

## **About Tacis and GEPLAC**

The Georgian Law Review (GLR) is a publication which is funded by the Tacis Programme through the Georgian-European Policy and Legal Advice Centre (GEPLAC).

Launched by the EC in 1991, the Tacis Programme provides grant financed technical assistance to 13 countries of Eastern Europe and Central Asia (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgystan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan), and mainly aims at enhancing the transition process in these countries.

When Tacis was initiated, technical assistance was a standalone activity, whereas the programme is now part of a complex and evolving relationship with each of the 13 countries concerned. Politicians and officials from the partner countries and the EU meet now on a regular basis. With the implementation of PCAs as well as the EU enlargement process, Tacis also becomes a more strategic instrument in the co-operation process between EU and partner countries.

A new Regulation concerning the provision of assistance to the partner states in Eastern Europe and Central Asia replaces the former legal basis (Council Regulation (EC, Euroatom) No. 1279/96, which expired on 31<sup>st</sup> of December 1999). This new Regulation covers the years 2000-2006 (Council Regulation (EC, Euroatom) No. 99/2000 of 29<sup>th</sup> of December 1999).

The new Regulation is based on an understanding that cooperation is a reciprocal process, encouraging a move from “demand-driven” to “dialogue-driven” programming. More flexibility in the way that Tacis is structured will allow potential technical assistance to be mobilised and implemented according to the capacity of each partner country.

The 2000 Regulation concentrates Tacis activities on fewer objectives:

- institutional, legal and administrative reform;
- private sector and economic development;
- consequences of changes in society, infrastructure networks;
- environmental protection;
- rural economy;
- nuclear safety.

The new Regulation also focuses on projects of sufficient scale (projects of at least 2 million in Russia and Ukraine and 1 million in the other partner countries) and supports the objectives of the PCAs.

GEPLAC was established in 1998 by the Tacis Programme in order to support economic and legal reform in Georgia. Activities under GEPLAC's programme include besides GLR the edition of Georgian Economic Trends (GET), establishment of a library and the provision of economic policy and legal advice to the Parliament and Government of Georgia to support the implementation of the Partnership and Cooperation Agreement between Georgia and the European Communities and its Member States concluded in 1996.

## About Georgian Law Review

This is the tenth edition of Georgian Law Review, which is prepared in Georgian and English languages. It enables legal specialists and other interested persons to become informed on the development of Georgia's legal system and the legal systems of the EU and its Member States. Georgian Law Review is free of charge and also available through the Internet:

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Georgian Law Review aims to encourage the legal reforms currently conducted in Georgia and to promote current Georgian law. Readers may quote any information used provided it is properly acknowledged.

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## INTRODUCTION

Dear Reader,

With this edition of the Georgian Law Review we would like to draw your attention to the results of the Treaty of Nice, which is the latest piece of reform that was carried out to help the European Union adjust to its imminent enlargement. The Treaty of Nice is the result of the Fifth Governmental Conference on Amendments to the EC/EU-Treaties started under the auspices of a Portuguese presidency and finalised at the European Council of Nice on 11<sup>th</sup> of December 2000.

The Governmental Conference concentrated almost exclusively on amendments to the institutional and procedural bases of the European Union in order to help it adjust to the addition of up to 12 states. However, after its rejection by the Republic of Ireland following a public referendum on 7<sup>th</sup> of June 2001 its future is still open to question. It is evident that renegotiation to a certain extent will be necessary to make the Treaty more responsive to the concerns of smaller countries. Nonetheless, the enlargement process definitely requires institutions and procedures that are suitable for a bigger group of Community members. Therefore, the results of the Treaty of Nice remain on the agenda and will maintain its importance during the discussions and negotiations that lie ahead.

The outcome of the negotiations that were held by heads of states and governments during the Governmental Conference 2000 and in particular, the envisaged consequences for decision making within the European Union, are analysed by **Andreas Maurer**, Research Fellow at the Institute for Political Sciences and European Affairs at University of Cologne, Germany, in his introductory essay. He concludes that the Treaty of Nice, like Maastricht and Amsterdam, is a further benchmark of an evolutionary and dynamically constituted process of interstate and supra national policy-making, which is open ended; he emphasises that this Treaty is not suitable for further delay or even prevention of the South-East enlargement.

Further, **Jacob Putkaradze**, Judge of the Constitutional Court of Georgia, provides an overview of Georgian legislation on gratuitous contracts in its contents and historical background. He assesses the reforms of respective provisions of the Civil Code as “grown from national soil” but enriched with legal ideas and experience from foreign, particularly European, legal systems.

**Jemal Gakhokidze**, Deputy Secretary of the National Security Council of Georgia, analyses the impact that Georgia’s geographical location has on its national security. Reviewing the country’s history he draws parallels to the current political situation in order to find solutions to the country’s present security problems. Finally, the essay provides proposals related to state organisation and distribution of political powers and responsibilities, which in the author’s view, may help to efficiently maintain Georgia’s state security. In particular, he addresses the necessity of establishing a cabinet of ministers, delegating an increased power to local self-governing bodies and promoting better relations between Georgia and Russia.

**Dr. Siegfried Lammich**, Head of Research Section at the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg/Breisgau, Germany and **Eliko Tsiklauri-Lammich**, Post-graduate Student at Tbilisi State University, contribute to the discussions that are at present being led in Georgia on whether or not to withdraw illegally obtained property and how to do it. The authors illustrate measures of German criminal law that serve to combat organised crime by withdrawing the property assets obtained by illegal acts. In their conclusion the authors suggest that it is necessary to educate special investigators with a solid knowledge not only in criminal but also in many fields of

private economic law and concentrating not only on legal remedies of criminal law but also introducing respective measures in tax legislation.

**Giorgi Gogiashvili**, a member of the Department of Theory of Law and Constitutional Law at Tbilisi State University, provides analysis of the delimitation of competencies in the federal state. The author focuses on the problems of budgetary federalism and discusses the ways of delimiting financial powers and instruments of the state between the federation, subjects of the federation and local territorial units. With the view of avoiding the confrontation between the central and the regional governments the author considers it reasonable for Georgia to make use of the following model of delimitation of competencies: constitutional law is to determine the exclusive competencies of the territorial units along with the exclusive competence of the central government, while other issues, that are not covered by the exclusive competence of one of the governments, should be assigned to joint government.

The exercise of state control over market behaviour of dominant undertakings is considered by **Ketevan Lapachi**, Deputy Head of the State Anti-monopoly Service of Georgia, as one of the principal activities of competition authorities throughout the world. By comparing the provisions of Georgian competition legislation with that of various countries, she highlights the theoretical and practical problems of state control mechanisms and concludes that the Law of Georgia on Monopolistic Activity and Competition, especially provisions on determination and abuse of dominant position, need further improvements and amendments.

The history of the development of constitutional justice and its role in the principle of separation of powers is discussed by **Prof. Otar Melkadze** from the Department of Theory of Law and Constitutional Law at Tbilisi State University. His proposals for the improvement of the Georgian system of constitutional control are based on deficiencies of the Organic Law of Georgia in the Constitutional Court, as well as on the experiences of different foreign states. The author is particularly concerned with the issues of the selection of judges for the Constitutional Court, not giving the function of preliminary control to the Constitutional Court, the problem of balance of votes for making decisions and other deficiencies regarding the technology of case hearing.

Finally, we would like to draw your attention to the fact that with accomplishment of this 10<sup>th</sup> edition of the Georgian Law Review the Chief Legal Adviser of GEPLAC will leave Georgia after having completed a four years term accompanying Georgia in great events, like the accession to the World Trade Organization and the Council of Europe as well as the implementation of the Partnership and Cooperation Agreement with the European Union. He would like to take this opportunity to give many thanks to Georgia and all Georgian colleagues, project partners and other friends for overwhelming hospitality and tremendous support. At the same the GEPLAC Team would like to express its deep gratitude for restless assistance, sincere friendship and wishes him further success in new challenges.

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October, 2001, Tbilisi

**EFFICIENCY OF DECISION-MAKING AND CAPABILITY TO ACT AFTER NICE:  
THE NEW FIELDS FOR APPLICATION OF MAJORITY DECISIONS\*\***

**1. INTRODUCTION**

The Treaty of Nice is the result of the fifth Governmental Conference on amending the EC/EU Treaties.<sup>1</sup> Unlike the European Single Act of 1987, the Treaty of Maastricht of 1993 and the Treaty of Amsterdam of 1999<sup>2</sup>, the Governmental Conference of 2000 almost exclusively focused on amending the institutional and procedural basics of the European Union in order to prepare it for enlargement by up to 12 new states. With this limiting of the negotiating agenda to a few basic questions regarding the institutional structure of the European Union it was already clear from the very beginning that it would not be as easily possible to combine<sup>3</sup> the negotiations on the allocation of competencies in particular fields of policy with those on institutional concessions in order to more efficiently “fulfil” the rules on competencies, as in Maastricht and Amsterdam loss of power was exchanged for reformed policies.

The mandate for negotiations in Nice was based on a two-tier cascade that was formulated in protocol No. 7 to the Amsterdam Treaty.<sup>4</sup> In a declaration attached to this Protocol the Governments of France, Italy and Belgium expressed the opinion that the Treaty does not correspond to the “necessity to achieve essential progress in strengthening the organs [of the European Communities]”, which is required by the mandate for negotiations. Those three countries<sup>5</sup> further made clear that a total revision focused on institutional issues would be “a necessary precondition for the conclusion of the first round of negotiations on enlargement”<sup>6</sup>. Consequently, in this context they expressed the opinion

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<sup>1</sup> The Treaty which was negotiated by the Heads of States and Chiefs of Government was signed on 26<sup>th</sup> of February 2001 in Nice following a revision of the legal language and is now available to the National Parliaments of the EU Member States for ratification.

<sup>2</sup> To the Treaty of Amsterdam from a standpoint of political sciences see *M. Jopp, A. Maurer, O. Schmuck (edit.)*, Die Europäische Union nach Amsterdam, Analysen und Stellungnahmen zum neuen EU-Vertrag 1998; *J. Monar, W. Wessels (edit.)*, The European Union after the Treaty of Amsterdam, London, 2001; *W. Hummer (edit.)*, Die Europäische Union nach dem Vertrag von Amsterdam, Wien, 1998; *A. Moravcsik, K. Nicolaidis*, Explaining the Treaty of Amsterdam, Interests, Influence, Institutions, in: *Journal of Common Market Studies*, 1 (1999), pp. 59-85; *M. Pollack*, Delegation, Agency and Agenda Setting in the Treaty of Amsterdam, *European Integration online Papers (EIoP)* Vol. 3 (1999) No. 6; <http://eiop.or.at/eiop/texte/1999-006a.htm>.

<sup>3</sup> To the concept with further references see: *D. Schumann*, Die Bedeutung politikfeldübergreifender Koppelgeschäfte für die europäische Energiewirtschaft: Das Beispiel der Liberalisierung des Elektrizitätsbinnenmarktes, Diskussionspapiere, Ruhr-Universität Bochum, Nr. 01-2, Bochum, 2001.

<sup>4</sup> Before admission of the next – 16<sup>th</sup> – Member to the EU the number of the members of the Commission should have been limited to one person per state, if at the same time the balancing of the casting of votes in the Council of the European Union could have been adjusted (Article 1 of the Protocol). However, a comprehensive revision of the institutional basics of the European Union was only planned for one year before the accession of the 21<sup>st</sup> member state through a new governmental conference (Article 2 of the Protocol).

<sup>5</sup> Originally the Finnish Government intended to support the declaration as well. In its decision about the Treaty of Amsterdam from 19<sup>th</sup> of November 1996 the European Parliament gave its consent to the declaration of the three countries and demanded to adjust the balancing of votes and the number of the Commissioners before each enlargement, and to limit the fields of application for unanimous decisions to decisions related to the constitutional structure of the EU.

<sup>6</sup> See the evaluation of the results of Amsterdam in: *Integration*, 4 (1977) and in *Wirtschaftsdienst*, Nr. 1997/VII, pp. 375-385.

“that a considerable extension of the principle of qualified majority voting is an essential element to be considered”.

Against the background of the progress that was achieved during the negotiations for enlargement and in order to facilitate consensus among the 15 Member States, the European Council of Cologne from June 1999 focused on a “small solution” for the “leftovers”<sup>7</sup> of Amsterdam (as outlined in the Protocol and in a related declaration) to be tackled by the Governmental Conference that was to be held by the end of 2000 under a French Council-Presidency. According to the mandate that was agreed upon in 1999 in Helsinki, the Governmental Conference 2000 was to review “the size and composition of the European Commission, the balancing of vote casting in the Council, the question of a possible extension of qualified majority voting in the Council, as well as further necessary amendments to the Treaty, as and when they appeared in the context of the implementation of the Treaty of Amsterdam or derived from the above-mentioned problems”. Of central interest at the governmental conference were three topics that had found little or no agreement at the conclusion of the negotiations of the Treaty of Amsterdam.

## 2. NEEDS FOR ACTION AND OPTIONS FOR ACTION IN AN ENLARGING EUROPEAN UNION

The objective of the Governmental Conference 2000 led to a simple question: should and can the European Union enter the 21<sup>st</sup> century as an ad-hoc coalition of organised particular interests or as a structured organisation for the representation and execution of “European Community interests”? The respective debate<sup>8</sup> that was initiated to optimise the institutional procedural design of “EU XXL”<sup>9</sup> was not to be understood as an exaggerated exposure addressed to Brussels. In view of a dynamic cross-border community, from which it is expected to act analogous to a state in almost all areas of public life, rules must be determined providing a unique identity for the EU and its institutional components within the international system. In representation of many others *Joschka Fischer* in his Berlin-speech emphasised areas of conflict that were intensively and controversially discussed as central moving targets in journalism and science.<sup>10</sup>

At first glance, the question of enlargement was dominated by a concentration on the processes of economic transformation and adjustment, or approximation. No doubt, the discussion referred to the needs and options for reform of the policies of distribution within the existing agreed framework of the European Communities, coupled with a view on the institutional and procedural legal aspects of related reforms where the question of procedural rules in the fields of finance, budget, and policies of cohesion of the EU/EC appear. Finally, it makes a difference whether the basic regulations on financially intensive promotional programs have to be adopted unanimously, with a majority, in “close cooperation”, participation in decision-making and procedures of approval, or to simply follow the standard procedures of consultation of the European Parliament. Closely connected with enlargement questions was the discussion of whether institutional and procedural adjustments are necessary in order to secure or to improve the capacity of the European Union to implement policies that are democratic, transparent and efficient. In relation to the surrounding international environment the challenges of the EU have increased, rather than decreased. However, with the end of the East-West

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<sup>7</sup> See *S. Lehne*, *Institutionenreform 2000*, in: *Integration*, 4 (1999), pp. 221-230; *B. Kohler-Koch*, *regieren in der Europäischen Union. Auf der Suche nach demokratischer Legitimität* in: *Aus Politik und Zeitgeschichte*, B 6/2000, pp. 30-38.

<sup>8</sup> See *O. de Schutter*, *N. Lebossis*, *J. Paterson* (edit.), *Governance in the European Union*, Luxembourg, 2001.

<sup>9</sup> See *A. Maurer*, *J. Mittag*, *Zur Reform der Europäischen Union*, in: *W. Wozke* (edit.), *Internationale Organisationen in der Reform*, Schwabach/Ts. 1999, pp. 57-72.

<sup>10</sup> See *J. Fischer*, *Vom Staatenverbund zur Föderation – Gedanken über die Finalität der europäischen Integration*, Rede in der Humboldt-Universität, Berlin, 12th of May 2000, Redemanuskript, pp. 3-5; see as well: *Integration* 3 (2000), pp. 149-197 and *C. Joerges*, *Y. Meny*, *J. Weiler* (edit.), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*, Florence, 2000.

confrontation, one of the “legitimizing-side-scenes” of the unification of Europe was lost. Scenarios of conflict and threat have replaced that, such as regional crisis and civil and cessation wars on the European continent, as well as in other regions outside Europe, where the European Communities/EU have contact, at least in terms of trade policy. In addition, the globalisation of the production of goods, services and risks, oligarchic tendencies in competition in the high technology sector and the world-wide competition of economic areas challenge the capacity of the European Union to act and to create. Therefore, during its negotiations, the governmental conference focused on those parts of the Treaty related to social and migration rights of third country citizens as well as the area of foreign trade policy, including securing efficiency of the procedural rules of the common foreign and security policy, with a specific interest in the areas of freedom, security and law as well as the field of judicial cooperation in civil and criminal matters and international aspects of European environmental policy.

### 3. INSTITUTIONAL NEEDS FOR REFORM AND OPTIONS FOR REFORM

The agreed existing structures of the EC/EU to deliberate and to take decisions were based on the logic of the Rome Treaties of 1957 and its six members, which acted in a relatively limited field of competencies and with wide common interests in the framework of the East-West conflict.

Options for actions that are related to specific institutions and fields of policy and respective opportunities for an efficient creation of policy within the legal community of the EC/EU should have followed all authorisations to act that are explicitly mentioned in the Treaty. The Treaty of Amsterdam, enacted in May 1999, specifically mentions a total of 222 authorisations to act with relevant rules for procedures, [i.e. rules for casting votes within the Council, rules for the functions of the Commission, and the participatory rights of the European Parliament, the Economic and Social Committee, the Committee of the Regions and other committees (Economic and Financial Committee, Occupational Committee, etc.)]. In 105 cases it was regulated that the Council may decide with the qualified majority of the balanced votes. However, even following the conclusion of the Treaty of Amsterdam, the Council was still forced to decide on 91 cases unanimously. Not only the cultural policy, the law on migration and the access to independent economic activities were decided unanimously, but also most of the decisions relating to the home and justice policy, common foreign and security policy as well as the trade policy in the fields of services and protection of intellectual properties. Furthermore, the heads of states and chiefs of governments constituted the risk of further self-blockades, which could show negative affects in the sense of “output legitimation”<sup>11</sup> of the European Community in relation to the citizens, and which could be interpreted and efficiently abused as a structural weakness to act against third states and organisations (for instance in the framework of the WTO).

In deference to the rules on unanimity, the possibility of majority decisions reflects the awareness and necessity of the member states to renounce national sovereignty in related policy fields permanently and to implement “the adopted legal acts also as a defeated minority – possibly against the will of the national parliament’s majority – in order to secure the capacity to act and to the efficiency of acting.”<sup>12</sup> The experience of an effective usage of qualified majority rules in the council indicate that the extension of the fields of application for majority decisions do not lead to an increase of decisions on the basis of such procedure.<sup>13</sup> In fact, majority decision-making functions more as a Damocles sword,

<sup>11</sup>See *F. Scharpf*, *Demokratiethorie zwischen Utopie und Anpassung*, Kronberg/Ts., 1975; *B. Westle*, *Politische Legitimität – Theorien, Konzepte, empirische Befunde*, Baden-Baden, 1989; *W. Wessels*, *Staat und (westeuropäische) Integration. Die Fusionsthese*, in: *M. Kreile (edit.)*, *Die Integration Europas*, PVS-Sonderheft 23 (1992), pp. 45-47.

<sup>12</sup>See *A. Maurer*, *Reformziel Effizienzsteigerung und Demokratisierung – Die Weiterentwicklung der Entscheidungsmechanismen*, in: *M. Jopp, O. Schmuck (edit.)*, *Die Reform der Europäischen Union*, Bonn, 1996, p. 32.

<sup>13</sup>See *A. Maurer, W. Wessels*, *The EU matters: Structuring self-made offers and demands*, in: *W. Wessels, A. Maurer, J. Mittag (edit.)*, *Fifteen into One ? The European Union and its Member States*, MUP 2001 (in publication).

which is sweeping above the Council to increase the probability of decision-making in the “shadow of voting”.<sup>14</sup> The extension of the fields for application of decision-making by a qualified majority was already made in the last three governmental conferences in 1986/1987, 1991/1993 and 1996/1999, and was declared as a goal of the majority of the member states.<sup>15</sup> To emphasise this principle as much as possible would be to secure the capacity to act as an enlarged union, because it could hardly be imagined how 27 states could “only” decide unanimously on distribution and regulation policies, which due to increasing socio-economic differences and resulting differences in interest, would lead to a tendency towards asymmetric distribution of costs and burden.

#### 4. “FIFTEEN TIMES SALADE NICOISE” – LINES AND STRATEGIES OF NEGOTIATIONS

In order to improve upon the poor outcome of the Treaty of Amsterdam,<sup>16</sup> the Commission and the German Federal Government first referred to an approach, which basically intended to transpose all the competencies of decision-making defined under the Amsterdam Treaty as unanimous decision-making, into decision making with a qualified majority. Exemptions to this rule were agreed upon according to a concrete catalogue of criteria (“rule – exemption – approach”). The principle of unanimity should have been applied under the following circumstances:

- Decisions that are subject to ratification by the Member States;
- Decisions with constitutional character that do not require an amendment of the Treaty, for example institutional questions that concern the relative balance of power between the states (e.g. the question of languages, Article 219 EC Treaty), or decisions related to the authorisation of the EU bodies to act in particular areas of policy according to Article 308 EC Treaty;
- Decisions in the area of taxation and social security that are not related to the smooth functioning of the internal market;
- Decisions related to military policy and defence.

Contrary to this strategy, another strategy of organised analysis of particular cases already prevailed under the Finnish Council-presidency 1999<sup>17</sup>, according to which any proceedings from the Treaty of Amsterdam must be reviewed for areas of decision making requiring a qualified majority. These cases should coincide with the following criteria:

- Cases related to the European Internal Market where procedures for decision-making could be converted into decision making with a qualified majority without a necessity to amend the substantial provisions;
- Authorisations for action, which cannot be fully transferred into decision making with a qualified majority due to concerns and particular interests of Member States;
- Basic principles for actions in the areas of freedom, security and law that have been incorporated into the EC Treaty;

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<sup>14</sup> See to the concept of the majority vote: *F. Scharpf*, *Games Real Actors Play, Actor-Centred Institutionalism in Policy Research*, Boulder 1997, pp. 191-193.

<sup>15</sup> See *F. Dehousse*, *Amsterdam - The Making of a Treaty*, London, 1999; *A. Duff*, *The Treaty of Amsterdam. Text and Commentary*, London, 1997; *B. MacDonagh*, *Original Sin in a Brave New World. An Account of the Negotiation of the Treaty of Amsterdam*. Dublin, Institute of European Affairs, 1998; *M. Petite*, *The Treaty of Amsterdam*, Harvard Jean Monnet Chair Working Papers Series No. 2/98, <http://www.law.harvard.edu/Programs/Jean-Monnet/papers/98&/98-2.html>.

<sup>16</sup> Finally the Heads of States and Chiefs of Governments agreed in Amsterdam four fields of unanimity which were converted into decision-making with qualified majority, see: *A. Maurer*, *Die institutionellen Reformen: Entscheidungseffizienz und Demokratie*, in: *Jopp, Maurer, Schmuck* (1998), a.a.O.S, pp. 49-54.

- Rules on assignment and appointment of representatives of particular EU institutions;
- “Institutional anomalies” i.e. rules of the Treaty which are already made subject to the procedure of co-decision making that are still subject to the principle of unanimity, which is obligatory for decision-making within the Council.

