time of detention. In mentioned case, I believe, that the judge should have justificated the reason of using this norm. It should also be considered the Art. 62 § 3 indicates computation of term of the sentence. In particular: the time of detention pending trial shall be included into the term of the sentence in manner hereinafter appearing: one day of detention – one

[10] See case # 1/7259-14, the verdict (1 April 2016) of Criminal Pannel of Tbilisi City Court.

day of imprisonment, placement into a disciplinary military unit; two days of restriction of freedom; three days of corrective labour or restriction of the service of a military; five hours of socially useful labour. Thus, the legislator has provided two cases: 1) if fine or deprivation of the right to occupy a position or pursue a particular activity was awarded as main punishment against the person held in detention pending trial, the court shall commute the awarded sentence in consideration of the time of detention or shall completely release such person from it (Art. 62 § 5 of the Criminal Code) and 2) the term of detention pending trial shall be counted towards the term of the sentence, based on the following calculation: one day of detention – one day of imprisonment (Art. 62 § 3 of the Criminal Code).

The case files indicate, that L. A was in prison from 30th day of October, 2014 until 20th day of January 2015 – for two months and 21 days. Although, the Art. 62 § 3 of the Criminal Code does not mention the kind of calculation of the term of a sentence while imposing house arrest, but I think, the judge should have discussed the mentioned case (how many days of house arrest equaled one day of imprisonment), which was not carried out by the court. If the court used the Art. 62 § 3 of the Criminal Code and compared one day of imprisonment to three days of house arrest (a maximum period prescribed for non-custodial sentence), L.A. should have a house arrest for certain period.

Thus, the judge should have discussed the reason of using the Art. 62 § 5 of the Criminal Code.

The court practice also provides the cases, when the court imposes house arrest as the main type of punishment and considers the detention period as serving the sentence. But this period does not affect the duration of house arrest.

Based on the verdict (22 March 2016) made by Criminal Bench of Tbilisi City Court, S. S. was found guilty of committing a crime, provided by the Art. 177 § 1 of the Criminal Code and was punished by house arrest for up to a six months term. S. S. was also found guilty of committing a crime, provided by the Art. 178 § 1 of the Criminal Code and was punished by house arrest for up to a six months term. On the basis of the Art. 59 § 2 of the Criminal Code of Georgia, when imposing equal sentences, one sentence absorbed the other sentence and in case of cumulative crimes, the term of imprisonment imposed as a final sentence was house arrest for up to six months terms.In this case, the sentence shall be calculated from the day when the person was detained – from 25th day of January 2016 until 27th day of January 2016[11].

As we can see, the minor S. S was imposed house arrest for six months term, as a final sentence. At the same time, the sentence was calculated from the period of imprisonment (2 days), however, the period of imprisonment (2 days) of a minor did not affect the duration of house arrest. I believe, that the judge should have discussed the mentioned case (how many days of house arrest equaled to one day of

[11] See case # 1/571-16, the verdict (22 March 2016) of Criminal Pannel of Tbilisi City Court.

imprisonment), which should have affect the duration of house arrest. I believe that imposed sentence of house arrest (six months) should have been reduced, taking into account the period of imprisonment, which was not implemented.

I believe, that juvenile justice code should provide how many days of house arrest equals to one day of imprisonment, which is not provided in the case, if the sentence determined by the judgment is replaced with a different sentence (Art. 77 § 8 of Juvenile Justice Code). Otherwise, the absence of the mentioned provision will create problems in the court.

It is interesting, how the final judgement is delivered, when a minor is imposed deprivation of freedom and house arrest together. In this regard, we shall discuss one case from judicial practice.

Based on the verdict (10 February 2016) made by Criminal Bench of Tbilisi City Court, L.G. was imposed as the final sentence – deprivation of freedom for 5 years term, which was partly added by house arrest for 2 months term, left from remaining sentence (house arrest for 6 months term) and finally, L.G. was imposed as the final sentence – deprivation of freedom for 5 years term and house arrest for 2 months term[12].

The juvenile justice code does not provide the rule of summing up sentences in case of cumulative crime. In particular, how does the court sum up sentences, in case, if the minor is imposed both – the deprivation of freedom and house arrest? In the mentioned case, the caurt imposed the sentence on the minor – L. G. separately, through accumulation of sentences (deprivation of freedom and house arrest).

Summing up sentences in case of cumulative crime or cumulative conviction is provided by the Art. 61 of the Criminal Code, when the deprivation of freedom is added non-custodial sentence by the court, but the mentioned provision does not provide the case, when the deprivation of freedom is added by house arrest. I believe, that juvenile justice code should provide special rule of summing sentences, when deprivation of freedom is imposed together with house arrest. Deprivation of liberty must incorporate house arrest (how many days of house arrest shall be convertible into one day of imprisonment should also be determined) or in case of addition of house arrest to imprisonmnet, house arrest must be used independently. Otherwise, the issue may be interpreted differently from the court.

3. Judicial practice study suggests that sometimes judges make mistakes, when imposing fixed term imprisonment against minors. For example:

Based on the verdict (10 March 2008) made by Zugdidi district Court, G. Kh. was found guilty in committing a crime (attempted murder), provided by the Art. 19, 108 of Criminal Code of Georgia and he was imposed a sentence deprivation of freedom for 7 years term[13].

[12] See case # 1A/G-26-16, the verdict (10 February 2016) of Chamber of Criminal Affairs of Tbilisi Appeal Court.

[13] The verdict is available in the archive of the court.

The case files show, that G. Kh. was 17 years old when committing a crime. In mentioned case, G. Kh. should have been judged under the Art. 88 (old edition) and imposed sentence – deprivation of freedom for 7 years term against him should have been reduced of one fourth – 1 year and 9 months term and the final judgment sentence of deprivation of freedom should have been imposed for 5 years and 3 months term, which was not implemented by the court. Although, the Art. 108 of the Criminal Code of Georgia provides punishment by imprisonment for a term from seven to fifteen years and the court imposed the minimum – imprisonment for seven years term, the court was obliged to fulfil the law requirment and reduce the imposed sentence in one fourth.

Although, the court is authorized to impose less than seven years term for committing the mentioned crime, ifa plea agreement is approved between the parties, in other circumstances, the court does not have right to make this decision. In mentioned case, the court should give preference to special rules for sentencing. It is the imperated demand of legislator. In the mentioned case, the judge did not discuss the reduction of a sentence in one quarter toward G. Kh. and it caused essential demage to offender's rights and legitimate interests.

4. The juvenile justice code separately allocates conditional sentence imposing rule.

Under the Art. 74 of juvenile justice code, the minor may be imposed the conditional sentence only if: 1) the minor committed less serious or serious crime; 2) a minor had not been convicted for intentional crime in the past. What does this mean? It means, that he/she never had been convicted. If possible, he/she had been sentenced with intentional crime, but the conviction has been expunged or cleared? For example, 17 years old teenager committed less serious crime. He had been convicted for intentional crime, but his sentence was expunged. Is it possible to use conditional sentence in this situation? If we explain the Art. 74 word by word, the court may hold that the imposed sentence be considered as conditional if a minor, who has no previous convictions for intentional crimes, has committed a less serious or serious crime. But I think that this is incorrect.Although the above-mentioned provision does not specify "Had no criminal record", but "Not been convicted". It should be considered not only the case,when the juvenile had never been charged, but such a case, when he/she was previously convicted, but the conviction was expunged. Under the Criminal Code of Georgia, cleared or expunged criminal record will not be considered. In this regard, we have to approach the above issue, in order to protect the rights and legitimate interests of accused juveniles.I believe that the definition of the norm against a minor is not permitted, whereas, the juvenile justice code is focused on protection of the best interests of the minor. That, the priority should be given to the best interests of the minor.

As already mentioned, if a minor, who had not been sentenced with intentional crime, has committed a less serious or serious crime, the court may hold that the

imposed sentence be considered as conditional. For example**,** the minorhas committed a less serious crime, at the same time, he had been convicted for less serious intentional crime (did not have sentence expunged). In this case, imposing the conditional sentence is not permitted (Art. 74 of the Juvenile Justice Code).

Consider the same case, but with respect to adults

The adulthas committed a less serious crime, at the same time, he had been convicted for less serious intentional crime. In this case, imposing the conditional sentence is permitted, whereas, according to the Art. 63 § 3 of Criminal Code of Georgia, If the convicted person has committed a less serious crime or a crime of negligence and he/she admits it and/or collaborates with investigative authorities, the court may rule that the sentence imposed be considered as a conditional sentence, unless the convicted person had previous conviction for particularly serious or intentional serious crime in the past. It turns out that if the minorhas committed a less serious crime, at the same time, he had been convicted for less serious intentional crime, imposing the conditional sentence is not permitted and if the adult has committed a less serious crime, at the same time, he had been convicted for less serious intentional crime, imposing the conditional sentence is permitted. Such an approach is unacceptable and contradicts the best interests of minors. In mentioned case, if the adult can be imposed conditional sentence,the more it should be possible against a minor. Therefore, the Art. 74 of of the Juvenile Justice Code needs to be corrected. I think, it shall be read as follows: "If the minorhas committed a less serious or serious crime, the court is authorized to consider the mentioned sentence as the conditional sentence".

The Judicial practice study suggests, that judges often use conditional sentence against minors, but we have also discussed the cases, when the court rejected imposing the conditional sentence. For example:

Based on the verdict[14] S. S. was imposed as the final sentence – house arrest for 6 months term, through accumulative sentencing (Art. 177 and 178 § 1 of the Criminal Code).

The case materials suggests, that the minor S. S. Has committed less serious crime (he was accused of illegal appropriation of a man's shirt, which cost was 45 GEL and obvious misappropriation of two bottles of bear). He admitted his guilt and sincerely repented the commited crime and he had no aggravating circumstances. Based on the seriousness of the offenses and the circumstances of the case, I believe, that convicted S. S. should have been imposed the conditional sentence, because he committed less serious crime and he had not been convicted for committing intentional crime. Thus, there were all the conditions for imposing the conditio-

[14] See case # 1/571-16, the verdict (22 March 2016) of Criminal Pannel of Tbilisi City Court.

nal sentence. In this case, the court was authorized to change the imposed sentence – house arrest into conditional sentence.

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Summary

Key words: juvenile justice, juvenile punishment, the best interests of the minor, conviction, Georgian legislation.

The article is about the criminal justice legislation of Georgia, in the field of juvenile justice,where are following issues discussed: General issues of sentencing; Peculiarities of inflicting the term imprisonment; The rule of imposing a punishment for a less severe offense if the offense under the criminal code of Georgia provides only the deprivation of liberty; While imposing fixed term imprisonment on a minor, when it becomes necessary to correct this sentence for the second time, may the court reduce the imposed imprisonment less than the lowest limit of the sentence, then it is provided by the Juvenile Justice Code?; Peculiarities of a non-custodial sentence for juvenile offenders; Peculiarities of inflicting the suspended sentence.

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The best interests of juveniles and the types of the punishment
(According to the Juvenile Justice Code of Georgia)

Introduction

The glorious creator, publicist, public figure – Ilia Chavchavadze wrote: "A child's nature is a secret of the secrets, a child is a same human and he is more difficult for reading, because he has been written by a difficult reading allegory [...] we should not be surprised, that what we can find in a great river, we see it at the source of the river. A child is a source, beginning of the great human".

Crime is a normal event and none of societies can get rid of it[1]. A certain part of the generalized crimes in the society are committed by juveniles. The survey, conducted in Germany, has shown that minors, regardless the social status, abused a law at least once in their life[2], therefore, it is the most important to establish such standards and mechanisms, which will ensure a particularly specialized approach for the juveniles, who are in conflict with the law. Important political and socioeconomic events,made in Georgia, led to create a necessary appropriate base in the field of Juvenile Justice. There had not been even a strategy of Juvenile Justice until 2009 in Georgia, the important transformations occurred in the last year. Particularly, the Parliament of Georgia adopted the Juvenile Justice Codeon 12th day of June, 2015. Its common part has become operative since 1st day of January, 2016.

Juvenile Justice Code offered new, more liberal views. It is oriented to the best interests of minors. We will discuss the issues of our study considered to the child's best interest. In this regard, we will attract your attention to the types and measures of the punishment of juveniles. The highest risk for committing a crime is during minority period, accordingly, the law must be so improved and corresponding to the

[1] M.B. Clinard, R.F. Meier, *Sociology of Deviant Behavior*, Wadsworth Publishing 2014, p. 13.
[2] M. Shalikashvili, G. Mikanadze, *Particularities of the Juvenile Justice: criminology, criminal, penal and international legal bases of the Juvenile Justice*, Tbilisi 2011, p. 18.

international standards that the crimes committed at this age, should make the child's life as painless as possible. On the contrary, it should become an example to make a mistake never again, for which he/she was convicted. Thereby, the particular role is obliged to the punishment in the Juvenile Justice.

Juvenile Justice Code strengthens the priority of the alternative measures appropriatelyto the child's best interests. According to the UN Convention on the rights of the child, a custodial restraint, as the last resort, should be used for the shortest period. It is important to develop alternative sanctions and promote their use in practice. Accordingly, the Juvenile Justice Code offers the alternative types of the punishment, including, a totally new type of the punishment – house arrest, which was adopted earlier than other articles of the Code, in 1st September, 2015.

The system of Juvenile Justice is very sensitive. A lot of juveniles spend their childhood not with their family, but at the penitentiary facilities. Such environment promotes commission of a new offense, not correction. For this reason, the international community has prepared legal documents for Juvenile Justice for the latest 25 years. Fortunately, Georgia is involved in the process, the clear reflection is the Juvenile Justice Code. The Code offers alternative types of deprivation of freedom: a fine, house arrest, community service, the deprivation of a right to carry out an activity, restriction of liberty. This reality has once clearly shown us, that the Juvenile Justice Code is really liberal for the persons, who are in conflict with the law. However, there are problematic issues in this Code, which will be briefly discussed and improvement and generalization of them will contribute a development of this issue.

