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MISSION STATEMENT

Fostering dialogue between Georgian and European legal communities and promotion of Georgia's European aspirations through providing an expert overview of the important legal developments pertaining to the rule of law, human rights & democracy, free market economy, Europeanization of the legal culture & legal education, and the approximation of Georgian legislation with the European Union law.

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EDITORIAL

The articles selected for this issue cover a broad spectrum of topics. We are pleased to remark, however, that three of them are devoted to a particularly pertinent topic: the approximation of Georgian legislation with the *acquis communautaire* of the European Union (EU). The fourth article in this issue, covering a no less important matter than the previous three, touches upon the current challenges of legal education in Georgia. That the author of this article is an American academic should, in our view, make it even more intriguing for a potential reader. A brief overview is in order.

Giorgi Asatashvili explores the notion of parallel conduct in competition law. By providing an overview of how doctrinal considerations and various jurisdictions shape its legal effects in antitrust cases, the article aims at conceptualizing the distinction between parallel conduct and direct conspiracy to fix prices among dominant market players. The comparative perspective of the article elucidates this distinction and emphasizes that parallel conduct can be driven by economic rationality without any conspiracy.

Next, Irakli Samkharadze looks into the highly-specialized area: the harmonization of Georgia's energy legislation with the regulatory framework of

the EU. The article contributes to mapping the relevant steps in the lengthy process of legal harmonization in this area, while providing a concise overview of the relevant legal instruments and identifying remaining gaps and challenges.

The article by Elene Gogichaishvili examines the extent to which Georgia's private international law can be receptive to EU consumer protection standards under the so-called Rome I Regulation, Article 6. Emphasizing Georgia's general undertaking under the EU-Georgia Association Agreement to integrate EU consumer protection standards into its own regulatory space, the author identifies potential limitations in national legislation on private international law which could hinder such integration with regards to cross-border transactions with the EU.

In the next article, Timothy Barrett, an American faculty member at a Georgian law school, offers a set of prescriptions for improving legal education in Georgia. These prescriptions are based on his observations and accumulated experience in the country's academic sector. The article identifies some first order problems common to Georgian law schools and contains the author's suggestions for overcoming them. The well-known issues of low student attendance (given the wide practice of students' employment parallel to their studies), low GPA thresholds set by law schools and a lack of practical skills upon graduation are central to the concerns outlined in the article. While the author's proposed solutions may well be subject to healthy debate, the article presents a much-needed opportunity to trigger discussion of this topic in our pages. For example, is the low GPA threshold related to the over-dependence of most Georgian law schools on income generated by tuition fees? Can it be that any single law school finds itself in a sort of prisoner's dilemma where the unilateral act of raising the GPA and other standards is disincentivized — because others might not follow the trend, thereby making the law school with higher standards less attractive to prospective students? Finally, do we come full circle if it is largely true that students need to work fulltime parallel to their studies to cover their tuition fees and therefore cannot properly devote themselves to studying? We invite any potential contributor to address these questions and are open to organizing a symposium on this topic should there be sufficient contributions.

On 29 June 2018, the Georgian-Norwegian Rule of Law Association, in cooperation with the Association of Law Firms of Georgia, launched a competition of papers for law students. This competition is made in memory of Giorgi Margiani and is currently planned to be held on an annual basis. Giorgi Margiani (1989-2016) was a young Georgian lawyer who tragically passed away following a long struggle with illness while studying for his LL.M. at the University of Oslo. An associate of the then newly-founded Georgian-Norwegian Rule of Law Association, he exuded one of the central aspirations of the Association – to facilitate the building of bridges between legal professionals in the two countries. As noted in the opening remarks of the chairman of the Association, Mr. Giorgi Giorgadze, the competition was conceived to encourage legal research and academic work among students. In light of this ambition, which is intrinsically linked to the main goals of both the Association and the Georgian Law Journal, we are particularly pleased to publish the winning paper by Ms. Gvantsa Elgendashvili in the current issue.

The paper – "Economic Analysis of Deterrence through Criminal Law" – grapples with perennial problems of crime and punishment. In particular, the paper examines the relationship between sanctions and deterrence through the lens of an economic analysis of law. Amongst many pertinent topics, the paper discusses whether a system based on restorative justice can be assumed to curb recidivism to a greater extent than a system based on a more traditional approach which seeks to make the punishment "fit the crime" (i.e., be proportionate to the perpetrator's wrongdoing).

While the notion of restorative justice is a central concept in Norwegian criminal law, its viability in the current political climate is by no means assured. In 2016, the Government of Norway narrowly failed to win support for its proposal to increase the maximum possible prison sentence that can be applied under Norwegian law. This setback should not obscure the fact that the Norwegian outlook on crime – and the persons responsible for committing it – has hardened considerably in recent years. Legislators have sharply increased penalties not only for violent crime and sexual offenses but also for

certain breaches of the Immigration Act. Moreover, courts have offered little resistance to applying these harsher penalties in particular cases.

The impact on Norwegian sentencing practice has been profound. In an examination of the period between 2005 and 2016, the Norwegian Prison Directorate, which is responsible for executing final judgments in criminal cases, found a decrease of 15% in the number of judgments that required a person who had been found guilty of a crime to serve time in prison. However, the number of days to be served by convicted persons increased by 71% in the same period.

The Norwegian experience illustrates that calls for being "tough on crime" can resonate even in a legal system that has enjoyed low recidivism rates and which has historically prided itself on valuing rehabilitation over retribution. If nothing else, it emphasizes the need for continued academic reflection and debate in this area of law. The questions discussed by the winner of this year's competition are therefore topical not only in Georgia but in Norway as well. We hope that the paper will be of interest to readers in both countries.

The Georgian Law Journal is always open to readers' comments and suggestions. These can be submitted by e-mail at editors@georgianlawjournal.org.

On behalf of the Editorial Board,
TEIMURAZ ANTELAVA and THOMAS FRØBERG

GIORGI ASATASHVILI*

Parallel Conduct Explained: Unlawful Conspiracy or Rational Economic Behavior

1. Introduction

The Competition Agency's attempt to disrupt anticompetitive behavior among market participants requires proof. That kind of proof may come from different sources, including evidence from economic analysis. Unfortunately, in most cases such economic analysis is inconclusive. The final outcome of the economic analysis is not decisive and leaves room for alternative interpretations. Such is also the nature of parallel conduct. Parallel conduct refers to indirect economic evidence open to contradictory interpretations. In its recent decision[1] to penalize Georgian oil companies, the Competition Agency of Georgia (the "Agency") predominantly relied on the existence of parallel conduct as its primary central evidence of anticompetitive behavior. With that decision, Georgia joined the controversy related to parallel conduct being played out in scholarly discussions as well as international legal practice. This article discusses the issue of parallel conduct in light of theoretical

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1 Order N81 of the Head of the Competition Agency of Georgia dated 14 July 2015.

and legal approaches, explains its nature and provides possible solutions to deal with the issue of parallel conduct in the Georgian case.