Following the first sessions of the Governmental Conference, which occurred on the level of personal representatives, the idea of subjecting the rules of the Treaty to review in each particular case, according to the above mentioned criteria, led to the identification of 25 areas of policy in which procedures for decision-making should be converted into decision making with a qualified majority. In addition, by the end of April 2000, the Portuguese Presidency was able to address concrete proposals for the formulation of Articles 93 (fiscal harmonisation), 42 (social security), 137 and 144 (social policy), 175 (environmental policy) and a new Article 188 bis of the EC Treaty on financial aspects of development/cooperation where aspects relevant for unanimous decision making were extracted or at least formulated in a more precise manner and were segregated from the rules of qualified decision-making.<sup>18</sup>

However, the approach for negotiations pursued by the Portuguese Presidency in the Council was also characterised by the fact that the criteria for review were heavily oriented on a balance of interests between the Member States, rather than towards abstract criteria seeking to secure the internal and external capacity of the Union to act, which is expected to increase in its strategic importance, in view of the envisaged EU enlargement. The multitude of reservations of the Member States to sacrifice “national sensitivity” options for a veto required the review of the mentioned particular cases<sup>19</sup>.

Out of the total 76 EC- and 15 EU-rules of agreement, which are subject to the unanimity decision-making laws under the Amsterdam Treaty, by December 2000, 49 were already made subject to negotiations,<sup>20</sup> 31 of those made under the French Council-presidency. The discussions became increasingly tense in November at the 18<sup>th</sup> meeting of the Representatives.<sup>21</sup>

In the area of Space for Freedom, Security and Law, the delegates did not raise any principal objections against the movement to majority decisions in respect to Article 65 EC Treaty (Juridical Cooperation in Civil Law Matters) and Article 66 EC Treaty (Cooperation between Government Offices). The representatives of Germany and France explicitly approved as well. However, Sweden demanded, with respect to Article 65 of the EC Treaty, to delete the section on Family Law. With respect to both core-articles 62 and 63 of the EC Treaty (policy on visa, external border regulations, internal border regulations, asylum, refugee and emigration policy), France insisted on the principle of anonymity, and the delegates that participated in those negotiations initiated a declaration to the

<sup>17</sup> See Presidency Paper: Efficient Institutions after Enlargement. Options for the Intergovernmental Conference, Helsinki (Dok. No. 13636/99), 7<sup>th</sup> of December 1999, p. 5; as well as in this context the remark of the Portuguese Presidency: Question of a possible extension of casting of votes with a qualified majority.

<sup>18</sup> See Presidency Note: Possible Extension of QMV, CONFER 4737/00, from 20<sup>th</sup> of April 2000.

<sup>19</sup> Concerning the reactions of the delegations of the Member States with regard to the proposals of the Portuguese Presidency: Agence Europe No. 7710 from 5<sup>th</sup> of May 2000. Opposition – for different reasons – by Member States to the Presidency’s suggestions for extension of a qualified majority (especially concerning taxation and structural funds).

<sup>20</sup> See Presidency Note, Extension of decision-making with a qualified majority, CONFER 4753/00, 3<sup>rd</sup> of July 2000 31 authorisations to this act were identified for a complete move to decision making with a qualified majority as well as 8 provisions with regard to which decision making with a majority should only be applied in regard to a few aspects of the respective provisions that provide authorisations to act. The list was extended in August to 43 (CONFER 4767/00 from 29<sup>th</sup> of August 2000), in September to 46 (CONFER 47790/00 from 14<sup>th</sup> of September 2000 and CONFER 4776/99 from 28<sup>th</sup> of September 2000) provisions of the Treaty. The synthesis of the consultations from 1<sup>st</sup> of December 2000 (CONFER 4815/2000) contains 49 provisions for transfer into decision making with a qualified majority.

<sup>21</sup> The following assessments refer to oral statements of three permanent representatives and of one state secretary who participated in the governmental conference.

Treaty, which should have expressed that in 2004, under certain circumstances, the Council should move to a decision making process with a qualified majority.

In the field of social policy, during October 2000, a far-reaching approval of the Presidency for Article 137 EC treaty was recognisable, which aimed at a partial move to majority decision-making. However, it remained under dispute whether or not interests should be shifted to majority decision making, in respect to the legal acts related to the representation and collective execution of employers and employees, because not only Great Britain but also Spain, Portugal, Ireland and Germany voted in favour of keeping the unanimity decision. Additionally, Great Britain and Denmark rejected the introduction of decision-making based on a qualified majority with respect to Article 42 EC Treaty (Social Security in the context of execution of the freedom of movement). Similar to the case of Space of Freedom, Security and Law, a strategy for negotiations was orientated on the analysis of a particular case that led to the loss of a coherent approach for reform in favour of a “pick-and-choose” mode, by which every competency for action indicated in the Treaty (in bulleted points), would have only been made subject to review from a national perspective.

In the field of tax policy (Article 93 EC Treaty), the British Delegation also declared its principle rejection of every move toward majority decision-making, making it more than clear that attempts of the Presidency to revise positions introducing amendments to the texts would be condemned to fail. Luxemburg and Ireland were hidden behind this British blockade, as well as Spain, Portugal and Sweden, which were considered “safe” partners of a coalition with Great Britain. In opposition to this Italy, Belgium, France, Finland and Germany, the Commission, as well as the European Parliament (which did not participate in the conference) declared interest in a more ambitious approach.

Particularly under dispute was the revision of the provisions on decision-making in the area of a common trade policy (Article 133 EC Treaty). In November the Commission distributed a proposal for a compromise, which was based on a complete integration of the areas of services, intellectual property and investment with common trade policy and which was based on a decision-making process with a qualified majority.

TABLE NO. 1

Options for amendment of Art. 133 ECT	Support from
Original proposal of the Commission	European Commission, Italy, Belgium, Luxembourg, Finland, the Netherlands, European Parliament
Proposal of the Commission with a negative list (isolation of areas for unanimity decisions)	European Commission, Italy, the Netherlands, Belgium, Finland, European Parliament
“Option 1 with braces” Compromise forwarded by the Commission	European Commission, Ireland, Portugal, Austria, Great Britain and Denmark
Option 2 of the Presidency (positive list: isolation of areas for qualified majority)	Spain, France
Transition to qualified majority decisions	Germany, Italy, Belgium, Finland
<i>Piris</i> Proposal (Legal Adviser of the Council) for the protocol with procedural rules for WTO	Great Britain

In respect to that, limitations were proposed concerning content and procedures and it was foreseen that for specific cases the establishment of a security network would have allowed the Council to

amend the mandate for negotiations, upon the initiative of the Commission, on the basis of unanimity. The original proposal of the Commission for a compromise envisioned a complete integration without any exemptions of those three areas into the trade policy, which were already under dispute in Amsterdam and thus withdrawn from the Commission itself, so that delegations of the Member States - freed from the conscience of the "keeper of the Treaty" - were in a position to address proposals for distribution of institutional and procedural competencies on different levels. One month before the concluding round on the level of the Head of States and Chief of Governments, six different basic options were lying on the table for negotiations:<sup>22</sup>

At an advanced stage of negotiations of Art. 133 ECT the Presidency admitted numerous different options. Thus, France did not respect one of the essential functions of the Presidency in the Council: the accumulation of negotiations towards final options that could be discussed conclusively. Because of this "organised anarchy" of positions in the end it was impossible to reach a satisfactory agreement at the final conference. The final proposal that was forwarded by the Finnish delegation<sup>23</sup> took into consideration the French concerns related to a too-far reaching "supra-nationalisation" of trade policy in the areas under dispute.

With that, the Presidency accepted an advanced stage of negotiations a number of different options. Thus, France did not respect one of the essential functions of the Council of the Presidency; the culmination of negotiations towards a final option. With this "organised anarchy" of positions, no satisfactory agreement at the final conference was possible. The draft text that was finally provided by the Finnish delegation included the French concerns toward a too far-reaching "supra-nationalisation" of trade policy in the areas under dispute.

## 5. RESULTS: CAPACITY TO ACT "IN THE SHADOW OF UNCERTAINTY"

The results of the Nice conference finally lead to 31 areas which will be transferred into decision-making by a qualified majority after the enforcement of the Treaty. From that, nine of those articles concern rules on appointment and approvals of agenda. Additionally, seven authorisations in the Treaty call for the EC/EU to act in respect to decision-making, using a qualified majority under the following conditions:

Article 67 EC Treaty on the procedures of the policy on asylum requires for the introduction of majority-decisions and co-decision procedures under the European Parliament framework agreements of the Council which are to be decided earlier with unanimity. In other fields of immigration policy a majority decision-making process will be introduced only from 1<sup>st</sup> of May 2004. In Articles 161 EC Treaty on structural funds and the Article 279 EC Treaty on the financial order of the European Community, the transitional period will remain in effect until 1<sup>st</sup> of January 2007<sup>24</sup> and thus, - in view of the decisions for the aid period 2007-2013 that were already decided upon, in fact until 2013.

The quality of an enlarged European Union to act in an international environment<sup>25</sup> has been improved upon with the possibility to decide using a qualified majority as a common policy "at the conclusion of

<sup>22</sup> See in this respect CONFER 4776/00 from 29<sup>th</sup> of September 2000; CONFER 4800/00 from 16<sup>th</sup> of November 2000; with respect to the WTO-expertise the expertise of the legal advisers: SN 2705/00 from 10<sup>th</sup> of May 2000 and SN 4849/00 from 25<sup>th</sup> of October 2000 as well as CONFER 4753/00 from 3<sup>rd</sup> July 2000.

<sup>23</sup> See CONFER 4818/00 from 8<sup>th</sup> of December 2000.

<sup>24</sup> See the Memorandum of the Government of the Federal Republic of Germany to the Treaty of Nice: Memorandum to the Treaty of Nice from 26<sup>th</sup> of February 2001, Berlin, 2001.

<sup>25</sup> See *H. Maull*, Europa als Weltmacht? Perspektive für die gemeinsame Außen- und Sicherheitspolitik, in: *T. Jäger, M. Piepenschneider* (edit.), Europa 2020, Szenarien politischer Entwicklung, Opladen, 1997, pp. 81-95; *W. Wessels*, Die Europäische Union als Ordnungsfaktor, in: *K. Kaiser, H. Schwarz* (edit.), Weltpolitik im neuen Jahrhundert, Bonn, 2000, p. 575-590.

agreements concerning trade in services and trade-related aspects of intellectual property” (Article 133, Par. 5 EC Treaty). On the other hand, “agreements in the area of trade in cultural and audio-visual services, which fall under the area of education as well as social security and healthcare, are subject to a mixed competence of the Community and its Member States” (Article 133, Par. 6, sent. 2 EC Treaty). Consequently, these are further subject to the principle of unanimity. With regard to questions related to the trade in intellectual property (patents, copyrights, trademarks) only an opening clause in favour of majority decisions has been stipulated, which requires an unanimous decision by the Council (Article 133, Par. 7 EC Treaty). These provisions are likely to weaken the central position of the European Commission as an international negotiating partner, if particular EU Member States take advantage of the exemptions from the majority principle as a consequence of national reservations.

TABLE NO. 2

Participation of European Parliament	Unanimity		Qualified Majority		Simple Majority		Special Majority		Sum	
		%		%		%		%		%
Consultation	38 EC 4 EU	18,0 9,30	29 EC 1 EU	13,74 2,32	2 EC 1 EU	0,95 2,32	2 EC 1 EU	0,95 2,32	71 EC 7 EU	33,65 16,28
Co-operation	0	0	4 EC	1,89	0	0	0	0	4 EC	1,89
Co-decision	4 EC	1,89	41 EC	19,43	0	0	0	0	45 EC	21,33
Assent	6 EC 1 EU	2,84 2,32	4 EC	1,89	0	0	5 EU	11,63	10 EC 6 EU	4,74 13,95
Information	0	0	9 EC	4,26	0	0	1 EC 3 EU	0,47 6,97	10 EC 3 EU	4,74 6,98
No Participation	20 EC 9 EU	9,47 20,93	41 EC 8 EU	19,43 18,6	5 EC 4 EU	2,37 9,30	7 EC 6 EU	3,32 13,95	71 EC 27 EU	33,65 62,79
Sum	68 EC 14 EU	32,23 32,56	128 EC 9 EU	60,66 20,93	7 EC 5 EU	3,32 11,63	8 EC 15 EU	3,79 34,88	211EC 43 EU	

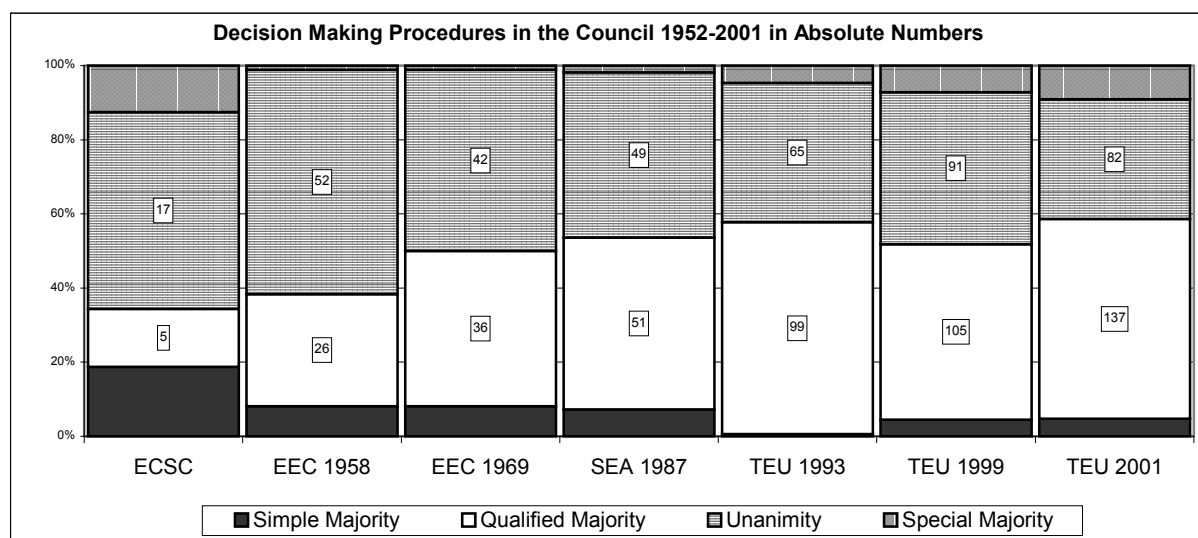
Source: A. Maurer, *Der Vertrag von Nizza - Eine Bewertung im Lichte neoinstitutionalistischer Theorie - modelle*, Köln 2001. Estimations are made on the grounds of the draft Treaty of January 30, 2001. The figures reflect procedural authorisations, which shall be enacted after the enforcement of the Treaty.

However, a complete overview on the extension of the field of an application for majority decisions clarifies the trend after Nice, at least in terms of quantity, of a continuous reduction of unanimity requirements, notable since 1958 has been continued (see table No.3). In Amsterdam numerous competencies for actions were established – first of all in the field of justice and home policy – where the “masters of the agreements” only established secondary law competencies with unanimity. In Nice, a partially successful attempt was made to extend qualified majority decisions step-by-step, against a stronger fragmentation of already existing “business rules”.

Remarkable is the relatively high amount of new majority decisions with regard to appointments. To analyse how much of this is “empty talk” is irrelevant. The introduction of majority decisions in these areas is to be understood first of all as a “door handle” for future package solutions. The occupation of the post of a General Secretary or members of the Audit Office, concerns the question of the representation of Member States in EU bodies – staff-related questions are not treated “by the way” in the Council of the European Union. It could be imagined that in a European Union with 27 states, the increasing national staff needs must be off-set against the readiness for compromise in other questions related to specific policy fields.

In the long run, as the Commission will have a larger staff available<sup>26</sup>, the provisions on appointment procedures and internal working structures will be reformed in the EC Treaty. These changes will take effect 1<sup>st</sup> of January 2005.<sup>27</sup> The question of an indirect legitimisation of the Commission by the European Parliament, which is closely related to the reform of the future working procedure of the Commission, is dealt with in Article 214 EC Treaty related to appointment procedures, which has been amended upon the initiative of Belgium. This provision stipulates that the Council may appoint the President with a qualified majority and the European Parliament is obliged to give its consent. In a second step, the Council, in cooperation with the appointed President, should create a list of candidates for the Commission. For this, again, the consent of the Parliament is necessary, whereby it is likely that the European Parliament will further apply its already twice-conducted procedure of individual candidate hearings. Only after consent of the European Parliament is granted will the Council appoint the Commission with a qualified majority. These procedural rules are the fundamental breach of the institutional balance between Commission, Council and the European Parliament as a consequence of a "significant reduction of intergovernmental elements"<sup>28</sup> in one of the key provisions of a multilevel system oriented on a dynamic differentiation of institutions and policies.

TABLE NO. 3



Source: A. Maurer: Entscheidungseffizienz und Handlungsfähigkeit nach Nizza: die neuen Anwendungsfelder für Mehrheitsentscheidungen, in: *Integration* 2/2001, S. 133-145.

## 6. CONCLUSIONS

Overall, the extension of the field of application of decision-making with qualified majority lagged behind the general targeted objectives of all those who participated in the negotiations. As for the complaint that states "A" or the group of states "B" are singly responsible is not true. In fact, the

<sup>26</sup> See the extensive contribution of J. Monar in *Integration* 2001, No. 1.

<sup>27</sup> Art. 27 EC Treaty is strengthening the role of the President of the Commission who can decide on the areas of responsibility of the Commissioners, propose the vice-presidents and their tasks to the assembly and can appoint them. An introduction of different ranking Commissioners could be envisioned, whereby the Commission, rather than the Member States be responsible for their levels.

<sup>28</sup> See A. Krekelberg, *Der Vertrag von Nizza – Grundlage für mehr Handlungsfähigkeit und Legitimität*, in: *Integration* 2 (2001), pp. 223-229.

governmental conference was not dominated by scenarios for conflict in which solid blocks of proponents for integration and proponents of status quo were acting, but by the existence of different primary interests that were changing due to the specific policy environment. In addition, an evident segmentation of procedural authorisations in the area of trade policy and the space of freedom, security of law, reflects two newer trends of the development of the European Union after Maastricht:

- Apparently, the question of a more or less of “integration” is no longer on the agenda of the participants of the governmental conferences. Instead, competency norms are plucked to pieces so that they can consider developments of policy and particular cases, which were not predictable during the governmental conference;
- The legitimate actors for decisions assess the evaluation criteria for institutional optimisation of the European Union increasingly as unilateral; a superior target perspective for the capacity of the European Union to act is increasingly rejected in favour of consciously articulated national interests.

As a result, all participants can assess the results of negotiations as positive because important partial aspects of their objectives for reforms are considered and analysed according to a non-agreed type measure. The outcome of “composed reforms” such as these, however, loses credibility in view of the citizens, other states and organisations in the long run, when each national interpretation of the capacity to act on behalf of the Union is used rather than made subject of dispute and the Treaty itself does no longer provide any coherent target objectives and criteria for evaluation.

The Treaty of Nice was subject to severe criticism. Thus it is placed in line with the list of institutional reforms conducted since the European Single Act. These agreements at first were blamed as being setbacks, minimal results or otherwise not acceptable. Only in the course of their implementation did the opportunities that these agreements provided to those who participated in the process of decision-making become evident. Consequently, nothing speaks against the assumption that in the future, the reforms of Nice will be evaluated in five or ten years as a positive push for further integration.

An essential partial result of the Treaty of Nice included the “Declaration on the future of the European Union”, according to which already in December 2001, on the European Council of Laeken/Brussels the concrete procedure for preparation of a governmental conference in 2004 shall be agreed upon. It must also be mentioned that the voting rights and European Parliament seats fixed in the Protocol on the Enlargement of the European Union will again be proposed as part of the agenda of the post-Nice process, and the results of the Protocol will enter into force in June 2004 (European Parliament) and January 2005 (Council and Commission), respectively. As voting rights and seats in the European Parliament are connected with the readiness to move to majority decisions, it is possible that the next revision of the Treaty will again make the application of unanimity requirements a subject of discussion.

The order of the European Union, which is construed as a poly-centric<sup>29</sup> and poly-archaic<sup>30</sup> multi-level-system, since Nice continues to be confronted with unpredictable needs and latitude for action due to internal and external influences.<sup>31</sup> The Treaties constituting the European Union are in this context,

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<sup>29</sup> See *P. Schmitter*, *Imaging the Future of the Euro-Polity with the Help of New Concepts*, in: *G. Marksi, F. Scharpf, P. Schmitter, W. Streek*, *Governance in the European Union*, London, 1996, p. 132.

<sup>30</sup> See *F. Pfetsch*, *Negotiating the European Union: A Negotiation-Network Approach*, in: *International Negotiation*, 3 (1998), pp. 293-317, pp. 295-301. See *H. Milner*, *Interests, Institutions, and Information: Domestic Politics and International Relations*, Princeton, 1997 and *J. Cohen, C. Sabel*, *Directly Deliberative Polyarchy*, unpublished paper, Columbia Law School, 1999.

<sup>31</sup> *A. Maurer*, *Die institutionelle Ordnung einer größeren Europäischen Union – Optionen zur Wahrung der Handlungsfähigkeit*, in *Barbara Lippert* (edit.), *Osterweiterung der Europäischen Union – die doppelte Reifeprüfung*, Bonn, 2000, p. 32.

indicators for a constitutionally structured community system that – in respect to its authorisations to act that are sanctioned by primary law, its actual application of competencies, its institutions and its policy area related regulations – is not arriving at a *finalité politique* that is agreed upon by all partners. The Treaty of Nice is like Maastricht and Amsterdam - a further benchmark of an evolutionary and dynamically constituted process of interstate and supra-national policy-making<sup>32</sup>, which still has an open end. As a vehicle for further delay or even prevention of the South-East enlargement, it is definitely not suitable.

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<sup>32</sup> The notion “European Union as a process” goes back to the activities of a working team in the Centre for interdisciplinary Research Bielefeld, which from 1973 until 1980 under leadership of *H. von der Groeben* and *H. Möller* published six studies to the “opportunities and limits of a European Union”, *H. von der Groeben, H. Möller (edit.)*, Die Europäische Union als Prozeß.

## GRATUITOUS CONTRACTS IN GEORGIAN LAW\*\*

### 1. INTRODUCTION

From a theoretical point of view, various classifications of contracts are recognised in the civil law. In this respect, Georgian civil law is no exception either. The classification of contracts is a broad field and the subject of separate, independent discussion. Generally, and for the purposes of this article, it is enough to say that contracts, depending on their characteristics, can mainly be classified into unilateral and bilateral (multilateral), consensual and real, compensated and gratuitous contracts. The author's interest in the present article is limited only to the group of gratuitous contracts.

### 2. GRATUITOUSNESS

Usually contracts are of the "compensated" variety. Under a compensated contract, it is in return for the performance of one party that the other party should receive some payment. For this reason, a compensated transaction is called "reciprocal" in the legal literature. Conversely, a gratuitous transaction is titled as "non-reciprocal".

There are contracts that are only compensated. Such are for instance sales and rental contracts. In accordance with Article 477 of the new Civil Code of Georgia<sup>1</sup>, "under a sales contract, the seller shall transfer to the buyer the right to ownership on the property, the documents associated therewith and shall deliver the goods". With this complies the buyer's reciprocal obligation "to pay the seller the agreed price and accept the purchased property". Moreover, according to Article 531 of the Civil Code, under the rental contract a lessor is obliged to transfer a thing to a lessee for use for a definite time-period. To this obligation of a lessor corresponds a lessee's reciprocal obligation - to pay the contract-fixed rental to the counterparty.

In gratuitous contracts, one party's action is performed without reciprocal payment from its counterparty. To this group of contracts belong gift and lend. These two contracts in their essence are gratuitous unexceptionally. The characteristics of gratuitous contracts under the Georgian law are discussed below using the examples of gift and lend.

Thus, in terms of being compensated or gratuitous, sale and rent on the one hand and gift and loan on the other are groups of contracts that are sharply distinguished from each other. Gratuitous sale and rent or, on the contrary, compensated gift and lend are never possible. Among these contracts, according to modern legislation, the first couple can be only compensated and the second will always be gratuitous.