We will display a research issue for the purpose of the best interests of minors. All news, naturally, will not be able to be discussed, but we consider discussing the types of the sentence for juveniles.

A fine

According to the Art. 68 of the Juvenile Justice Code, a fine may be imposed on a minor only if he/she has an independent income from lawful activities. When a fine is imposed on a minor, the minimum amount of fine established by the Criminal Code of Georgia shall be reduced by half.

There are several suggestive questions about the disposition of this article. The regulations established by this article shall be applied to juvenile justice procedure according to part 2 of Art. 2 of this Code. According to part 3 of this article, the provisions of other normative acts of Georgia shall also be applied in juvenile justice procedure if they do not contradict this Code and/or are favorable to minors. Accordingly, the Criminal Code, Criminal Procedure Code and other appropriate normative acts are used for the issues, which are not regulated in Juvenile Justice Code. The types and measures are presented in Juvenile Justice Code, which are used during

the period of the juvenile's conviction, so this issue is determined by the Juvenile Justice Code. In the case of a fine, it is unclear, why the reference is to the Criminal Code, when it can be written directly in the Juvenile Justice Code, that a minimum amount of the fine is 1000 GEL, in accordance with the fine for adults is 2000 GEL (i.e in a case of the juvenile the fine is half). Also, if the relevant article of the private part of Criminal Code sanctions imprisonment with the term of three years, a minimum amount of the fine shall not be less than 250 GEL, according to the case of adults, the fine shall not be less than 500 GEL.

In addition, as Art. 42 of the Criminal Code, also an Art. 68 of the Juvenile Justice Code does not determine the maximum amount of the fine. This is contrary to – the principle of determinacy in a law – very important for the state, which provides the stability in the country. The legislator is bounded by the principle of the determinacy of a law during the imposed responsibility period. This principle is derived from the principle of the legal State, shown in the Constitution of Georgia[3]: "Punishment, as a reaction of the State to the criminal injustice, shall be determined normatively by the legislature, taking into account its type and measure, and the response of the State for breaking the law, shall be predictable to the addressee of the norm"[4]. The principle of the determined law requires establishing clear and concrete norms of criminal law by the legislator, in order that citizens can understand norms of the law and appropriate activity[5]. "Generally, the legislator is obliged to get an exact, clear, foreseen legislation (norms) for determination of the exact right of the constitution in acceptable limits. This circumstance is one of the decisive criteria for estimating the constitutionality of this norm"[6]. The principle of determinacy of a law, which arises from the general principles of the State, is not right of an individual, however, they have decisive importance for protection of the basic rights. They establish a limit of intervention of the public authority in basic rights and this is an important material base of this intervantion[7] . The person should be able to find out exactly what is required from the legislature and accommodate his/her behavior to this requirements. There are elements of the Legal State, which may not be directly provided by any norms of the Constitution, but have important meanings, because they are the basis of realization of the principle of the legal State. Such element of the principle of the legal State is the principle of Legal certainty, and the noted norm doesnot satisfy its requirements.

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[3] Decision N516-542 of 14 May 2013 by the constitutional court of Georgia, for the case *Citizens of Georgia Aleksandre Baramidze, Lasha Tugushi, Vakhtang Khmaladze and Vakhtang Maisaia against to the Parliament of Georgia*.

[4] E. Shvabe, *Decisions of the Federal Constitution Court of Germany*, Tbilisi 2011, p. 372.

[5] K. Kublashvili, *General Rights*, Tbilisi 2008, p. 351.

[6] Decision of 26, 2007, N1/3/407 by the constitutional court of Georgia, for the case *Georgian Young Lawyer's Association and Citizen of Georgia – Ekaterine Lomtatidze against the Parliament of Georgia*.

[7] E. Gotsiridze, *Recognition other rights implied from the principles of Constitution*. *A comment of Constitution of Georgia*, chapter II: *Citizenship of Georgia; general rights and freedom of the human*, Tbilisi 2013, p. 484.

Also, it should be noted the words of this article "A fine may be imposed on a minor only if he/she has an independent income from lawful activities". The following words give ambiguity to the disposition "if he/she has an independent income from lawful activities". If the court wants to sentence this type of the punishment, it shall be known for the court if the juvenile is employed, how much his/her income is and etcetera. The activity shall be legal, of course. If the income is illegal, i.e. it is received as a result of offence, this situation presents other issue and of course, this issue shall be known to the law enforcing body before the court, which shall take appropriate measures. Accordingly, it is unclear the existence of these words in the deposition of the article. Such abstract is not given in the similar article of the Criminal Law. Neither juveniles nor adults shall have illegal income, of course.

Asfor the addition of the word "independent" in the disposition, it is very complimentary, because the principle of individualization of the sentence, which remained as a problem in juvenile justice during the years, became more evident. A parent or other person is not a participant of this punishment, which was according to part 5^1 of Art. 42 of the Criminal Law until 1st day of January, 2016, when the responsibility for the payment got imposed on a parent or guardian in case of insolvent juvenile. The aims of the punishment works most effectively by impact on the convicted, and in the conditions, when the fine is paid by the parent or other person, the quality of influence of punishment of the convicted is very law. On the other hand, the fine may havea negative effect on condition of other members of the family[8]. Imposingfine on the juvenile's parent cannot ensurealegal equality between the juvenile and his/her parent and make a legal social environment. On the contrary, social tensions may be caused between the parent and child by transfering the fine on the parent, which resists to the best interests of minors.

House arrest

According to Art. 69 of the Juvenile Justice Code, The definition of house arrest is an obligation upon a minor to stay at the place of his/her residence during specified time of the day and night. House arrest may be imposed on a minor in the case of the commission of a minor crime, so that its execution does not obstruct the performance of remunerated work or education. Imposition such kind ofsentence, must not violate the best interests of minors. The State must ensure that juvenile's life shall be interesting during the period, when he/she is most susceptible tobehave wrongly,the State must promote a personal development and an educational process[9].

[8] Decision of 11 July 2011, N3/2/416 of the Constitutional Code of Georgia on the case *Public defender of Georgia against the Parliament of Georgia*.

[9] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, "The Beijing Rules" 1985, rule 1.2.

The purpose of this punishment is to give the accused person opportunity to go to the educational institution, work, to go to the centers of probation, to perform community service or undergo the treatment course in case of addiction on drugs[10] or alcoholic.

One of the main principlesof the Criminal Code is to appreciate the best interests of minors, which means, thatthe purpose of sentence is not punishment, but to rectify.It is important the minor shall be avoided to a penal institution, as much as possible. House arrest is an alternative type of punishment, which does not automatically mean, that person under house arrest should be at home during 24 hours. The judge determines a number of hours during which he/she have to be at home according to his/her everyday life. At the rest of the time he/she is free for going to sport, school, to have a relationship with the community and to promote not make such mistake, for which he/she is a convicted. However, the noted punishment has still a big risk and it is necessary to beware of it. We shall get started solving the problem by elimination of deficiencies in the legislation.

It is particularly impossible to determine a target group of the convicts under house arrest all around the world. House arrest is used as for convicts with a law risk as a high risk in different states in USA[11]. House arrest consists ofelements of imprisonment – a kind of the most serious punishment. "As imprisonment, as well as house arrest is equal with restraint of liberty"[12]. It is true, that a person has an obligation to stay at one place i.e, although at home and at certain period, but justice has no aim to lock a minorin prison and trusts so, that his/her imprisonment can be implemented at home. For more caution, it may be made a reservation that this punishment may be sentenced to the person, who commits a crime at first, he/she has not committed an aggressive crime and etcetera.

We meet a house arrest "with a right of activity" in the Juvenile Justice Code, exactly, the minor should be sentenced with mentioned punishment so, that its execution will not interrupt to the payable work or educational process, which is very complimentary. One of the main achievment of the Code is, that imprisonment of minors shall be admissible only as measures of a last resort. All these shall be carried out by defense of the best interests of minors.

In general, there are three types of house arrest and they are so-called: the strictest and the closest form of house arrest i.e "Home incarceration" to the imprisonment, which makes a convict to stay at home permanently, expect of visiting to the medical facilities and participate in the religious ceremonies. "Home incarceration" is less strict, during which the convict can leave home only for going to work, educational institution or visiting the doctor, and the most liberal form of house

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[10] Zh. Pradeli, *Comparative Criminal Law*, Tbilisi 1999, p. 431.

[11] U.S. Department of Justice, „Electronic Monitoring Reduces Recidivism", Sept. 2011, p. 1, [online] <www.ncjrs.gov/pdffiles1/nij/234460.pdf>.

[12] *Mancini v. Italy*, ECHR, Application No. 41812/04, 13 October 2005.

arrest is "Curfew", when the convict is obliged to stay at home during certain hours, This mainly refers to the hours of the night[13].

There are also suggestive questions about minimum and maximum measures of house arrest. House arrest shall be imposed on a minor for a term of 6 months to 1 year, according to the Juvenile Justice Code. While, in general, an execution mechanism of house arrest means permanent electronic monitoring, which implementation of the long term is inappropriate as for adult convicts also minor convicts, because this may cause a psychological deviation or other serious results. Psychologists estimated, that even electronic chains carrier adult and mentally stable convict, have psychical deviations after 6 months[14]. According to the juridical literature, the one of the most important precondition for the wearing an electronic chain is – using it as short-term punishment[15].

The deprivation of a right to carry out an activity

One of the types of the punishment of the Juvenile Justice Code is the deprivation of a right to carry out an activity. A minor may be deprived of a right to carry out an activity for a period of one to three years according to Art. 70 of the Juvenile Justice Code.

Deprivation of the right to hold an official position or to carry out a particular activity shall be imposed as the term penalty for a term of one to five years and as an additional sentence, for a term six months to three years. While the deprivation of a right to carry out an activity may be imposed as common, also as an addition punishment with a same term, which is not correct. Imposed additional punishment of the deprivation of a right to carry out an activity, the measure of the punishment is less in case of juveniles, which is unwarrantable.

The issue of effectiveness of punishment – the deprivation of the right of activity from the juvenile, shall be subject of discussion. A convict may find himself in a hard financial situation by this sentence. This law income may be deprived, on which his normal life and development was depended. The advantage of the alternative sentences is that the juvenile has not to stay at the detention facility so as not encumber his/her normal life, including working and employment, which serves his best interest. The problem of employment is an acute issue in Georgia, especially employment of juveniles. The deprivation of the right of activity of minors is not

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[13] Zh. Pradeli, op. cit., p. 430.

[14] S. Önel, *12 Verfassungsmäßigkeit und Effektivität der "Elektronischen Fußfessel"*, "Jahbuch deas Kriminalwissenschaflichen Institutes der Leibniz Universität Hannover" 2012, No. 1. The maxim term to use an electric shackles is one year, but th maximum term is a half year year in the practice. See: K. Mchedlishvili-Hedrikh, *Notes about the Juvenile Justice Code*, "Court and the World" Tbilisi 2015, No. 2, p. 60.

[15] M. Lindenberg, *Elektronisch unerwünschte hausarrest auch in Deutschland*, 1999, p. 14.

such punishment, which promotes to aims of execution of the sentence. "The purpose of the sentence is the final result, for which the Government reaches by using the established coercive measures"[16]. How will resocialization-rehabilitation occur by this sentence? Or to be avoided a new crime? If a person commits a crime, this is forbidden without this sentence. Employment and labor, on the contrary, will contribute to the goals of punishment.

In addition, it is difficult to imagine that this type of the punishment will be often used for the juveniles, because, the most crimes of the noted category, do not require a professionalism and a special skill[17].

Socially useful work

Art. 71 of the Juvenile Justice Code is about the socially useful work. This punishment shall be imposed on a minor for a period of 40 to 300 hours. Before becoming this law operative, this norm of the Criminal Law provided a period of punishment from the term of 40 to 320 hours. It is complimentary, that the maximum of the measure of the punishment was reduced, but with less, which is not enough. Socially useful work is imposed on adults for a period of 40 to 300 hours in Slovakia[18]. According to the project of the criminal law code of Georgia, Socially useful work term, imposed on adults, is determined by period of 40 to 400 hours[19], which is closed to the established measure of punishment of juveniles. This also indicates that it is desirable to reduce a maximum measure of the punishment. An old edition allowed a term of this punishment no more than 4 hours a day for minors under 15 years old and – 6 hours a day for juveniles from 15 to 18 years old. Now, the type of this labor shall not exceed 4 hours a day. The reason for forming this norm is not clear by the explanatory note. Under the Art. 71 § 3 of the Juvenile Justice Code, community service shall be imposed on a minor, so that its execution does not obstruct the performance of a remunerated work or education.

Under the Art. 71 § 2 of the Juvenile Justice Code, if imprisonment is replaced by community service, or if a plea agreement is concluded by the parties, community service may be imposed for a longer term. Community service may be imposed for a short term as additional sentence. We cannot agree with the noted norm. There is also an issue with a constitutional principle of the determination of the law. "The legislator is obliged to make principal decisions about the legal results and scale and

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[16] M. Lekveishvili, *Purposes of the sentence and criminal and criminology aspects of the imposed sentence*, "Justice and Law" Tbilisi 2014, No. 4 (43), p. 23.

[17] See also I. Dvalidze, *General part of the Criminal Law*, Tbilisi 2013, p. 215.

[18] L. Tobiasova, *Development and Construction of The European Legal System, Alternative Penalties*, Bratislava 2007, p. 27.

[19] See the project of the Law of Georgia "About changes into the Criminal Code of Georgia", 30.06.2014, <https://matsne.gov.ge/ka/document/view/2383542>.

the judge shall determine the limit as possible, within which he/she will act. In addition, the more intensive intervention, the stricter the requirement to the legislator is. The more severe the sentence, the more the legislator is obliged to give additional information to the judge, on the basis of which, the prediction of the appropriate sanctions, which is entertained at the appropriate existed particular elements will be possible. He/she should enable a citizen to foresee a possible sentence"[20].