Under its own initiative on 12 November 2014, the Agency opened an investigation into the Georgian market for motor fuel products (petrol, diesel).[2] According to the Agency's market analysis, parallel pricing serves as key evidence of violation of Article 7 of the Law of Georgia on Competition[3], which prohibits "any agreement, decision or concerted practice ('the agreement') of undertakings that have as their object or effect the prevention, restriction and/or distortion of competition within the relevant market."

Under order N81 of the Head of the Competition Agency of Georgia issued on 14 July 2015, the Agency penalized the five dominant firms operating in the Georgian market for motor fuel products, treating the practice of parallel pricing as evidence of collusion (defined by concerted practice or agreement). According to the Agency, in spite of the existence of a highly-concentrated (oligopolistic) market characterized by the phenomenon of parallel pricing, the prices set by the five dominant companies were supra-competitive (significantly higher than the market price) and therefore inappropriate. Analysis of the Agency's argumentation indicates that this decision was based primarily on the occurrence of parallel conduct, i.e., indirect evidence of an economic nature.

Parallel conduct typically occurs in oligopolistic industries. It is a strategy of business entities that takes into account the practice of rival firms rather than the interests of consumers. The most obvious manifestation of parallel conduct is the similarity of prices across firms and their rapid fluctuation in a strikingly parallel manner (parallel pricing is usually a tool for setting inappropriately high prices). Such behavior is designated as "tacit collusion" or "conscious parallelism".[4]

There are various interpretations of parallel conduct. The approach of the European Union ("EU") courts is that parallel conduct does not in itself

[2] For more information on the Investigation of the Market of Motor Fuel Published by the Competition Agency of Georgia, refer to the following web link: competition.ge/images/upload/ვრცლად.pdf.

[3] Law of Georgia on Competition N2159 dated 21 March 2014.

[4] Reza Dibadj, Conscious Parallelism Revisited, San Diego Law Review, Vol. 47, No. 3, 2010, pp.593-595.

amount to unlawful action.[5] The same applies to the courts of the United States of America ("USA").[6] In spite of that, some academics believe that parallel conduct in particular circumstances may amount to unlawful action and some countries predominantly use it as key circumstantial economic evidence of unlawful action.[7]

The Agency's reliance on parallel conduct as evidence of unlawful action and the ensuing controversy necessitates comparative research. This paper examines the nature of parallel conduct in light of international practice and provides key policy recommendations for the Government of Georgia.

2. Theoretical Analysis

2.1. Scholarly Debate on the Problems of Parallel Conduct

Scholars have been debating the problems of parallel conduct in oligopolistic markets for more than half a century.[8] The opposing sides of the debate are well represented by two characters: Donald Turner – Professor at Harvard Law School; and Richard Posner – Judge on the United States Court of Appeals for the Seventh Circuit in Chicago.

5 Richard Whish and David Bailey, Competition Law, Oxford, Oxford University Press, 2012, p.567. Also see cases: 48/69 Imperial Chemical Industries v Commission (Dyestuffs) [1972] ECR 619; Züchner v Bayerische
Vereinsbank AG (172/80) [1981] ECR 2021, [1982] 1 CMLR 313; and Zinc Producer Group OJ [1984] L 220/27, [1985] 2 CMLR 108.

6 Matthew M. Bunda, Monsanto, Matsushita, and "Conscious Parallelism": Towards a Judicial Resolution of the "Oligopoly Problem", Washington University Law Review, Vol. 84, Issue 1, 2006, pp.189-191. Also see cases: Williamson Oil Co. v Philip Morris USA, 346 F.3d 1287; In re Flat Glass Antitrust Litigation, 385 F 3d 350, 359-60 (3d Cir. 2004); and In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002).

7 OECD, Policy Roundtables, Prosecuting Cartels without Direct Evidence, 2006, p.11. This approach is shared by prominent Judge Richard Posner; refer to his opinion in: Richard A. Posner, Antitrust Law, Second Edition, 2001, pp.93-94.

8 Gregory J. Werden, Economic Evidence on the Existence of Collusion: Reconciling Antitrust law with oligopoly theory, 71 Antitrust L.J. 719, 735-36, 2004, pp.719-720.

2.2. Professor Turner on Parallel Conduct

According to Professor Turner, prices similar to those prices set as the result of unlawful agreements are unavoidable in oligopolistic markets.[9] Parallel pricing is highly probable in markets where many producers supply identical products. Decline in demand, excess supply or other changes in market conditions do not facilitate price stability in spite of the fact that, as a general rule, such conditions create advantages for producers in the event of price reductions. The maintenance of high prices raises suspicion when market conditions provide the opportunity for firms to obtain increased profit by lowering prices. Moreover, price stability can be maintained in oligopolistic markets even without explicit agreement between firms.[10]

The nature of the oligopolistic market is such that decisions related to the prices or output of one firm affects the sales volume of the others. One may anticipate the behavior of the other and vice versa. Therefore, parallel pricing occurs without overt collusion between firms and may be dependent on "rational calculation." If one firm reduces prices, its sales volume will grow to the detriment of the other, and the competing firm will also cut prices in order to regain the lost clients. Because such a price cut induces the oligopolists to sell their production at a low price, which may be detrimental, firms foresee the negative consequences of price reductions and refrain from cutting prices.[11]

The abovementioned rational calculation may be designated as agreement by conduct, but in Professor Turner's view parallel conduct in an oligopolistic market is not agreement and, even if we call it agreement, does not constitute unlawful conspiracy. Unlawful agreement shall be proved only by the application of additional evidence.[12]

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9 Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal Harvard Law Review Vol. 75, Issue 4, 1962, p.666.

10 Matthew M. Bunda, Monsanto, Matsushita, and "Conscious Parallelism": Towards a Judicial Resolution of the "Oligopoly Problem", Washington University Law Review, Vol. 84, Issue 1, 2006, p.189.

11 Ibid, p.190.

12 Donald F. Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, Harvard Law Review Vol. 75, Issue 4, 1962, p.671.

According to Professor Turner, parallel conduct may result from independent reasoning. Parallel conduct of firms may result in anticompetitive outcomes, but that does not prove the existence of collusion or unlawful conspiracy. Such behavior characterizes the structure of oligopolistic markets making firms interdependent.[13]

2.3. Dissent of Judge Posner

Judge Posner based his approach on "A Theory of Oligopoly" developed by George Stigler[14]. Stigler's analysis of the oligopolistic environment indicates that noncompetitive behavior by firms is not the ultimate outcome of oligopolistic structures. Firms must have a complex understanding of each other's behavior and of the rules they implicitly accept to coordinate parallel conduct.[15] Firms are required to monitor deviation (noncompliance with commonly-accepted rules) and punish it in order to sustain a non-competitive environment. A cartel, however, is not always able to punish deviation. Firms are capable of cheating such a monitoring system, slightly decreasing prices and making more profit while avoiding detection. Stigler's analysis doubts the inevitability of anticompetitive prices in oligopolistic markets.[16]

Judge Posner also argues that anticompetitive outcomes are not unavoidable in oligopolistic markets. Despite their being oligopolists, firms will still encounter many difficulties in attempting to coordinate.[17] Competing firms are not always able to obtain fresh information regarding prices. If the firm has a chance to reduce prices in a short period of time without being detected, it will decrease said prices and resultantly gain profit. The capacity avoid detection is also significant, because firms may be able to increase sales

13 Ibid, p. 681.

14 William H. Page, A Neo-Chicago Approach to Concerted Action, Antitrust Law Journal, Vol. 78, Issue 1, 2012, p. 174.

15 Jonathan B. Baker, Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory, Antitrust Bulletin, Vol. 38, Issue 1, 1993, pp.156-157.