By contrast, the contract of storage, depending on the terms agreed by the parties, can be both compensated and gratuitous. This is confirmed by Article 764 of the Georgian Civil Code ("compensation for storage"), according to which "storage shall be gratuitous unless otherwise

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\*\* Translated from Georgian language by *Maka Machkhaneli*.

<sup>1</sup> See "Parlamentis Utskebani" (legislative supplement), No. 31, 24 July 1997.

provided for by agreement". Consequently, contract of storage can be compensated if the parties agree.

The practical importance of classification of contracts according to a compensated and or gratuitous nature is seen in the legal literature when dealing with the issue of property liability. In particular, less responsibility is imposed on a person not receiving profit under a contract. Such a person is not required to take special measures for the protection of property. Under Article 765 of the Georgian Civil Code, "in the case of gratuitous storage a bailee shall keep a thing with the same faith as he would keep his own thing". Consequently, a bailee is required to carry out ordinary measures for caution. Whereas "in the case of compensated storage ... a bailee may be obligated to take special measures for keeping a thing"<sup>2</sup>.

It is quite natural that in the civil legislation and in practice gratuitous contracts are less applied than compensated ones. "This, first of all, is conditioned by the fact that civil legal relations are based upon reciprocity i.e. equivalency, whereas gratuitous transactions are exceptions from this common practice"<sup>3</sup>. The relationship between compensated and gratuitous contracts is defined by everyday necessities, natural economic developments and the interests of civil interaction.

The comparative dominance of compensated contracts does not at all lessen the significance of gratuitous legal relations nor does it diminish the interest in having such contracts. On the contrary, the gratuitous aspect of contracts, this specific peculiarity, is rather intriguing in a view that together with its legal features the everyday and social relationship of people is seen from a different angle – a moral aspect.

### 3. HISTORICAL HERITAGE

Gratuitous contracts, namely the institutes of gift and lend are quite thoroughly presented in the reformed Georgian civil legislation. The legal reform, the transformation of legal fields and instruments in Georgia, is characterised by a double process. The reform is grown from national soil and at the same time foreign experience, the achievements of politically and economically leading countries in the field of lawmaking are broadly applied. It should be said that such a situation is seen as an echo and continuation of an old historical tradition. In olden times too, Georgian law specialists took an interest in other peoples' legislation, made fruitful translations and, with the knowledge acquired, enriched the national legal culture. For instance, the unique compilation elaborated by *King Vakhtang VI* contains both national laws and translated legislative monuments.

However Georgian law was mainly fed from national roots and developed through the principle of historical heritage on its own soil. Specialists fairly point out that the new Georgian Civil Code "bases upon historical experience of the development of the Georgian law" in which "Georgian national law is optimally adjusted with the common idea of the law" and "old as well as new Georgian literary vocabulary, terms mostly born on Georgian soil" are applied.<sup>4</sup>

This tendency is revealed in every field of contractual law, which namely is confirmed in the historical-legal light of gift and gratuitous use of an other's thing (lend).

<sup>2</sup> Z. Akhvlediani, *Law of Obligations* (2<sup>nd</sup> Edition), Tbilisi, 1999, pp. 29-30.

<sup>3</sup> L. Chanturia, *Introduction to the General Part of the Georgian Civil Code*, Tbilisi, 1997, pp. 328-329.

<sup>4</sup> See B. Zoidze, *Historical Roots of Civil Law Reform in Georgia*, - "Samartali", 1996, No. 5-6, pp. 54-62; B. Zoidze, Z. Akhvlediani, *Synthesis of Common and National Spirit (Some Notes on the Draft Civil Code of Georgia)*, - "Sakartvelos Respublika", 3 December, 1996, No. 242, p. 3.

#### 4. GIFT

After the notions of sale and barter the Gift is given third place (Articles 524-530) in the Special Part of the Contractual Law of the Civil Code of Georgia.

The legislator defines the notion of a contract of gift. Under the contract of gift the donor transfers to the donee the property in his ownership with his consent but without compensation. A contract is deemed concluded from the moment of actual delivery of the property. In case the object of the gift is a kind of property on which the right of ownership arises only after the observance of a law-defined form: the contract of gift shall follow this form. The promise of a gift gives rise to a respective obligation only when it is authenticated by a notary. Gift is prohibited (a person shall not have the right to gift the property) if by giving a gift the donor or his dependants will be deprived of their source of living. If the purpose of the gift is for common good it is performed in the form of donation (Article 528).

The Code provides for a defective gift, cancellation of the gift due to ingratitude on the part of the recipient and conditions for the demand of the return of a gift. The donor shall be liable to pay compensation for damage caused if he deliberately concealed the defects of the gift. A gift may be cancelled if the recipient insults or expresses major ingratitude towards the donor or the latter's relative. In the case of cancellation of a gift the donor may demand the return of the gifted property. A gift may be cancelled within one year from the moment the donor learns the circumstance which grants him the right to cancel the gift. If, after making the gift, the donor finds himself in a grave economic position and is not able to maintain himself or his dependants he shall be entitled to demand the retraction of the property that was given provided it actually exists and its return will not put the recipient in a grave condition. If a donor's grave economic condition is caused by his own deliberate action or gross negligence he shall not be entitled to retract the gifted thing.

Interesting parallels can be found between the old Georgian law and the Civil Code in terms of specific regulations on gift. This fact points out to the lineage of the old and new Georgian law.

In the old Georgian law, gift was one of the widespread means of acquiring or losing an ownership right. Gifted property was quite a steady property in those times too and actively involved in civil exchange. Firmness and stability that the property acquired by means of gift is manifested in the legislative monuments and the ancient documents of legal nature. However, purchased property must be considered as more certain in ownership than the gifted one. The basis was the gratuitous nature of the contract of gift, which conditioned the inadmissibility of the dispute on the quality of the gift, the possibility for return of gifted property and the otherwise encumbrance of the gift with a condition.

The inadmissibility of dispute on the quality of the gifted thing is one of the essential principles deriving from the nature of gift. The proverb "don't look a gift horse in the mouth" explains this feature of contract of gift. Modern law takes interest in the quality (defect) of the gifted property only in terms of its consequences (Article 527).

The retraction of gifted property is stipulated by Article 183 of the Georgian version of the Greek law contained in the compilation of Vakhtang VI. According to this Article, a gift shall be returned if a child is born to a childless man after he had gifted his "much or less" property to his released serf. Even afterwards the donor can give away anything he so wishes but other gifted property shall be returned.

The old legislation granted the donor the right to refuse (the return of) a gift at his discretion. To avoid such regulation, to have the donor deprived of the opportunity of return of the gift, fictitious character

of mutual compensated transaction was given to the gift by means of paying just a modest amount. The Langobards law is interesting in this respect, under which in exchange for the gifted property the donor received an insignificant thing, such as a glove or an old hat<sup>5</sup>. Here we are facing disguise of a gift with a sale. This way the advantage of sale compared to the gift is evident and clearly confirmed.

A rude rule on the return of the gift caused by late feudal decline must have influenced the Georgian proverb – “eat the bread that a bad master gives right away or he will come and take it back”<sup>6</sup>.

Contract of gift was often concluded by the imposition of some<sup>7</sup> condition. Due to non-observance of the conditions agreed by the parties, as a rule the gift would be cancelled and the gift itself (or the payment made for it if the thing did not exist any more) would be returned to the donor. The current Georgian Civil Code is familiar with a gift with certain conditions attached. Under Article 528 of the Code, the parties may agree that the validity of the contract of gift should depend on the performance of a specific condition or the achievement of a specified purpose. Besides the donor, performance of the condition can be required by a person in whose favour it was reserved. If the recipient does not fulfil the condition the donor may refuse to honour the contract.

A gift under any reservation or burdened with conditions was widely known in Roman law. A donor would set a certain goal to a donee, define directions for use of the gift, etc. This certainly did not hinder the acquisition of the ownership right but complicated the use of the acquired thing. With the fear of cancellation of the gift a donee had to fulfil all conditions provided for by the contract. In general, these conditions could vary. There was no specific restriction. It is important to note that a condition should not contradict the laws in force and legal principles. Further, it should be included in the contract of gift with a specific indication.

In addition, non-performance of all contract-stipulated conditions did not always cause the cancellation of gift. This concerns conditions that were of non-binding character. Such conditions were not legally binding for the donee.

Article 61 of the Law Book of *Beka Mandaturtukhutsesi* stipulates for a gift with reservation of a legally binding condition: a gift is made to the close relation of donor-donee, for having good and honest relation. The end of such a relationship means elimination of the basis of the contract of gift. This omits the main condition of gift, which is followed by cancellation of the contract itself and return of the gift to the donor.

The kindness received from the donor, of course, imposed certain moral obligations upon the donee. He was obliged to be grateful to the donor and not like the proverb “a man gifted a vineyard to another and this one did not even give him a grape to eat”<sup>8</sup>. Thus, in peoples’ view, ungratefulness of the donee was considered as bad behaviour. Article 529 of the Civil Code of Georgia should be seen as an expression of fortification of this moral norm in a legislative manner. This Article stipulates for cancellation of gift due to ungratefulness of the donee. It would be natural if non-respect of donee towards the donor, the break of the moral link established between them causes a legal consequence in the form of return of the gifted thing. In general, the legal basis for the demand of return of gift was

<sup>5</sup> I. Koler, Introduction to the Science of Law, St. Petersburg, 1903, p. 77.

<sup>6</sup> T. Sakhokia, Georgian Proverbs, Tbilisi, 1967, p. 45.

<sup>7</sup> U. Baron, Roman Civil Law System, 1<sup>st</sup> Edition, Book 1, General part, 1909, 135-137 pp. 135-137, 160-161; S. Muromtsev, Civil Law of Ancient Rome, 1883, p. 398.

<sup>8</sup> Georgian Proverbs, prepared by A. Kandelaki, Tbilisi, 1959, p. 43.

ungratefulness on the part of the donee, insulting or beating of a donor, infringement of his life.<sup>9</sup> In the German law to this list was added the insult of donor's family members.<sup>10</sup>

It is noteworthy that grounds for the return of the gifted property were strictly restricted under the old Georgian law. According to above mentioned Article 61 of the Code of Beka, the donor did not have the right to the return of the gift due to such serious reasons as his impoverishment, or economic difficulty. Article 530 of the existing Georgian Civil Code substantially differs from the above-mentioned regulation. It stipulates that a donor whose economic condition becomes grave after making a gift may demand the return of the gifted thing. In terms of certainty in legal relations, in our opinion, the stipulation of old Georgian law is more acceptable. This idea is further strengthened by the fact that, in accordance with Article 530 of the Civil Code, the right to retraction of a gift is not limited to a defined period after the moment of delivery of the gift. Nor is the right to return of a gift limited to a definite time after delivery of the gift under Article 529 of the Civil Code which provides for the cancellation of a gift due to ungratefulness of the donee.

The German researcher *Rudolf Klutmann* has expressed an opinion with regard to Article 61 of the Code of *Beka Mandaturtukhutsesi*. The researcher notes that the Book of Law of *Beka Agbouga* "concerns the right to retraction of a gift". *R. Klutmann* says, "attention is caught by the meaning of the motive that the donor was driven with at the time of gifting". An impoverished donor can not retract the gift but the right to it arises immediately if "their friendly relationship breaks up without legal grounds"<sup>11</sup>.

Under the old Georgian law, cancellation of gift was caused by non-performance of the condition of the contract on the basis of which the donee was obliged to do some favour for the donor. In such case, in the legislator's point of view<sup>12</sup>, a donee is obliged to return the gift to the donor.

It was from the specific law of those times, such as the gifting of a human being, that the burdening of a gift with quite a specific condition was derived: in the case of the giving of a young girl the obligation of giving her in marriage was attached<sup>13</sup>.

A characteristic of the contract of gift in the old law was its gratuitous nature though the element of compensation and reciprocity was not excluded. Article 178 of the Georgian version of the Greek law provides for the conclusion of contract of gift by reserving a condition to make a gift in return. The making of a gift in return is an ancient custom and is included in the written or unwritten law. It is mentioned several times in the "Odyssey".<sup>14</sup> In Norway, was applied the principle of equal compensation for the gift. If this principle was not followed it was considered as legal grounds for the return of the gift. Generally, gift was initially understood so that the donor necessarily expected a gift in exchange from the donee. The exchange of gifts was voluntary in form but in essence was a firmly obligatory and universal phenomenon.<sup>15</sup> The necessity of a gift in return is expressed in Georgian proverbs – "Gift asks for gift" and "A fool thought gift was free".<sup>16</sup>

<sup>9</sup> Eclogue (VIII century Byzantine Collection of Laws ), Moscow, 1965, pp. 51-52, 112; *V. Umov*, Gift, its Notion, Characteristics and Place in the Law System (comparative study under the Roman law and modern legislation), Moscow, 1876, p. 6.

<sup>10</sup> *A. Simolin*, Influence of Aspect of Gratuitousness in the Civil Law, Kazan, 1916, p. 147.

<sup>11</sup> *R. Klutmann*, Analyse des national-grusinischen Obligationenrechts im Kodex König Wachtangs VI – "Zeitschrift für vergleichende Rechtswissenschaft", vol. xxi, p. 444.

<sup>12</sup> Law of Prince David, Edition by *D. Purtseladze*., Tbilisi, 1964, p. 75.

<sup>13</sup> Documents from the Georgian Social History, edited by *N. Berdzenishvili*., Part I (XV-XVIII centuries), Tbilisi, 1940, p. 237-238.

<sup>14</sup> *Homer*, Odyssey, Tbilisi, 1979, pp. 21, 149, 335, 381.

<sup>15</sup> *A. J. Gurevich*, Wealth and Gift of Scandinavians in the Early Middle Ages, "Middle Ages", Collection, 31<sup>st</sup> edit., Moscow, 1968, pp. 186, 188.

<sup>16</sup> See *P. Umikashvili*, Folklore, vol. II, Tbilisi, 1964, p. 263; *T. Sakhokia*, Georgian Proverbs, p. 162

Initially as well as essentially gift was a voluntary action but after a while it became even obligatory. Namely, in this way were enacted the kinds of fees such as *dzgveni* and *samaspindzlo* in Georgia during the feudal era.

Gift under both old and new Georgian law is a real contract. In olden times too, the moment of delivery of a gift was a definitive one. Moreover, a gift must be “really” i.e. appropriately, and lawfully delivered. A written document on delivery of the gift was written on behalf of the donor as a unilateral document.

## 5. GRATUITOUS USE OF OTHERS’ THINGS – LENDING

Society can not be imagined without friendly, uncompensated help or support. One of the expressions of such relationship is gratuitous use of another person’s thing, which in essence means lending (though sometimes it goes beyond the common limits of lending).

One of the great values of the Georgian Civil Code is the fact that it returned this legal notion of lending to its national origin and historical roots. The point is that in the traditional Georgian legislation lending was directly stipulated. In the Soviet legislation, namely 1964 Georgian SSR Civil Code, lending was not mentioned at all. It was understood under the general notion of gratuitous use of the property (Chapter 28, Articles 335-342)<sup>17</sup>. Conversely, in the new Civil Code of independent Georgia lending again took the form of an independent conception as it used to be under the Georgian national legislation.

Lending belongs to the domestic, mainly neighbouring relationship. It is a quite popular and important transaction. This is proved by modern legislative situation too. Namely, in the 1997 Civil Code of Georgia, lending is presented as a separate Chapter 8, which comprises eight articles (615-622).

The Civil Code provides for various aspects of lending such as the concept of lending, liability of the lender, obligation to indemnify damage in the case of concealment of a thing’s defect, purposeful use of a lent thing, obligation to bear usual costs, wear and tear of a lent thing, obligation to return a thing and effects of the death of the borrower. This list shows that the modern legislation pays much attention to lending as being of great social importance.

Moreover, in our opinion the Georgian Civil Code gives a singular definition of the concept of lending which from its essence excludes the obligation of the return of a lent thing. Article 615 (“Concept”) of the Code stipulates that “under a lending agreement, a lender assumes an obligation to transfer to a borrower goods in temporary free use.” Whereas Article 621 (“Obligation to return a lent thing”) points out that “a loan-recipient is liable to return the lent thing after expiry of the lending agreement”. In order to fully form the concept of contract of lending, the obligation to return a lent thing should have been included in Article 615 instead of Article 621. In this respect Georgian Civil Code of 1964 (Article 335) rightly stipulated this matter within the concept embodying the institute of lending - the gratuitous use of property.

A significant peculiarity that characterises lending lies in its gratuitous nature. Lending means keeping and use without payment. Materially it is useful only for one party – the lend-recipient. Gratuitousness and doing a favour indicates that the lender has moral-charitable motives and not material incentives.

<sup>17</sup> Civil Code of Georgian SSR, Tbilisi, 1985, pp. 112-114.

The legal institution of gratuitous use of a thing had particular social importance in the Georgia of olden times. Lending was used for various purposes and needs. It mainly served for meeting domestic requirements. Furthermore it played an important role in determining economic tasks. Lending of land, serfs and working cattle aimed at meeting such requirements. One of the reasons for lending was internal disorder and forays of external enemies into the country that destroyed material sources and the normal conditions of life: people left their own houses and looked for shelter in other places. Such situations, as can be seen from documentary materials<sup>18</sup>, influenced lending as well: borrowing another's land and for quite a long time was widespread in old times in Georgia.

According to Georgian law, like the Roman but unlike the Byzantine one, the lend-recipient of the land, no matter how long the lending lasted, could not gain the right of the possession under succession nor indeed of ownership. Similarly a lend-recipient could not be enslaved and he could freely leave the land of the lender any time he so wished.

The long-term possession of the lent land speaks about the fact that the principle of gratuitousness of contract of lending was not always adequately followed in Georgian reality. As an analogy we must mention Saxon Civil law under which, though as an exception, which allowed compensated lending (i.e. lend-recipient assumed payment of certain amount for the use of a lent thing) if the parties' intention was the establishment of relationship under contract of gift<sup>19</sup>. According to the Georgian law, the element of compensation is revealed in the contract of lending by the fact that a lend-recipient gave to the lender some part of the harvest taken from the lent land.

In accordance with old legal monuments of Georgia, a contractual relationship was established after delivery of the lent thing. From the norms regulating lending, it is shown that when a legislator speaks about lending as a legal relationship, a thing is already delivered to the lend-recipient and is in his hands. Thus, the contract of lending was regarded as a real contract. This is also confirmed by the conclusion of the contract and issuance of the document on lending on behalf of the lend-recipient as provided for in Articles 207 and 207<sup>1</sup> of the Law Book of Vakhtang VI. The Vakhtang VI Code contains also regulations on the liability of a lend-recipient.<sup>20</sup>

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<sup>18</sup> Documents from Social History of Georgia, edited by *N. Berdzenishvili*, II part (XV-XIX centuries), Tbilisi, 1953, pp. 98, 187-188.

<sup>19</sup> *K. Annenkov*, Russian Civil Law System, vol. IV, Separate Obligations, St. Petersburg, 1904, p. 360.

<sup>20</sup> *M. Pellegrino*, Postkommunismus und Zivilrecht: Das Obligationenrecht Georgiens, Frankfurt am Main, 1997, p. 47-50.

**“HISTORICAL GEOGRAPHY” AND THE SECURITY OF A COUNTRY\*\***

We can observe that global integration processes are gradually moving from the West to the East. The European Union and NATO, the integration of western Europe and America already belongs to the past and a kind of continuation of this practice is the intensification of the integration processes in the vast Eurasia space. As it seems apparent, this very phenomenon provides for the future development in the XXI century as well. The last monograph of *Zbigniew Brzezinski*, “The Grand Chess Board”, makes an explicit statement in this regard. All six chapters of this monograph lay emphasis on the idea that very soon Eurasia will become the centre point of global policy and this fact should be taken into consideration even from now. In the fifth chapter, the “Eurasian Balkans”, (the geographical area which covers the Caucasus and the nine countries of Middle Asia, including Georgia), it is directly said that whoever wishes to be a world leader has to manage leadership in this very region, and to solve its most difficult political, social, economic, ethnic and cultural problems.

If the anticipations of *Brzezinski* come true and the Caucasus and adjoining territories become the new Balkans, we should expect large global cataclysms in this region, which is so controversial from the ethnic and religious points of view. Thus, in such a geopolitical situation, Georgia must be particularly conscientiousness with regard to the security of the country. We should be guided by the precondition, that suitable geopolitical situation of Georgia may not only have positive effects, but it may give rise to some negative processes as well and failing to take this into account may be a big strategic mistake on our part. Hence, the future social and economic development of Georgia will largely depend on the extent to which we shall be able to take account of all the above. Our analysis is based on such a dialectical understanding of Georgia’s geopolitics.

The present analysis is mainly centred on the materials of the “History of Georgian Nation”, that refer to the peculiar features of the “historical geography of Georgia”. The notion “historical geography” itself points out the concept of *Javakhishvili’s* understanding of “geopolitics”: every historical epoch has its own “geography” as the “political map and the outline” of a country is permanently changing, the new “vector” arrangement of forces from the North to the South and from the West to the East, the different arrangement and direction of forces is acquired by the borders of the country itself and those of its neighbours, as well as of their (of the countries) military-political, economic cultural, and other interrelationships. It is apparent, that the geopolitical situation of a country changes as a consequence and quite often these changes are radical: Georgia’s geopolitics was absolutely different before the creation of the Ottoman Empire and quite different again after 1462, when, after the downfall of Constantinople and Trabzond, Turkey became the super-state of the near East. And again the geopolitics of Georgia of the seventeenth century (“the most dreadful century in the history of Georgia” as estimated by *Ivane Javakhishvily*) was different from that of the nineteenth century, when Georgia became the part of the growing Russian Empire.

And even now we are witnessing the change of the “historical geography of Georgia” our country’s disposition in space, under the establishment of the “new world-order”. Unfortunately, our mass media

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\*\* Translated from Georgian language by *Ketevan Vakhtangadze*.

often makes reference to the idea that the success of Georgia’s geopolitics allegedly depends only on the politics of the powerful states. Of course, no individual with a realistic vision can deny this aspect, but we should not forget either that our present “historical geography”, i.e. the geopolitical trumps are, first of all, in our hands and at our disposal and if we make and efficient use of them in the global political game, we are not going to be losers in the future. The wisdom of the politics and a politician should be sought in this very aspect.

But I would not like to say that only our correct political analysis, guiding conclusions deriving from the latter and correct strategy and tactics based on these conclusions could guarantee the stable and peaceful development of a state, its security. No, we are well aware of the role of the external factors in state security. In this respect, the search for strategic allies in terms of the stable and powerful countries is of crucial importance. The United States of America is still considered to be the most reliable partner in guaranteeing the national security. Although, as a general rule, we believe that internal policy to be decisive in the interrelation of the foreign and the internal policies of a state, practice shows that priority should be given to foreign policy when speaking about the security and defence of a state. This is particularly true with regard to such small countries as Georgia, which at the same time faces the real danger of malevolent surroundings. Thus, for our country, the foreign policy is a prevailing political factor with respect to state security.

We give particular importance to this political thesis and we shall speak about it a bit more later. From the methodological point of view we consider it incorrect to always give priority to the internal policy in the interrelation between foreign and internal policies. Such a methodology may cause practical damage to the future development of a state. Let us take a look at the present political situation in Georgia: some parties often declare that the definite success in the foreign policy, attained by the government of the state can not substitute or compensate for failures in internal policy. To our mind, such a methodology of political analysis is not correct. This may lead us to an erroneous perception of the perspective development of our country.