The legislator tries to link up an appointment of the punishment to the plea agreement, which is not expedient. Appointment of sentence type and measure is a judge's prerogative, but the noted norm limits the legal power of the judge. The attempt of "trade" about the sentence of a minor is made by the institution of the plea agreement, which resists the best interests of minor, who is in complict with the law, also his/her upbringing. In case of this, the government tries to resolve the conflict quickly and placesthe best interests of child on the back side. Here of the best interests of minors, it is expedient to impose such kind of the sanction, which promotes his/her upbringing, resocialization.It is better, the institution of the plea agreement should not be used during the process of execution of the justice. This issue needs to be discussed separately.

When imposing community service on a minor, according to the Art. 71 § 4, it is complimentary toassign the minor to work to a place where he/she can acquire the experience and skills necessary to become a member of society. i.e the legislator considers these factors desirable and not obligatory, which is not correct and the sentence directly contradicts the goal of punishment – re-socialization and rehabilitation. Community service, when it is performed by the juveniles,must provide constructive and interesting activities, which would allow a child's ability to learn something and to make him/her feel that he had made benefit for the public. According to the best interests of minors, it will be more reasonable to involve training elements in execution of the sentence. At the execution of this sentence, the society will be involved in justice, which may determine the future of the minor, exactly, while serving the sentence, a juvenile may acquire certain interests, study the case and be employed in the same place in the future, where he/she was serving the sentence.It is necessary for a convicted minor to be employed at a place, where he shall be established as a decent member of a society.

Restriction of liberty

As for the restriction of liberty, this type of the punishment is providedby the Juvenile Justice Code. The maximum term of restriction of liberty for minors shall be three years, according to Art. 72 of the Code, while the term was 4 years,

[20] I. Shvabe, op. cit., p. 374.

according to Art. 86[1] of the Criminal Code till 1st January, 2016. Such liberalization of the measure of the sentence is complimentary and appropriated with the best interests of minors. Although, there is the same problem, as in case of the fine. There is not determined the minimum limit of the sentence, which is contrary to the Criminal Law.

Restriction of liberty shall be imposed on a person with no previous convictions, according to Art. 47 § 2 of the Criminal Code of Georgia. This record is not in Juvenile Justice Code, which is better, because the juvenile convict may be with previous conviction, but imposing restriction of liberty for such committed crime shall be appropriate to the action.

Deprivation of liberty

Juvenile detention facilities in Georgia have been very crowded for last years. In one hand, this was a fault of a criminal situation in the country and the other hand, incorrect legal regulations, which were strict in relation with the juveniles: the judge had no authority to impose less than minimum limit of the deprivation of liberty, it was able to impose the deprivation of liberty in case of the less serious crime, there was not a practice to use an alternative punishment and etcetera. In this regard, the Juvenile Justice Code is a step forward.

Juvenile justice process should first take into account the minor's best interest. This is a main principle. The best interests of minors of the explanatory note is determined as "Safety, welfare, health care, education, development, re-socialization and rehabilitation and other interests of juveniles should be determined in accordance with international standards and individual characteristics of the juveniles, also taking into account his/her opinion"[21]. To take into account the best interests of minors, imprisonment should be used in special cases. According to the convention about the rights of a child, the deprivation of liberty, including arrest and imprisonment, should be used only as the last resort of punishment during the shortest period of time, only when using an alternative, more light means will not ensure reach of appropriate goal, provided for by law[22].

According to Juvenile Justice Code, fixed term imprisonment may be imposed on a minor if he/she has committed a serious or a particularly serious crime, if he/she has avoided serving a non-custodial sentence, and/or a judgment of conviction has been delivered against him/her in the past. The judge doesnothave discretion to impose a deprivation of liberty as a sentence to the juvenile, which is complimentary and corresponds the best interests of minors. In addition, the mentioned

[21] See the project of the Law of Georgia "About changes into the Criminal Code of Georgia", 30.06.2014, [online] <https://matsne.gov.ge/ka/document/view/2383542>.

[22] The convention about the rights of child, 1989, Art. 37 (b); United Nations Standard Minimum Rules for the Administration of JuvenileJustice, 1985, rule 13, 18.

record will promote to use the alternative sanctions. The word "alternative" is an important word in juvenile justice, which includes any form of interference ofthe law and means avoidance ofdeprivation of freedom, imprisonment or staying at the closed facilities[23]. The deprivation of liberty must be used as *ultima ratio*, the last decision in juvenile justice. Alternative mechanisms of the discussion of the case should ensure the particular guarantee to protect a child's rights[24]. A strict punishment will be justified, only if the less serious punishment cannot ensure the goals of the sentence. So, our legislator offers such conception, which sets limits on the minimum sentence in favor of the principle of intervention. Therefore, sentence ordering authority should ensure more frequent use of sentences, provided for by the law, which are not concerned withdeprivation of liberty[25].

The measure of the penalty of deprivation of liberty is a subject of a big interest. The purpose of the deprivation of liberty is correction and newly social upbringing of criminal, so juvenile convicts are separated from the adults and they are imposed the appropriate regime,according to their judicial status and age[26]. Therefore, the term of the deprivation of liberty must be such length that a juvenile can return to the society rehabilitated and corrected. The term of deprivation of liberty, imposed on juveniles from 14 to 16 years old,is reducedby 1/3 by the Juvenile Justice Code. In addition, the term of the final sentence shall not exceed 10 years. The term of deprivation of liberty, imposed on juveniles from 16 to 18 years old, is reduced by 1/4. And, the term of the final sentence shall not exceed 12 years, while 15 years was foreseen by the Art. 88 of the Criminal Code till 1th January, 2016. In case of a minor from 16–18 is liberalization, which we cannot say about minors from age 14–16. It is better this term would be reduced and become 8 years instead of 10 years.

Conclusion

Modern era has shown us necessity to create a law, based on the best interests on minors, because this field is very neat and important. The harm, caused by imposing a wrong sentence on a minor appears at the level of an individual, family and State and needs integrated and consistent approach. For the legal existence of the state, it is essential to take care of juveniles, who are in conflict with the law.

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[23] Explanation made for the juveniles by the international council, [online] <www.ipjj.org/resources/glossary/>.

[24] The manual directives about the oriented justice (by the committee of the ministers of the Europe Council, 17 November, 2010), point 26.

[25] M. Lekishvili, *The Reasons of the Sentence and Aspects of Imposed Sentence*, "Justice and Law", Tbilisi 2014, No. 4(43), p. 26.

[26] International pactabout the civil and political right, 1966, Art. 10(3).

The legislator is required to take his/her own responsibility toward minors, and contribute her/his mite for moving closer to international standards. Taking into account the best interests of minors, non-custodial sentences, a variety of alternative institutions should be carried out more frequently. This will give the judge possibility to use deprivation of freedom, as less, as possible. The rights of juveniles are protected within international law and practice.

The role of alternative sentences appears more effectively in the framework of realized liberation of the Criminal Code in Georgia. Its each type and efficiency is the most important. The accent should be made on the alternative sentences, which was realized within the new Code, howevergaps are still observed. All types and measures of juvenile sentence should be appropriate to the best interests of minors.

Juvenile Justice Code has been become operative in Georgia for one year. This period is small for general conclusion, but it is a fact, that this normative act provides the types of juvenile sentences, which protectshis/her best interests.

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Summary

Key words: juvenile justice, the best interested of juveniles, the types of the punishment, basic principle of juvenile justice, Georgian legislation.

In this article main issues are discussed on the basis of Georgian legislation analysis. The best interest of the juvenile protection is the basic principle of juvenile justice implementationin Georgia. In the article the types of the punishment are analyses in the sense of the best interests of juveniles. The advantages and shortcomings of the code of juvenile justice are highlighted. Concrete proposals and recommendations are laid out. The article is intended for foreigner lawyers and readers who are interested in juvenile penalty.

Sources of Law

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The Book of Law of Beka-Aghbugha

The Law of Aghbugha, governor (Atabag) of Samtskhe principality (Southern Georgia), written in the 80s of the 14th century is one of the most prominent manuments of Old Georgian Law. In the introduction of the book Aghbugha states that he used the collection of laws made by his grandfather, Beka-Atabag, governor of Samtskhe as a foundation for his book and complemented it with the laws introduced by himself. The only change, according to Aghbugha initiated by himself concerns the currency used in the principality. Specifically, "the Kazanuri teti" circulated in Beka's time was replaced by the so-called "Giorgauli Tetri". Due to this fact, the majority of scholars refer to the law code compiled by Aghbugha as *The Book of Law of Beka-Aghbugha*.

Two significantly differing manuscripts of the work have reached us. One of them *The Law of Aghbugha* (incorporating 175 articles) is included in the collection of books of law compiled by the King of Kartli, Vakhtang VI in the beginning of the 18th century. The other manuscript, dating back to 1672 is titled differently – *The book of law about people's illegal deeds*. The text of this manuscript unlike that of *The Law of Aghbugha* is not fractioned into articles, is smaller and corresponds to Articles 1–98 of *The Law of Aghbugha*, which may indicate that this work initially comprised only 98 articles and the remaining part (Articles 99–175) was added later, arguably by the codification commission initiated by Vakhtang VI.

The text that comes after Article 98 in *The Law of Aghbugha* reads like an introduction to similar works, in which King of Kings Bagrat Curopalate and not the governor of Smatskhe is named as its compiler. Interestingly, the identity and therefore, the exact time of compilation of *The Book of Law of Bagrat* has invited many opposing theories among historians of the Georgian law. Specifically, a distinguished Georgian scholar, Ivane Javakhishvili maintains the point of view that Bagrat Curopalate mentioned in the book must be Bagrat III (978–1014)[1]. On the other

[1] Iv. Javakhishvili, *The History of the Georgian Law*, Tbilisi 1928, p. 94 [in Georgian].

hand, Iv. Surguladze[2] and I. Dolidze[3] believe that the book was compiled by Bagrat IV (1027–1072)[4]. Quite a few scholars (A. Kikividze[5], M. Kekelia[6]) put forward the theory according to which the book was compiled by Bagrat I (who ruled in the second part of the 9th century).On the other hand, I. Antelava refers the book to a later period of time. In addition to this, there are several theories about the number of the articles comprising *The Book of the Law of Bagrat*. Specifically, Iv. Javakhishvili and Iv. Surguladze maintain that only four articles (99–103) belong to Bagrat Curopalate, whereas I. Dolidze considers that the fragment of *The Book of Law of Bagrat* comprises as many as Articles 99–160.

On the other hand, the scholars have come to an agreement regarding the authors, structure and origin of separate parts of the first part of the book (Articles 1–98). Specifically, based on solid arguments, distinguished Georgian scholar S. Kakabadze proposed that the book of the law was compiled in the second part of the 14th century by the governor of Samtskhe – Aghbugha. As well as this, his grandfather Beka Mandaturtukhutsesi, mentioned in the book must be Beka I (1285–1306) and not Beka II, as believed earlier. This theory by Kakabadze, also followed by the scholars of the next generation, was based on the historical sources according to which the heirs of Beka I (amongst them, Beka II) did not possess the title of *Mandaturtukhutsesi*[7].

Therefore, apart from the fragment discussed above from *The Book of Law of Bagrat*, about which scholars still do not hold a universally accepted opinion, *The Book of Law of Beka* slightly edited by Aghbugha, is the earliest collection of Laws known to us, which makes it especially important.

The structure of the first part of the book (Articles 1–98) does not invoke many different theories. The introduction of this book of law, as well as its Articles 66–98 belong to Aghbugha, whereas Articles 1–65 were written by Beka. The Article 66 is preceded by a new introduction which also is written by Aghbugha.

The present work is dedicated to the first part of the book (i.e. Articles 1–98) which is the book of law employed by the governors of Samtskhe.

Originally, *The Book of Law of Beka-Aghbugha* was created as of local importance, compiled by the governors of Samtskhe and initially, it was in force only within the Samtskhe region. However, since Vakhtang VI, king of Kartli, included the book into his collection of Laws, the jurisdiction of *The Law of Beka-Aghbugha* spread over the territory of Eastern Georgia.

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[2] Iv. Surguladze, *Monuments of Georgian Law*, Tbilisi 1984; Iv. Surguladze, *Towards the History of the Georgian State and the History of Law*, Tbilisi 1953, p. 73.

[3] I. Dolidze, *The Old Georgian Law*, Tbilisi 1953, pp. 56–57.

[4] A. Kikvidze, *Who does the book of law known as the Law of Bagrat Curopalate belong to? Materials of the Georgian Ethnography, XVI-XVII*, Tbilisi 1972, pp. 232–233.

[5] M. Kekelia, *Towards the Code of Law of Bagrat Curapalate*, "Issues of the History of Law", Tbilisi 1986, p. 94.

[6] I. Antelava, *Issues of the Social-Economic History of Georgia*, Tbilisi 1980, p. 53.

[7] S. Kakabadze, *Identity of the Book of the Law of Beka-Aghbugha*, Tbilisi 1912, pp. 3–4.