16 Ibid, pp.149-153.

17 Matthew M. Bunda, Monsanto, Matsushita, and "Conscious Parallelism": Towards a Judicial Resolution of the "Oligopoly Problem", Washington University Law Review, Vol. 84, Issue 1, 2006, p.192.

volume in a short period of time as a result of price decreases, which will not cause reduction of sales volume of their competitors.[18]

Parallel conduct is not the ultimate result of oligopolistic markets. Oligopoly facilitates coordination but does not necessarily cause it.[19] If the economic evidence refers to collusion, then evidence of actual agreement between firms is not necessary. The evidence of such agreement may be deduced from the presence of parallel conduct. Unlike Turner, Judge Posner argues that parallel behavior may be understood as "a literal meeting of the minds" and "a mutual understanding."[20] Judge Posner's ideas support the opinion that parallel conduct may not only be evidence of unlawful conspiracy but may also be its direct expression and a substitute for actual agreement between firms.

2.4. Subsequent Developments

In the current debate, some argue that the problems put forth by the debate between Turner and Posner remain unresolved.[21] However, new methods of economic analysis offer new solutions for detecting unlawful conspiracy. Instead of searching for agreement or intent, these methods observe basic measurements of firm performance – price, output, cost and demand.[22] It is also claimed that research on existing cartels shows that they need to coordinate extensively in order to prevent misunderstandings and detect cheating, and in doing so avoid price reductions and competition.[23]

Despite the above analysis, empirical studies still do not provide sufficient evidence for theorists to solve the problems of parallel behavior endemic to oligopolistic markets.[24] Highly-qualified economic experts reach

18 Ibid, p.193.
19 Ibid, p.194.
20 Richard A. Posner, Antitrust Law, Chicago, Chicago University Press, 2001, p.94.
21 Matthew M. Bunda, Monsanto, Matsushita, and "Conscious Parallelism": Towards a Judicial Resolution of the "Oligopoly Problem", Washington University Law Review, Vol. 84, Issue 1, 2006 p.198.
22 Reza Dibadj, Conscious Parallelism Revisited, San Diego Law Review, Vol. 47, No. 3, 2010, p.624.
23 William H. Page, A Neo-Chicago Approach to Concerted Action, Antitrust Law Journal, Vol. 78, Issue 1, 2012, pp.190-194.
24 Reza Dibadj, Conscious Parallelism Revisited, San Diego Law Review, Vol. 47, No. 3, 2010, pp. 625-629.

different conclusions from the same economic evidence even when they employ widely-accepted modern methods of economic analysis. Some experts believe that parallel conduct occurs without explicit communication, thus rendering circumstantial evidence irrelevant.[25] Other experts focus on Stigler's model and, according to them, parallel conduct rarely occurs without explicit communication.[26]

The above analysis indicates that theoreticians are inconclusive regarding the nature of parallel conduct. This theoretical dichotomy between two main approaches has found expression in international legal practice and induced countries to adopt divergent approaches, which are discussed in detail below.

3. International Legal Practice

3.1. European Union

According to the EU courts, parallel conduct may constitute evidence of concerted practice. However, taken alone it is insufficient and there must be additional evidence.[27] The case of Wood Pulp is exemplary of the kind of inconsistency; parallel conduct can be key evidence of unlawful concerted practice in the absence of a plausible alternative explanation.[28]

3.2. United States of America

The US courts support the opinion of Professor Turner and attempt to adduce additional evidence in order to determine the existence of conspiracy.[29]

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25 Gregory J. Werden, Economic Evidence on the Existence of Collusion: Reconciling Antitrust law with oligopoly theory, 71 Antitrust L.J. 719, 735-36 (2004), pp.798-799.

26 Ibid. p.799.

27 Richard Whish and David Bailey, Competition Law, Oxford, Oxford University Press, 2012, pp.567-568.

28 Ibid, p. 569.

29 Reza Dibadj, Conscious Parallelism Revisited, San Diego Law Review, Vol. 47, No. 3, 2010, p.597. See also the cases: Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287; In re Flat Glass Antitrust Litigation, 385 F 3d 350, 359-60 (3d Cir. 2004); In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002).

The courts rely on the plus factors which may constitute behavior contrary to self-interest (i.e., behavior which cannot be explained rationally can be the probable outcome of concerted practice) as well as evidence of communication.[30] The US courts are consistent in ruling that parallel conduct in itself does not amount to unlawful conspiracy; thus something more than parallel conduct is needed in order to exclude the possibility of independent lawful action.[31]

3.3. Chinese Taipei (Taiwan)

The officials and courts of Chinese Taipei equate parallel conduct in pricing to unlawful agreement. The Fair Trade Commission of Chinese Taipei (the "FTC") launched investigation into violation of the Fair Trade Law by two domestic oil suppliers. The FTC acknowledged that simple uniform pricing (parallel conduct) is not necessarily illegal. However, the occurrence of mutual understanding through public price announcements or news releases was followed by the uniform pricing of relevant products on the market, so the public exchange of views constituted more than mere parallel conduct. According to the FTC the two firms did not merely set uniform price levels, but their public exchange of information could be considered a form of mutual understanding and thus concerted action, which is prohibited under the Fair Trade Law.[32]

3.4. Republic of Korea (South Korea)

In South Korea, the issue of parallel conduct is regulated by law. Under Article 19.5 of the Monopoly Regulation and Fair Trade Act (MRFTA), where two or more firms commit any acts (agreements or concerted practice) that practically restrict competition in a particular business area, the firms shall be presumed to have committed an act of unfair collaborative even in the absence of an explicit agreement to engage in such act. On the basis of this

30 Ibid, p.598.
31 Ibid, pp.599-600.
32 OECD, Policy Roundtables, Competition in Road Fuel, 2013, p.307.

article the Korean Fair Trade Commission applies the presumption of a cartel agreement if there is "uniformity of outward conduct", "competition-restrictiveness" and circumstantial evidence.[33]

On the basis of the presumption clause of Article 19.5, the Seoul High court developed a two-step presumption analysis. The first step includes the presumption of concerted action without explicit agreement if it is revealed that the firms engaged in externally-uniform acts which fall under Article 19.1. The second step is presuming unlawfulness when the claimant arguing in favor of concerted practice proves the presence of anti-competitive market outcomes. This presumption may be refuted by defendants if they provide evidence of the absence of concerted action or provide other circumstantial evidence proving that the conscious parallel conduct does not amount to concerted action.[34]