If we recall history again, we can say that success in the foreign policy enabled *David Agmashenebeli* (*David the Builder*) to make great progress in internal policy and thus make the state secure and stable for over a hundred years. If we consider the present state of Israel as an example, we can see, that successful foreign policy and guaranteeing state security helped the country to attain the great achievements and the victories in internal policy (the fact that the state of Israel managed to retain good relations with a number of Arabic countries up to the present is worth mentioning).

We are nearly in the same situation as Israel is and thus the present and future foreign policy of Georgia should be considered and comprehended from this point of view: the geopolitical situation of the country, collision of the interests of the big states in our region and globally in the near East and the whole world makes us think, that so far the priorities of our national policy, though strange enough, are shifted to foreign policy. Only by means of their realisation shall we achieve success in domestic policy and maintain the stable development of our country. To be more precise and accurate, this political doctrine means the comprehension of foreign and internal policies in a dialectical unity, where the settlement of foreign policy problems is of prior and utmost importance in the system of causal links between events. We consider that the present government should necessarily take the account of and, what is most important, implement the above if we want not to have the same fate as the Democratic Republic of Georgia of 1918-1921 had, when given an incorrect and passive policy Georgia again became the victim of Russian aggression. All the aforementioned is well analysed and comprehended by *Z. Avalishvili* and *G. Kvinikadze*. The latter openly blames the Georgian Social

Democrats in the deliberate neglect of the national interests and capitulatory behaviour before the enemy.<sup>1</sup> This should not happen again.

*Herodotus* defined history as “our teacher” and the tragic lessons of Georgia’s past history should teach us at least now how to elaborate a correct policy and thus keep the country away from new tragedies. For the time being the example of such a correct policy is shown by the President of Georgia, *Mr. Eduard Shevardnadze*. With the help of this policy he managed to make a solid basis for the future independent development of the state. As an example we could mention two of his momentous political ideas about the “revival of the Silk Route” and the “peaceful and stable Caucasus”, widely acknowledged and supported on an international level. The importance of this acknowledgement and support is so profound, that the US Congress passed a Bill sponsored by the Senator *Brownback* – The Great Silk Road Strategy Act, fairly called by the world mass media during consideration in the Senate as a “New Marshall Plan”. Like the Marshall Plan, adopted by the US Senate after the World War II under the initiative of *Senator Marshall*, that helped the war devastated Europe out from the crisis, the “New Marshall Plan” is to facilitate the future social and economic development of the post-Communist state, which has fallen into a crisis after the collapse of the Soviet regime. It is understandable and clear for everyone, even for those who are complete laymen in politics, that without intense military-political and social-economic support of the developed countries no country is able to adequately solve the problems of the transition period. This is quite natural as domestic problems are always accompanied by systematic efforts of the neo-imperial forces to have the former “Soviet Republics” again under their influence and government. Reanimation of the USSR will still be a serious danger for them for a long time on.

Thus, for the time being, it is crucial for us to make as much use of our geopolitical trumps as possible and get involved in the processes of global and regional integration. This is the main strategy of Georgia’s foreign policy for today and the same one is to be maintained for the first decades of the twenty-first century. This is the only way for us to make stronger our state independence.

The essence of one of our main proposals is that the present government of Georgia, which is on the cusp of two centuries and of two millenniums, as well as its foreign policy and foreign economic agencies are to elaborate a targeted working programme for the implementation of this strategy for every key direction of the social and economic development of the country. Our main benchmark in this respect should be the intensification of the relations with the USA and their transformation into a military-political union within the NATO.

The President of Georgia gave a very good explanation of this problem of foreign policy, when he described the USA’s endeavour to create a common Eurasian space:

“The US Senate demonstrates its great interest towards the problem of the Silk Road. Senator *Sam Brownback* from Kansas has prepared a Bill for the Senate: Amendment to the Act on the Economic and Political Independence of the Countries of the South Caucasus and Central Asia (1961), which could be conditionally called “The Silk Road Strategy Act”.

The Act of the US Senate on the economic and political independence of the Eurasian countries, adopted back in 1961 is very interesting. The document about the EU Project on TRACECA is an amendment to this Act.

The first hearing of this Bill in the US Senate was held on July 23, 1997.

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<sup>1</sup> G. *Kvinikadze*, *Memoirs*, vol. I, Tbilisi, pp. 224-227.

The US Senate Foreign Relations Committee Sub-committee for the promotion of the international economic policy, export and trade held the second hearing of this Bill on October 23, 1997.

The draft Bill on the Amendment stresses that the ancient “Silk Road” secured life for such countries of Central Asia and the South Caucasus, as: Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan, Armenia, Azerbaijan and Georgia.

This is the American vision of the problem.

The government of Georgia gratefully supports the Bill of the Senator *Sam Brownback* and hopes that the US Senate will pass this Bill, thus facilitating the development of the world economy and democracy, strengthening the economic and political independence of the countries of the sub-region, protection of human rights and freedoms in the region of Europe-Asia, that is covered by the Great World Silk Road.<sup>2</sup>

This is a very interesting and comprehensive political and historical analysis of the processes, occurring between Europe and Asia for millennia on the one hand and of the measures implemented by the United States’ Government after World War II with the view of securing the economic and political independence of the countries of the Transcaucasus and Middle Asia in the nearest future. As stated by *Mr. Eduard Shevardnadze*, this process started back in 1961 and naturally it also facilitated the collapse of the Soviet Union and creation of eight independent states in this sub-region for the time being. The case is that our region is of particular importance for future development of the United States itself and thus it will not permit Russia to restore its colonial government here once again. When making a presentation at the “Asia Society”, founded back in the nineteenth century, Senator *Brownback* said:

“The Caspian Basin and the countries of Central Asia and the South Caucasus which surround it, are an area of vital political, economic, and social importance for the United States

The countries of the South Caucasus and Central Asia - Armenia, Azerbaijan, Georgia, Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan - are at an historic crossroads in their history: they are independent, they are at the juncture of many of today’s major world forces (he definitely means Russia, China, Europe and the USA – J.G.), they are rich in natural resources, and they are looking to the United States for support.”<sup>3</sup>

As we can observe, political analysis leads us to the fact that the Eurasian space is to become the main forum for the foreign policy of the present world. As already mentioned, the outstanding American politologist, *Zbigniew Brzezinski* dedicated a comprehensive politological analysis to this problem in his study “The Grand Chess Board”. The main idea of this book is the following: which ever state extends its political and social-economic influence over this space, will become the most dominant “super-power”.<sup>4</sup>

This political doctrine should be permanently the centre point of the concentration of the Georgian politicians in order to try to make as much use of it as possible for the future of our country. It is also apparent that not only America’s interests are at stake here. Europe, Russia and China are greatly interested as well, hence the analysis of *Mr. Eduard Shevardnadze* is absolutely correct:

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<sup>2</sup> *E. Shevardnadze*, *The great Silk Route*, Tbilisi, 1999, pp. 117-118.

<sup>3</sup> *Ibid*, pp. 118-119.

<sup>4</sup> *Z. Brzezinski*, “The Grand Chess Board”, Moscow, 1997, pp. 141-145.

"The goal of the United States of America is to secure the strength, independence, economic sustainability and political sovereignty of the countries of the Caspian Basin and the South Caucasus.

This complies with the vital interests of the United States and its global-historical mission.

The US Senators consider that the Caspian Basin region holds the third position in the world according to the oil and gas resources. The value of these resources exceeds 4 trillion dollars. The creation of powerful market economies along the Silk Road, in the neighbourhood of Russia and China can have only a positive impact upon the economy and policy of both Russia and China.

These are some political and economic aspects of the American doctrine, that are quite acceptable for us."<sup>5</sup>

It is also apparent that the performance of this doctrine, the practical implementation of its specific ideas and the generation of results that benefit the country will require some time. In general, the phenomena of time and space, their correct calculation and application have a decisive importance for politics. If an individual lacks this ability he is not supposed to get engaged in politics. For the time being there are many reasons to reprimand the government, quite often they are absolutely fair, particularly in regard with the economic policy. But, whatever is pertinent to the features of the foreign policy they are generally revealed much later: the more so in the country which begins everything from the very beginning.

We can make an interim conclusion here:

The enduring efforts of the Georgian Government to restore the Silk Road stipulated only the political provision of this issue of particular importance. But the political aspect would not be enough. Its implementation is no less important and an organisational practical priority of the immediate future. This requires state endeavours, targeted regulation of the activities of every state institution and private infrastructure.

For the time being, two specific tasks have been outlined: first, Georgia should become the country of stability and security standards for the states interested in transit; and, second, it should be able to get rid of everything that is unacceptable and detrimental for our national originality and to receive everything that will facilitate the preservation and enrichment of the national features and accenting the values common for all mankind. The reason for such an assumption is that the possibility of the attainment of the first task will depend on the demonstration of our own personality and readiness, and the second one on the ability to preserve the national character. Georgia should become an exceptional model of stability for benevolent foreigners. The geostrategic situation does not mean anything, unless we find the necessary strength and will-power for its realisation. Tasks that are provided for by the geopolitical and geoeconomic functions of Georgia are historical ones and there is nothing new among them. We have all the opportunities to this end and the only thing we need now is mobilisation and organisation.

It is a well-known fact that politics, and specifically, diplomacy requires particular skills and art. Straightforward and logical thinking would not be of great help in this case. It necessitates complex and versatile calculations like chess. Even *Talleyrand* demanded the acquisition and perfection of the "art of silence" from a diplomat: a politician should be able not disclose his strategic goal too early

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<sup>5</sup> See supra note 2, pp. 119-120.

where it is not necessary. Politics is nothing else than “the art of receiving the maximum of whatever is possible”. A politician is not a politician if he lacks this virtue.

The present life of our country is very much like chess. It has to deal with numerous problems and dilemmas, but it is up to the politics and the politicians’ great skills to identify the priorities that will finally save our country. What is such a priority that will save the country, surely the establishment of guarantees of its security and defence, such safety, that will make the process of state independence irreversible. And this time, together with the foreign factors, we need the revival of our internal potential, first of all the real creation of the Georgian Army.

The Georgian military art has the same ancient and deep historical roots as the history of our country and nation itself. It is also evident, for centuries every nation and every country established the security and the defence systems that correspond to their history, natural environment and psyche. Naturally, the Georgian nation has created such a national system of defence and security during the 3,000 years of its statehood. Its reliability is also proved by that fact that, despite permanent invasions, numerous efforts of countless enemies to get hold of our territories, our nation still managed to retain its personality and nationality. *Ilia Chavchavadze* has a very interesting observation in this respect, a very eloquent analysis of “What has saved and what has rescued us”.

“What would protect the handful of us against so many sworn enemies, how this paradise, called Georgia, would survive the greed of alien tribes unless our past made the foundation to our life out of solid stones.

This is on the one hand, and on the other one, what would have made us to lag so hopelessly behind the other countries in education and wealth unless our history added rotten and tiny pebbles to the foundation of the life of the masters of the country together with the solid stones”.<sup>6</sup>

In his famous article, written in 1888 (“The nation and the history”), for the first time in the recent history of Georgia, *Ilia Chavchavadze* stresses the importance of the philosophy of history and of the applied politology together with the former in securing national self-preservation and security. On the next pages of the article he pursues the idea of how to use “this diversified importance of the history for the revitalisation of the nation”<sup>7</sup>. He regretfully mentions as well, that we have forgotten our past and thus forgotten “the origin of our life, the roots of our life, the foundation of our life and if that is so – what shall we base our present, our future on?”<sup>8</sup>.

Just for the sake of future *Ilia Chavchavadze* pleads us to share the problems of “salvage” and security of our country as well. Unfortunately, under the strict colonial regime of Russia it was impossible not only to research these problems, but also even to raise them. One could speak about them only in the historical past. An inclusive and exhaustive answer to these problems could be found in the volumes of “The History of the Georgian Nation” by *Ivane Javakishvili*, as well as in the military-political analysis of the authors of “The Life of Kartli”. Let us see how the annalist of *David Agmashenebeli* describes the political situation of those times, when this great King-Reformer eradicated the misconduct and disobedience of the “devastator families”, first of all, of the *Bagvshi* family:

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<sup>6</sup> *I. Chavchavadze, Works, Tbilisi, 1989, p. 610.*

<sup>7</sup> *Ibid, p. 612.*

<sup>8</sup> *Ibid, p. 612.*

"This was the end of the domain of *Bagvshi* family, as the clergymen have sinned before the God and the King has taken their lands away from them, as they have abused the churches instead of revering the episcopates. They were praying for apostasy instead of teaching divinity."<sup>9</sup>

Thus *David Agmashenebeli* started to "build the country" establishes order, as he was well aware that a state is first of all an order. He put an end to the dominion of the "brigands, unworthy and dishonourable persons". Instead he facilitated the "dominion of honourable ones". This case and the later ones as well reveal the position of the annalist and naturally that of *David Agmashenebeli* himself: the transformation and "building up" of a state starts from the spiritual, moral catharsis. Thus it seems natural, that the annalist talks about the reasons of mightiness and the preference for *David Agmashenebeli* over others:

"The King has called for the nation in order to rectify great mistakes. The scientists have studied everything carefully, cursed the responsible persons and sent them into exile. The King has performed all the good deeds... See what God has done for him in return."<sup>10</sup>

The annalist of *David* points out not only the key to strength and security of a state – "predominance of spirit", but gives some of his own parameters of this security. Together with the spiritual strength of the people and high morals, this of course, first of all, depends on the organisation of armed forces by *David*. The annalist is quite right when he considers internal order and "strong arrangement" as the main merits of *David Agmashenebeli*. This idea stands out through the security of the whole "Golden Era" which was later described by *King Tamar's* annalist as an ideal of Georgia of those times.

"Fear for God was added to the mercy of God for the country. Nobody dared to plunder churches and monasteries... Nobody raided caravans in Western and Eastern Georgia. The Old Kingdom of Abkhazia (of the *Bagrations*, who moved to Tbilisi – J.G.) led a peaceful life... Not a fowl got killed; nobody did evil things. Did anybody find anything stolen, he put it in front of the house... Ossetians, Kivchaks and others did not dare to steal and the kingdom lived in peace, where the serfs used to dress like their masters... There was peace and harmony in the country"<sup>11</sup>

Thus, according to the "State men" of those times the main criterion for state security was "the pacification of the country", establishment of a stable state order, establishment of such a "fear for God" in the country, that nobody would dare "to destroy the churches and monasteries", when "there was no thief, an ill-doer", the brigands were so frightened that "not a fowl was killed anywhere". Very accurate scientific grounding of the various aspects of state order and the security are given in the famous study of *Ivane Javakhishvili* "Serfdom".<sup>12</sup>

Through an ample and detailed analysis *Ivane Javakhishvili* demonstrated that the military-political and social-economic basis of the Georgian state security was serfdom. *Ivane Javakhishvili* gave the first global comprehension of the state security in this very study and thus it may serve a basis of and the main source for us as well. In the introduction of the study the author writes:

"It is impossible to take account and have a real picture of the state and in particular, the social order of Georgia without thorough study of serfdom, as the social life of Georgia is based on this institution. Serfdom gave a peculiar direction and touch to Georgia of those times".<sup>13</sup>

<sup>9</sup> The Life of Kartli, edited by *I. Antelava* and *N. Shoshiashvili*. p. 250.

<sup>10</sup> Ibid, p. 251.

<sup>11</sup> Ibid, pp. 299-301.

<sup>12</sup> *I. Javakhishvili*, Works, vol. V, Tbilisi, 1982, pp. 225-258.

<sup>13</sup> Ibid, pp. 225.

This is the reason for his persistence with the comprehensive analysis of serfdom as a state order in his every work, particularly, in the “History of Georgian Law”. That is why all our other scholars, both lawyers and historians rely on his great heritage. When working on our study we paid particular attention to the works of *Vakhtang Abashmadze, Ivane Surguladze, Shota Meskhia, Davit Gvritishvili, Roin Metreveli, Zurab Avalishvili, Ivane Shaishmelashvili, Levan Sanikidze, Valerian Metreveli, Maia Dumbadze, Irakli Antelava, Eduard Kodua, Ioseb Megreladze, Giorgi Avaliani, Guram Korganashvili, Kveli Chkhatarashvili, Irakli Jorjadze, Guram Asatiani, Giorgi Abzianidze, Mikheil Gaprindashvili, Lovard Tukhashvili, and Giorgi Kvinikadze.*

These, as well as the other works are rich in pressing materials, that are important for us, but it should be said, that the majority is either of historical nature or refers to the history of Russian military art and wars of the past two hundred years, or Georgian military art is reviewed from one side only, separately from the modern problems of national security. Thus, we have a different scientific and practical goal: to try to show the most advantageous way of solving security problems in organic unison with the state building of the transition period with due consideration of the current situation in Georgia. Though it should also be mentioned that taking account of the historical experience of the past and national peculiarities are again the key points for the solution of the issue. The study of the problem of security should be subject to the famous guideline of *Iliia Chavchavadze* – “What were we, what are we, what can we be”: without taking account of the past historical practice of our country and national heritage it will be difficult even to raise the problem correctly. We consider that the methodology of *Iliia Chavchavadze* will enable us to find the only correct way to the “Church”. Otherwise it will be absolutely impossible to solve the problem of security.

A few words about the word “security” itself. We prefer it to the term “safety” that was so commonly used earlier, as the former is more global and refers to the every field of social and economic development of a country. For example, the use of the term “safety” instead of “economic”, “social”, “demographic”, “energy” or “environmental” security seem abnormal, inadequate. Thus we consider that our literature and mass media should give preference to the term “security”, especially in cases, where we have to deal with common-national and common-state problems. To be short, “safety” is a term of personal and local nature (probably, this is the background of an old biblical maxim – “Fearless like fleshless”, while “security” is a term of common-state and global purpose.

That the above assumption is correct is proved by the example of such grounds of settlement of the security problems, as they are the state itself, the state, political and social-economic principles of a country. No country will feel secure unless it manages to organise an efficient and stable state infrastructure based on these principles and we should start by settling security problems from this very point. If we define the term “a state” from this point of view it means the political organisation of guaranteeing the security of the people concerned.

Hence, if we put a question where the greatest danger for our people and country comes from, the answer probably should be: from the non-efficient state infrastructure and the widespread bureaucracy and corruption. Thus, the problem of state security will be fully settled when we avoid this danger. In this respect we have some specific proposals and ideas:

- Within the framework of the Presidential Republic it is necessary to reorganise the executive power through the development of the globally well proved cabinet of ministers. Apart from this, it is necessary to choose its optimum variant, to reduce the number of ministries instead of the present parallelism and duplication. We urgently need the incredible phenomenon historically

characteristic for Georgia – “Cheap government and quick legislation”, responsibility of a specific agency or a specific person, responsible for every field of national life, over the policy implemented in each of the fields. Otherwise we should not count on success. “A child having two nurses, was left hungry”, it is impossible to implement a common national policy and have the personal responsibility when two or more ministries are fighting against one and the same problem. Delimitation of competencies and responsibilities ruins everything. For some heads of a number of agencies the responsibility over the field means the full dominion over that field. We consider that this is one of the main reasons for the crisis, and to eradicate it, ministries are to be organised according to the “block-branch” principle, like the world practice:

- Foreign Affairs;
  - Internal Affairs;
  - Security, Intelligence and Border Control;
  - Military Affairs;
  - Economy, Finances, Property, Customs-Taxation Affairs;
  - Environment, Demography, Health and Social Security;
  - Culture, Education, Science and New Technologies;
  - Power, Urbanisation and Transport;
  - Youth, Sport and Tourism.
- 
- A number of spheres of national life and state management and government (except for the first four) should be basically distributed among the local self-government and regional government that will take a certain burden and responsibility off the central government and improve the role of the regional government and responsibility in the general management and government of the country. To our mind the rational combination of the principles of unitarism and federalism and optimal reallocation of functions should become the strategy of ongoing reforms and improvement of the state management and government. This will put into motion and give a strong impulse to the energy and creativeness of the population, without which state building is impossible.
  - In the event of creation of a Cabinet of Ministers it is really possible to eliminate the Chancellery and develop the staff of the President instead with much less personnel. At the same time the functional performance of the National Security Council should be considerably increased: non-military economic and energy security, as well as any political, legal and social economic problem related to state security should be comprehended together with defence and safety.
  - Particular attention should be paid to the agencies of the economic block as far as the economy is the main basis of a state and its security. We consider that one Ministry should be responsible for and pursue state policy in the monetary and revenue collection activities. Experience has shown that the division of this block into a number of independent agencies has not justified itself, while the shifting of the responsibility to each other will make the country bankrupt.
  - As regarding law enforcement and the so called “power” agencies, a new pattern should be created for their reformation with due consideration to remove parallelism and duplication from the functions of the enquiry and investigation bodies. Actually responsible persons for specific directions should be determined here as well. To my mind the military reform is an urgent task. Similar to other reforms it should be implemented based on two principles with due consideration of the national and international experiences. It is impossible to neglect the centuries old Georgian military art and be guided only by the experience of other countries in the organisation and training of the Georgian army.

It will be much appreciated if a special discussion will be held regarding these problems, in order for the people to consider state defence as their personal task. The future self-government shall make it weighty utterance even in parallel with the army, reviving the traditions of ancient “assistant army” or “border troops”. In any case Georgian armed forces should be united and mobile for ensuring state security.

- To my mind the amalgamation of the State Security Ministry and the State Department of Intelligence into one agency together with the State Department of Border Control is a far stronger guarantee of state security. A number of functions of these agencies are in fact identical and the rest dependent on one another.
- The most dangerous threat for the new-born Georgian statehood is corruption. The preparatory stage for fighting corruption has stretched out too much. The initial optimism of the population is gradually changing into pessimism. This is no less dangerous for state building and its security, because without the wide support and faith of the population we would not be successful. We considered and we do consider that special anti-corruption service (we do not mean the Anti-corruption Co-ordination Bureau) should have been established despite a number of its negative features. According to its functional performance it had to be a kind of “cleaner” with the view of eradication the corruption in the highest echelons of the government as *Roosevelt* did during the “Great Crisis” in America in the 1930s. This would be a kind of breakthrough in the campaign for fighting corruption and would definitely result in the revival of the faith of the population in the government and thus would be the first step in overcoming the crisis.
- Together with the reformation of the executive power it is necessary to reform and reorganise the Parliament itself, as is required by Article 4 of the Constitution. Thus, we already have a legal framework in this case. The only thing we need is to adopt the Law on Bicameral Parliament. Under the present situation the President should be given more rights with the completion of the higher chamber of the Parliament, the Senate, on the grounds of the proportional system through parity representation from each region. At the same time this would be a serious step forward towards the territorial-administrative arrangement of the country.

We consider that in the present situation when *Ardzinba* tries to make *de jure* the *de facto* independent state, we shall *de jure* state the unity and territorial integrity of Georgia through the inclusion of the representatives of the population of Abkhazia and South Ossetia into the higher chamber of the Georgian Parliament. We also consider that it is necessary to make it legally binding that the office of the Chairmen of the Senate to be given to the representatives of Abkhazia, Adjara and other regions in succession, according to the rotation principle. All the above said will be an important trump in the propaganda campaign against the separatists. To our mind the delay in the settlement of these issues is directly proportional with the delay in the settlement of the Abkhazian problem.

- As regards the features of foreign policy, as mentioned above, despite the primacy of the western orientation, the future faith of our country should be in parallel sought in good neighbour relations with Russia from the point of view of state security. The present situation can no longer persist. It can bring about only evil. Thus the old mistakes should be rectified as soon as possible and all this should take its start, first of all from the revival of economic and cultural relations, in which our two countries have rich and centuries old traditions.

- If we are able to develop such friendly and neighbourly relations with Russia as the Georgievsk Treaty was in fact based on and stipulated for, then they will promote the settlement of the pressing problems of the Caucasus. We should in no case allow for the escalation of the confrontations and armed conflicts in the Caucasus, what will finally drive us to the "Caucasian Balkans" with its devastation and bloody results. The way out is the integration of the Caucasian people, which may give a rise to entirely new political and social-economic unions.