Occupying almost a third of the Georgian Kingdom of the period, Samtskhe was situated in Southern Georgia. Governors of Samtskhe were appointed by the kings of unified Georgia and were subject to them. As a rule, they occupied high positions at the Royal Court of Georgia serving as *atabagis* (Governors), *amirspasallaris* (Commanders-in-chief), *mandaturtukhutsesis* (Heads of Police), etc. Presumably, Atabagi initially acted as a mentor of the prince, heir to the throne and was considered to be one of the most influential positions at the Court, together with *Mtsignobartukhutsesi* (Chief Adviser to the king on all state issues). *Amirspasalari* was in charge of military affairs, whereas *mandaturtukhutsesi* headed police forces of the kingdom. These officials were appointed by Georgian kings and were included in the consultative body created by rulers of the Georgian kingdom. In 1265 Mongols, who had already occupied the Near East, severed Samtskhe principality from the Kingdom of Georgia and subjected it to their rule. Due to this fact the governor of Samtskhe became a vassal of the Mongol Khan which also meant coming out of control of the Georgian king and gaining independence regarding internal affairs of Samtskhe principality. In addition, the governor of Samtskhe was in charge of both administrative and legislative power which is clearly proved by *The Book of the Law of Beka-Aghbugha*. This book was issued on behalf of the Samtskhe Governor and there is no mention of the King in Articles 1–98. However, certain formal connection with the King of Georgia is still felt, specifically, in employing the titles (*atabagi*, *amirspasallari*) by the Samtskhe governors after 1265. Clearly, the governors no longer performed the duties of the above-mentioned court officials, which conferred on them only honorary status.

Although the majority of the legal norms in *The Book of the Law of Aghbugha* belong to the criminal law sphere, a considerable number of norms refer to private law. However, regulating norms of the court trial are presented relatively poorly – they do not appear as independent articles but are quoted together with criminal and civil law norms.

The Book of Law of Beka-Aghbugha provides interesting information about the social structure of the Samtskhe principality of the period. In the Georgia of the Middle centuries the amount of pay for crimes, violations of law – *siskhli* (blood) depended on the title and status of the person. More specifically, according to *The Book of the Law of Beka-Aghbugha*, the legal status of the person and, therefore, the price of its *siskhli* was determined by their social origin (the house), property (estate) and their occupied position. According to the book the social-hierarchical structure of Samtskhe was as follows: the society was headed by the Governor referred to as *patron-atabagi* (Master-Governor). Interestingly, *siskhli* of neither the Governor that of the highest church dignitary – Episcopos (matskuereli) is not determined in the book, which indicates that the Governor is considered to be the highest ruler. As is known, in the legal documents of the medieval Georgia, the *siskhli* of the King and highest church dignitary is usually not assessed. The highest layer of the ruling classes was made up by a small group of the *didebulebi* (peers) whose siskhli was

assessed at 40,000 tetris. The major part of the ruling class was made up by *aznauris* (esquires). Unlike the title of the *didebuli*, which was considered to be a private title, status of *aznauri* was hereditary. Due to the size of the estate and the position occupied, the *aznauris* fell into three groups in the book of law with different amount of *siskhli* allotted to them (respectively 20,000, 12,000 and 6,000 tetris). The lowest part of the society was made up by the taxpayers – *glekhoba* (peasantry), whose *siskhli* was assessedat 400 tetris. Servants (*msakhuri*) occupied the position between peasantry and *aznauris*. Although the servants also belonged to peasantry, they still enjoyed a higher status determined by the fact that they were under the service of their masters. Therefore, the price of their *siskhli* was higher and amounted to 1,000 tetris.

Due to the importance of the book, it attracted the attention of a number of Georgian scholars (N. Urbneli, Iv. Javakhishvili, Iv. Surguladze, I. Dolidze, M. Kekelia). A Georgian text of the book was first published by I. Dolidze[8] whereas its Russian translation, made according to the manuscript of 1672, was published by I. Dolidze and V. Dondua[9].

It is worth noting that *The Book of the Law of Beka-Aghbugha* was translated into Russian twice, together with the collection of the Law of Vakhtang VI[10] although this edition does not present a precise translation and contains a number of errors. In 1938–1939 Swiss scholar J. Karst published a French translation of *The Book of the Law of Aghugha*[11], which obviously relied on the above-mentioned Russian translation.

Clearly, the translations of this source made in the 19th and early 20th century do no longer meet contemporary standards. Due to this fact we considered it to be necessary to re-publish the translations of *The Book of the Law of Aghbugha* as well as of other sources of Old Georgian Law.

The present work presents the first English translation of *The Book of the Law of Beka-Aghbugha* according to the manuscript of 1672, which is titled *The book of law about people's illegal deeds* and as noted above, includes Articles 1–98 of *The Law of Aghbugha* as given in the collection of laws of Vakhtang VI.

The book of law about all kinds of illegal deeds of people

In the name of God, eternal father, son and holy spirit, with the help of St. Mary and all the saints, both in heaven and on earth, we, Atabag Amirspasallar Aghbugha,

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[8] *Manuscripts of Georgian Law*, vol. I, ed. I. Dolidze, Tbilisi 1963; I. Dolidze, *Old Georgian Law*, Tbilisi 1953.

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[10] *Сборник законов Грузинского царя Вахтанга VI*, ред. Д. Бакрадзе, Санкт-Петербург 1887.

[11] J. Karst, *Code d'Aghbugha*, vol. II, Strasbourg 1938.

delivered to the honest matskuereli and sons of my uncle Shashia and his brother, Papnuti, Head of the monastery of Sapara, and in front of Heads of all five districts of Samtskhe and the regions inhabited by the peoples of Tao, Shavshi and Klarjeti, and episcopes and hermits (*meudabnove*) and [other] monks who abide there, given themselves to the care of God and St. Mary, put in front of us the book of laws of our grandfather and patron, Beka. It has been copied fully and entirely and combined with all the crime laws which came into our life after Beka, during the hard times for the country, namely crimes regarding *siskhli*, *gershi*, attack, betrayal and any other type of illegal deeds, connected with the penalty in *tetris* (money).

Kazanuri tetri was set as the currency for compensation by our patron, our Grandfather. By now the *kazanuri tetri* is no longer in circulation, thus we have decided to accept the *tetris* of the great king George, pure silver *tetri* in five double *dangs*. Money should be accepted according to the current rates of *tetri*. We have not reduced it in order not to make the illegal deeds easier to commit.

[Decisions] regarding Atskuri and Sapara were not changed by our patron, and were left as they were in the old times. We certainly endorsed them.

First we determined the cases regarding siskhli.

1. If god is furious with the devil and the man kills another man; for instance if a *didebuli* (noble) kills a noble, or if the [victim] commits some kind of hostile action before the people sent by the patron or if *matskuereli* arrive at the place where the crime was committed, and put the icon of *Atskuri* St. Mary there, whatever the damage was, it will not be included in the amount of *siskhli* he is to pay.

   However, when the afore mentioned icon and people arrive, let the wronged person stop any kind of hostility. If this does not happen, this person is to pay a penalty (*patiji*) in favour of *matskuereli* and the patron, as well as the *siskhli*, and the damage incurred will be added to the *siskhli* which has already been determined. *Siskhli* of a *didebuli* is equal to forty thousand *tetris*.

   If the murderer is not able to pay, then he is subjected to exile, and his *mamuli* (lands) will be given to the patron or *matskuereli*, and [the latter parties] present the right to the *mesiskhle* to employ half of the income from the estate.
2. If a *didebuli* kills an *aznauri*, the one who serves his patron honourably, and is considered among the best, and who is a court's esquire (*tadzreuli aznauri*), owning a castle and a monastery, then the *sistkhli* for him is twenty thousand *tetris* and the murderer will pay that much.
3. If he kills someone beneath him, an *aznauri*, whose *mamuli* has been reduced during the time, and who does not own a monastery, then he (the murderer) will pay the price of the *siskhli* to the amount of 12,000 *tetris*, in the order mentioned above and the one who suffers from losses, must be the third generation to experience property reduction.

If the patron humiliated him, having become angry at him over something, and the patron had mercy on him, then let him determine *siskhli* in the initial amount.

4. If an esquire kills an esquire, the former pays the *siskhli* in the same order. If he is not able to pay, then he is to be banished, and his *mamuli* (land) is to be owned by the patron and the *matskuereli* and they are to allot the *mesiskhle* half of the income from the estate till the *siskhli* is fully paid.

[4[1]] There are many similar cases: some of them demand a nominated jury, selected by the judges and the latter should select them very carefully.
There may be some very important matters, which will need a non-nominated jury:
Details about the merchants is written below (see Articles 96, 97).
The first case, regarding the *gershi* (penalty for wounding a person) is as follows:

5. If a hand or a leg is either cut off or fully damaged, then a third of the *siskhli* is to be compensated for. If an eye is lost, a quarter of the *siskhli* is to be compensated for; If evidence of a strike is visible on the face, 1,500 *tetris* are to be paid; if a finger is cut off, a fifth part of the *gershi* determined for a hand is to be compensated for. In the same way, the amount of compensation must be determined according to the number of missing fingers.

6. If the wound did not cause any serious damage, then the parties should come to a certain agreement regarding the compensation, employing mediators in the presence of respected people, as it should be.

7. If a man kills *msakhuri* (servant), who is employed as a *aznaurishvili* at his patron's house, he should pay 12,000 *tetris*.

8. If a man knocks out either a front or a back tooth, he is to pay *gershi*, determined as a compensation for the loss of one finger: the loss of a front tooth makes the man ugly whereas that of a back tooth makes it difficult for him to eat.

9. As for the *kotlosani* (a man with a spare horse) and *abjrosani* (a man with armour), as well as a man with a tent who held post from their patron, their *siskhli* is equal to 12,000 *tetris* and *gershi* is also made up in the same way.

[10] If a *kotlosani* and an *abjrosani*, who served at a patron's as an *aznauri* (esquire) dies and his offspring cannot serve the patron, his *siskhli* is equal to 1,000 *tetris*.

11. A *siskhli* for a peasant is 400 *tetris*.
If a man kills a serf (*qma*) who is known to his patron by his good and kind deeds, the murderer is to pay 1,000 tetris.

12. For an attacker neither *siskhli* nor *gershi* is allowed. And for the man who gets attacked, double the amount of *siskhli* and *gershi*, in the same order, is to be paid.

13. If the man is not killed when attacked, then the attacker, due to the harm and disgrace brought to the family, is to pay half of the *siskhli* allotted for harming a respected person.
If the amount of money is decreased by the mediation of honourable people, this is how it should be.
If the attacker is caught, the assaulted should undress him, drag him for seven steps to disgrace him, and have a man (driver) whip him on his backside. The attacker must be dragged along the streets in front of people. This should be done by negotiation between both sides.
If the attacker prefers to be punished by dragging, rather than pay, the assaulted agreeing to this, should deem this punishment sufficient, as this is the measure equal to afflicting extreme and eternal shame and disgrace.
14. If a pregnant woman is attacked and this is followed by an abortion, full *siskhli* is to be paid according to her ancestry.
15. If an *asabia* (accomplice) is killed, this should be treated as follows: The man whose *asabia* is killed is to pay *siskhli*; for wounding the *asabia*, the patron is to pay *gershi* unless there is some concession due to family ties.
Regarding the the intercessor (one who intervenes between fighters) one should follow this rule.
16. If a nun or a woman, acting as an intercessor is killed, double the amount of *siskhli* should be paid, according to their ancestry. *Gershi* is also paid in the same way.
If it was the intercessors themselves who fought and this is stated in the evidence presented by honest witnesses, they will be compensated for like a dog for barking.
If the intercessor was a secular person, and this role of his is sufficiently evidenced, he is entitled to double amount of siskhli.
17. As for the *siskhli* and *gershi* regarding traitor [*asabia*], if he did not have any personal reason for revenge and killed or wounded [a victim] following the attacker, he is to be subjected to the punishment as stated in the order of *sapatijo* (penalty for criminal offences). He is to pay *siskhli* of double the amount similar to cases of attack. [see Article 12]
18. When a man, feeling a certain type of dissatisfaction towards another man equal to him, finding the latter in his estate, arrests, binds, beats him, tears off his armour or other type of clothes he is wearing, and kicks him out of his estate, and beyond the borders, keeps him in his house as a prisoner and disgraces him.
If these people are taken to court, then the wrong doer is to pay half of the *siskhli*, return all the things taken, compensate for all the damages in the order determined above regarding the attack [see Article 12), because the wrong doer did harm to the patron by such behaviour. Except for the patron, no other man can arrest any man as by doing so, he will disgrace the arrested man forever.

If the evidence of the strike is seen, then the penalty for this misdeed will not be included in the siskhli.

19. If a man beats another man, this victory over the rival is suffice, and he should take away nothing else from the defeated one. If he disgraces and shames the defeated man, the former should pay half of the *siskhli*, return the armour and all the stolen property and pay a penalty for wounding the defeated man. The man is to pay half of the penalty for each *qma* of the defeated man, taken as a prisoner together with the defeated man.
20. If a man arrests a man equal to him, locks him up in a peasant's house and feeds him in circumstances disgraceful for a man, let them pay the *siskhli*, according to the court and laws, and return all the stolen property to the owner.
21. If a man beats another man, equal to him in rank, high or low, by taking advantage of either the latter's weakness or old age and binds his private parts with a rope or puts pants over his head, he is to pay *siskhli*, the amount of which is determined according to his rank. There is nothing worse than disgrace, even death is better than that.
22. If a man kills a brother either living together with him in the same house or separately, double the amount of *siskhli* is to be paid, according to rank. This is because such behaviour is a sin in front of God and deserves hundredfold *epithamy*. In this world he can hardly appear in front of people; due to this, he is to be banned from the land and should live in the mountains. He is to run, live as a hermit and should not be mentioned by a single man. *Episcopos* is aware of the rule applied in such cases and is to behave as he (the murderer) deserves.
23. If a member of the family behaves dishonestly towards the wife of a member of another family and disgraces her, with her agreement or against her will, and this becomes known, and if the wrongdoer is a relative, he has to pay to the husband of the woman full *siskhli* and let the patron of the culprit walk him around the streets nude above his waist, wearing only knickers, with a rope tied around his neck. If the lover of the woman prefers, he may redeem his sins by paying *siskhli*, and let him pay double amount, according to the rank of his ancestry as both of them, by the type of relationship, are *mindobili* by blood and body.
24. If a man kidnaps another man's maidservant, let him pay the former *siskhli* for two servants, according to rank.
25. If a man attacks another man, equal in rank, on the cemetery, encroaching upon digging a grave, the following should be done: let the culprit pay *siskhli* set for the two highest ranking, from the deceased members of the family, buried in the same cemetery, to which the victim belongs and remembers about and to whom his (the victim's) family acted as a patron. Let the culprit return all he took from the grave.