4. Recommendations for the Government of Georgia

According to OECD roundtables, "The country just beginning to enforce its competition law may face obstacles in obtaining direct evidence of a cartel agreement. It probably will not have in place an effective leniency programme, which is a primary source of direct evidence. There may be lacking in the country a strong competition culture, which could make it more difficult for the competition agency to generate co-operation with its anti-cartel programme. In short, the competition agency could have relatively greater difficulty in generating direct evidence in its cartel cases, which would imply that it will have to rely more heavily on circumstantial evidence."[35]

On the other hand, cases of parallel conduct may force the Agency to devote significant financial and human resources to investigation. Quantitative analysis, expert testimonies and the collection of economic evidence may create difficulties even in experienced jurisdictions such as the USA. The

[33] OECD, Policy Roundtables, Prosecuting Cartels without Direct Evidence, 2006, p.137.

[34] Chung-Su Choe, Korean Antitrust for proof of price Fixing: Comparative Analysis with the U.S. Antitrust, Journal of Korean Law, Vol. 9, Issue 2, 2010, pp.365-366.

[35] OECD, Policy Roundtables, Prosecuting Cartels without Direct Evidence, 2006, p.11.

varying approaches of economic experts and adjudicators and the unavailability of necessary information may increase the costs and enforcement errors. The inherent complexity of possible violations expressed in instances of parallel conduct poses important challenges to the Agency.[36]

Georgia is inexperienced in competition policy enforcement issues and must adopt the approach best suited to its conditions, modeled on either the EU or USA approach. The punishment of companies for parallel conduct will be a precondition for endless litigation and ambiguity, incurring related burdensome expenses for the state. It is recommended not to view parallel conduct as the agreement or concerted practice in itself or the key evidence of an unlawful conspiracy. It may become the ground of suspicion or the complementary evidence.

5. Conclusion

It is apparent that judges and theoreticians disagree on the nature of parallel conduct. Parallel conduct may constitute agreement, key evidence of agreement, complementary proof or rational economic behavior, all simultaneously.

Indeed, it is not possible to apply different meanings to the same phenomenon. Parallel conduct cannot constitute agreement. There is strong evidence that business entities are able to adapt to market conditions quickly and take the most advantageous decisions. In some cases, firms opt for parallel conduct because it is the best choice for the firm. It is not recommended to equate independent, calculated and rational decision making with agreement or concerted action. It is not possible to say that every instance of parallel conduct constitutes agreement. In some cases, parallel conduct may be considered evidence of agreement rather than agreement in itself.

Parallel conduct may serve as key evidence of agreement in very rare occasions. In most cases, economic analysis is not sufficient to detect con-

[36] Juan David Gutiérrez Rodríguez, Tacit Collusion: Theory and Case Law in Argentina, Brazil, Chile, Colombia and Panama (1985-2008), Latin American Competition Law and Policy, 2009, p.324.

spiracy and there is instead an alternative explanation for parallel conduct. In some cases, it is possible to provide very convincing economic evidence asserting that the engagement of firms in parallel conduct is not in their best interest and supposedly not the result of independent decision making. This is exceedingly difficult to prove, however. Parallel conduct may amount to complementary evidence which can form the basis of suspicion and, subsequently, proof of unlawful action when presented in conjunction with other evidence. It, of course, can be the rational economic behavior, as it provides much gain for the members of oligopoly and in the most cases is in their best interest.

IRAKLI SAMKHARADZE*

The Europeanization of Georgian Energy Law: The Legal Harmonization Agenda

1. Introduction

Modernization of an obsolete national energy legislative infrastructure requires a so-called "paradigm shift" in legal thinking as well as a consistent course of reform which to follow. This course of reform is now largely driven by the partnership between the European Union (EU)[1] and the Government of Georgia and impacts the harmonization of Georgia's energy regulatory framework under the footprint of EU legislation. Transposing EU energy legislation onto Georgia's domestic legal system is the "remedy" for Georgia to systemize its currently unregulated energy sector. This transposition, however, presents considerable challenges to the country and uncovers substantial legal gaps. The objective of this paper is to address some of these challenges by analyzing the impact of the EU's external energy policy on municipal law in Georgia.

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1 Hereinafter the "EU" or the "Union".

This article thus studies the tendencies of legal harmonization in Georgia's energy sector toward a liberal, competitive and transparent energy market. It also contributes to the practical and theoretical debates about the EU's role as an international actor promoting Europeanization. For this particular purpose, the second and third sections of the paper theorize on key concepts. The fourth section takes a closer look at specific legal tools and applies scrutiny of the EU-Georgia Association Agreement (AA) and the Energy Community Treaty (EnC) as EU-brokered instruments triggering the harmonization of Georgia's national energy law with EU law.

2. EU Energy Diplomacy in Georgia

The study of EU external relations must address the extraterritorial application of EU energy law and policy. Historically lagging behind other aspects of external relations, energy has only recently gained prominence, becoming a central element of today's EU foreign affairs priorities. Concerns over the security of supply[2] coupled with issues such as import dependability and limited diversification call for the EU to participate in international law making as one of the most important tools to mitigate risks and meet objectives regarding energy. Recognizing that "the price of failure is too high,"[3] the EU actively engages in energy diplomacy and takes steps to strengthen its relations with neighbouring countries in the energy sector. This phenomenon can be called the "Europeanization of energy law" when the application of the EU's acquis communautaire[4] (the "acquis") transcends national borders and is transposed onto the domestic energy regulatory regimes of non-EU countries.

[2] Notably, a significant amount of energy consumed in the EU is produced outside the EU and comes primarily from countries that are politically unstable and characterized by poor human rights and governance records.

[3] Communication from the Commission of 10 November 2010 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Energy 2020 A Strategy for Competitive, Sustainable and Secure energy, COM(2010)639,10/11/2010,' 2.

[4] The term is used to refer to all real and potential rights and obligations of the EU system, body of EU law and practice. More succinctly, it is legal jargon to refer to the EU's supranational legal and regulatory regime.

It is no longer a question that implementation of the acquis can extend beyond the EU member states and be incorporated into the legal obligations of non-EU countries.[5] The EU, enjoying the capacity to enter into cross-border international relations, often refers to Europeanization as a twinned incentive structure between EU policymakers and external stakeholders.[6]

Georgia offers a typical example of such "stakeholder" participating in the European Neighbourhood Policy (ENP)[7] and the Eastern Partnership Initiative (EaP),[8] both political formats for expanding Europeanization, including in the field of energy. The country, re-entering the geopolitical arena following the collapse of the Soviet Union, is strategically located on key East-West transportation routes.[9] Being an attractive alternative for the EU in transporting oil and gas from Central Asia to European markets,[10] Georgia is characterized as an EU-focused "willing state" endeavouring to create a stable, competitive and market-oriented regulatory framework for energy.