If the things go this desirable way the recent idea of the President of Georgia, Mr. *Eduard Shevardnadze* about a "Peaceful and Neutral Caucasus" will acquire a great practical nature and importance. For the time being this idea may sound only as an idea, but we presume, that if Russia and other southern neighbours support it (which presumably is not against their interests), then Caucasus may become a kind of oasis in the Eurasian space. And this will be greatest guarantee of the security of our country.

**MEASURES FOR CONFISCATION OF PROFITS OBTAINED BY  
CRIMINAL ACTIONS\*\***

**1. THE PROBLEM IN GENERAL**

In its reports on the state of organised crime in Germany that have been published since the beginning of the nineties, the German Federal Department of Investigations has regularly noticed that the success in combating organised crime largely depends on how far it is possible to withdraw criminally obtained profits from criminal organisations and to reduce their profit expectations. The confiscation of criminally obtained profit is of superior importance, not only because of the danger of criminal acts committed by organised crime, but also because of the opportunity that organised crime has to influence social developments with criminally obtained capital out of democratic control.

In 1992 German lawmakers reacted with the adoption of the "Law on combating illegal drug trafficking and other forms of organised crime" from 15<sup>th</sup> of July 1992. Similar to other amendments that were introduced to the Criminal Code and the Criminal Procedural Regulations from 1994 to 1998 made in the context of combating organised crime, the amendments that this law introduced to substantive criminal law and to criminal procedural law aimed first of all at providing the state with more flexible access to criminals' property. These new measures that are specifically aimed at combating organised crime exist in addition to the "traditional measures" that have been provided by German criminal law since the sixties, based on the confiscation of proceeds from criminally obtained profits through confiscation and forfeiture (see below).

Since the mid nineties increasing attention has been paid to the problem of confiscation of proceeds that are obtained through general - not organised - crime. In order to confiscate the proceeds of criminal acts it is envisaged in this context that, in addition to measures provided by criminal law, tax law measures should also be used. This should ensure that the confiscation of proceeds from criminal acts will be achieved even when the measures provided by criminal law do not work, e.g. when it is difficult to prove the criminal origin of the property according to the rules provided by Procedural Law Regulation.<sup>1</sup>

**2. CONFISCATION OF PROCEEDS OBTAINED BY CRIMINAL ACTS THROUGH LEGAL MEASURES UNDER THE  
TAX LAW**

The confiscation of proceeds from criminal acts due to criminal procedural law measures, is frequently limited by the principles of law that are formulated in the Constitution and guaranteed by the Charter of Human Rights, for example, the principle of presumption of innocence or the right to reject the provision of testimony. As a consequence of these principles that are applicable in criminal procedural

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\*\* Translated from German language by Maik S. Masbaum.

<sup>1</sup> See W.Hetzer, Steuererhebung und Strafverfolgung, Kriminalistik, 200, No. 7, p. 434; D. Ehlscheid, Gewinnabschöpfung durch Besteuerung, Der Kriminalist, 2001, No. 4, pp. 147

law, the criminal origin of property that is subject to confiscation must be proven by the authorities that are competent for prosecution.

Certainly the introduction of a reversal of the rule for burden of proof, which was discussed during the 90's in Germany, would help. In this case it would not be the state who must prove that certain property has been obtained by criminal means, but the criminal who must provide evidence concerning the origin of the property under question. Meanwhile, among leading German politicians, the opinion prevails that such a solution violates the constitutional principal of the presumption of innocence. The question under dispute in this discussion focused on whether or not the presumption of innocence extends only to the criminal or to his property as well.

The principles of constitutional law mentioned above however, are only applicable in criminal procedures. In tax procedures everyone is obliged to provide evidence to the tax authorities concerning the type and amount of income; in Germany this is generally considered in line with constitutional principles. If tax authorities recognise indications showing that a person, who is subject to taxation, has income that has not been taxed, they start tax procedures. This requires the person concerned to provide a respective tax declaration in which the amount and the source of the property increase has to be indicated. If the person concerned violates his duty to cooperate, i.e. refuses to provide information on the amount and the origin of the property increase, the tax authorities have the right to estimate the increase of income and its origin and to tax this with the respective duty (§ 162 Tax Regulation of 1976).

Within this context it should be noted that, according to German tax law, the inconformity of the origin of the property increase with the law or good customs has no consequences (§ 40 Tax Regulation). Accordingly, proceeds from prohibited drug trafficking or prohibited trade in weapons must be taxed in the same manner as proceeds from other (legal) trade activities. This is also true with respect to proceeds from bribery, blackmailing, pimping and other acts prohibited by criminal law from which the criminal obtains a material advantage. It must also be emphasised that, according to § 116 Tax Regulation, the courts and other state bodies (including the police and other prosecution bodies) must notify (without request) any facts which they have gathered during their investigations and which constitute the suspicion of a criminal act according to tax law (tax evasion) to the tax authorities.

Specific rules on the confiscation of proceeds from criminal acts by tax law were introduced to German law along with provisions on money laundering. As a result of respective amendments to the Money Laundering Act of 1993, completed in 1998, prosecuting bodies are obliged to inform the respective tax authorities when starting money laundering and criminal procedures and about the respective constituting facts. Up to then, such information would have been provided to the financial authorities only after the adoption of a valid verdict. As valid verdicts, especially with respect to economic criminal acts, often are obtained only years after the opening of criminal procedures, the requirement of the adoption of a valid verdict had the consequence that sanctions under tax law were rarely executed. Most facts relevant to tax procedures are difficult to prove or, in many cases, cannot be executed, because the person concerned moved his property away from the access of the tax authorities, for example by moving it abroad. If the suspect refuses to provide evidence on the origin of his property to the tax authorities they have the right to conduct a respective estimation and as a result are allowed to impose a tax rate which could possibly be higher than the value of the property that has been confiscated by the prosecuting authorities.<sup>2</sup> Thereby it is secured that property can be withdrawn from

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<sup>2</sup> See *W. Hetzer*, Steuererhebung und Strafverfolgung, Gewinnabschöpfung zwischen Dogma und Dilemma, *Kriminalistik*, 2000, No. 7, p. 436.

the suspect even if there is no valid verdict under criminal law because of the money laundering in question.

### **3. “TRADITIONAL” CRIMINAL MEASURES FOR CONFISCATING PROCEEDS FROM CRIMINAL ACTS**

The “traditional” measures of German criminal law, stipulated during the sixties, that are based on the confiscation of criminal proceeds are:

- forfeiture (§ 73 Criminal Code) and
- confiscation (§ 74 Criminal Code).
  - a) According to § 73 Criminal Code in the framework of forfeiture the court can withdraw the proceeds from a (purposeful or negligent) crime or property assets that were obtained from the crime committed (e.g. proceeds from a robbery or remuneration that a criminal obtained from another person for committing a crime). Further, property assets that have been obtained directly or indirectly from objects that have criminal origins (for instance cash money from the sale of stolen property) are subject to forfeiture.

Also subject to forfeiture are property assets that stem from criminal acts and that are in possession of a third person if he has obtained those property assets or rights for the criminal act or knew about the circumstances constituting the criminal act, for example the purchase of a stolen car when the buyer of the car knew that it had been stolen.

The court has to prove that the property assets (cash money, objects, demands) have been obtained in context with an illegal act. If the amount of what was obtained by or in the context of an illegal act cannot be investigated precisely its value can be estimated by the court (§ 73 b Criminal Code).

Exempted from forfeiture (but not from seizure if it serves to secure a victim’s claims) are all property assets which, if they are withdrawn (in favour of the state), will deny the crime victim the chance to execute compensatory claims; the court can estimate the amount of these claims as well.

- b) Unlike forfeiture, confiscation regulated by § 74 Criminal Code, can only be imposed by the court if the valuables (money, other assets, claims from a bank account, etc.) stem from a purposefully committed criminal act or were destined for the commitment or preparation of such a criminal act. The assets or valuables, which shall be made subject to confiscation, must generally be in the property of the criminal. Only with regard to a few criminal provisions explicitly indicated in the criminal code can those assets be confiscated, even when the owner, with complete negligence, supported the commitment or preparation of a criminal act or these assets were obtained with full knowledge of all circumstances that would have admitted their confiscation. If the assets that are subject to confiscation have already been sold, the confiscation of a respective amount of money can be imposed on the property of the criminal (§ 74 Criminal Code).

Taking property assets into custody (seizure, arrest *in rem*), when it can be assumed that they are subject to confiscation or withdrawal of proceeds, is regulated by Art. 111a of the Criminal Procedural regulation.

#### 4. SPECIFIC CRIMINAL LAW MEASURES TO CONFISCATE PROCEEDS FROM CRIMINAL ACTS COMMITTED BY ORGANISED CRIME

The measures based on the confiscation of proceeds from criminal acts committed by organised crime stipulated by German criminal law since 1992 are the following:

- a) The property penalty (§ 43a Criminal Code), established by lawmakers in order to withdraw the proceeds from criminal acts, aims to punish criminals. It also allows the state access to the property of criminal organisations or drug dealers in order to make it impossible for them to use their financial means for further criminal activities, especially for the maintenance, extension or recreation of an organisation that is based on crime. However, in the jurisdiction of the Federal Supreme Court it is emphasised that this sanction is not considered as a measure to confiscate profits but as a punitive measure that is based on the guilt of the criminal. Reason and limit for the application of the property penalty consequently is not the amount of the property of the criminal but the severity of the committed crime and his individual guilt.

A precondition of the application of the property penalty is that it is explicitly indicated in every concrete norm of criminal law. This is particularly the case with respect to norms of criminal law, which sanction behaviour that is typically carried out in the framework of organised crime such as drug trafficking, money forgery, arms trading, trafficking in human beings, etc. An additional precondition is that the penalty can only be applied in addition to a deprivation of liberty of more than two years. The property penalty can be applied up to an amount, which is limited by the property of the criminal. If the court takes advantage of the full scope of this rule this constitutes a confiscation of all the criminal's property.

If there is a suspicion that a crime has been committed, seizure of a suspected person's property can be imposed already during the preliminary proceedings in order to secure the execution of a predicted property penalty (before the amendments were made into the Criminal Procedure Code of 1998, seizure was available only in the form of "urgent" measure).

In German legal literature the property penalty is subject to severe criticism. The opinions expressed in this context (which are not shared by court jurisdiction) indicate that this sanction allows an illegal confiscation of legal or unproven illegally obtained property, which violates constitutional principles. Also subject to criticism is the lack of preciseness in the corresponding § 43 a Criminal Code, which does not provide sufficiently precise criteria on how the property penalty amount must be determined in a way that is "proportional to the guilt" of the criminal. For these reasons a large part of German criminal law science favour the idea that the property penalty is "an alien idea in the German criminal law system" and "an inappropriate legal institute" that should be abolished.<sup>3</sup>

- b) Another legal instrument being used to withdraw proceeds from organised criminal acts is the extended forfeiture (§ 73 d Criminal Code). Stipulated in the Criminal Code since 1992, this measure can be imposed with respect to the same criminal acts as the property penalty. The introduction of this new legal instrument created the opportunity to withdraw property assets that were (apparently) obtained as a result of a criminal act. This is a precondition if a criminal, sentenced to an ordinary crime, is found to have property assets which are well beyond a modest legal income. It will justify the suspicion that they are the

<sup>3</sup> See *H. Jescheck, Th. Weigend, Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th edit., Berlin, 1996, pp. 778; *Schönke/Schröder, Strafgesetzbuch*, 25th edit., Munich, 1997, pp. 624.

results of criminal acts. In contrast to the simple forfeiture (see above) the extended forfeiture can be applied even when it has not yet been proven whether or not an object is (directly or indirectly) of criminal origin. It is sufficient if the “circumstances” of a particular case justify the suspicion that it is such a case. Subject to forfeiture are all objects and valuables that are in the criminal’s possession and are thought by a judge to have “presumably” come from any criminal act, not just the criminal act of which the criminal is accused of in the particular case.

Like property penalty, the extended forfeiture is subject to criticism in German legal literature. According to critics the legal institute of an extended forfeiture violates several principles of Criminal Procedural regulations, which cannot be justified even for the purpose of combating organised crime.

- c) The provision on money laundering (§ 261 Criminal Code) serves to contest the property from organised crime, i.e. the channelling of proceeds from criminal acts into legal financial and economic circulation for the purpose of camouflage. According to German Criminal Law money laundering can only be made subject to criminal punishment if the valuables (as a rule cash money), which are then channelled into legal financial and economic circulation, have their origin in criminal acts (so-called prior-offences) explicitly mentioned in the Criminal Code. The majority of these Criminal Code provisions mostly relate to organised crime; Subsequent revisions of the Criminal Code from 1994 to 1998 have seen the number of Criminal Law provisions extended. Money “laundering” originating from other prior-offences not mentioned in the Criminal Code, e.g. money that has been obtained as a result of a simple theft or fraud, is not subject to punishments relating to money laundering.

## 5. WITHDRAWAL OF PROCEEDS OF CRIMINAL ACTS IN PRACTICE

In German law circles experts commonly agree that those measures that were introduced to German law in 1992 and that should have served to withdraw the proceeds from organised crime (property penalty, extended forfeiture, other measures against money laundering) to a wide extent have not led to the desired results.<sup>4</sup> The opportunities that are provided with the “traditional” instruments of criminal law (forfeiture, confiscation) are by far in practice also not fully. The reason for this lies, first of all, in the requirements of criminal procedural law, which must be respected when applying these measures. The problems relating to these measures are so complex that they are the main reason why, at the preliminary preceding stage to withdraw criminal proceeds, the measures are limited to just taking into custody any criminal equipment and cash money which has been found while searching for evidence.

In order to increase the withdrawal of criminal proceeds, especially during the second half of the nineties, special financial police investigators were appointed to detect criminal proceeds. These police officers, after following specific training, work exclusively on revealing and taking into custody proceeds from criminal acts. They are freed from other investigative activities such as crime investigations. This organisational innovation was introduced in police departments in 1996 at German Länder level. The results reveal that the value of criminal proceeds that have been taken into custody by police investigative authorities since 1996 have shown strong growth rates. For instance in Baden-Württemberg, the value of criminal proceeds that have been taken into custody by the investigative authorities has increased from approximately 19 million in 1997 to 56 million in 1998 and approximately 72 million in 1999 (growth rate from 1996 to 1999 - 397%). Similarly high growth rates

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<sup>4</sup> See *M. Thiele*, *Präventiver Kapitalentzug*, *Kriminalistik*, 1999, No. 8, pp. 506.

have been observed in Bavaria (1996 to 1999, approximately 600%), where this organisational innovation was introduced in 1998.<sup>5</sup> A large part of property assets that have been safeguarded by investigating authorities were to be handed back over to the crime victims (in 1999 in Bavaria these were 53% of the total valuables taken into custody). The intensification of the withdrawal of criminal proceeds has mainly been carried out by an increased application of the “conventional” measures provided by the Criminal Code (forfeiture, confiscation”).

According to German experts it is not necessary to extend the respective measures that are provided by German substantive Criminal Law in order to achieve a more efficient withdrawal of criminal proceeds. However, the respective procedural revisions possibly require simplification. Furthermore, it is considered necessary to educate specialised police officers in financial investigation so that they have knowledge not only in criminal and criminal procedural law, but also solid knowledge in other fields of law, such as economic law, civil law, tax law, law on joint stock companies, etc. Moreover in cases, where the legal instruments of substantive criminal law to withdraw criminal proceeds do not function due to criminal procedure law reasons, the proceeds from criminal acts must be withdrawn by legal measures under tax law. This will require a better co-operation between the investigation authorities and tax authorities than ever before.

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<sup>5</sup> Minister of Justice of Bavaria, *Der Kriminalist*, No. 7-8, p. 315.

## DELIMITATION OF COMPETENCIES IN A FEDERAL STATE\*\*

### 1. INTRODUCTION

One of the most complicated problems our country is facing on its way to the construction of new Georgian State, is the problem of the territorial arrangement of Georgia. At the present time, Georgia must make a choice. After many years, we have been given the chance to determine the territorial-political organisation of our country independently. The present type of territorial arrangement, which was artificially adjusted to that of the Republics of the USSR, so different from each other in historical, economic and political traditions, does not correspond to the traditions of the centuries-old state system of our country or the present objectives of the new Georgian State. Due to the loss of statehood, the natural, internal evolution of our country has been violated, the inherent harmony of natural law has been destroyed, and this has created many problems. Thus, the solution of the problem acquires a double importance: on one hand, the natural-historical course of development of the Georgian State needs to be found and at the same time, the new model of territorial arrangement is to promote the fulfilment of the objectives and functions of the modern Georgian State. The main precondition for the above is to strengthen the integrity of the state system, stimulate the political, economic and cultural revival of the country through reaching harmony between general national and local interests and placing the traditional Georgian variety within the whole.

The new Georgian Constitution of 24<sup>th</sup> of August 1995 left the issue of territorial arrangement unsettled leaving the creation of relevant conditions on the territory of Georgia and provisions for the regulation of this issue by Constitutional law to be adopted later. A decision of major state relevance is to be taken, which greatly intensifies the urgency and importance of the issue for our country.

Which model is to be chosen: unitary or federal? What should be status of the autonomous areas and other territorial units? What amount of competence should be retained with the central authority and what part of it should be transferred to the territorial units? It is not an easy task to make a choice. Thus, it becomes particularly important to study the practice of world constitutionalism in regard to these issues.

The federal system of each country has a number of peculiarities. But, at the same time, central sovereign authority of each federal state is based upon one common principle: its establishment and functioning has a double source – the will of citizens and the separate political units, amalgamated in the federation. No decision of state importance, resulting in the change of existing balance of powers within the federation, could be adopted without application of the same principle - without participation of the subjects of the federation and consent of their majority when adopting this decision. In a federal state the mechanism of adoption of all the important decisions - legislative process and process of constitutional changes - is based upon this principle.

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\*\* Translated from Georgian language by *Tamar Cherkezishvili*.

The subjects of federation have the benefit of political organisation independent from the central government and together with exercising their own powers they participate in the determination of joint sovereignty.

Two constitutional powers are effective in a federal state: central government and government of the members of the federation. Powers are divided between them on a constitutional basis. Neither party is able to change the scope of delimited competence, or exercise powers that are excluded from its jurisdiction by the Constitution and delegated to the other part of the government. Such an action is qualified as a violation of the Constitution.

At the initial stage of delimitation of powers within states, the distribution of political rights was treated with great tentativeness, mainly they were retained within central government and only the administrative and some civil rights used to become the subject of delimitation. Apart from political traditions, the difference between American and German federalism is manifested in the system of delimitation of powers. In the USA, the delimitation of competencies between the Federal Government and the States has always been vertical. Whenever the Federal Government was conferred the right of resolution of some issue, it, as a general rule, enjoyed the right of exercising all the legislative, administrative and judicial functions, necessary for its regulation. In Germany, traditionally, the Government enjoys the legislative right in regard with most issues, while the administrative and executive functions, necessary for the execution of these powers in relation with nearly all of the issues, remain with separate political units. In accordance with the German Constitution, exercising the state power and fulfilment of state assignments are the functions of the *Länder*.

In the USA, the subject of delimitation between the centre and the states are the organisations, while in Germany it is the functions. In first case the competencies are delimited vertically, while in Germany horizontally - political centralisation, administrative decentralisation - what is manifested in the following model of delimitation of competencies: legislation falls within the competence of the federation, while the executive activities are governed by the *Länder*; the establishment of the general principles of legislation falls within the competence of the federation, while the adoption of special laws, as well as the executive activities remain with the *Länder*.

Among the various combinations of delimitation of competencies four common models could be singled out:

- Special competence of the federation. Only the federal government has the competence in certain areas. Interference of other subjects of federation into this competence is qualified as a violation of the Constitution;
- Special competence of the members of the federation. The competence of the central government is excluded and only the members of federation are authorised to exercise it;
- Competitive, i.e. joint competence. Powers do not explicitly belong to any of the parties and could be exercised by territorial units only in case the issue under consideration is not regulated by federal government. Members of the federation enjoy this competence until the central government issues relevant legislative acts regarding the same competence. We consider, that joint competence should comprise all the rights, regarding which the central government is authorised to adopt legal acts, while the executive and administrative activities fall within the competence of the members of the federation; as well as the rights, for the execution of which one of the subjects of the government requires the consent of the other;
- Residual competence. Rights, that do not fall within the special competence of central government, or that of the members of the federation and are not covered by competitive competence, are considered to be residual competence. It is essential for federalism, the

competence of the federal government to be defined comprehensively, and the residual competence to be conferred upon the subjects of the federation.

As regards the scope of delimited competencies, as such, it may not be of decisive relevance for the classification of the types of states. But the other extreme is hazardous as well, which considers that the issue, whether what kind of competencies should be attributed to the subjects of the federation, is not of essential relevance for federalism. One of the outstanding researchers of federalism, A. *Jashchenko* considers, that the issues of delimitation of competencies are the issues of self-government and decentralisation. It is the issue of political organisation of subjects independent from central government that matters for federalism and not the scope of their competencies.

But what is meant under the concept of independent political organisation? How to accomplish it without creating state bodies within the subjects of federation and granting them the right of functioning, without administrative functions and own financial resources, necessary for their functioning? We consider that these issues are of essential relevance for federalism, as far as the principle of independent political organisation of subjects of the federation comprises the aggregate of powers, necessary for their independent operation, obtained as a result of delimitation of competencies.

## **2. BUDGETARY FEDERALISM**

The centre of gravity of disputes arising in a federal state in regard to the distribution of competencies between the central government and the subjects of the federation has shifted to financial rights from the field of sovereign and political rights. Thus, in modern concepts of a federal state, legal aspects of financial relations are to the fore. As defined by *Alexander Blankenagel*, one thing is common for all the definitions of federalism: in every case the “cake” is divided between several “eaters,” who, as a general rule, are hungry. And here arises the problem: how to divide the “cake” between the centre and provinces? Real federalism occurs only in those cases, when the distribution of the “cake” leads to the creation of a balanced system. The issue of revenues, necessary for financing of powers of the federation and federal units, is a complicated and delicate problem for every federal state.

Government and finances are interrelated and their independent existence from each other is impossible. Finances are the basis for the execution of state power. Thus, the issue of finances is the issue of reality of acquired rights. If the government is unable to rely on its own financial possibilities, it means, that it is incapable of exercising the rights conferred upon it and to solve the problems it is facing.

Apart from the task of carrying out fiscal and economic functions, financial law has to play an important political part as well. It is the most important instrument for the achievement of the given political objectives. Moreover, it is widely known that exerting implicit influence upon the political process, by means of economic and financial methods, is far more efficient than explicit compulsory legal approaches, which often give rise to serious political crises. Hence, delimitation of financial resources in a federal state is not of administrative-technical nature, but in fact, it is a major political issue.

The financial law of a federal state is of twofold nature: on the one hand it consists of the establishment of financial systems, which determine the delimitation of financial powers and instruments of the state between the federation and subjects of the federation and local territorial units. On the other hand the principles of state fiscal policy are of essential importance, they are to

secure the integrity of state fiscal system and market, and the stability and actual financial autonomy of territorial units.

Upon the determination of the degree of centralisation and decentralisation of financial functions both the political bearing of the issue and its economic, social, demographic and other results should be taken into consideration. It is acknowledged that economic growth of the State, the fight against inflation, overcoming the problem of unemployment, growth of the competitiveness of domestic production could be attained more efficiently in a shorter period on a federal level, with due consideration of economic necessity, interests of the majority, priority of common interests over the private interests, and their solution in equal succession. Such an approach is justified, both from an economic and political point of view, inasmuch as the establishment of economic stability is directly connected with the availability of solid political stability in the state.