If a man did not dig up the grave but only stole the property, let him pay *siskhli* for one highest ranking, from the deceased member of the family and return the stolen [property]. In the same way, the elder compensates for the younger and *vice versa*.

If the doors of the graveyard church were broken into or the wall was broken, let learned people decide the amount of the penalty, according to their love of God. The exact amount [of the penalty] is not possible to state.

26. If a *didebuli* starts wooing an *aznauri's* wife and this becomes a matter of knowledge, or she is abandoned by her husband, let the lover pay the *aznauri* 12,000 *tetris*. If the husband does not leave the wife, the lover pays 6,000 *tetris*.
27. If a *didebuli* kidnaps the wife of an *aznauri*, 12,000 *tetris* is to be paid [to the latter]; If he did not sleep with her, but only wooed her, let him give an oath [about this] together with another *aznauri* and let this end the grievance.
28. *Siskhli* must be incurred in this way: according to the dignity of the house he belongs to; some stand high, some low; for a *didebuli* (noble) – 40,000 *tetris*; for a *tadzreuli* owning a castle and a monastery – 20,000 *tetris* and for families standing beneath this – 12,000 *tetris*.
29. If a man deserts an innocent wife, he pays her half of the siskhli and returns, in full, her dowry. If he leaves her due to her committing adultery, even in this case he is to return dowry to her, as if she herself is a whore, her dowry also is whore.
30. If a man deserts his wife who comes from a family above him in rank, he pays her no higher amount of *siskhli* than that paid by his family, according to their rank.
31. A son born beyond a wedlock belongs to his mother. His birth does not give the father the right to take him away. The person who inherited the mother, will also have her son. No one has the right to take him away due to the reasons of educating him. He will go according to his will, as he has a hereditary patron.

    If he was born of a *didebuli*, stays in his house as a *qma* and has a status of an *azanuri*, with the right to have a *samamule* (land), the *siskhli* for him is 12,000 tetris.
32. A woman has no right to initiate a divorce, and leave her husband. If she does behave like this and if she makes God angry for her wicked tongue, she will pay her husband a *siskhli*, according to the rank of his family.
33. If a man betrays another, being in his (the latter's) castle or an estate, and takes away one or both of these properties, when the patron hears about this, let him make the culprit return the castle or the estate to the owner and pay the *siskhli*, set for two highest ranking members of the family of those people who the patron will find at the place of the betrayal. Let the culprits return the stolen objects the amount of which is stated honestly and not deceitfully by the victim under the oath.

If a man *daundobari* (a stranger), being in a hostile relationship, performs an act of betrayal, he shall not pay *sapatijo*, although is to pay only *siskhli* for one highest ranking person.

If a man, sitting in a valley, is attacked, he is to be paid for the betrayal in the order indicated above; if the person who does not own a castle but owns a cave, is attacked, let him be paid in the order discussed above regarding the cases of attacks [see Article 12].

34. A wedding *sanichari* (wedding present) is a duty of everyone. Assistance to the warrior, going to war is also a duty as well as the payment at the funeral.
35. If a peasant insults an *aznauri* and takes away something from him, and, at the same time, wounds his *qma* (surf), and if the patron of the peasant does not pay any attention to this fact, let the parties pay half of the *siskhli* and *gershi* later, when the parties are taken in front of the court and the damage done on that day is estimated.
36. If a man, a human being, is killed during the attack, then full *siskhli* and in addition, an extra half of the *siskhli* is to be paid, as the attack was carried out by an indecent hand. Let the patron hand the man performing the insult to the insulted *aznauri*, and the latter is to treat him according to his preferences.

If not so, then full payment of *siskhli* and in, addition, an extra half of the *siskhli*, is due to be paid and the culprit stays with his current patron.

37. If a man attacks a man in the house of his peasant, let him pay in the order set out regarding the cases of attacks [see Article 12]. Attackers give an oath regarding the amount of the stolen goods and property. The more the stolen goods the more the number of the jury. The oath must be given by the nominated jury.
38. If two men, being on hostile terms, come across each other and one of them avoids facing the other, the latter should not follow him. If one runs after the other and kills him, the murderer is to pay double amount of *siskhli*. If both of them face each other and one kills the other, the murderer is to pay the *siskhli* as set for [such cases].
39. If an engaged fiancée is kidnapped, the victim has the right to express his dissatisfaction. Let respectful people act as intermediaries, invite both parties and make the victim be paid a set amount of money. In this way, the insult should be made up for.
40. If a man reports on a man who has not done any wrong to him, has neither robbed his estate nor fought against him, and if he reports on him to the patron, and, as a result, the patron treats him (the reported) badly, makes him bankrupt or bans him from his land and makes him live away from his home; later, if the patron decides to put mercy on the victim, as patrons should do, and pardons him, brings him back to his home and gives him the opportunity to prove his innocence, the victim has the right to demand compensation for all the harm done to him by the accuser without court interference. This issue

should be settled by people close to the victim and let the accuser fully compensate for the harm done.

In addition, the patron penalises the accuser in the order of patiji, without court interference.

If the accuser fights back without evidence, it is classed as a betrayal of the patron. It is the obligation of the patron to be well-aware of the case.

41. If a man really committed adultery with a priest's wife, and the priest resigns but does not desert his wife, the offender must pay the full amount of *siskhli* for the resignation of the priest.

If the priest deserts his wife, the offender must pay half a *siskhli* for defaming the priest's wife as the priest will be in a difficult situation.

42. If a man's land is in another man's hands, and the owner cannot retrieve it due either to his patron's fault or to other circumstances, and if he has never stopped suing, fighting and complaining about this case, no one has the right to keep the land away from him on basis of prescription of time.

43. If a man keeps a piece of land (a field, vineyard, a grove or a house) as a pledge, as soon as the owner is able to pay back the debt, let him get back what he paid as collateral and the mortgaged land returns to the owner.

If the man (pledge holder), has not returned the land according to the set order, he should return it (the land) together with the income he obtained since the day he was offered [the mortgage] payment but refused to take it.

44. If a patron gives his *qma* a piec of land (*mamuli*) but it [the land] remains mortgaged, the one who has mortgaged it, will buy it out. The man who was given the land, must be its sole owner.

45. It is illegal to sell *mamuli* without the patron witnessing it. In the case of such a sale, the buyer of the land loses half of the price of the land as a *sareguno* (fine for illegal sales). This may not be completely fair, but nobody should dare embark on such a sale.

46. If a man steals another man's wife, of her own free will, the man who steals her should pay the husband double amount of *siskhli* according to rank. In addition, he must also return her *sasaluko* (jewellery given to a wife by her husband) to the husband. And nobody should expect the ex-husband to return her dowry as the wife eloped with another man, deserting her family and disgracing her husband.

If the dowry consisted of only *samamulo*, (hereditary piece of land) then the ex-husband returns it to the relatives of the woman after the man who took the wife has fully paid the amount of *siskhli*.

47. If a man's wife is kidnapped against her will, which cannot be done without an armed gang, the kidnapper should pay the *sapatijo* (fine for the committed crime) in double amount of *siskhli*.

The kidnapper should pay according to the rule set regarding the attack (see art 12) and all the stolen [goods] indicated under the oath, by the ex-husband, must be returned to him.

Regarding the dowry act as indicated above (Article 46);

48. If a brother evicts his brother or another relative from the *mamuli* (hereditary land), no matter how the latter harms him, being banned from the family, when he gets back, no penalty should be laid on him. He must enter the land according to his lawful right. According to the tradition, a brother owes another brother no more than *saukhutseso*.

49. If there is a local custom according to which a younger son should leave his father's house with a part of land after his marriage, this is a rule, written by the hand of Moses and dictated by the Creator, in the book entitled *The Genesis* and mediators do not have the right to reduce the intended lot.

If the issue turns into a fight, the younger son is evasive, he must behave and beg for a reasonable settlement of his issue.

50. If a wife, openly accuses her husband, or if a woman openly tells the husband of another woman "my husband sleeps with your wife" and as a result of this the latter, because of the evil words of the first woman, has a row with his wife or deserts her, *siskhli*, as set for adultery, is to be paid by the culprit offender.

51. If a man, due to certain circumstances, keeps another man's land or violates the border, as soon as the patron (owner) of the land finds justice, he should return the land to the owner and compensate by any income received from it.

52. If someone catches and kills another man's cattle in his own field, vineyard or vegetable patch and if the owner of the cattle arrives and it becomes clear that the cattle were allowed to go into the field due to the hostile disposition, then nothing should be demanded for the loss or the death of the cattle as this evil act was performed deliberately, which makes it a special case.

If the cattle have accidentally entered the other man's property and the owner did not know that the animal was killed, then according to the decision of the intermediaries, the owner must be forced to compensate for the loss incurred by the animal. If the flesh of the animal is taken by the owner, he receives half of the compensation for the loss; if the flesh of the animal is taken by the man who killed it, then he pays for the whole amount of the incurred loss.

53. If the man gives another man his land to keep for him and if the latter refuses to give it back on demand from the owner, then when the owner of the land finds justice, the keeper of the land should return it to the owner and also, compensate the loss by handing the income received from it.

54. If a man manages and transforms the land of another man either by planting trees on it or by building on it and these actions are performed by taking advantage of the minor orphaned children of the owner or due to the fact that the owner has been banned from his motherland, if the owner asks for the

return of the *mamuli*, the former has no right to keep it. The owner must pay him half of the price of the changes made by the former, and the land returns to its owner.

55. He does not have the right to ask for the land as he hasn't any right to buy it out from the patron.
Even if he buys the land without notifying the owner, when the latter asks for his land back, he should be given it without making any objection and the sum must be demanded from its receiver.

[55[1]] He has no right to keep the *qma* either due to the fact that he raised him up, or because he fed him in hardship but he (patron) should demand his return in the order described above (see Article 54).

56. If a man sells another man a piece of land, whether it is cultivated or lived on or not, – the buyer does not have any right to demand any other money from the seller apart from what the latter has on himself on the day of the sale.
If the hereditary holder of the *pudze* being absent, returns to his land, then the man on whose behalf he had the land, has not the right to keep it notwithstanding the period of time the holder spent away.

57. The will prepared by someone before his death is valid and cannot be changed.
The law – setting epistles written by the holy fathers aspired by the divine spirit, also say so, that evaluating such cases and altering it (the will) in some way is not possible. Let nobody attempt this.

58. A man has a right to ban his son from his house for his sins.
If the son followed his father's words obediently, and if he did not make him angry, when his father dies, nobody has the right to deny him (the son) the land (*mamuli*) to be put in his ownership.
If the son deserved his father's wrath by making him angry he should not be given the *mamuli* after his father's death.
This should be carefully investigated and thought over in order to avoid the father potentially committing a sin. The father should not ban his own son from his land for the sake of another son, his wife or his daughter-in-law.

59. If the father bans an adopted son, the latter obeys and loses the right to his father's property, unless he apologises for his betrayal and sinfulness committed due to his impertinence.
This should also be carefully investigated and thought over as written above regarding the father and son. This particular case should also be considered as the above-mentioned [see Article 58].

60. If a man gives another man a document or if a patron grants his desire and resolves the issue in his favour, and if, at the same time, the witnesses also approve of the document, then this particular document makes any previously issued document invalid.
If this document is given secretly, and is not approved then the previous document will be considered valid.

61. If due to relations by marriage, a man presents another man something from his property, he will not have any right to demand the present back due to his later impoverishment.
If their relations by marriage is ceased then the gift has to be returned.
The theft will be resolved in this way:

62. If a horse or something else is stolen, and if the thief is caught with the stolen property, he is to return the property to the owner adding something equal in amount.

63. If a man recognises his stolen property with another man and declares: "I have lost many other things together with this", and the man, caught with the stolen property, does not want to admit the theft, the latter should confirm under the oath, together with two neutral men, that he had not ever touched any other property of the man, but the one already mentioned.
If he does not agree to this, then the owner of the property should take an oath and the culprit should compensate a double price for the loss.

64. If a man sells another man a stubborn horse without mentioning this, but disclosed later to the buyer, the seller should return to the buyer the price he has been given for the horse, together with the money for breaking in the horse and compensate for the damage incurred.

65. If a thief steals something from the caravan, and later the man who suffered the loss recognises his property in the hands of another man, and if the latter declares under oath that he is not a thief, the former no longer has a right to demand the stolen property.
If he refuses to take an oath, then the owner of the property should declare under oath what he has lost and the culprit should compensate for that.
If it turns out that he was the head of the gang, then he has to compensate for all of the stolen goods he received and confirmed this under the oath.
I, Patron Athabag-Amilrspasallari, have started to occupy myself with the affairs of the whole Samtskhe. Due to the hard times, stealing horses became common among the army. The thieves were protected by their patrons. This angered the honourable men of the country and they discussed in front of us, combining their newly made decisions about robbers with the older ones [made by themselves], and stated that our security, – drives us to introduce *additional laws*, as none of the evildoers have been made [to pay] *patiji* for a long time.

66. From now on, the thief shall be punished, no matter who he belongs to, and *be banished from the army* without partiality being shown to him. Before being banished he will be made to return the stolen horse as well as an extra horse to the owner.
If the stolen horse is no longer available, then the owner of the horse should testify, under oath, the cost of the horse on the day of the robbery and the cost of the horse, doubled, will be reimbursed to him. The punishment shall be fulfilled according to the order indicated in the resolution.