3. Key Terms and Definitions

3.1. Conceptualizing the Europeanization of Energy Law

EU energy law covers the body of laws encapsulating rules governing energy-related matters concerning the union.[11] A great deal of energy legisla-

5 L. Dietz, L. Stirton, K. Wright, 'South East Europe's Electricity Sector: Attractions, Obstacles and Challenges of Europeanisation,' *Elsevier, Utilities Policy 17*, 2009, 7.

6 Ibid.

7 For more information, see: The European Union External Action, 'European Neighbourhood Policy (ENP)' (*Https://eeas.europa.eu*, 21 December 2016) <https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp_en> accessed 22 September 2018.

8 For more information, see: The European Union External Action, 'Eastern Partnership (EaP)' (*Https://eeas.europa.eu*, 19 October 2016) <https://eeas.europa.eu/diplomatic-network/eastern-partnership/419/eastern-partnership_en> accessed 22 September 2018.

9 L Alieva, N Shapovalova, (eds.), 'Energy security in the South Caucasus: views from the region,' *FRIDE working paper*, 2015, 17.

10 M. Margvelashvili, A. Maghalashvili, T. Kvaratskhelia, L. Ushkhvani, G. Mukhigulashvili, *Georgian Energy Sector in the context of EU Association Agreement*, Tbilisi, 2015, 14.

11 For a more detailed review of energy law and its specificities, see: A. J. Bradbrook, 'Energy Law as an Academic Discipline,' Vol. 14 (2), *Journal of Energy and Natural Resources Law*, 1996, 193-217.

tion[12] is now targeted at market liberalization, environmental issues, climate change, antitrust and state aid rules which, inter alia, constitute EU energy law. The body of law has gained momentum in the aftermath of the Lisbon Treaty introducing a new legal basis for energy. Article 194 of the Treaty on Functioning of the European Union spells out the EU key energy policy objectives and enshrines three policy principles in this field: competitiveness; security of supply; and sustainability. Therefore, the Europeanization of Georgia's energy legislation should hypothetically encapsulate these principles and endorse European values. In consideration of that fact, this paper addresses the practical implications and tangible impacts of Europeanization in the energy sector.

Originally, the research on "Europeanization" was concerned almost exclusively with domestic impacts in EU member states. In this context, Europeanization can be understood as a coherent body of rules of a supranational character, whereby EU law is an autonomous source of inspiration. Given this logic, the term "Europeanization" most commonly refers to the domestic impact of the EU driven by the requirements of EU membership. However, in light of the developments of European integration and of its wider impacts, this exclusive research focus no longer appears appropriate.[13] To date, Europeanization can more broadly be interpreted as the process of adapting to the EU model of governance. In this far-reaching perspective, Europeanization is the recognition of EU law and principles as a major source of law in non-EU countries when such states attempt to transpose EU rules and concepts onto their national legislative and regulatory regimes.[14] In other words, it is a process of "regulatory alignment" whereas the EU enjoys a certain leverage in neighbouring coun-

[12] Introduced gradually through different legislative packages, some of the key secondary legislation (directives, regulations and decisions) include the Electricity Market Directive of 1996 and the Gas Market Directive of 1998 (later superseded by Directive 2003/54/EC and Directive 2009/72/EC), various regulations addressing access to gas and electricity networks and other issues such as security of supply, renewable energy and energy efficiency, *inter alia*.

[13] F. Schimmelfenning, U. Sadelmeier, 'Candidate Countries and Conditionality in Europeanization: New Research Agendas' (ed.) P. Graziano, P. M. Vink, *Palgrave Macmillan*, 2007, 88.

[14] C. Ferreira, 'The Europeanization of Law' in J. Oliveira, P. Cardinal (eds.), One Country, Two Systems, Three Legal Orders – Perspectives of Evolution, *Springer-Verlag Berlin Heidelberg*, 2009, 171.

tries, including Georgia, and is a catalyst for reform through "third countries" mirroring its own mechanisms.

3.2. Effects of Legal Harmonization in Energy

Legal harmonization is identified as one mechanism of Europeanization which defines the dynamics EU transformative power in third countries. Harmony is a state of affairs in which otherwise disjointed matters come to be conjoined.[15] Legal harmonization amounts to the assimilation of legal standards and norms through the massive diffusion and transposition of foreign norms. It is aimed at the co-existence of different legal systems and the creation of an organically-uniform legal system within the country.[16] Harmonization of specific laws (as opposed to harmonization of whole legal systems) may necessitate the deployment of as little as a single transplant between different legal systems.[17] To this end, Georgia's energy legislation harmonization must be seen as the adaptation of domestic energy law norms to the EU standards. This is carried out by legislative activities aimed at reducing the legal regulatory variance between the municipal law of Georgia and the EU energy law.

The country's gas and electricity sector is currently governed by the overarching Law of Georgia on Electricity and Natural Gas. The domestic energy regulatory framework also includes the Law of Georgia on Oil and Gas as well as secondary normative acts and other legislation adopted by the Georgian National Energy and Water Supply Regulatory Commission (GNERC) responsible for licenses and permits.[18] While the Law of Georgia on Electricity and Gas has undergone a number of amendments, energy legislation remains non-compliant with the EU's Third Energy Package (with regard to the electricity and gas sector) targeted at achieving more competitive mar-

15 A. E. Platsas, 'The Harmonization of National Legal Systems Strategic Models and Factors,' *Elgar Edward Publishing*, 2017, 6.

16 I. Samkharadze, 'Harmonization of Legal Systems: EU and Georgia,' *Journal of Law, №1*, Tbilisi, 2015, 322.

17 Ibid, 704.

18 GNERC, 'Legal Acts adopted by the Commission' (http://gnerc.org/en/legal/komisiis-mier-mighebuli-samartlebrivi-aqtebi) accessed 22 September 2018.

kets, unbundling energy suppliers from network operators, strengthening the independence of regulators, promoting cross-border cooperation between transmission system operators and increasing transparency in the retail market to benefit consumers.[19] Additionally, Georgian energy legislation does not enshrine tangible renewable energy and energy efficiency standards, nor does it establish national sustainable energy targets in line with the EU 2030 strategy.[20]

Taking that Georgia's current energy legislation and regulatory regime is not aligned with modern regulatory standards, as listed above, energy legal harmonization is an absolute necessity for the country to modernize its energy regulatory framework and to align with the EU's liberal market model.[21] Georgia's aspiration to approximate its legislation to the EU's core requirements is possible to realize by deploying proper codification and enforcement measures that ensure consistent transformation processes. To facilitate such a transformation, it is of great importance to study the concrete instruments employed by the EU to externalize energy legislation and regulation. These are further explained in the following chapter.

4. EU Instruments for Externalizing Energy Matters

4.1. Rudiments of Georgian Energy Harmonization: The Association Agreement

In pursuit of its external energy policy the EU primarily uses conditionality to create a network of legal, political and administrative obligations with

19 European Commission, 'Market legislation,' *https://ec.europa.eu*. <https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation> accessed 22 September 2018.