These tasks require the maintenance of serious economic functions and financial possibilities for central bodies. Thus, even in federal state, which is based on vertical delimitation of power, such important fields of state's activity as customs, the basic principles of foreign trade and taxation policy are unified. Federal constitutions contain formula, according to which, the territories of the federation are united in customs and foreign exchange relations. No customs, taxation, transportation and other restrictions can be imposed separately.

The principles of budgetary federalism and taxation sovereignty are essential for financial autonomy of the subjects of federation. Vertical distribution of power in a federal state requires the existence of a multilevel budgetary system, when every level of the power has its own budget. Budgetary federalism implies the autonomous functioning of the budgets of various levels of the state as well, which is based upon explicitly defined legal rules. Every component of the budgetary system has its independent sources of financing and enjoys the right of free disposal of budgetary resources.

Elements of taxation sovereignty are: determination of the types and rates of taxes, disposal of taxes, calculation of the amounts of taxes, their collection and the exercise of control over their expenditure.

In a federal state taxation rights are distributed between the federation, the subjects of the federation and the bodies of self-government within the subjects of federation. There exist various combinations of distribution of taxation rights. In general, it is expedient that the taxation rights to coincide with the limits of delimitation of general competence between the federation and the subjects of federation. In cases where the subjects of federation are to exercise specific functions, their competence should as well include the imposition of tax liabilities in regard to these issues.

Autonomy of the subjects of federation should also cover the function of the determination of the types and rates of taxes to be levied on its territory. This will not lead to significant differences in terms of taxation between various parts of the federation. Tax policy, i.e., decisions regarding the determination of the tax rates become the subject of economic competition between the subjects of federation, low taxes attract entrepreneurs and investors, while the principle of competition induces the territorial units with high taxes to lower them, in order to increase revenues through attracting entrepreneurs.

Supporters of the decentralisation of financial powers have grounds to consider that observance of public needs and collection of necessary resources for their financing is easier on the level of local territorial units, i.e., for those who have direct contact with the consumers. Financial autonomy is an essential part of self-government. It is manifested in the following: bodies of local government are authorised to determine their revenues and expenses. And if local government is unable to rely on its

own financial possibilities, it is unable to resolve the problems it is facing, independently. On 15<sup>th</sup> of October 1985, when the Members of the Council of Europe adopted the Charter on Local Government, this principle acquired international legal acknowledgement.

Financial autonomy of the bodies of local government implies in principle the independent status of local territories within a federal state. Local territorial units have definite organisational status and are independent in relations with other subjects of the government, i.e. they are legal persons of public and private law, which form the part of the subjects of federation and the part of federation with the help of the latter. As far as the Constitution delegates to bodies of local government the rights of self-government, they acquire the rights of securing such activities as well.

Financial support of the bodies of local government could be exerted in different ways. First of all, the state, which is responsible for financial welfare of local governmental bodies, may open for them their own sources of financing, from which they will be able to finance themselves. The concept of real local government implies exactly this method of financing of the bodies of local government.

Upon the regulation of the issue of financing of local government bodies, the following main problems could be singled out:

- The sources of own revenues of local government bodies should be defined. Their model list is to be established;
- Own revenues of local government bodies should be calculated, in order to establish whether they cover their expenses; in average, the own revenues in the federal state make up one third of municipal financing;
- Following the above said, the other ways of filling up the deficit and types of financial balancing should be identified. Local government bodies, where the public per capita revenue is lower than average level of per capita revenues of the country, are subject to balancing. As a general rule, common state revenues are: income tax, corporation tax, turnover tax and entrepreneurial tax, which is distributed among three levels of federal state: those of common-state, subjects of federation and local government bodies. The percentage amount due to each governmental level from the total amount of revenues should be determined. In certain countries the percentage is equal for all the municipal bodies. The fixing of equal percentage amount for local government bodies is often unjustified, as far as the bodies differ from each other according to the level of their economic development, population, and area;
- It should be established, whether the local government bodies are authorised to approve the rates of taxes that make up their own revenues. The right of establishing tax rates secures the self-government of the bodies of local government in the field of finances and reflects the essence of their financial independence. Taxation policy, i.e. making decisions on the determination of tax rates, becomes the subject of competition between the bodies of local government and, through them, of the subjects of federation. As mentioned already, low tax rates attract entrepreneurs and investors, while in the case of high tax rates, they move to the territories under the other bodies of local government who have lower rates.

As a general rule, the following revenues make up the sources of own revenues of the subjects of the federation and other territorial units:

- Real estate turnover tax;
- Income tax;
- Agricultural tax;
- Private entrepreneurial activities tax ;

- Private professional activity tax;
- Property taxation income;
- Company income tax;
- Inheritance tax and other taxes for various gifts;
- Taxes on gambling and other entertainment business;
- Natural persons' income tax;
- Copyright and inventions tax;
- Administrative charges;
- Court fees;
- Utility service charges;
- Pecuniary fines;
- Other revenues obtained through the activities of own government bodies.

Revenues of the bodies of local government are of two categories: natural and indirect taxes. Natural taxes are: land and entrepreneurial taxes, as far as the taxes are levied on real objects. The rates and grounds for estimation of such taxes are determined in a whole state with equal application. Bodies of local government transfer part of entrepreneurial taxes to the subjects of federation and get the part of income tax in return. Income tax is one of the main sources of revenue of the bodies of local government. Income tax is a common tax that is divided between the state, subjects of federation, and the bodies of local government.

Inasmuch as the revenue of local government makes up only one thirds of their financing, members of the federation are obliged to take care of balancing the financial possibilities of the bodies of self-government. Financial balancing aims at securing an approximately equal level of state welfare for every citizen living in various territories of the state, in order not to cause irrational interregional migration of population from poor to rich regions.

Financial balancing is applicable both between the federal centre and the subjects of federation (vertical balancing), and between the subjects of federation (horizontal balancing). In 1951, in Germany Federal Law on "Financial Equalisation of *Länder*" was adopted. It provided for the definition of "strong *Länder*," which bore financial liability in favour of "weak *Länder*," the latter having right of equalisation. The method of horizontal equalisation caused the irritation of rich *Länder*, which have even lodged a claim before the constitutional court against the horizontal balancing. After the dismissal of the claim, the *Länder* giving out financial support started to demand wider rights in the process of adopting common federal decisions by the increase of the number of their representatives in the Bundesrat.

This institution operates more efficiently between the *Länder* and bodies of local government under it. Every year the *Länder* adopts the law, which determines the share of bodies of local government in the total amount of taxes. They are: income tax, corporation tax, turnover tax and entrepreneurial tax, which are divided between the state, *Länder* and local governments.

Proceeding from common economic purposes, the state can participate in local bodies' investments of particular importance. The transfer of funds to the bodies of local government by the *Länder* could be of a general purpose, or additional and targeted. General-purpose transfers are of particular importance, as they are not related to specific tasks and demands and bodies of local government are authorised to dispose of them at their own discretion. The amount of general-purpose transfers is dependent upon the size of population of the communes and their specific expenses.

Additional transfers are used for covering budget deficits and the compensation of discrepancies in the distribution of general-purpose transfers. They are not related to specific targets, but it is understood that other sources of incomes are exhausted

Targeted transfers are related to the fulfilment of specific tasks. Communes may use them only in certain circumstances. Together with financing state procurements, transfers for investments are important as well.

The application of the mechanism of financial balancing requires political control as well, in order not to exert financial influence over the decisions of the members of the federation and bodies of self-government, what results in their losing independence, centralisation of the political system and all this is dangerous for the development of federal relations.

### **3. CONCLUSION**

Given a number of objective reasons the Georgian Constitution of 1994 failed to settle the issue of territorial arrangement of Georgia and provided for its later resolution by a constitutional law. Based on world experience in constitutionalism, a constitutional law on territorial arrangement of Georgia should provide for: the number of territorial units, their denomination and borders, their status, governmental bodies of these units and their competencies, the number of representatives of each territorial unit in the supreme legislative body, the sources for the budgets of the territorial units.

The Georgian Constitution established the principles of territorial arrangement: first, the sovereignty of the state; and second, the delimitation of competencies between the central power and territorial units.

The Constitution provides for two types of competencies: the issues that belong to the governance of the supreme state bodies of Georgia and those belonging to joint governance. The Constitution does not give the list of these issues and they are provided for separately. Though the Constitution does not mention the issues of exclusive governance of territorial units, it does not exclude the existence of such authorisations. These authorisations, which are not included in the list of exclusive competencies of the central government and the competencies of joint governance, belong to the "residual competencies".

With the view of avoiding the confrontation between the central and the regional government, as well as the numerous misunderstandings, we consider it reasonable to make use of the following model of delimitation of competencies: a constitutional law is to determine the exclusive competencies of the territorial units along with the exclusive competence of the central government, while other issues, that are not covered by the exclusive competence of one of the governments, should be assigned to joint government.

In our opinion, under the constitutional law on territorial arrangement of Georgia the following issues should be assigned to the exclusive governance of the regions:

- Regional legislation, its enforcement and supervision;
- Development of own supreme and local bodies;
- Local self-government, establishment of their limits;
- Adoption of own budget, its fulfilment and supervision;
- Local taxes and the operation of the local taxation system;
- Disposal of the regional property;

- Public order, local police;
- Roads and transport for local Construction;
- Power sector;
- Trade;
- Social security;
- Utility services;
- Healthcare and hygiene;
- Local TV – radio and telecommunications;
- Apartment building;
- Social insurance;
- Secondary and vocational education;
- Culture, protection of historical monuments;
- Science;
- Tourism and sport;
- Nature utilisation;
- Hunting and fisheries in internal waters;
- Agriculture, cattle-breeding, forests and forestry.

Each version of the territorial arrangement of Georgia should be assessed in view of the fundamental elements of a state: national security; economic and democratic development. The type of territorial arrangement is to promote the implementation of the state objectives and functions. The main precondition of the above is the chosen type to reinforce the sense of common statehood, to unite and bring together the people in view of common objectives.

## SOME ASPECTS FOR THE IMPROVEMENT OF MECHANISMS OF CONTROL OVER THE MONOPOLISTIC BEHAVIOUR\*\*

One of the principal activities of competition regulation is the exercise of state control over the activity of companies with a dominant market position in order to avoid and eliminate the probable abuse of their position.

The Law of Georgia on Monopolistic Activity and Competition as well as the competition laws of other countries comprise provisions on the restriction of behaviour of dominant companies, including control over prices, the amount of production and contractual conditions that are not applied to other undertakings. In this respect both for market participants and potential investors particularly interesting are the criteria, which characterise the dominant position of an undertaking. However, if according to the law it is too simple to assign undertakings into the category of dominants and thus to include them under the regime of state control, potential investors may refrain from investment projects in the country until the improvement of this law and accordingly the whole society will lose.

Thus, the interest and certain worry which was caused among entrepreneurs by the Order of the Head of State of Antimonopoly Service on the Determination of Dominant Position of Economic Agent on the Relevant (specific) Commodity Market is quite understandable.<sup>1</sup> Questions were raised, would the setting of a presumed norm of domination at a 35 % market share encourage tighter controller over the economic agents registered on the register of monopolist undertakings and conformably paralyse successful businessmen and cause other negative effects? Why exactly 35%? Is there a corresponding normative-methodological framework available for identifying and preventing the abuse of dominant position?

The present article aims at informing the interested reader about the theoretical and practical problems of the abuse of dominant position and setting the main directions for the improvement of respective provisions of the Georgian legislation.

Generally, according to the widespread opinions of the economic theory and practice, an economic agent is deemed as having the dominant position if it is able to influence the market independently from competitors. The notion of collective domination is also known.

Measures against the abuse of dominant position is stipulated in the competition legislation of almost all countries. It should be noted that to this problem is related the adoption (in 1890) of the first competition law of the USA the "Sherman Antitrust Act", which focuses on two principal directions of application of the modern legislation such as agreements between undertakings and abuse of dominant position (under this Act "monopolization"). According to Section 2 of the "Sherman Act", monopolization of the market is deemed unlawful and certain actions which intend the monopolization of the market such as fixing of agreed prices, market-allocation etc. shall be punishable. Later in 1914

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\*\* Translated from Georgian language by *Maka Machkhaneli*.

<sup>1</sup> *Sakanonmdeblo Matsne*, No.118, 2000, 19 December, p. 26.

the Clayton Act was adopted. This declared the application of discriminatory prices on the consumers as unlawful.<sup>2</sup> Under the law on the Federal Trade Commission adopted in the same year the said Commission was established and it was assigned the power of implementation of antitrust laws.

The major part of the provisions of US antitrust laws dealing with monopolization mainly focuses on prohibited behaviours of two categories, such as exploitation of a dominant position and the maintenance and strengthening of the dominant position itself which means the creation of barriers to access of new participants to the market and hindering the development of competition.<sup>3</sup>

Analysis of the practice of competition regulation of the USA shows that the antitrust laws are rather intensely applied for the second category of offences, i.e. actions that hinder the development of competition on the market. This once again points out that it is not the dominant position itself but the abuse of the position that is considered dangerous for the public.

It should be taken into consideration that according to American approaches, generally an undertaking which lawfully maintains a dominant position is authorized to fix any price on its own product or service in order to receive higher profit. This becomes kind of an incentive for the access of new participants to the market, promotes the development of competition and accordingly increases public welfare.

Furthermore, as for the control over the behaviour of dominant companies, the characteristic of the US approach is that the company's behaviour on the market is conditioned first of all by the structure of the field. However discussions on the object of antitrust investigation took quite a long time. There was a wide variety of opinions on the enforcement of antitrust laws. Specialists argued what should be the object of prohibitions: the structure of the field or a specific behaviour. One group of specialists believed that in the monopolistic fields neither action would be desirable for the public. For them monopolized fields should be a lawful target for antitrust claims. According to alternative opinions the link between the structure of the field and market behaviour is weak, even the monopolized field can be technologically progressive and produce products with permanent increases of the quality at a price acceptable for a consumer. Thus it is not worth having it as a target for antitrust law only on the grounds that it is highly concentrated. Adherents to this position considered that application of competition legislation on companies successfully operating or even having monopolistic position makes no sense if they artificially hinder the development of competition. The Review of the case of the Aluminium Company (1945) and the termination of the IBM case (1982) clearly confirmed that in the above noted discussions the advantage was evidently shifted to the control of behaviour.<sup>4</sup>

Prohibitions of the abuse of a dominant position are also stipulated by the Treaty Establishing the European Community (EC Treaty), in particular its Article 82 which says that any abuse of a dominant position within the Common Market shall be prohibited as it may affect trade between Member States. According to the same article, abuse of a dominant position may consist in setting monopolistically high prices (which significantly differ from the cost incurred by the undertaking); or "predatory" low prices, when it is intended to knock competitors out of the market; or unfair trading conditions; limiting production, markets or technical development; applying dissimilar conditions to equivalent transaction with other trading parties; and other practices. Under the EC Treaty it is stipulated that the provisions of Article 82 shall be applied under only two conditions: an undertaking must have a dominant position and at the same time be engaged in a practice that amounts to an abuse of the dominant positions.

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<sup>2</sup> E. Gellhorn, W. Kovacic, *Antitrust Law and Economics in a Nutshell*, 4<sup>th</sup> edit., West Publishing Co., 1994, pp. 15-30.

<sup>3</sup> R. Pittman, *Antitrust Policy and Legislation in the USA*, 1998, p. 11.

<sup>4</sup> C. McConell, S. Brue, *Economics*, McCraw-Hill Publishing Company, 11<sup>th</sup> edit., 1990 (Russian Edition, 1992), p. 226.

It should be noted that in the first generation competition laws of Eastern European post-socialist countries one of the criteria for domination used to be a 30% market share. Moreover, this indicator was applied as a main, sometimes sole criterion determining domination.<sup>5</sup>

Later, after making changes and amendments to the above noted laws the meaning of the indicator of market share was raised. Furthermore, the criteria for determination the dominant position were expanded. For instance, under Hungarian law, an economic agent is deemed as having dominant position if its goods cannot be purchased on other markets or can be purchased only under considerably less favourable conditions. In addition, an undertaking must hold more than 30 % on a similar, comparative or mutually substitutable commodity market. The law of the Czech Republic determines domination by a 30% market share. Whereas in the Slovakian as well as Polish law the lower margin of domination was raised from 30 to 40%. The Romanian law of this same period grants the authority of determining the market share to the Romanian Competition Council. For this reason a famous expert on competition matters *Russell Pittman*, Head of the Division of Competition Policy of Antitrust Board of the US Department of Justice, considers this law as "unique".<sup>6</sup>

In the legislation of CIS countries, a dominant position (in the laws of some countries e.g. Ukraine and Georgia, a synonym for dominant position is used - monopolistic position) is defined as a particular position of an undertaking when this position gives it the possibility to exert important influence over the general conditions of turnover of goods or restrict other undertakings' entrance to the market.

In the competition legislation of the majority of CIS countries, the maximum norm of market share (as of 1999) is determined as follows: in Azerbaijan, Kazakhstan and Kyrgyzstan - 35%; under the Moldavian legislation if the share is lower than 35% the issue of domination of the company is not considered at all. In Belarus and Georgia the maximum norms shall be approved by the antimonopoly body. Under the last edition of the Russian law the issue of domination is considered when the market share of the undertaking ranges between 35-65%. A 65% share is an unconditional sign of domination whereas if the share is lower than 35% the issue of domination is not considered at all. In Ukraine, an undertaking is deemed as having a dominant position if its market share exceeds 35% and the Antimonopoly Committee is authorized to determine the existence of domination even if the market share of an undertaking is below 35%. Thus in the majority of CIS countries, including the Russian Federation, Moldova and Kazakhstan the issue of domination of undertakings with market share below 35% is not considered at all.

According to the legislation of these countries, the following is considered to be the abuse of dominant position: creating barriers to other undertakings' entrance to the market (Azerbaijan, Moldova, Georgia, Kazakhstan, Kyrgyzstan, Uzbekistan, Russian Federation, Belarus); fixing of monopolistic prices (Georgia, Ukraine, Russia); maintenance of prices or their increase in order to receive monopolistically high profit (Azerbaijan, Belarus, Uzbekistan); discriminatory price-fixing or offer of additional conditions on sales/procurements (Azerbaijan, Georgia, Moldova, Russian Federation, Ukraine, Uzbekistan, Kyrgyzstan); offer of additional conditions to other agents in which the latter is not interested (Azerbaijan, Belarus, Georgia, Moldova, Kazakhstan, Kyrgyzstan, Russia); withdrawal of goods from economic circulation in order to create a shortage or raise the price (Georgia, Russia, Azerbaijan, Belarus, Moldova, Kazakhstan, Kyrgyzstan, Uzbekistan) etc. A specific case of dominant

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<sup>5</sup> *R. Pittman*, Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe, *The International Lawyer*, vol. 26, No. 2, 1992, p. 496.

<sup>6</sup> *R. Pittman*, Competition Law in Central and Eastern Europe: Five Years Later, *The Anti-trust Bulletin/Spring 1998*, Federal Legal Publications Inc., pp. 199-202.

position is the activity of natural monopolies that is a separate topic, but it is noteworthy, that violations in this field basically take form of the imposition of unjustified tariffs.<sup>7</sup>

In Georgian law, the term for the dominant position is “monopolistic position” which is defined as “particular position of an economic agent when this position gives the possibility to exert important influence over the market and restrict competition”. In accordance with the principles applied in international practice, Georgian law prohibits not the monopolistic position but monopolistic activity defined as “an activity, which gives the possibility to an economic agent to exert important influence over the market price of interchangeable (competitive) product at the commodity market and to restrict competition”.

According to Article 11 of this very law “an economic agent shall be considered to be in a monopolistic position if its share of the particular commodity market directly or indirectly exceeds the maximum norm established by the Antimonopoly Service”.

In most of the European countries (for instance Germany, Greece, Bulgaria, Lithuania, etc.) the market share of an undertaking above which it is considered to be in a market dominant position, is specified in a law itself.

As we see this definition does not cover all aspects of the notion “dominant position” accepted in EU legislation as well as in the theory and practice of American regulation. Besides, in Georgia, Romania and several CIS countries (Belarus and Uzbekistan), the authority of determination of marginal share is granted under the law to the antimonopoly body.

It is noteworthy that in the specialists’ point of view every law requires amendments:

if the definition of dominant position focuses only on the undertaking’s market share and not on the actual market power of the undertaking, which *per se* depends on permanently high market share of the undertaking, existence or non-existence of entry barriers, market expansion by other undertakings and other factors, there is a risk of over-regulation of the economy and raises the degree of caution of investors because the successful market strategy may turn them into the object of permanent supervision by the regulatory body;

- if the law contains provisions which put the normal market behaviour of dominant companies under the question only because of their market position, and which evidently hinders the development of the market;
- if in the law there are provisions with regard to control over the prices of goods/services of dominant companies and these provisions are strictly implemented, the economy suffers triple damage: first, bureaucratic involvement in market mechanisms; second, companies costs will grow as the companies allocate sources for relations with regulators; and third, non-use of structural capacities as the antimonopoly bodies use part of their resources on price regulation to the detriment of other antimonopoly measures.<sup>8</sup>

As for the range of actions forbidden for dominant undertakings, according to the Law of Georgia on Monopolistic Activity and Competition, an economic agent taking or having a monopolistic position is prohibited from abusing this position with a purpose to discriminate against other participants of the

<sup>7</sup> N. Yacheistova, Competition Policy in Countries in Transition: Legal Basis and Practical Experience, United Nations, New York, Geneva, 2000, Advanced Copy, pp. 22-23.

<sup>8</sup> R. Pittman, Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe, The International Lawyer, vol. 26, No. 2, 1992, p. 496.

market. Whereas under Article 13 of this law, the action, which causes or may cause infringement of interests of other economic agent or consumers shall be considered as abuse of monopolistic position. Such actions are:

- decrease or cessation of production, withdrawal of goods from economic circulation in order to establish or maintain a shortage on the market and exert influence on prices;
- setting conditions hampering another economic agent from entering the market or leaving it, or impeding the activity of an economic agent already acting on the market;
- setting discriminative conditions for the participant in the market, which impose irrespectively high or low purchasing or selling prices on it, or when conclusion of an agreement is connected to the performance of additional conditions that are neither essentially nor under trading rules related with the agreement;
- compulsion of any kind in order to conclude an agreement;
- establishing a high or low monopolistic price, which, within a certain period, considerably differs from the expenditure on production and sale;
- decrease or cessation of commodity production when there is a demand or order of consumer at hand and it is possible to produce the goods without damage;
- use of dumping prices;
- other actions leading to the restriction of competition or infringement of lawful interests of an economic agent and consumer.

It should be taken into account that this list is not exhaustive and antimonopoly bodies can add any action to the category of prohibited actions.

Georgian law provides for special approaches with regard to mergers and vertical agreements to be implemented with the participation of dominant economic agents. Namely, Georgian law prohibits agreements (concerted practices) “between economic agents that are not competitors, one of which has a monopolistic position and other is a supplier or consumer and which may lead to restriction of competition” (Article 12). Article 14 of the law also provides for the necessity of antimonopoly investigation “at the time of merger of a monopolistic economic agent with other economic agents” and “when the economic agent having a monopolistic position acquires shares and part of other economic agent (its branch)” (Article 23).

Apparently, under the conditions of appropriate pro-competitive interpretation and use of the above noted provisions, participants of the market will be protected against anti-competitive behaviour of dominant undertakings and from other restraints. However, the general wording of this law and the present situation with regard to appropriate normative and methodological framework lessens the efficiency of the law in the process of its implementation.