And if a horse is found with him, and he says "I have bought it", and produces *ullam* (a receipt of purchase) and names the seller, the offended does not have the right to demand anything from him, but his horse and payment for the breaking-in the horse shall be demanded from the offender.

If he is not able to name the seller with sufficient evidence, then he will be considered to be the thief himself and made to pay the compensation.

If the man is not in possession of the horse, and wants to embezzle it, if he makes an attempt to do so, and this is clearly stated, then the robber himself must compensate, following what is set forth for the robbers.

67. If a man received some property from a man which later was stolen or the village was harmed by the Tatars or Kartvelis (Georgians), the man who received the property should accompany the one who stole the property, should answer any questions and make him return the whole property.

If he does not accompany him and does not make him return the property, then he should compensate for any loss if it occurs, unless there is a concession made due to some related connections between the two, and all the property which the owner indicates under oath.

[67[1]] If communities or regions of a different faith or just neighbours are mutually *daundobeli*; if the *daundobeli*, being in constant hostility with the [other] *daundobeli* (strange, unfamiliar person), harms him, and if the latter, due to hostility and in hostility, harms him; then due to hostility, they harm the third party even more, or they harm only *this* party, the latter [party] has the right to consider himself to be offended, and begrudge only the one, who first harmed him; as being hostile [towards each other], they were mutually *daundobeli*.

68. If one peasant acts as a guarantor for more than one ox or for a sum higher price of one ox, then the bail, if he belongs to a respectful [honourable] person, shall let his master, patron agree with the letter of guarantee.

If he belongs to a *didebuli* (noble) or an *aznauri* (esquire) then let the latter give help and compensate for what he gave the guarantee for.

If no guarantee is available, then the peasant does not have any right to act as a guarantor for a higher sum of money as he does not have enough resources. If this rule is not followed, then the master may treat him appropriately.

69. If either the *didebuli* or *aznauri* acts as the guarantor then he shall have to produce or compensate for what he guaranteed.

70. If a *skhvis-shvili* (the other's son, peasant) of peasant leaves him, then he has the right to take both what he brought with him and what he acquired later because he worked as an equal with another in the yoke, if he did not steal anything from him.

If he bought some land before he left then he is devoid of any right to it.

71. If a peasant helps the escaped peasant, then either he himself shall take the peasant to his master or the master of the peasant who helped the escaped one returns him to his old master. Let the peasant not keep the escaped one for

ever. He does not possess the right to do so, he does not have the right to buy the peasant: he is not allowed to do so because he is not of high enough status.

Either the purchased man himself, when he collects resources, he compensates the buyer the exact amount of money he paid for him, or the hereditary master of the purchased man returns the buyer the sum, and so the buyer lets the man go.

72. If the man enters under someone's protection and is registered to him, and the latter accepts him as a son-in-law, and marries him to his maid, or marries him to a peasant's daughter, then the registered man does not have the right to leave.

If the hereditary owner takes him back, then he, the owner, does not have the right to take with him, besides the man himself, either his wife or his children. What the man brought to the protector, the latter should let him proceed with that.

If this man does not leave on his own free will, and is forced to go by law, then, as a husband should not be divorced from his wife, let the wife leave with him but he should pay the price of the woman to her master.

[72[1]] If a man, being a *qma* (serf) to another man, after years of devoted, honest service and as a result of hardships or wounds experienced by him becomes unable to work or [this happens] due to his old age, or some other circumstances force him to leave, then all he brought to the master should go with him together with a third of the property acquired by his labour – because he, after he has left, is exhausted and helpless.

If he has children, they will accompany him. The master will not let him take anything but what he brought with him.

73. If an unregistered man gets married without either becoming the master's son-in-law or marrying the latter's maid, then, to whom such a man belongs, his wife and children also belong to him, and let him leave with the property which he bought with him.

74. If anybody possesses someone else's inherited peasant or *qma* and if the master demands his return, the former has no right to detain him, and a mutual agreement [between them] should be reached.

If he refuses [to return the peasant] and if the peasant leaves him, and he is not able to take him back, or if the peasant dies, he should pay siskhli.

75. If a *momartebuli qma* leaves the master for another man, the latter has no claims against the former, has no right to keep the *qma* without due agreement of his master.

76. If the peasant, without his master's agreement, sells land, this sale will be classed as illegal: the land belongs to the master. The buyer should demand the sum paid from its receiver.

77. If one has in his possession a hereditary *qma* (serf) belonging to someone else, or a peasant, if the latter leaves on his own will, he has the right to take the property he brought. If the man has a wife and children, they should be allowed to go with him as nobody has the right to detain them. If grandchildren express willingness to go to the hereditary *mamuli* (land), no one has the right to hamper them in this wish.

If the peasant does not express a desire to leave but his ex-master demands this, then, if he, the unregistered, will not go to his master off his own free will, the latter cannot take him by force. If the master did not demand him for a period of 7 years, and did not sue him, he already does not have the right to demand him and nor does he have the right to take him to court.

If the *qma* (serf) lived at a large distance from his master and the latter did not know about his location, then the fixed term of 30 years comes into force. If the master did not demand during this fixed term, depending on the distance of the serf's location, far or near, he has no right to demand the serfs return when he desires.

78. If either a *didebuli* (noble), *aznauri* (esquire) or a *msakhuri* (servant) has in possession a *momartebuli qma* (serf in protection), and if the latter leaves behind and takes with him something of significance or no significance at all from the possessions of the master or the neighbour, no matter whose possessions the man might take, [the master] is to compensate fully for the loss.

If a hereditary *qma* leaves and takes something with him, if he has got a wife or children, they should compensate for the loss, if they own something.

If there is no family left behind, the injured party does not have any right to place demands on the master of the leaving *qma*, because responsibility of the master would be lawful, only if the *qma* had started a family under the rule of the master, but if the *qma* had no children, the master is not responsible.

79. If a person hires a man, with the goodwill of the hired man and if the latter dies in these circumstances, no one has the right to demand from the hirer anything above the sum for hiring the man.

The same holds true for the pack animal.

In the case if the hirer violates the hiring term or wears out or drives the pack animal to a distant place, or if he loads it more than agreed, and the animal dies, he shall compensate for it.

80. If a man kidnaps a man on his way to another man, and the former, not being an enemy of the man sending him, it is not in the right to do so, then the sender has the right to respond by any insult or any damage. In addition, he has the right to demand full compensation of all the losses incurred.

81. If a husband dies and the wife has no children, while leaving, she has the right to take all her dowry with her.

82. If a childless woman dies, her dowry belongs to her relatives.

If a woman with children becomes a widow, any armour belongs to the son whereas all of the remaining property belongs to the woman wherever she may be.

As for the *samamulo* (inherited land), let her not sell or give away any of it. Only if she donates *samamulo* to the monastery, her children will not have the right to contest the decision.

83. In the case of peasants let it be like this: if a woman dies childless, one part of her dowry will be allotted to the service of her soul, whereas the remaining part belongs to her relatives.

If the daughter survives her mother, whoever brings her up will marry her and give her the remaining part her mother's dowry.

If the dead woman leaves behind both a daughter and a son, then any armour belongs to the son and all the remaining part of the dowry – to her daughter.

If a man owes another man money for a loan and if the money-lender keeps the man's *mamuli* (land) as collateral, then every three years one *tetri* will be taken off from the debt for each 20 *tetri* of the value of the debt. When the owner of the property pays back the debt, to what extent the money-lender has used the profits from the land is to be assessed by mediators and *tetris* should be taken off as a proportion of this.

If the owner of the estate leaves his motherland for a strange land and does not use the profits from his land, the money-lender has no right to demand payment of the debts till the return of the one, who has been living in exile in a strange land, as he, alas, has had to wander with hardship and devoid of his estate. Such behaviour will be lucrative for both parties: to the payer, his debt will become lighter whereas to the money-lender, money-lending will not be considered by God as self-interest, and the latter can always demand one-twentieth from the borrower.

84. If there arises some senior and vassal-type of fight and disagreement between the master and serf, they will settle the dispute between themselves and will seek reconciliation via genuinely honest impartial people – this should be like this. As people and the creator of the world, they are also reconciled in the same way, by the teachers and mediators singled out among so many unfaithful people. This is why the order of settlement is made between the large and the small, on the basis of the request for settlement.

85. If a man presented a gift to another man in the form of some movable property or *mamuli* (land), to win patron's approval (trust) and to settle some issues, and the presenter later suffered from some difficulty, then despite all this he should admit the presented property to be well-deserved and has no right to demand the return of the present. It is compulsory for the receiver of the present to swear an oath that the denunciation to the master was not made for getting retrieving the present.

If he does not swear an oath, then he must give the present in the hands of to the presenter who may even remain offended.

86. If a man, without knowing for certain, accuses another man of theft; by this he commits an evil and indecent act. If there is no evidence, let the accused swear in order to prove himself not guilty. This is not surprising, and let him be cleared of the crime.

If the accuser accepts neither the oath [given by the accused] nor witness, and pleads that the accused is a thief, the latter will be taken around the streets. If later the loss is found in a different place, let the accuser return the stolen things to the accused and also something else of the same merit. This is because he mistreated an innocent man and defamed him.

87. If the man takes some object from another man to keep it for him, whatever the property is, and someone whom he owed something takes it by force from him later, the property still belongs to the owner and the latter should demand it from the keeper.

If the keeper finds the same thing, let him return it; if not, then let him compensate for the property from his home.

88. If the man is in need and demands his own property, given away to another man for keeping, the keeper should give it back as he has not any right to keep it due to the disagreement between them.

If the man does not give the property back and keeps it, when they come to trial, let him compensate double the amount of the property.

89. If a man sells to a man a donkey taking into account an agreed period of time, and before the set time is over, the animal reveals some fault, the buyer has the right to break the deed of purchase and he (the buyer) does not have to pay the forfeit.

If the buyer broke the agreement before the set period of time, let him pay the forfeit in the amount of one *tetri* from every ten *tetri* paid by him.

If he keeps the animal for a long time, using it for work, and drives it to exhaustion, he has to compensate according to the discretion of the people-mediators.

If the movables is sold, the same measure must be taken.

This rule is valid till the end of the set time with an addition of the same length of time. As soon as the indicated period ends, the buyer loses the right to demand anything.

90. These are the words of the holiest fathers that avarice, although reflected through the mental processes, is the foundation on which all crimes which infuriate man as well as God, are laid. In addition, the judge shall not satisfy the claim through avarice.

If bribery is discovered in the decisions of judges, then they (the decisions) are not lawful, and the judge will be made to put hands in a copper pan and the litigants should be tried again.

91. If the litigants fight for the armour of the man, who fell into their hands, it belongs to the man, the marks of whose arms are found on the armour or on the horse. The armour belongs to the man who first struck it. Let the man, who fell into their hands, is found be questioned under oath and become satisfied with evidence given by him and thus settle the litigation.

92. If a man finds some property, lost by another man, should it be livestock or other objects, let him, having heard about the investigations, submit the find and give it back to its owner. And let the latter compensate this act by giving the former an award, set for the find.

If the man does not reveal the find immediately, then he is not entitled to the award as his behaviour looks like theft.

If the find is an animal, and it turns out that the man drove the animal to exhaustion, or if the find is an object and the man wore it or rented it out, let him compensate for it according to the discretion of the mediators.

If the man finds it while being part of the levy, then he is not entitled to the award for the find.

Let the case be investigated properly in order to find out whether there was a group of people acting in order to amass wealth informing about the find as well as finding the object or stealing it, or maybe the owner of the object blamed an innocent person.

93. If the man took bread on loan, then God forbid, but if the giver of bread, taking advantage of the needs of the other person, demands from the other man a bigger percent. It will be enough to take three for two measures as punishment.

If not, when taken to court before the judge, let him return to the debtor the extra percentage taken. It does not matter what kind of written act they may have enclosed, it will be invalid, as "avarice is a major sin", according to the holy fathers' writing.

94. If a man takes *tetris* for use on interest, let him pay on a thousand *tetris* in this way: let him be satisfied with receiving 1,200 *tetris* annually. Let this principle be employed with greater or lesser sums of money.

The compound interest should not be mentioned. Let the capital increase by the rate determined previously no matter how long this will be.

In an exactly similar way, a big estate should not be taken as collateral for a property of insignificant value or the amount of the interest taken will still be high and will enrage God.

95. If a man took a loan in *tetri* or silver with a written contract letter, unless there is a corresponding mention in the latter, the landowner will not allow himself to demand from the debtor payment according to the rates of *Sharvan tetris*. If the debtor pays interest let him pay as instructed.

If the debtor had taken a loan to be paid without interest, then let him pay back, based on the conditions on which he got the loan.

[95[1]] There are several districts and parts where while selling *samamulo* (hereditary land), half of the price is taken off while the land is being assessed in favour of the master. This is right and if this rule is followed by other people as well, it will be better as neither the *mamuli* (land) will suffer from taxes, nor the country from bankruptcy.

96. If a merchant kills another merchant, on his way to a respectful mission, 12,000 *tetris* is to be paid, [if he served his patron well] and if he was in favour with his patron.
For the murder of the merchant standing lower [in society] who, when returning from the trading trip, is able and has to visit the patron and make a present to him, 6 thousand *tetris* should be paid to the master and imposition of penalty will be as indicated above.

97. If the merchant on his way to or from a trading trip gets his property attacked and stolen by some man without any hostility to him, and if after this both of them go to court, let the merchant testify under oath what was taken from him on the day of the burglary. And let the offender compensate double the amount, if he was not wounded.
If he was wounded, suffered *sagersho* (penalty for wounds) and disgrace, then let him pay a *siskhli* as mentioned above. If the merchant is robbed and, moreover, is killed, he is to pay double amount of *siskhli* and compensate for the property in double the amount as well [see Article 5,6,8].
The cases are to be subject to consideration in the order indicated above, some of them first and others to be considered later [see Article 96].