20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A policy framework for climate and energy in the period from 2020 to 2030,' Brussels, 22.1.2014 COM(2014) 15 final.

21 Liberalization can be thought of as a reformist approach wherein the hierarchical "top-down" mechanism is replaced by market-based relationships.

partner countries.[22] Apart from the institutional machinery for political leverage and technical assistance[23] the EU employs various complementary and targeted frameworks ranging from the specific energy provisions of bilateral agreements with third countries (i.e., Free Trade Agreements, Partnership and Cooperation Agreements, Association Agreements) to multilateral treaties such as the Energy Community Treaty and Energy Charter Treaty, which are regional or national scope.[24] These regimes are characterized by differentiated legal force varying from soft law to binding law and therefore affect the energy markets of other states to a greater or lesser extent.[25] Georgia participates in the Association Agreement process and it has further acceded to the Energy Community Treaty.

Generally speaking, the AAs provide preferential access to EU markets, often with a view to eventual entrance to the EU customs union.[26] This characterizes the EU-Georgia Association Agreement of 2014. In its legal nature, the AA is an international treaty binding on Georgia and enjoying supremacy over its national laws as long as it does not contradict the Constitution and the Constitutional Law of Georgia.[27]

While the AA mandates the harmonization of Georgian legislation with EU law in a number of fields, the energy sector is one crucial aspect. Article 297 of the AA defines the general principles of cooperation between the EU and Georgia as partnership, mutual interest, transparency and predictability, all of which reflect the EU's endeavour to support the modernization of Georgia's energy legislation through harmonization. Annex XXV of the AA specifies the concrete EU legal acts (regulations and directives) that must

22 T. Walde, 'The International Dimension of EU Energy Law and Policy' in M. Fitzmaurice, M. Szuniewicz (eds), Exploitation of Natural Resources in the 21st Century, *Kluwer Law International*, 2003, 17.

23 The EU has employed various technical assistance programmes such as TACIS, PHARE, SYNERGY, EU4Energy (ongoing) to support partner countries in shaping their domestic policy and strengthening legislative and regulatory frameworks. Although these programs are targeted toward helping recipients obtain expertise, they also provide means for exerting EU influence on the energy policies of "willing states".

24 V. B. Vooren, A. R. Wessel, '*EU external Relations Law, Text, Cases and Materials*,' Cambridge University Press, 2014, 451.

25 H. Krüger, '*European Energy Law and Policy*,' Edward Elgar Publishing, 2016, 216.

26 K. Talus, '*EU Energy Law and Policy: A critical Account*,' Oxford University Press, 2013, 9.

27 Constitution of Georgia, Article 6 (2).

be implemented in the fields of electricity, natural gas, oil, renewable energy and energy efficiency. The following EU legislative acts, inter alia, are examples of the legal approximation agenda to which Georgia's domestic legislation should be harmonized: Electricity Directive (2009/72/EC); Gas Directive (2009/73/EC); Oil Directive (2009/119/EC); Renewable Energy Directive (2009/28/EC); and three key Energy Efficiency Directives (2006/32/EC, 2010/31/EU, 2010/30/EU). Georgia is committed to the EU association timeline which requires the establishment of national energy regulatory authorities and sector-specific national programs in due course.

4.2. The Multilateral Regime: Energy Community Treaty

The Energy Community Treaty, an example of "sector-based normative multilateralism" (Blockmans, 2012), is another principal instrument for modernizing Georgia's energy sector. The Energy Community's launch represents reinforcement of the EU external energy policy regime and a bold experiment in Europeanization.[28] It further can be seen as a proactive effort by the EU to create a pan-European energy network whereas the contracting parties commit to implementing EU energy law in their national energy systems.[29]

In common with the Association Agreement, the EnC establishes a specific legal harmonization agenda for partner countries to adopt the acquis in the areas of electricity, gas, oil, security of supply and infrastructure as well as legislation related to environmental protection, competition and renewables, energy efficiency and energy statistics.[30] Article 10 of the Treaty explicitly requires each contracting party to implement the acquis with regard to energy.

Georgia's accession to the Treaty regulated by the Accession Protocol[31] can loosely be considered an "endorsement" of already-assumed legal ob-

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28 M. Roggenkamp, C. Redgwell, A. Ronne, L. Guayo, '*Energy Law in Europe*,' Oxford University Press, 2007, 202.

29 M. Wustenberg, K. Talus, '*Risks of Expanding the Geographical of EU Energy Law*,' European Energy and Environmental Law Review, 2017, 139.

30 S. Blockmans, V. B. Vooren, 'Revitalizing the European Neighbourhood Economic Community: The Case for Legally Binding Sectoral Multilateralism,' *Working Paper, Leuven Centre for Global Governance Studies*, No. 91, 2012, 15.

31 Protocol Concerning the Accession of Georgia to the Treaty Establishing the Energy Community.

ligations under the Association Agreement and the obvious manifestation of a reliable energy partnership with the EU. Primary and secondary energy legislation in Georgia currently incorporates some aspects of regulation and rules in accordance with EU principles. However, complying with the EnC requirements oblige Georgia to significantly alter its energy legislation and to create a new market framework to achieve security of supply, competitiveness and sustainability goals.[32]

The report on compliance with the energy acquis,[33] the first-ever comprehensive document assessing Georgia's progress with respect to EnC requirements, finds the country has demonstrated its willingness to establish itself as a successful energy partner with the EU. Although the country has already implemented a number of reforms to accelerate its transformation from a post-Soviet republic, its energy market framework remains heavily influenced by the Soviet legacy. This is most evident in poor performance in terms of competitiveness and the absence of a regulatory framework to stimulate smart energy solutions.[34] In consideration of the difficulty of this process, in some cases Georgia is able to request derogations from its obligations for certain periods of time. This allows the country to implement EU rules sequentially but diligently, without harming public and private energy interests.

5. Conclusion

This article looked at the potential of EU transformative power on the Georgian energy market. Upon measuring the practical impacts of extraterritorial application of EU energy law in Georgia, the article concluded that implementation of the EU-Georgia Association Agreement and Energy Commu-

[32] G. Narmania, N. Sumbadze, 'Possible Challenges of Harmonization of Georgian Legislation with the Acquis Communautaire of the European Union in Energy Sector,' *PMC Research Center or Konrad Adenauer Foundation*, *Policy Paper*, Tbilisi, 2014, 3.

[33] Energy Governance in Georgia, Report on Compliance with the Energy Community Acquis, Energy Community Secretariat, July, 2017.

[34] Ibid.

nity Treaty, as mutually reinforcing instruments,[35] requires the Government of Georgia to render the sector more transparent and liberal.