Furthermore, under Article 15 of the Georgian law, in the repeated infringement of competition laws by an economic agent having monopolistic position, the Antimonopoly Service is authorized to raise a question on its compulsory division before the appropriate organs if territorial or organizational separation or implementation of other antimonopoly measures including establishment of fixed prices, marginal norm of profitability etc. are possible. As we see, this Article, which was acceptable at the beginning stage of demonopolisation of country’s economy and state property privatisation when the list of dominant undertakings basically was limited to the public undertakings, still allows the controlling body to be involved in the price-fixing processes of a dominant undertaking acting on a specific market even in the fields where prices are not subject to state regulation. Thus, the essence of the provisions

of this law and the Law of Georgia on Grounds for Prices and Price-making is “outdated”, contradicts to the principles of free market economy, and requires serious changes.

Taking account of the basic principles of market economy, we consider that even in the case of repeated violation of the law by a dominant undertaking it would be reasonable to apply any norm of administrative or criminal law according to the qualification of the violation and not of the company's position. In addition, we find it reasonable to differentiate between sanctions on the basis of the size (annual turnover) of companies and the effects caused by concrete action though this matter goes beyond the topic and purposes of the present article.

It is noteworthy that monopolistic activity and restriction of competition is punished under the Criminal Procedure Code of Georgia. Namely, according to Article 195 of this Code “monopolistic activity - fixing monopolistically high or low prices, as well as restriction of the competition by dividing the market, maintaining the influence on the market, knocking out of other economic entities from the market and/or setting or maintaining common market price shall be punishable by imprisonment for a period up to three months or deprivation of liberty for a period up to two years”.

Apparently, the abuse of dominant position may take place only if the dominant position of an undertaking is obvious on the market and it has committed an action that causes or may cause restriction of competition.

Consequently, before taking the law-defined prohibition measures against respective dominant companies it is necessary to conduct an analysis, which will aim at:

- determination of the relevant market which is a very important practical problem and its solution is related to the situation of informational and methodological framework, as well as performance capacities of antimonopoly bodies;
- determination of domination of a company on the market;
- assessment of concrete action of dominant company or finding of the fact of abuse of dominant position.

Although a dominant position is regarded as a static event, dynamic changes taking place on the market must be necessarily considered in determining it. Economic theory is not aware of a concrete percentage the possession of which automatically determines a dominant position. The turning point for determination of company's domination is to define its share on the market though the latter does not always speak of actual market power and respectively cannot be regarded as the only criterion for determination of a dominant position. There are cases known in the practice of competition regulation when the issue of domination of a company is not at all raised if the share is too small and vice versa when even a very small share might be enough to recognize an undertaking as having dominant position, namely under the conditions of shortage. According to the result of market determination, by considering various factors one and the same action of an undertaking could be assessed as anti-competitive as well as pro-competitive. As an example can serve *Cellophane* case from the US practice<sup>9</sup> and *Banana* case from EU practice<sup>10</sup> and many others.

Thus, in determining domination by an economic agent on the market besides the share it is necessary to study other factors such as characteristics of competitors, existence of barriers for the entry to the market, possible reaction of competitors to the company's behaviour and *vice versa* the

<sup>9</sup> E. Gellhorn, W. Kovacic, *Antitrust Law and Economics in a Nutshell*, 4<sup>th</sup> edit., West Publishing Co., 1994, pp. 102-103.

<sup>10</sup> Proposals of GEPLAC for the Strategy of Harmonization of the Georgian Legislation with that of the EU, *Comparative Analysis of Competition Legislation*, 2000.

level of development of not only actively operating but of also temporarily stopped but existing powers, distribution networks, etc.

Considering that under the Georgian law, the only criterion for domination is market share and the authority of determination of it is granted to antimonopoly service, it is obvious that the law necessarily needs changes in this respect.

It is widely known that determination of the market and of a company's share on the market is quite a difficult methodological problem in the antimonopoly practice of any country. Proceeding from the above, representatives of legislative and enforcement bodies (including both US and EC countries)<sup>11</sup> very carefully and responsibly treat the issue of verification of the facts of determination of market and domination and indeed the abuse of dominant position. The purpose is not to have the legally operating companies even with dominant positions punished unfairly for their successive activity.

This problem is particularly pertinent in the countries with no tradition of competition regulation, including Georgia. The purpose of it is that due to complications caused by imperfect normative and methodological and organisational frameworks, legislative norms that aim at the development of competition must not unwillingly interrupt the growth of activity of entrepreneurs and public welfare in the process of their implementation.

As the best means of avoiding similar cases we consider the elaboration and refinement of competition legislation and necessary mechanisms for its enforcement on the basis of approaches universally declared and established in the theory and practice of competition regulations, as recommended by American and European experts working for the Antimonopoly Service of Georgia, and typical cases of developed countries which can be regarded as classical examples and practical experience of Eastern European and post-socialist countries.

Besides difficulties of a methodological nature it is impossible not to mention that due to certain reasons tendencies towards regulation of business with non-market methods under the motive of consumer protection is well observed in Georgia as well as other post-socialist countries. If we consider the existing degree of corruption and many other factors it is impossible not to share businessmen's worry with regard to the establishment of marginal share for determination of dominant position, registration of economic agents with relevant position in the register of dominant undertakings and measures of competition regulation possibly to be taken against them. Psychological factor should also be taken into account. Namely, in the existing social economic situation, in the socially or legally unprotected society, the word monopoly is almost unconditionally understood as "maliciousness". Besides this public mentality and concrete unfair actions of economic agents with market power it is conditioned by the fact that quite often it is not a successful market strategy but unfairly implemented economic reforms that are the basis of dominant position of an undertaking or it is the remainder of our past economic heritage.

The competition law of Georgia as well as those of post socialist and CIS countries contains provisions, which can be applied by potential market participants and competition bodies for the prevention of anti-competitive behaviours of dominant companies. In addition, each of them comprises stipulations a direct interpretation of which might be harmful for the goals of competition laws. Such provisions in the legislative acts are compared by *Russell Pittman* to the double edged sword<sup>12</sup>. He says that the provision of each law, under which damage caused to a competitor, is stipulated as an

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<sup>11</sup> *E. Gellhorn, W. Kovacic*, Antitrust Law and Economics in a Nutshell, 4<sup>th</sup> Edition, West Publishing Co., 1994, pp. 109-120.

<sup>12</sup> *R. Pittman*, Competition Law in Central and Eastern Europe: Five Years Later, The Antitrust Bulletin/Spring 1998, Federal Legal Publications Inc., p. 205.

unconditionally unlawful action is potentially dangerous. It is natural that a competitor will always lose to a certain extent, if a competing party lowers the price or improves the quality even through an entirely lawful action.<sup>13</sup> In his articles *Pittman* gives the provisions of Polish, Hungarian, Czech and Russian laws as an illustration of those which serve: "to prevent (the) creation of such conditions that are necessary for the development of competition" (it is obvious that a company selling high-quality products at a low price does not really promote the development of competition, however the sale of production under conditions acceptable for consumers can not be deemed as an unlawful action), "hindering of market entry for other companies", "creation of groundless barriers for competition on the market", "dominant company shall not infringe others' interests" etc.

The above given provisions raise many questions, like: would such provisions of the law make unlawful production of the goods, which will complicate entry of other entrepreneurs to the market? Would such actions be regarded as infringements of others' interests or causing damage etc?

In this context, the opinions of other experts are interesting as well. In particular, similar questions are raised by *Natalia Yacheistova*, the advisor of the Conference of Trade and Development of UN, in her article "Competition Policy in Countries of Transition". The author writes that under the laws of some countries actions such as refusal to conclude a contract in case of unavailability of another alternative seller/buyer (Ukraine, Azerbaijan) or at all possibility of production and supply (Russia), termination of economic links without preliminary notification (Azerbaijan), violation of price-making procedure stipulated under governmental acts (Moldova, Kazakhstan, Kyrgyzstan, Russia, Uzbekistan), reduction or termination of production where there is demand for it (if their production is possible without damage) (Azerbaijan, Russia) all belong to the category of prohibitions. Proceeding from the principles of a market economy the author argues against the above being determined as actions that should be prohibited and I hope that they will be changed in the process of further refinement of the laws.<sup>14</sup>

In our opinion, the same can be said about the preamble of Article 13 of the Georgian law, which says that "an action, which causes or may cause infringement of interests of other economic agents or consumers shall be considered as abuse of monopolistic position" and clause "f" of this Article according to which, an economic agent with dominant position is prohibited "from reducing or terminating production of goods for which demand or an order is available, if its production is possible without damage". We believe that if on each market there is socially necessary, unsatisfied demand, the state itself should find alternative ways to satisfy it. The same could be said about Article 15 of the Georgian law and other mechanisms of control over price-making of dominant companies, which besides basic principles of market economy contradict to a certain extent to Article 10 "c" of this same law under which every state body is required not "to prohibit, terminate or otherwise hinder the business activity and independence of an economic agent unless otherwise provided for by the Georgian legislation". In addition we believe that there is a significant contradiction between the contents of the provisions of the Georgian law on the basis of prices and price-making, standardized economic approaches of control over monopolistic action and objectives of sound competition development. We hope that in the nearest future appropriate legislative changes will help to put the essence of these provisions in line with the course of market reform.

<sup>13</sup> *R. Pittman*, Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe, *The International Lawyer*, vol. 26, No. 2, 1992, pp. 498-500.

<sup>14</sup> *N. Yacheistova*, *Competition Policy in Countries of Transition – Legal Basis and Practical Experience*, United Nations, New York, Geneva, 2000, Advanced Copy, p. 23.

Proceeding from all of the above, we believe that the establishment of presumable norm for determining of dominant position under the conditions of proper application of it should not be dangerous in terms of state control over their business, because:

- recognition of an undertaking as having a dominant position and its inclusion in the register (I personally take a sceptical view of the necessity of this register due to certain presumptions, though this is only author's opinion and not a position of antimonopoly service) of dominant companies does not mean to put it under any regime of regulation but under the supervision in order to avoid possible abuse of its dominant position unlike companies not having market power in the work of which the antimonopoly service interferes only in case of violation of the law by them and/or availability of a specific claim;
- the Georgian law prohibits not the dominant position but monopolistic activity;
- a dominant position does not mean anti-competitive whereas competition legislation aims at control of anti-competitive behaviours and not prosecution of registered companies. Therefore, it should be taken into account that under the competition legislation protection is afforded not to any competitor but to competition in general. In addition it should be noted that the Georgian legislation allows an economic agent to challenge a groundless decision of any controlling body.

The Western community treats differently the objectives of competition legislation and the means for their achievement. However, they unambiguously declare two principles. Namely, that these laws shall be intended for avoidance of monopolistic action and agreements that cause damage to consumers. In addition they should create encouraging conditions for new companies to enter the market and protect sound competition among existing ones. As for the enforcement of the law, it should be done with clarity, predictability and transparency to assure investors that they will be protected against anti-competitive actions of companies existing on the market and that their activity will be impartially assessed and also to assure the population that they will be protected against abuse of dominant position by dominant companies.

The purpose of the present article is to assess the Georgian Law on Monopolistic Activity and Competition in the light of the above noted principles, its further improvement and proper interpretation.

**SOME ASPECTS REGARDING THE CONSTITUTIONALITY OF THE ORGANIC LAW  
OF GEORGIA ON THE CONSTITUTIONAL COURT\*\***

Constitutional justice, succeeding its historical development, “conquers” the system of the law sources. The doctrine of constitutional supervision was derived from a court case (precedent) that took place in 1803 in the United States and gradually was legally recognised in the countries of the continental law as well - beginning with legislative recognition and ending up with the common constitutional establishment. Today, the activities of the Institute of the Constitutional Supervision and Control is regulated by the whole hierarchical package of the law system. The Constitution establishes the mentioned institute, defines its place within the system of governmental bodies and mandates the tasks in terms of the warrant of the principle of separation of powers. The relevant law or package of laws defines the structure of the Court, the competence and peculiarities of the Constitutional Law proceedings, the status of the judges, the rule of their selection and appointment, and guarantees the protection of their independence. The regulation regulates the internal organisational issues of the court performance.

In a number of countries worldwide, the entire law-making process is oriented towards the increase in the level of regulation of the constitutional supervision mechanism for the providence of the systematic integrity of the law sources, regulating Constitutional Justice. Along these lines, a lot of case studies can be presented based on practices of constitutional law in various countries. Currently, based on the study and generalisation of such numerous but specific experiences, it can be said that the vitality of constitutional justice and the effective implementation of the power-balancing function within the system of the state mechanism of the democratic nature is essentially conditioned by optimal legislative regulation.

Throughout the course of time, the intentional harmonisation process of the law sources conditioned not only the enlargement of the scope (area) of supervision by constitutional supervision practice, but also conditioned its operational field. It essentially involved itself in a new method of legal arrangement of relations between the branches of the power.

As a logical output of the qualitative transformation of constitutional justice, the relevant term – “Constitutional Control” was established in legal literature. This is a simple terminological innovation. “Constitutional Supervision” and “Constitutional Control” represent two distinct concepts. They are differentiated by two legal activities – supervision and control.

Supervision aside, Constitutional control foresees a certain action aiming towards the regulation of compliance within the law and the reasonableness of the activities of the sub-control objects, through the process of management. Following is an essential peculiarity concerning this case: for the purpose of regulating the reasonability of activities, control foresees the self-initiating interference of its own subject. Unlike constitutional supervision, exemplified by a number of countries, constitutional control predicts a certain interference in the process of law-making, by the preliminary expertise of the

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\*\* Translation from Georgian Language by *Tamar Cherkezishvili*.

draft laws and international treaties before the parliamentary ratification, to ensure their constitutionality within the frame established by the Constitution itself or the relevant organic law. Particularly, the mechanism of the Preliminary Inspection or Agreement Institute, executes the preventive function of constitutional control, while the interpretation of constitutional norms is recognised as the official form of the protection of the Constitution.

Recently, France's Constitutional Council's practice of preliminary control through the regulation of the scope of subjects or objects of control was widely initiated in the activity of the West-European countries' Constitutional Courts. In its arsenal frequently there are interchanging preliminary-preventive and further forms of control. Hence, the constitutional supervision in these courts has been enriched with the measures of control and in fact has been replaced by Constitutional Control, implemented through procedural rules adopting legislative acts, as well as through the inspection of the compliance of such acts with the constitutional norms.

Preventive control is recognised on the level of the Constitution and is procedurally regulated by the organic laws in Austria, France, Ireland, Italy, Portugal and several other countries. The subject of referendum and international treaty procedurally is subordinated to the Constitutional Courts' preliminary control.

For the purpose of understanding and enacting Constitutional norms, the Institute of Interpretation, not legislation, requires neutral interpretation, particularly in countries that with poorly organised legal structures. So far, the constitutional courts in a number of countries are actively using the right of interpretation of constitutional norms. Such enlargement of these constitutional courts' authorisation gives them considerable power. This fact gains a fundamental importance in the frame of the principle of separation of powers, related to the insurance of real balance among the branches of power.

While evaluating the positive sides of the constitutional justice, it is incontestably worthy to draw attention on the shadowy aspect existing in the current practice of constitutional supervision. The point is, constitutional supervision can not always provide protection of the constitution from the current legislation that is offering it. Quite common are the cases of when a normative act or sub-normative act, which is not in compliance with the Constitution, is enforced while it queues up for the attention of the subject authorised to lodge the constitutional claim, who, in the end, will never execute his right. Such a fact is mostly anticipated in countries where only the mechanism of the further reaction is functioning.

In the process of building a democratic state, particular attention should be paid to the actual separation of the branches of power at the level, which constitutionally guarantees an "abstention-balancing" mechanism. Of course, first of all, this must be regulated by the system of constitutional norms. In this case, the main issue concerns their further realisation. With regard to the above mentioned, I would like to draw attention to the legislator on the following important factor: the principle of separation of powers, basically, is of a controlling nature and the protection of it on the state level is in the competence of the constitutional supervision and control bodies, established specifically for this purpose.

In the longstanding practice of the world of constitutionalism, legal control has been established in terms of various institutes of constitutional supervision. Next to the general court systems and quasi courts special Constitutional Courts were established, which according to the West-European lawyers, on the basis of their successful work, represent constitutional jurisdiction in many countries.

An essential innovation of the new Georgian Constitution is the newly-formed Constitutional Court, established in terms of the Institute of Legal Control, which is called upon to provide the supremacy of the Georgian Constitution, its constitutional legality, and the protection of the constitutional and human rights of citizens. Truly, this body covers a wide spectrum of activities. At a glance, the competence of the Constitutional Court of Georgia is at a high standard. The finality of the decision of the Constitutional Court is recognised constitutionally. Regarding the section of the Normative Act that is considered to be non-constitutional, the Act becomes legally invalid from the date of publication of the relevant decision of the Constitutional Court.

The role and place of the Constitutional Court, in the process of complete enactment of the constitutional model of the country, is remarkable from the viewpoint that all state bodies, legal or natural persons, the political or public unions of citizens, and local self-governmental bodies are obliged to follow the requirements of the Constitutional Court and its members, emanating from their authorisations, regarding considerations of a case.

These are the initial conditions of the Supreme State body, currently established under the new Constitution and the outlines, which are defining the constitutional legal proceeding, regulating its activity. Incontestable is the fact that effective operation of the Constitutional Courts depend on the level of compatibility of the regulating legal sources – the Constitution, laws and regulations. Precisely, harmonisation of the mentioned acts is the requirement that serves as a major warrant.

However, this is how it went with us: The laws of the Constitutional Court and the constitutional legal proceeding did not fully or absolutely take into consideration some of the constitutional assertions. Several issues were resolved under the regulations of the Constitutional Court in its' own way, as well. I think - the arrangement of the above-mentioned issues is the current task that is oriented towards the increase of the effectiveness of the activity of the Constitutional Court, providing their harmonisation not simply from the viewpoint of the legal technique but through the re-regulation of the frame of the competencies and rules of activities in compliance with the requirements of the Constitution.

More than five years have passed since the upstart and recognition of the Constitutional Court of Georgia. At this stage, the work executed by the Constitutional Court during this period of time can be evaluated positively. However, I consider that the results of its work could have been more successful if not the superficial approach of the legislators involved. I am sincere in saying that I recall with pain my work in the Parliament - as I was unable to draw the attention of the Constitutional Commission or the Parliamentary Majority to some of my considerations, critical remarks or concrete proposals. It is not that easy, when the major reference point of the legislative process is velocity; or, to be more precise - the creation of the artificial *zeit nota* and increasing speeding-up of the course of events when the major argument for the adoption of the law is the time limit, as was in the case of Law on the Constitutional Court.

Everything began with the appearance of the following imperative norm in the transitional provisions of the Constitution: "The organic law of the Constitutional Court shall be adopted before February 1, 1996" (article 107-3). Now, it's too late to dispute the rationale of such a provision, but it is possible to discuss the negative outcome caused by its enforcement, due to the formal approach towards the implicit implementation of that requirement.

One may judge the following way: The mentioned draft law was included in the agenda of the Parliament hearing only on 31<sup>st</sup> of January 1996. Of course, just one day would not have been sufficient time to implement the technological procedures foreseen under the Parliament's regulations,

regarding the hearing of the organic draft law, which included three hearings with debates and relevant voting and the promulgation and publishing of the draft law adopted by the President in the Parliament. All the procedures were performed under the “simplified rule” due to the limited working schedule. Thus, the participation in the debate with any constructive position was senseless because there was no possibility for consideration. In fact that’s how it happened.

Nevertheless, now after the five-year experience concerning the field of constitutional norms and relevant legislation, we are confirmed that some of the issues drawn by us still maintain their actuality. New problems have also arisen which have to be resolved carefully. Of course, we are eager to improve the legislation on the Constitutional Court to the extent where the Constitutional Court shall take its due active position within the system of the State’s power bodies.

Foreseeing the controlling nature of the idea of separation of powers and considering the peculiarities of the presidential governing model that we have, the body protecting constitutional justice should have enough actual competence that, through its neutral and objective legally guaranteed position, can promote the maintenance of the balance among the branches of power. The constitutional process led by calendar dates and targets has left similar heritage to the process of legal registration of the Constitutional Court. As it has been said, debates were held on a level that corresponded to a one-day agenda. There was no time to objectively discuss and evaluate the matter, nothing to say about the taking in account the considerations and even if there was a willingness to consider these matters, there was no time left for voting.

Today it is clear that from the perspective of the Georgian Constitutional Justice Department, its legislation has failed to play the role of the “harmonious chorus”, with a high sonority and no falsity during the execution of this difficult role. That is why we have to repeat some of the considerations expressed at that time the reasonability of which, as we think, has been confirmed by the past years.

The Constitution of Georgia explicitly assigned to the Constitutional Court of Georgia the status of the constitutional control body. At this point was defined following: the rule of its formation, incomplete system of the several but necessary parameters for the selection of the members of the court, though the issues connected to their appointment and selection, had to be regulated by the organic law. Now it can be said definitively that the Georgian Organic Law failed to execute the two constitutional ideas/tasks, outlined above.

During the review process of the draft law on the Constitutional Court, the biggest dispute arose in regard to the contents of Section 4 of Article 88 of the Constitution. To properly understand the dispute is essential to fully envision the Section. The section states: “A member of the Constitutional Court must be a citizen of Georgia, who has attained the age of 35 and has a higher legal education. The right of selection, appointment and election, their release from duties and other activities of constitutional jurisdiction are determined by law.”

In the given section there are two united groups of norms which commission the law to regulate the issues related to the court members, legal proceedings and court activities. At the same time, the given section includes complex normative implications and certain links with a number of the norms of other articles, which should be reviewed in total and not in such a simplified way as it has been presented and further adopted in Parliamentary sessions.

Firstly, I consider that the membership of the Constitutional Court is one of the most responsible positions in the Government of Georgia. That is why under the Constitution (Article 86), there are

several parameters for the selection of ordinary judges, such as age (30 years), education requirements and at least five years of work experience in a field of speciality. The legislator has not intended such simplification of the parameters concerning the candidate for the member of the Constitutional Court. The only argument of the opponents was very weak - as though they considered the issue concerning the revision of the constitutional norms arose because we, unlike them, can simply not imagine a member of the Constitutional Court being "a citizen of Georgia who has attained the age of 35 and has a higher legal education", and no other merits to carry this difficult burden. While elaborating on the draft of the Constitution, the Legislator, who was thinking the same way, has very concretely clarified that "selection, appointment and election of members of the Constitutional Court are defined by law". Of course the issues connected with the "appointment and selection" include the legal regulation of the mechanism of the designation of three candidates to the Constitutional Court by each of the subjects electing the members of the court - the President of Georgia, the Parliament and the Supreme Court. Regarding the "selection", it is that very norm which undermined the opponent's argument and required it to be formulated as an entire requirement with respect to all cases of appointment or selection.

During the break of the Parliamentary session and the debates concerning the draft law on the Constitutional Court of Georgia, so-called consultations took place before the voting began. Thus, the agreement regarding the law, remained just that - a mere agreement. In a one-and-a-half month period, the adopted law was supported by the "Law on the Changes and Amendments to the Law on the Constitutional Court", shedding light on the issues concerning "appointment and election". The following amendment, concerning the "selection", was introduced: "In the event of the selection of members to the Constitutional Court, the President of Georgia, Parliament and the Supreme Court shall take into account the professional experience of the candidate which, should be corresponding to the high status of the members of the Constitutional Court". I think the latter formula focuses on the essential term for the selection in a not strictly obligatory form, because the very act of taking into account "the professional experience of the candidate should correspond to the high status of the member of the Constitutional Court" does not contain the terminology defining a sense of "selection" at all.

Our approach towards the issue of "selection" is based on the experience of numerous countries (Austria, Belgium, France, Germany, Italy, Portugal, Spain), where special law, during selection, gives preference, basically, to the high category judges, scholarly lawyers, law professorships and experienced barristers.