98. If a man, *qma* (serf) of some *darbaziskatsi*, possesses a man with small *siskhli*, and if the latter demands to be set free, the former does not have the right not to let him go. Let him take what he brought and half of what he bought except for the land.

Glossary

abjrosani – (9, 10) one (esquare) who has an armor.
asabia – (15, 17) accomplice.
atabagi – "father (tutor) of prince", the title of the governor of Samtskhe principality
aznauri – (2, 3, 7, 10, 26, 27, 35, 36, 68, 69, 78) esquire, nobleman; vassal, owner of an estate.
dang – (0) small silver coin.
darbaziskatsi – (98) courtier.
daundobari – (33) a hostile, ruthless man, stranger; ant. *mindobili*. See: *mindobili*.
daundobeli – (67) see daundobari.
didebuli – (1, 2, 26, 27, 28, 31, 68, 69, 78) noble, a highborn feudal lord, owner of an estate.

gershi – (4[1], 5, 8, 9, 12, 15, 16, 17, 35) wound; penalty for wounding a person.
kazanuri tetri – silver coin of Kazan-Khan (1295–1304).
kotlosani – (9, 10) one (square) who has a horse in reserve (a spare horse).
mamuli – (1, 3, 4, 44, 45, 48, 54, 58, 77, 83, 85, 95[1]) land estate, hereditary ownership of an estate.
matskuereli – (1, 4) archbishop of Atskuri.
mesiskhle – (1, 4) one who takes vengeance on *siskhli*, successor (heir) of a victim.
mindobili – (23) people who are interrelated by supporting each other according to feudal custom (ant. *daundobeli*).
momartebuli – (75, 78) a person who voluntarily enters under patronage according to preliminary agreement.
msakhuri – (7, 78) servant.
patroni – (0, 1, 2, 3, 4, 7, 9, 10, 11, 15, 18, 23, 25, 31, 33, 35, 36, 40, 42, 44, 45, 51, 55, 60, 65, 68, 85, 96) master, lord.
pudze – (56) peace land of a peasant, taxable unit.
qma – (19, 78, 98) slave, serf, vassal, subordinate.
sagersho – (97) wound.
samamuli – (31, 46, 81, 95[1]). Also see *mamuli*.
sanichari – (34) a gift presented before marriage.
sapatijo – (17, 33, 47) penalty for crime; a respectful, important place like a church or a treasury, or a herd, and so on.
sareguno – (45) a fine for an illegitimate purchase of an estate.
sasaluka – (46) articles of adornment, a gift made to the bride from bridegroom
saukhutseso – (48) an extra share for elder brother from the hereditary property
siskhli – (1, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 28, 29, 30, 31, 32, 33, 35, 36, 38, 41, 46, 47, 50, 74, 97, 98) blood; punishment, money or property given as a compensation to a person who suffered from a crime, from an offence.
skhvis-shvili – (70) peasant's labourer ("smb. else's son").
tadzreuli – (2) courtier, esquire, vassal of king (patron).
tetri – (1, 2, 3, 5, 7, 9, 10, 11, 26, 27, 28, 31, 83, 89, 94, 95, 96) white; money, silver coin.
ullam – (66) deed of purchase.

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Summary

Key words: legal translations, sources of old Georgian law, criminal law, private law.

This work presents the first English translation of one of the most important sources of medieval Georgian code of law, compiled in the second half of the 14th century by Aghbugha, the governor of the Samtskhe Principality (Southern Georgia).

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The Law of Bagrat Curapalate

The Law of Bagrat has not come up to our days in the form of a separate law book. A fragment from it has been preserved in the book of law compiled by Aghbugha (end of XIV century), governor of Samtskhe principality (Southern Georgia), and this book, for its part, is one of the component segments of the collection of books of law compiled by Vakhtang VI (beginning of XVIII century), king of Kartli.

The Law of Aghbugha consists of the introduction written by governor of Samtskhe Aghbugha and 175 articles, but Article 98 is followed by one more introduction, in which it is stated that King of Kings Bagrat Curapalate is the compiler of the book of law, instead of Aghbugha – the governor of Samtskhe. Hence we can conclude that *The Law of Aghbugha* ends up with Article 98, and the rest part of the monuments (Articles 99–175), including the fragments from *The Law of Bagrat*, was added later on.

The identity of "King of Kings Bagrat the Curapalate" has long been the subject of dispute among the Georgian scholars. Ivane Javakhishvili, a prominent Georgian scientist, was the first to raise the issue on the identity of Bagrat and on the date of compilation of the book of law. Accordingly, analyzing the situation described in the book, particularly a considerable influence of church over the state, he concluded that this situation must have been most compatible with the reign of Bagrat I, son of Ashot (IX century). Consequently, he first considered Bagrat I as the compiler of the book. However, later on, he withdrew this opinion due to the fact that Bagrat I was not the king of unified Georgia; hence, he did not own the title of King of Kings. Based on these arguments Javakhishvili claimed either Bagrat III or Bagrat IV to be the possible author of the book, as each of them owned the titles of both King of Kings and Curapalate. And still, preferably, he proposed Bagrat III to be the compiler of the book as, according to historical sources, during his reign the country was orderly and law-abiding[1]. Conversely, the same chronicles characterized the period of Bagrat IV as chaotic and high in criminal rates. However, these very reasons

[1] Iv. Javakhishvili, *The History of Georgian Law*, Tbilisi 1928, p. 94 [in Georgian].

(disorder, chaos, crime rate) motivated I. Dolidze and Iv. Surguladze to propose Bagrat IV as the author of the book of law[2]. They supported their arguments based on many books of law "Dzeglisdeba" (legislation), Georgi V the *The Law of Aghbugha* and etc. – in which precisely social turbulence and high rates of crime of the time are stated by their compilers as the main reason for creating such books. It is also noteworthly to mention that the proposal regarding the authorship of Bagrat I put forward by Iv. Javakhishvili later was shared by a number of authors (A. Kikvidze, M. Kekelia, D. Muskhelishvili, G. Jamburia). In their opinion, the lack of the title King of Kings is not a sufficient argument to exclude Bagrat I as the author of the book. Further on, according to the chronicles Bagrat I son of Ashot and King of Tao-Klarjeti (Southern Georgia) ruled the country together with his brothers and therefore he could have possessed the title of King of Kings[3].

In contrast, there are several other theories (S. Kakabadze, I. Antelava, D. Zhghenti, Z. Ratiani) dating *The Law of Bagrat* from a later period (namely from the XVI century). This opinion was first initiated by S. Kakabadze[4], although he rejected this approach later. However the same theory was developed by I. Antelava[5]. He analyzed the language of the monument and compared it to other sources of XVI century. Finally he concluded that *The Book of Law of Bagrat* was compiled during the reign of King of Imereti (West Georgia), Bagrat III (1510–1565). However, it is worth mentioning in this respect that some of his arguments (for instance, the comparison of *The Law of Bagrat* with "Bichvinta Iadagar") seem to be somewhat artificial and, therefore, not shared by scholars. Thus, the majority of scholars date the book either from the IX century (considering Bagrat I to be the author of the book) or from the XI century (regarding either Bagrat III or Bagrat IV to be the compiler of the book). In both cases *The Book of Law of Bagrat* is the oldest among the literature of its kind and this makes it especially valuable.

There are also different assumptions driven concerning the size of the extract from *The Book of Law of Bagrat* added to *The Law of Aghbugha*, and the origin of other parts of the book. Iv. Javakhishvili suggests that only four articles from the book (99–103) belong to Bagrat as the word "king" is mentioned only in those articles. The similar theory is followed by Iv. Surguladze[6]. In his overview of this issue he argues that it is impossible to assert any proposition on the origin of other parts of the monument unless some new sources referring to this issue were not found.

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[2] I. Dolidze, *The Old Georgian Law*, Tbilisi 1953, pp. 56–57; Iv. Surguladze, *The Sources of History of Georgian Law*, Tbilsi 1984, p. 85 [in Georgian].

[3] M. Kekelia, *Towards the Code of Law of Bagrat Curapalates*, "Issues of the History of Law", Tbilisi 1986, p. 94 [in Georgian].

[4] S. Kakabadze, *Identity of the Book of the Law of Beka-Aghbugha*, Tbilisi 1912, pp. 3–4 [in Georgian].

[5] I. Antelava, *Issues of the Social-Economic History of Georgia*, Tbilisi 1980, p. 53 [in Georgian].

[6] Iv. Surguladze, *The Sources of History of Georgian Law*, Tbilisi 1984, p. 90 [in Georgian].

A different standpoint is suggested by I. Dolidze[7] . His arguments are based on the linguistic and terminological analysis of the material, and these leads him to conclude that the fragment of *The Law of Bagrat* comprices Articles 99–160 of *The Law of Aghbugha*. He presents a list of legal terms which are quoted only in these articles and we don't observe them in other parts of the book. The same author proposes that Articles 161–171, unlike other articles of the book of law, introduced sanctions typical of canonical law and, consequently, he considers these articles to be the fragments from some other canonical law. With respect to the final articles of *The Law of Aghbugha*, which actually repeat the previous articles of the book they were added to the book later on.

We have already published the English translation of Articles 1–98 of *The Law of Aghbugha* according to the manuscript from the year 1672. Now we present the English translation of the remaining articles, one part of which constitutes *The Book of Law of Bagrat*.

A Law of Bagrat the Curapalate

In the name of the Lord, we begin to inform of god's (divine) decrees and laws, resolved and unresolved so far, by the order of the descendant of David Bagrat the Curapalate and the King of Kings Aghmashenebeli (the Builder) first of all and then by the [blessing of] episcopes (bishops), and [by the approval of] *didebulis* (nobles) and *aznauris* (squires), and other wise man, who determine concurrent sentences with the goodwill of God.

99. You who sit in the court to perform judicial functions rightfully, should hold fear of god deep in heart and should be impartial towards your father or mother, your patron (master) or brother, or your relatives, or towards those who offer bribe, not in any way [should you act otherwise]!
You should conduct only rightful justice!

100. Anyone who is learned, or bred up at the king's court, or had visited there, or is an honourable merchant, or a village *mamasakhlisi* (foreman) of a good name, such worthy man is to be appointed as judge, [since] he is well aware of laws and will not judge unfairly.

101. If an episcope transgresses against the king, he is not to be arrested by the king, as he [besides the king] has the right to determine the law.
[Instead], the episcope is [only] to beg his (the king's) pardon and recompense him.

102. If the king angered at the episcope, justly or unjustly, even in this case he can not be arrested, as he is the second king, who maintains the Christian religion, and whenever the king is concerned with religious affairs, [he is to investigate thoroughly and judge] and pardon accordingly.

[7] I. Dolidze, *The Old Georgian Law*, Tbilisi 1953, pp. 43–60 [in Georgian].

103. If a spiritual preceptor (confessor) or a priest, or a monk transgresses against the king or episcope, or against the law and religion, he is not to be arrested by anyone, [instead] whatever the charge is, they are to investigate the reason [for the misdeed] thoroughly and impose the penalty accordingly.
104. He, who encroaches upon a monk or a priest and arrests him wilfully, whoever he (the offender) might be – a great man, an *aznauri*, or anyone [beneath], five thousand *tetris* is to be added to the amount of his (the assaulted man's) *siskhli* in accordance with his ancestry.

And if he (the latter) is from a noble family or holds a post, half of the amount of *siskhli* is to be added to his *siskhli*.

105. If a man, higher or lower in rank, disgraces (defames) the name of a churchman's wife by falsely charging her for having a love affair, sixty thousand *tetris* is to be paid above the amount of her *siskhli*.
106. If a *didebuli* abuses the episcope, he should beg his pardon and pay forty thousand *tetris*.
107. If an *aznauri* abuses the episcope, he shall beg his pardon and pay twenty thousand *tetris* as a penalty.
108. If an *aznauri* or a *didebuli* or anyone beneath abuses a priest, he should pay one third of the *siskhli* and should plead mercy on him.
109. If a man beats another man and breaks into his church, he is to pay full *siskhli* according to his ancestry.
110. If he raids another man's fence from inside, half of the *siskhli* is to be charged.
111. If he raids the man's fence from outside, he is to be imposed to pay one third of the *siskhli* and the loot should be returned.
112. If the church belongs to two, three or four, or to the [community of] parishioners, the allotment is determined according to what share each of them holds.
And the one who is guilty of the incident is to pay *sapiro* (penalty for crime), and the parish church is to be compensated by the owners of the community, but they are not required to compensate if they are hostile to each other.
113. If robbers break into the church without the permission of their patron, and they blame him for being aware [of the crime], the patron is to swear under oath in the presence of twenty-four men [to prove his innocence] and they are to believe him, only in this case he is to give the robbers up to them and return the loot, or compensate the damage.
114. If a hostile man robs the church (breaks the door of the church) of his enemy without the knowledge of his patron, he (the latter) is to give him up to the assaulted and whatever they do to him (the robber), he should not be angered at them. The patron of the robber should swear under oath his unawareness of the crime in the presence of twelve men.
And if he does not give the robber up, the latter is to pay five thousand *tetris* and return the loot in full.