A so-called EU "legal external policy"[36] ensures, that Georgia's energy framing process is line with the energy community acquis. The incoming Law of Georgia on Energy, drafted with the assistance of the EnC secretariat,[37] is a giant leap toward implementation of the acquis. Although the draft law, which requires repealing the primary Law on Electricity and Natural Gas, remains under discussion at the ministerial level, the draft law should be seen as instrumental to energy sector reform accommodating the principles of the EU's Third Energy Package.

To summarize, the Europeanization of Georgia's energy sector is in progress and the implementation of EU energy norms in Georgia's domestic legal system is an irreversible process. However, law as a tool for the external energy policy requires the unfailing scrutiny of enforcement measures and diplomatic dialogue.[38] The success of Europeanization is largely dependent on the following factors: the EU should be willing to employ more sophisticated mechanisms for strengthening energy governance in Georgia; and that process must be go along with sufficient administrative supervision and capacity-building actions at the municipal level.

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35 These international treaty mechanisms are interchangeable in terms of their legal purpose. Given the argument for dynamic harmonization, it is recommended to pursue the EnC agenda as it is a relatively new mechanism for Georgia and entails a supportive approach (including financial and technical mechanisms) from the Union. In cases of overlap, Article 218 of the AA applies, which governs the relationship between the Association Agreement and Energy Community Treaty and states that during conflicting situations the provisions of the Energy Community Treaty shall prevail as the more concrete and sector-specific legal instrument.

36 N. Pradel, 'The EU External Energy Policy and the Law: Does the EU Really Matter?' L. Squintani, M. Reese, B. Vanheusden, 'Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the European Union,' *European Environmental Law Forum Book Series*, Vol. 1, 2014, 245.

37 EU Neighbours East, 'Georgia close to finalising new Energy Law in line with EU standards' (*www.euneighbours.eu*, 1 December 2017) <https://www.euneighbours.eu/en/east/stay-informed/news/georgia-close-finalising-new-energy-law-line-eu-standards> accessed 25 September 2018.

38 N. Pradel, 'The EU External Energy Policy and the Law: Does the EU Really Matter?' L. Squintani, M. Reese, B. Vanheusden, 'Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the European Union,' *European Environmental Law Forum Book Series*, Vol. 1, 2014, 245.

ELENE GOGICHAISHVILI*

Comparative Analysis of Consumer Protection Under the Law of Georgia on Private International Law and the Rome I Regulation

1. Introduction

Cross-border transactions between Georgia and the European Union (hereinafter, the "EU") have intensified[1] since execution of the Association Agreement (hereinafter, the "Agreement").[2] The Agreement presents a number of provisions aiming to enhance consumer protection standards existing in the Georgian legal framework.[3] Thus, the importance of establishing legal instruments to safeguard consumer interests under the national laws of Georgia is rising.[4] The present research paper describes Regulation (EC) No

* LL.M., International Commercial Law.

1 Trade > Policy > Countries and regions > Georgia' (*European Commission*, 8 July 2016); <ec.europa.eu/trade/policy/countries-and-regions/countries/georgia/> accessed 15 May 2018.

2 Council Decision 2014/494/EU of 16 June 2014 on the signing, on behalf of the European Union, and Provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261.

3 Michael Emerson and Tamara Kovziridze (eds), *Deepening EU- Georgian Relations. What Why and How?* (Roman & Littlefield International Ltd. 2016) 153-154.

4 Ibid, 153.

593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (hereinafter, the "Rome I regulation"), in particular Article 6 and the consumer protection standard provided by it. A similar study was executed with regards to the Law of Georgia on Private International Law (hereinafter, the "GPIL") and its respective article endeavoring to safeguard the interests of consumers. Such description aims to comprehend and compare the protection standards provided to consumers, being party to the international transactions, under the Rome I regulation and the GPIL Consequently, the paper identifies the necessity of improving on the consumer protection standards established by the GPIL in light of the Agreement and the obligations imposed by it, in particular Articles 345, 346 and 347.

The Agreement reached between Georgia and the EU was signed on 27 June 2014[5] and came into force on 1 July 2016. Signing and executing such Agreements is one of the instruments of the EU's neighborhood policy (hereinafter, the "ENP") for integrating with its eastern neighbors; in the present case – Georgia.[6] The alignment of relevant Georgian national laws with EU principles and regulations outlined in the Agreement, inter alia, the consumer protection standard, results from execution of said Agreement.

2. Consumer Protection under the Agreement

Article 345 of the Agreement states the following: "the parties shall cooperate in order to ensure a high level of consumer protection and to achieve compatibility between their systems of consumer protection." Article 345 establishes a general commitment to achieving such compatibility with regard to consumer protection standards. The aforesaid Article influences the revision of the relevant acts existing in the Georgian legal framework in order

5 Trade > Policy > Countries and regions > Georgia' (*European Commission*, 8 July 2016); <ec.europa.eu/trade/policy/countries-and-regions/countries/georgia/> accessed 31 May 2018.

6 Pieter Jan Kuiper, Jan Wouters, Frank Hoffmiester, Geert De Baere and Tomas Ramopoulos, *The Law of EU External Relations: Cases Materials and Commentaries on the EU as an international Legal Actor* (2nd edn, Oxford University Press) 556.

to achieve such compatibility.[7] In addition, the approximation of consumer legislation is instructed under Article 346 of the Agreement, which states the following:

> "In order to achieve these objectives the cooperation may comprise, when appropriate:
> (a) aiming at approximation of consumer legislation while avoiding barriers to trade;
> (b) promotion exchange of information on consumer protection systems, including consumer legislation enforcement, consumer product safety information exchange systems, consumer education/awareness and empowerment, and consumer redress;
> (c) training activities for administration officials and other consumer interest representatives, and
> (d) fostering the activity of independent consumer associations and contacts between consumer representatives."

Moreover, Article 347 refers to Annex XXIX of the Agreement which lists the respective EU "acts and international instruments" to which Georgia undertook the obligation to approximate its laws. Said alignment process is to be conducted in a gradual manner within the period of time given in the relevant provisions of the Agreement.[8] The aforesaid Articles of the Agreement, as well as Annex XXIX, make no reference to the Rome I regulation, including Article 6. However, as the Rome I regulation is one of the most important instruments establishing conflict rules,[9] including consumer contracts established in Article 6,[10] comparing and reviewing the need of enhancing the relevant provision – Article 38 of the GPIL – with Article 6 of the Rome I regulation is crucial for fulfilling the obligations set out in Articles 345, 346 and 347 and approximating the other legal instruments listed in Annex XXIX.

7 Michael Emerson and Tamara Kovziridze (eds), *Deepening EU- Georgian Relations. What Why and How?* (Roman & Littlefield International Ltd. 2016) 153.
8 Ibid, 153.
9 Michael Bogdan, *Concise Introduction to EU Private International Law* (2nd edn, Europa Law Publishing 2012) 117.
10 Ibid, 130-131.