The completion of the "selection" principles with such requirements is moreover justified by the fact that the Constitutional Court, like the State Control Bodies, holds a preventive role; The level of which is directly related to the qualification, honesty and principality of the members of the Constitutional Court. While unlike ordinary judges, who are selected in accordance to three parameters, in the event of the Constitutional Court were added to the two parameters (conditions) only one term, to be voluntarily "foreseen". In fact, Parliament did not take into consideration the constitutional task and did not improve the selection mechanism. All of this became clear after 5 years.

We consider, that after the termination of the five-year term of authorisation of the first Chairman of the Constitutional Court, on the basis of his so-called personal application and his appointment of the other post, it became necessary to withdraw him from the board of the court to free-up a place for another member of the court brought from the outside to be the Chairman on the same day. This is recognition of the inconsistency of the system of the selection of the members of the Constitutional Court.

According to Article 88 of the Constitution, the Constitutional Court of Georgia is recognised as the constitutional control body and that is all. Furthermore, this constitutionally legalised level of authorisation has drawn in the relevant legislation. So far, when evaluating the scope of competencies of the Constitutional Court, one can say that actually, Georgia received not the body of control but the body of supervision with quite limited authorisation.

The point is the following: the right of the implementation of the function of supervision, if its activity, anyway, is executed on the basis of the claim of the citizen or the object acknowledged as the constitutional subject. The Constitutional Court itself has no right of initiation. However, as it has turned out, the Constitutional Court might possess primary information, let's say, on the illegal results of elections, but as it is limited by the frame of procedural norms and complies with them, consequently, it may be found in the position of the passive witness of lawlessness. This judgement is based on a case from the practice of the Georgian Constitutional Court, which will be discussed further on.

In past decades, the tendency of the constitutional justice, in the constitutional law of the foreign countries, is directed towards the enlargement of the function of control of the Constitutional Courts. For us it was well-known fact at that time too. So the recognition of the Constitutional Court as the body of the constitutional control was not accidental and the mentioned idea should have been developed within the organic law through the elaboration of the relevant mechanism by means of the definition of the frame of competencies and constitutional legal proceeding rules.

All these issues came up during the parliamentary session, to register the competencies constitutionally assigned to the Constitutional Court under the Organic Law. Nor did the initiators of the adoption of the law have a different opinion. As it has already been said, the "*zeit note*" practice established in the Georgian Parliament "prevailed" this time as well. There is nothing to wonder about, as the proposed Constitution could not be "violated".

Our intensive review of the two major issues raised at the session of the Parliament is caused by the fact that this time, the argument confirming their actuality does not include only the experience of another countries but our inexperience in the implementation of the constitutional control and not just the five-years of experience of the Constitutional Court and legislative activities of Parliament, as well as the ambiguities and deficiencies left in the new Georgian Constitution.

We have chosen quite an easy way to explain our own mistakes or incomplete work – everything is blamed on poor time management. But this is just an explanation of the situation of which we are at fault and in no way justifies the results.

Such results are caused by the free "reading" of the constitutional norms of laws. It is a mistake not to take in account of the consideration concerning the giving of the function of interpretation of the constitutional provisions particularly upon the Constitutional Court. As an argument can sufficiently serve the serious deficiencies of our constitution. Whereas, in a state the function of interpretation of the constitutional norms should be the responsibility of a neutral and objective body. That's why I still stand by my opinion that, by all means, the Constitutional Court should be the one, entrusted to fulfil this vacuum in Georgia, in the frame of its basic function - warrant of the protection of the Constitution and of course on the basis of the application of the constitutionally defined subject.

It has been said many times and confirmed by the international practice that the Constitutional Court, functioning under the Constitution and relevant legislation, has great importance in terms of

guaranteeing and protection of separation of powers. The Constitutional Court has to establish the balance and serenity within the country. The implementation of this basic function by the Court is evaluated according to the level of protection of the Constitution at the supreme level of the power branches. The constitutional declaration of the Constitutional Court as a body of constitutional control means nothing if the scope of its activity does not include measures and means of control. The specific, so-called, preventive function of the protection of the Constitution is based upon the preventive, preliminary control. Truly, before initiating the relevant procedures for the ratification of the international treaties and determination of the reasonability of the subject of referendum, it is better to undergo the preliminary expertise in the Constitutional Court. In this case, by the way, the electoral law would not suffer from the preliminary control aiming at the evaluation of its constitutionality.

Unfortunately we became assured in this fact quite late - the non-constitutional norm “sneaked” in the law on the Parliamentary Elections, was revealed just now, six years after the adoption of this law. To be short, the electoral law was adopted by the “*zeit nota*” method in one day as well. One can not say that everything is the fault of carelessness. On the contrary – it was a result of deliberate actions. A different evaluation may have been unclear if we recall that the non-constitutional norm revealed in the electoral law is always beneficiary for a candidate introduced by the governing party.

In general, entrusting the right of preliminary expertise to the Constitutional Court regarding the constitutionality of the electoral legislation might be as important as measuring the guarantee of justice of the electoral law. The enforced version of the Law on the Parliamentary Elections has subordinated the representative democratic institute to a single-party orientation. Such a statement is based on the serious causal analysis of the Georgian Electoral Law. Herein I will introduce only the layout of its characteristic features: the enforced law on the Parliamentary Elections was adopted by the parliamentarian majority from 1992-1995, which constituted the environment of President *Eduard Shevardnadze* and the core of the “Citizens Union”. Today it still represents the majority of the Parliament, with the electoral law under their control. A few months before the elections of 1999, the changes made to the law adopted in 1995 by this majority group again focused on its “long-life”, fulfilling the task. The common rush that took place around the Electoral Code is again related to the “equal” registration of the priorities of the governing party and it seems that in the future the same results will occur if the electoral justice will not be outburst with the spirit of building a democratic and legal state, as it is declared in the Constitution. And this requires the spirit and with which can be possessed only by the neutral, objective body that is independent from other branches of power.

The fact that electoral law created numerous questions and became the fundament for the numerous constitutional claims, particularly from the view-point of justice, creates a problem of perspective of the country’s level of democratisation. At the same time, the procedure of hearing these very claims in the practice of the Constitutional Court revealed that deficiencies existed in the procedural mechanism, the improvement of which raises the issue of the development of the relevant normative base.

For the last year I have been twice invited as an expert to the Constitutional Court. In both cases this concerned the non-constitutionality of the distinct norms of the Law on the Parliamentary Elections. I am not going to go into detail on the judgement of the mentioned claims but I would like to express my considerations regarding some deficiencies, seen in the process of the Court procedures. I would like to mention one issue – If the consideration of the expert and serious arguments make no difference, moreover when the constitutional panel of judges itself creates the confusing precedent, to say it mildly, by “balancing of the votes of voting, what sense does it make to invite the experts?! These remarks appeared with respect to the hearing of the claims of a citizens’ group of refugees against the Parliament of Georgia on un-constitutionality of the norms of the laws on “the Election of the Local

Representative Bodies Sakrebulo”, “the Elections of the Parliament of Georgia” and “Displaced Persons - Refugees”.

The claim was submitted to the Constitutional Court on 25<sup>th</sup> of November 1998. The hearing was held two years later on 28<sup>th</sup> of November 2000. Refugees, whose civil rights were restricted, demanded the restoration of their electoral rights. All three experts of constitutional justice called by the regulating session declared the validity of the constitutional claim. But the votes of the panel of judges consisting of four judges, split up in a quite peculiar way. Furthermore, the Chairman of the panel of judges, as a refugee, requested the challenge and did not participate in hearing the case. The chairman of the session and the speaker decided to terminate the proceedings over the case regarding one of the sources of the claim, and in respect to the other two sources of the claim did not acknowledge the declaration of the non-constitutionality. One member of the panel of judges, a Professor of constitutional justice, agreed with the panel of judges on the first part, on the basis of “different consideration”, but on the second part of the decision he disagreed and recognised the non-constitutionality of the norms of the laws.

The technological process of hearing this constitutional case highlighted the necessity to improve the situation on several elements. As I think, the claims concerning the electoral legislation must be a priority in the course of work of the Constitutional Court, as from the view point of hearing sequence, also - the balancing of the votes in the decision-making process.

I consider that the claim concerning such issues as mentioned above should not be put in two-year line according to the “general rule of hearing” because with such a principle attitude towards the rule of sequence, we might miss, in-between, the following elections. Regarding the so-called balance of votes, in this light the given case is unique. Besides the fact that two votes represent the majority out of the three and not of the four votes, to say mildly, is incorrect in terms of pure arithmetic calculation of the majority. If not the formal subordination of a law to a norm, I do not think that the chairman of the panel of judges - being a refugee, and in this case having restricted electoral rights - would share the position of the majority. In this case, the votes would have been split two against two and the decision would not have been taken. This fact we consider improper as well.

The discussion of the problem of the balance of votes was not brought up solely because of the above-mentioned specific case. In the process of hearing the well-known claim of a burning of dummies which represented a group of judges of the Constitutional Court, the votes of the panel of judges were split one against three. We consider this case unique too. Because the fact that the Chairman was confronted with the unanimous decision of other members of the panel of judges is not only the revelation of the balance of votes but appearance of the problem of the minority and majority on a much more serious level. I consider that in both mentioned cases, the plenum of the Constitutional Court had to state and make its position public. I consider that the plenum of the Constitutional Court being the higher structure of the panels of judges, has to gain, such kind of competence in particular.

The mentioned shortcomings of the legal technique, revealed by the Constitutional Court’s practice, require the relevant legal regulation in the applicable laws and regulations. At least, the plenum through the pertinent act has to confirm the declaration of the validity of the decision made by the panel of judges, of course, in the case of the corresponding ratio of votes regarding such anomalies.

The special mission of the Constitutional Court regarding the mechanism of the constitutional protection of the legality of the electoral law has to be mentioned separately; particularly concerning

the protection of the electoral rights of the citizens in terms of specific or abstract form of control. In this case, the problem that we will bring here is also connected with one claim, but it became evident exactly in terms of such a double-profile claim.

In the course of this event, the technology of the case hearing creates an issue for consideration as well, and relevantly reveals the problem. The case "The Group of the Members of Parliament Vs the Parliament of Georgia" was lodged on 15<sup>th</sup> of December 1999 based on the constitutional claim signed by 60 MP's. The case was lodged due to the recognition of the authorisations of the MP's according to the results of the Parliamentary Elections of 1999.

Under the ruling of a regulatory session of the Constitutional Court's panel of judges the following dispute matter was recorded: the constitutionality of paragraph 10 of article 54 of the law of Georgia on the Parliamentary Elections in relevance to the article 28, and the first paragraph of the article 29 of the Constitution of Georgia and the annex of the Parliamentary provision No. 961 of 1999 on the Recognition of the Authorisations of the Members of Parliament of Georgia ("The Issue of the Authorisation of the Members of Parliament Under the Following Numeration: No. 25, No. 49, No. 103, No. 197").

Apparently the plaintiff united on the subject of abstract and specific supervision.

Under the ruling of the regulatory session of the panel of judges, it was stated that the specific part of the subject of dispute, like all independent claims, should be subordinate to the general rule of hearing mentioned above. The hearing of the so-called abstract part of the dispute was planned for the 15<sup>th</sup> of February 2000. However, in fact, on 24<sup>th</sup> of March, the speaker judge informed the plenum of the Constitutional Court that the "Georgian Law on Changes and Amendments to the Law on Georgian Parliament" was enforced the day before on March 23, from the date it has been published in the "Sakartvelos Sakanonmdablo Matsne" No. 10 (Georgian official law gazette).

Even the indirect recognition of the validity of the abstract claim had to open the way for the specific claims, which despite the certain specific nature of the matter had been subordinated to the "general rule" of hearing and was put on a so called "life line". Such an attitude towards the issue caused a new series of misunderstandings. The four specific claims singled out from the abstract claim had to wait for one year. The claim concerning the elections of the majority candidate of Khoni region, lodged on the basis of the same offence, appeared to be far ahead of the above-mentioned claims in this line. Although on June 13, 2000, the Constitutional Court declared null and void the elections held in Khoni, the MP elected by violation of law is, more than one year, still on his post.

When the time came for the hearing of the four specific claims, the preliminary process of the withdrawal of signatures of the certain group of MP's was followed by chaos and raised a clamour. Finally, by the end of March of 2001, the Constitutional Court declared null and void the results of the majoritarian elections in Abasha, Poti and Tsalendjikha. So at last the justice has won over the MP's who have been elected through the violation of the law for one year and a half. What concerns the majoritarian MP elected in Gldani electoral district, he still remains as a MP, because the campaign for the withdrawal of the signatures worked for his benefits and the number of the subscribers made less than one fifth of the MP's and because of this reason the claim was not subordinated for the hearing of the Constitutional Court.

I think that current situation is far more serious than can be cited from the incompleteness of its procedural norms. I consider it unacceptable when the strict protection of the procedural norms is

directed to the prejudice of justice and prolongs the presence of MP's elected into Parliament in violation of the law .

All this must be improved by the Constitutional Court itself – by arranging the norms of the regulations. Regarding the fact concerning the Gldani MP, we review it in terms of indispensable assignment of the controlling right of the Constitutional Court. The legislator, by all means, has to improve the Law on the Constitutional Court in terms of clarifying the mentioned scope of its authorisation. It is unacceptable, that the supreme body of the constitutional control of the country could find itself in the role of the passive witness on the basis of a legal claim – because it possessed reliable information concerning the election of a majority MP through the violation of the law due to the fact that the plaintiff or the group of plaintiffs had withdrawn their signatures,

In conclusion, I would like to state our position concerning the perspective of constitutional justice in Georgia. I think that apart from our remarks, the members of the Constitutional Court, involved in the establishment of the five-year practice of this body, have thought over the proposals concerning the improvement of the Court's performance from their perspective too. We think that the time has come to gather all these proposals and elaborate a draft law on changes and amendments to the relevant laws, aiming at developing the legislation of constitutional justice, for submission to Parliament.

## MOST IMPORTANT LEGAL ACTS ADOPTED IN THE SECOND QUARTER OF 2001

### 1. LAWS OF GEORGIA

10.04.2001	Law on Amending the Law of Georgia on Restructuring of Tax Debts	SM <sup>*</sup> No. 11, Art.42
10.04.2001	Law on Changes and Amendments to the Criminal Procedure Code of Georgia	SM No. 11, Art.38
10.04.2001	Law on Amendments and Changes to the Criminal Code of Georgia	SM No. 11, Art.39
10.04.2001	Law on Changes to the Law of Georgia on Operative-Investigation Activities	SM No. 11, Art.40
10.04.2001	Law on Changes and Amendments to the Law of Georgia on Conducting Bankruptcy Cases	SM No. 11, Art.41
27.04.2001	Law on Changes and Amendments to the Law of Georgia On Training and Certifying of Marines	SM No. 11, Art.44
27.04.2001	Law on Amending the Tax Code of Georgia	SM No. 12, Art.43
27.04.2001	Law on Changes and Amendment to the Law of Georgia on Mandatory Insurance of Health and Life and Pension Security of a Member of Parliament	SM No. 13, Art.46
23.05.2001	Law on Changes and Amendments to the Law of Georgia on Communications and Post	SM No. 14, Art.47
25.05.2001	Law on Changes to the Law of Georgia on Structure and the Rule of Activities of the Executive Power	SM No. 14, Art.48
25.05.2001	Law on Amendments and Changes to the Law of Georgia on Healthcare	SM No. 15, Art.50
25.05.2001	Law on Changes and Amendments to the Customs Code of Georgia	SM No. 15, Art.49
05.06.2001	Law on Changes to the Law of Georgia on Road Fund	SM No. 16, Art.52
05.06.2001	Law on Changes to the Law of Georgia on Budgetary System and Budgetary Responsibilities	SM No. 16, Art.51

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<sup>\*</sup> Sakanonmdeblo Matsne is the Georgian official law gazette.

20.06.2001 Law on Changes to the Organic Law of Georgia on the Elections of the Parliament of Georgia SM No. 17, Art.53

**2. ORDINANCES OF THE PRESIDENT OF GEORGIA**

01.04.2001 Ordinance of the President of Georgia No. 120 on Establishing the Commission for Co-ordination of the Economic Relations between Georgia and Israel

13.04.2001 Ordinance of the President of Georgia No. 131 on Approval of the Statute of Anti-Corruption Policy Co-ordination Council

23.04.2001 Ordinance of the President of Georgia No. 149 on Establishing a Co-ordination Centre for the Agricultural Development Projects of Georgia to be carried out by the Financial Support of the Public Law Legal Person the World Bank

23.04.2001 Ordinance of the President of Georgia No. 150 on Establishing the Co-ordination Council for the Co-operation with the European Union

01.05.2001 Ordinance of the President of Georgia No. 170 on Approval of the Statute of the State Commission for calling up the Citizens for Non-military, Alternative Work

01.05.2001 Ordinance of the President of Georgia No. 171 on Approval of the Statute for Serving Non-military, Alternative Work

03.05.2001 Ordinance of the President of Georgia No. 176 on Changes to the Ordinance of President of Georgia No. 394 of 17<sup>th</sup> of June, 1996 on Participation of Georgia in Partnership for Peace Program

03.05.2001 Ordinance of the President of Georgia No. 177 on Approval of Statute for Registration and Recording of Persons Searching for Work and the Unemployed

11.05.2001 Ordinance of the President of Georgia No. 188 on Establishing the Advice Council for the Regulation of Fulfilment of International Treaties with the Ministry of Foreign Affairs of Georgia and on Approval of the Statute

25.05.2001 Ordinance of the President of Georgia No. 207 on Changes and Amendments to the Ordinance of the President of Georgia No. 326 of 17<sup>th</sup> of May, 1998 on Preparation, Promulgation and Publication of Normative Acts of the Executive Power

28.05.2001 Ordinance of the President of Georgia No. 215 on Establishing the Public Law Legal Person the Centre for carrying out Healthcare Projects

29.05.2001 Ordinance of the President of Georgia No. 216 on the Condition of Combating Drug Addiction and Narco Crime and on Immediate Measures Aroused from this Condition

05.06.2001 Ordinance of the President of Georgia No. 224 on Approval of the Statute of Supervisory Council under the Public Procurement Agency

**3. DECREES OF THE PRESIDENT OF GEORGIA**

- 03.04.2001 Decree of the President of Georgia No. 256 on Exchange of Notes between the Government of Georgia and the Government of Japan
- 06.04.2001 Decree of the President of Georgia No. 264 on Signing an Agreement on Establishing Black Sea Military-Navy Co-operation Group
- 11.04.2001 Decree of the President of Georgia No. 280 on 7<sup>th</sup> Conference for the Chairmen of the Supreme Courts of the Council of Europe Member States to be held on 17-19 of October, 2001 in City of Tbilisi
- 20.04.2001 Decree of the President of Georgia No. 315 on Signing an Agreement on International Road Transportation of Passengers and Goods between Georgia and the Republic of Portugal
- 20.04.2001 Decree of the President of Georgia No. 324 on Signing an Agreement "Support of Renewed Energy and Field of Healthcare" on Financial Co-operation between the Government of Georgia and the Government of the Federal Republic of Germany
- 28.04.2001 Decree of the President of Georgia No. 360 on Signing the Changes made to the Credit Agreement of 4<sup>th</sup> of March, 1998 made between the Reconstruction Credit Bank (KFW) and Georgia (Ministry of Finance)
- 28.04.2001 Decree of the President of Georgia No. 361 on Conduction of Negotiations with the purpose of Adoption of the Credit Agreement Text between Georgia and International Development Association and on Signing the Relevant Documents
- 04.05.2001 Decree of the President of Georgia No. 387 on Signing an Agreement between the Government of Georgia and the Government of the Russian Federation on Restructuring of Debt of Georgia to the Russian Federation
- 04.05.2001 Decree of the President of Georgia No. 388 on Signing an Agreement on the Principles of Indirect Taxation of Export and Import of Goods (Work, Service) between the Government of Georgia and the Government of the Russian Federation
- 04.05.2001 Decree of the President of Georgia No. 389 on Signing an Agreement between the Government of Georgia and the Government of the Republic of Azerbaijan on Restructuring of the Debt of Georgia to the Republic of Azerbaijan
- 06.05.2001 Decree of the President of Georgia No. 401 on Signing an European Agreement Relating to the Persons Participating in the Proceedings of the European Court of Human Rights
- 11.05.2001 Decree of the President of Georgia No. 419 on Establishing the Interagency Governmental Commission with regard to Election of Georgia as a Member of the United Nations Economic and Social Council (ECOSOC)
- 12.05.2001 Decree of the President of Georgia No. 429 on Signing an Agreement between the Government of Peoples' Republic of China and the Government of Georgia on

Technical and Economic Co-operation

- 17.05.2001 Decree of the President of Georgia No. 444 on Signing a Fund Treaty and its Special Agreement between Georgia and Reconstruction Credit Bank of Germany
- 05.06.2001 Decree of the President of Georgia No. 567 on Signing a Convention on Mutual Assistance in Consulate Issues among the Member States of GUUAM
- 05.06.2001 Decree of the President of Georgia No. 568 on Signing the YALTA GUUAM Charter
- 05.06.2001 Decree of the President of Georgia No. 569 on Signing an Agreement among the States of GUUAM (Azerbaijan, Georgia, Moldova, Uzbekistan, Ukraine) on establishing a Free Trade Area
- 09.06.2001 Decree of the President of Georgia No. 582 on the Development Credit Agreement (power energy market support project) between Georgia and International Development Association
- 14.06.2001 Decree of the President of Georgia No. 613 on the Strategy of Harmonisation of Georgian Legislation with the EU Legislation
- 15.06.2001 Decree of the President of Georgia No. 615 on Signing an Agreement on Restructuring of Debt between the Ministry of Finances of Georgia and Export Credit Bank of Turkey
- 17.06.2001 Decree of the President of Georgia No. 625 on Grant Agreement in the Military Field between the Government of Georgia and the Government of the Republic of Turkey

**4. DECISIONS OF THE PARLIAMENT OF GEORGIA**

- 27.04.2001 Decision of the Parliament of Georgia No. 862 on Ratification of Agreement between the Ministry of Defence of Georgia and the Ministry of National Defence of the Republic of Lithuania on Co-operation in the Military Field
- 27.04.2001 Decision of the Parliament of Georgia No. 863 on Ratification of Agreement between the Ministry of Defence of Georgia and the Ministry of Defence of the Republic of China on Free Aid
- 27.04.2001 Decision of the Parliament of Georgia No. 864 on Ratification of Convention on Avoidance of Double Taxation of Incomes and Capital between Georgia and the Republic of Italy
- 27.04.2001 Decision of the Parliament of Georgia No. 865 on Ratification of the Additional Protocol to the Convention on Avoidance of Double Taxation of Incomes and Capital between Georgia and the Republic of Italy
- 23.05.2001 Decision of the Parliament of Georgia No. 878 on Ratification of Agreement between the Government of Georgia and the Government of the Federal Republic of Austria on Air Transport

- 23.05.2001 Decision of the Parliament of Georgia No. 879 on Accession to the Treaty of World International Property Organisation relating to the Copyrights
- 23.05.2001 Decision of the Parliament of Georgia No. 880 on Accession to the Treaty of World International Property Organisation relating to the Performances and Phonograms
- 23.05.2001 Decision of the Parliament of Georgia No. 881 on Ratification of Agreement between Georgia and the Kingdom of Belgium on Avoidance of Double Taxation of Incomes and Capital
- 08.06.2001 Decision of the Parliament of Georgia No. 911 on Ratification of Agreement between the Ministry of Defence of Georgia and the Ministry of Defence of the Czech Republic on Co-operation in Military Field