115. If a church is attacked, five thousand *tetris* is to be imposed upon them as a *saupatio* (penalty for crime).
116. If a herd [of those places] is driven far away, a sum enough for the ransom of twelve peasants is to be paid as a righteous compensation, *patiji* (punishment, penalty for crime) and *siskhli* is to be paid in addition, and the herd is to be returned.
117. If a man kills another man treacherously, he shall be sentenced to twelve thousand *tetris* above the amount of payment worth his (the victim's) *siskhli*.
118. If he robs the dead, he is to pay twelve thousand *tetris* above the amount of payment worth his *siskhli*.
119. If he swears under oath that the killed man was his enemy, he is sentenced to pay five thousand *tetris*.
120. The penalty for slander is as follows: if a rightful man is calumniated, the penalty is to be multiplied; if slander is caused by enmity, he should take oath and will not be imposed any responsibility.
    If he does not take oath, he is to pay the *siskhli*.
121. Thirty serfs are due as a *saupatio* for bringing disgrace to the place where the icon of Our Saviour is put in defense of our country; twelve peasants are due to the icon of Our Lady, twelve peasants to Saint Archangel, and twelve [more] peasants to other saints : chief confessors, apostles, Saint George, John the Baptist and others.
122. The amount of *siskhli* is doubled for robbing the monks, priests and deacons, and for warriors – not more than that.
    And if any of them is killed, the *siskhli* is to be paid in full.
123. If someone drags out [a person] and robs him, he (the robber) is to pay half of the *siskhli* and return the loot without [being imposed] the *sanakhshiro*.
124. For injuring the eye stealthily, or wounding (*dagersha*) the hand and legs, or marking the face with a scar – [the penalty for each of] these three equals half of the amount of *siskhli*.
125. For the wounds in an imperceptible place, he is to pay the *gershi* (penalty for wounds).
126. If beats someone in hand-to-hand fighting, he (the former) is to pay half of the *siskhli*.
127. If a great man (a noble) threatens unjustly another man [equal in rank], he is to pay ten thousand *tetris*.
128. If a man low in rank threatens his friend [equal in rank], he is to pay five thousand *tetris*.
129. If a man abuses unjustly another man during the campaign, he is to pay four thousand *tetris*.
130. If a man abuses a woman, he is to pay the money sufficient to buy twelve peasants.
    The ancestry of both man and woman should [thoroughly] be investigated.

131. If an unworthy man [low in rank] abuses a noble, his penalty shall be higher.
132. If he unjustly informs on a man to his patron, he is allotted full *siskhli* for treating the man mercilessly.
133. If a man decides to attack another man treacherously, and then changes his mind, or others have him change his mind – he is not to assume any responsibility.
134. If he [still] commits the crime, but God is merciful to him and the man recovers, he is to pay six thousand *tetris* for an attempt on homicide, three thousand *tetris* for [committing] a sin.
135. A man is allotted full *siskhli* if he abducts another man's wife.
136. If a man gives his neighbor away [to a robber] treacherously, half of the penalty is to be paid by the robber and the other half is allotted to the traitor as a *sapatijo*.
137. If a man burglarizes or robs (thieves) another man, his patron is to pay attention to this [to inflict punishment upon him].
    If he fails to make [the culprit]/ return the loot, or if he takes no heed of it, this might mean he was aware of the robbery and the consequent damage, and should pay the compensation [on his own].
138. There is no [penalty in] *siskhli* for robbers and attackers.
139. If a man gives another man a woman [as a wife] and the latter does not marry her [in church], twelve thousand *tetris* is imposed upon him [to be paid to her relatives] and some additional payment in behalf of the church.
140. If a wife is diseased, her husband should not blame her family, as she got diseased while living with her husband. If he leaves her, he should swear under oath by his descendants that hatred was not the reason for divorce, and he is to pay half of the *siskhli*.
    And his wife shall not claim the dowry if they have a child.
141. If the cattle is stolen, whatever the number of the live-stock is, male or female, the owner is to be paid the *saupatio*: two thousand *tetris* [shall be paid] for male, three thousand – for female and the entire cattle is to be returned [to the owner].
    And if the cattle is stolen in the presence of the owner, half of the *siskhli* is to be paid.
142. If a man knocks out a front tooth of another man, he is to pay half of the *siskhli*.
143. If he knocks out his back tooth, one fifth of the *siskhli* is to be paid.
144. If a man's beard is clipped or torn out, he [the abuser] is to pay money worth two *gershis*.
145. If a man reproaches (utters slander about) another man's wife for having been treated disreputably by another man and swears under oath [to confirm his charge], or has the man's wife admit [her guilt], he is not to pay anything.
    Otherwise, he is to pay to the husband.

146. If a man charges another man (with sorcery), he is to pay half of the *siskhli* if the man does not admit it.
147. If an *aznauri* does not compensate another *aznauri* the *siskhli* imposed upon him by the court, he is to pay ten thousand *tetris* above it.
148. If a patron robs [ruins] a *qma*, he is to pay twelve peasant as a compensation.
149. If a *qma* leaves his patron unrightfully, he is to pay a compensation worth twelve peasants.
150. If an *aznauri* kills another *aznauri*, he is to be exiled from his estate for three years, and the estate is to be assigned to his brother in order the family not to be ruined (not to die out); in the fourth year, he is allowed to come back, and the estate is returned to him; and he is to pay the *siskhli*, whether he is *tadzrobili* (belonging to the king's court) or not.
151. If a man injures another man's eye by burning it out, he is to pay twenty thousand *tetris* above the price worth his *siskhli* in accordance with his (the victim's) ancestry, for he suffers from constant forfeiture and mortification, which is worse than death.
152. Therewithal, you are to know that nobody deserves from the king and from the greatest of the men to be injured by burning out the eye, except for the cases when he robs the great *salaro* (treasury), or the church, or steals the herd, or becomes a traitor.
153. If the brothers separate and they are in the possession of serfs, the elder brother gets one peasant as *saukhutseso*, the rest is divided [equally] and all the *monagebi* (gained property) each of them has accumulated on their own, goes with the owner.

    And if the *monagebi* of one brother is reduced and another brother is to be blamed for that, and if it belonged to one brother [the former] only, this *monagebi* is also to be divided [equally between them].
154. If the *didebulis* separate, the best village goes to the elder brother by the right of *saukhutseso* (seniority), the rest is divided among them, and the *monagebi* is to be divided according to the established rule.
155. If the peasants draw apart (separate), the eldest brother is given either the family (main) house, or one vineyard and the largest wine pitcher by the right of *saukhutseso*, the rest is to be divided [among them].
156. If father and son separate, the son should not make any demands of his share, as after his father's death, the *mamuli* (estate) goes to him and nobody has the right to litigate with him [about this *mamuli*], [meanwhile] he is to obtain other *mamuli*, until his father dies.
157. In the case of the adoption of son-in-law, you should know the following: if he is registered [as a son], [a share from] the *mamuli* is allotted to him. When they separate, the *saukhutseso* goes to the patron of the *mamuli*, the rest is divided, and each of them takes his own share, according to what was brought with and what belonged them [in the household] before.

158. If he is not registered, he can take the [only] possessions he has brought with him and obtained from his own *labour*, and whatever they ate and drank should not be mentioned.
159. The *sapiro* (penalty for the felony) and the *sanakhshiro* are to be paid preliminarily: the price of full siskhli is equal to twenty thousand *tetris*, half of the *siskhli* equals ten thousand *tetris*, the *siskhli* for the unwarranted arrest equals five thousand *tetris*; [the judge] is to determine the amount of *siskhli* each of them is to be allotted.
160. The *sapiro*, as instructed by the order, should be imposed preliminarily and judged [in the right order]: the great are imposed with the high, and the small – with the low [penalty]. Accordingly, the *sapiro* in *siskhli* for peasants, *didebulis* and *aznauris* is as follows: thirty thousand, seventy thousand, twelve thousand, seven thousand, and it [the penalty] is determined accordingly [according to their line of descent].
161. Woe to him, whoever he might be, great or small, who kills his brother or any other person by treachery, may he be cursed and anathematized forever in the name of eternal God! And double amount of the siskhli is allotted to him in accordance with the ancestry (status) [of the dead]. And he, who helps (intercedes for him) and patronizes him, may he be cursed and anathematized!
162. If a Christian injures his brother's eye by burning it openly or treacherously, or cuts off one of the parts of his body, he is to pay the full *siskhli* and the *sanakhshiro*. May he and the memory of him be cursed and anathematized in life and death (in heaven or on earth)!
163. A man who dies in the battle, should not be taken off his clothes, except for his *armoury*, neither should he be stripped off his underwear. May those who did it be cursed and anathematized!
164. A man who kills a plunderer, a *mejurmutse* (pirate) or a robber, and it is proved that he (the dead) was not right, and his relatives and mediators demand the *siskhli* as a compensation, may they (the latters) be cursed and anathematized!
165. If a man takes away and kidnaps another man's legitimate wife, full *siskhli* is to be paid according to his (the victim's) ancestry. And the man will be condemned and anathematized in the name of the Lord, and will be judged by the laws of saint apostles!
166. If a man, whatever ancestry he might belong to, kills a priest or a monk or a deacon stealthily or treacherously, or captures and robs them, he is to pay double the amount of *siskhli*. May his body and soul be cursed and anathematized!
167. Whatever a man might steal and [the crime] is evidenced, he will be deprived of both eyes and cut off both hands and legs.
    If the crime was committed not at a *sapatijo* (a respectful place), and [the thief] sold it (the stolen things) out, he must buy it back at the price the buyer

indicates and fully return the loot to the owner. And [above it] he shall be cursed and anathematized!

168. If a man, great or small, breaks into a church or sets it on fire and burns it down openly or stealthily, for whatever the motive might be, self-interest (avidity) or enmity (hostility), or non-payment of the *siskhli* [imposed upon him] or a debt, he will be judged under the laws of saint apostles and holy council! May he be cursed and anathematized! Smaller amount of compensation in *siskhli* is determined as follows: whatever *patiji* (penalty for crime) is set by church, it is to be doubled and the loot is to be compensated in full. Such is the law the man is to be judged by!

169. If a man, [out of revenge] for not being compensated in [*siskhli*], cuts down the vineyard or fruitful trees, or mows down the cornfield, openly or secretly, may he be cursed in heaven and on earth!
If at night a man sets on fire the property of a church: cells, arable lands, *satsekhveli* (a mortar for crushing millet, rice or the like), *marani* (a location for storing wine in special pitchers), or the property of another man, whoever he might be and no matter what the motive is – the hostility or the revenge for not paying the *siskhli*, cursed and anathematized shall he be in heaven and on earth! The *siskhli* and *patiji* is to be imposed according to the reason of the wrong doing and the place of the crime, and should be judged in accordance with the Christian law!

170. If a man, whoever he might be, sets the church and the church property on fire, whatever he might burn down and for whatever deeds or hostility [he might do this], openly or in secret, and his wrongdoing is sufficiently evidenced, he is to pay thirty-two thousand *tetris* as a *patiji*. And our curse is on him! And evil and futile is the memory of him and his body and soul on this earth and in heaven with [the mercy] of almighty God, and he shall be under the laws of the apostles!

171. If a *daundobari* (a hostile) betrayed his patron, the *sapatijo* (penalty for crime) is not imposed upon him, and he is to pay the amount of *siskhli* allotted for a noble of the highest rank.

172. If a man sells another man an ill-natured (untrained) horse and does not tell him that it is faulty, and later on it is revealed, he is to give him the money he has got [for the horse] and pay for the breaking in the horse, and whatever damage it (the horse) might cause, he is to compensate it in full.

173. If a man served another man as a *qma* (serf) zealously and devotedly, and he, well advanced in age, or worn out and weakened as a result of burdensome labor and the wounds he got [there], or for some other reasons, was made to depart (leave his master), that man is to take away what brought with him and one third of whatever he obtained by his own labour [in order not to fall into poverty], as [after his departure] he becomes feeble and wasted (weak).

174. If he has children and they leave with him, their master (memamule) should not let them take what they had not brought [with them].
175. If a woman's husband dies and she, as a widow, endows her property to the church, her children should not prevent her [from doing this].

Glossary

aznauri – (0, 99, 104, 107, 108, 150, 160) squire, nobleman, vassal, owner of an estate.
dagersha – (124) wounding.
daundobari – (171) a hostile, ruthless man, stranger; ant. *mindobili* – people who are interrelated by supporting each other according to feudal custom.
didebuli – (0, 99, 106, 108, 154, 160) noble, a highborn feudal lord, owner of an estate.
episcope – (0, 99, 101/2/3, 106/7) bishop, member of an Episcopalian church.
gershi – (125, 144) wound; penalty for wounding a person.
mamasakhlisi – (100) foreman.
mamuli – (156/7) land estate, hereditary ownership of an estate.
mejurmutse – (164) pirate; plunderer,spoiler.
memamule – (174) hereditary owner of an estate, vassal.
monagebi – (153/4) purchased gained, acquired (not hereditary) property.
patiji – (116, 168, 169) punishment, (170) penalty for crime, for criminal offence.
patron – (99, 113/4, 132, 148, 157, 171) master, lord.
qma – 1. (148, 149) vassal, subordinate; 2. (173) slave, serf usually working on a land.
salaro – (152) treasury, a place where valuables where kept (not for everyday use).
sanakhshiro – (123, 159, 162) a special payment, a warranty for the compensation in siskhli.
sapatijo – 1. (136, 171) penalty for crime; 2. (167) a respectful, important place like a church or a treasury and so on.
sapiro – (112, 159, 160) penalty for crime (or felony).
saukhutseso – (153/4/5/7) an extra share for elder brother from the hereditary property.
saupatio – (115, 121, 141) penalty for crime.
siskhli – (104/8/9, 111/6/7/8, 120, 122/3/4/6, 132/5, 142/3/6/7, 151/9, 160/1/2/4/5/6, 169, 171) blood; punishment, money or property given as a compensation to a person who suffered from a crime, from an offence.
tadzrobili – (150) courtier, squire, vassal of king (patron)
tetri – (105/6/7, 114/5/7/8/9, 134/5/8/9, 140/1, 150/1/9, 170) white; money, silver coin.

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Summary

Key words: legal translations, sources of old Georgian law, criminal law, private law.

The present work is the first English translation of the second additional part of the Law of Aghbugha, which contains a fragment, presumably, of the earliest code of law compiled by King Bagrat Curapalate, which is the oldest monument of Georgian law preserved to our time. The book of law predominantly considers fields of criminal and private law.