Thus, the present research aims at better understanding the protection standard established by Article 6 of the Rome I regulation and Article 38 of the GIPL in order to identify any incompatibility, if any, "... between their systems of consumer protection".[11]

3. Rome I Regulation

3.1. Scope of Application

The Rome I regulation introduces the most important conflict rules regarding contractual obligations in civil and commercial matters.[12] According to Article 1(1), the Rome I regulation is applicable *"in situations of a conflict of laws, to contractual obligations in civil and commercial matters"*. The term *"civil and commercial matters"* takes an autonomous meaning in the regulation. Article 1(1) constitutes the substantive scope of applicability of the Rome I regulation. Besides Article 1(1), the requirements of Article 2 and 28 must be fulfilled in order for the Rome I regulation to be applicable; the first requirement being *"universal application"* and the second being *"application in time."*[13] The Rome I regulation adopts the principle of *"universal application"* which allows application of the law of any state, even if reciprocity is not present[14] Pursuant to Article 28 of the Rome I regulation *"this Regulation shall apply to contracts concluded as from 17 December 2009."* If the scope of application is fulfilled, the relevant provisions of the Rome I regulation will designate the applicable law to the contract unless the parties have chosen the applicable law in accordance with Article 3. Party autonomy to choose the law applicable to their contract is the dominant principle under the Rome

11 Council Decision 2014/494/EU of 16 June 2014 on the signing, on behalf of the European Union, and Provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261 Article 345.

12 Michael Bogdan, *Concise Introduction to EU Private International Law* (2nd edition, Europa Law Publishing 2012) 117.

13 Ibid, 118.

14 Petar Sarcevic, Andrea Bonomi and Paul Volken, *Yearbook of Private International Law*. Vol. X (Swiss Institute of Comparative Law 2008) 165-168.

I regulation.[15] Despite the fact that the parties have autonomy with respect to determining the applicable law, Article 9 – which aims to safeguard the application of mandatory EU law – was introduced.[16]

3.2. Consumer Protection

Party autonomy to choose the applicable law is further limited in *"weaker-party contracts."*[17] The aim of consumer protection is to afford consumers the possibility to apply a system of law that is familiar to them to their contracts.[18] Article 6(2) sets out the restrictions for such a choice, which will be discussed further here. Consumers are considered to hold weaker positions in comparison to firms and are mandatorily protected in the European Private International Law.[19]

Article 6(1) of Rome I regulation sets out the following: *"[...] a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:*

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
(b) by any means, directs such activities to that country or to several countries including that country."

The notion of the *"consumer"* is provided in Article 6 of the Rome I regulation in its first sentence, as given above. The notion does not include legal persons and only applies to *"natural"* persons *"for the purpose that can be regarded as being*

15 Christopher Bisping, 'Mandatorily Protected: The Consumer in the European Conflict of Laws' 22(4) (2014) (European Review Law) 513, 517.
16 Ibid, 172.
17 Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, Recital 23.
18 Christopher Bisping, 'Mandatorily Protected: The Consumer in the European Conflict of Laws' 22(4) (2014) (European Review Law) 513, 514-515.
19 Zheng Sophia Tang, 'Review Article Private International Law in Consumer Contracts: European Perspective' (2010) 6 (Journal of Private International Law) 225, 226.

outside his trade or profession"[20]. The latter approach also applies to non-profit associations having non-business activities as their scope of work.[21] Moreover, *"mobile consumer"* is not protected under Article 6 and in cases when *"mobile consumer"* is presented, the applicable law is determined by the general rules of the Rome I regulation.[22] Article 6(1) limits the scope of its application by imposing the requirements set forth in (a) and (b). In addition, it is deemed necessary that *"[...] a contract must also be concluded within the framework of [...]"* the commercial or professional activities of a professional.[23] Article 6 of the Rome I regulation is considered to take into account the habitual residence of a consumer at the time of concluding the contract.[24] Said article also defines a *"professional"* who must act in the course of its business activities.[25]

Article 6(1) is invoked if the parties have not made the choice of applicable law in accordance to Article 6(2) of the Rome I regulation[26]. If the parties to a consumer contract fit the aforesaid definitions and meet the requirements set forth in sections (a) or (b), the law applicable to the contract will be *"the law of the country where the consumer has his habitual residence."*[27] The concept of *"habitual residence"* is autonomously *"defined by material or factual elements."*[28] Otherwise, according to Article 6(3), the law applicable to the contract will be determined by the general rules of the Rome I regulation.[29]

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20 Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, Article 6 (1).

21 Jana Valant, 'Consumer Protection in the EU Policy Review' (2015) European Parliamentary Research Service, 4 <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf> accessed 25 May 2018.

22 Commission (EC) *on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization* (Green Paper Cm 654, 2003) 28.

23 Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, Recital 24, 25.

24 Michael Bogdan, *Concise Introduction to EU Private International Law* (2nd edn, Europa Law Publishing 2012) 131.

25 Ibid, 130.

26 Petar Sarcevic, Andrea Bonomi and Paul Volken, *Yearbook of Private International Law* Vol. X (Swiss Institute of Comparative Law 2008) 186.

27 Michael Bogdan, *Concise Introduction to EU Private International Law* (2nd edition, Europa Law Publishing 2012) 131.

28 Garcimartin Alferez, Franciso J. 'The Rome I Regulation: Much ado about nothing?', European Legal Forum, 61, I-74 < http://www.simons-law.com/library/pdf/e/884.pdf> accessed 20 May 2018.

29 For the list of contracts see: Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, Article 6(4).

Article 6(2) imposes the following condition on the choice of law in a consumer contract: *"such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1."* A large number of EC directives provide protection for consumers throughout the EU. However, these directives cover only certain aspects of legal rules. Different rules with regards to consumer protection exist in the EU Member States. Therefore, even within the EU, consumer protection can still vary.[30] Article 6(2) introduces *"the principle of most favorable law"*, which retains the protections afforded the consumer by virtue of applicable laws by default, even if the choice of law is present.[31] The comparison is performed by analyzing the overall view of the protections afforded the consumer in the specific claim. The possibility of joint reference or *"cherry-picking"* is not granted.[32]

Article 6(4) lists the exceptions where the consumer is not afforded the protections set forth in Article (1) and (2).[33]

4. Law of Georgia on Private International Law

4.1. Scope of Application

According to Article 1 of the GPIL *"this law determines which legal order is applied when there are factual circumstances of a case related to a foreign law, as well as the rules of procedural law that are applied during*

30 Commission (EC) *on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization* (Green Paper Cm 654, 2003) 29.

31 Garcimartin Alferez, Franciso J. 'The Rome I Regulation: Much ado about nothing?', European Legal Forum, 61, I-74 < http://www.simons-law.com/library/pdf/e/884.pdf> accessed 20 May 2018.

32 Maria Campo Comba, 'Week 5: Comparative Private International Law' [lecture notes], *Consumer Contracts*, University of Groningen, delivered 24 November 2015, accessed April 2018.

33 For the list of contracts see: Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, Article 6(4)(a), (b), (c), (d), (e).

these proceedings."[34] The scope of application of the GPIL is not limited to civil and commercial matters – the act also applies to other legal relations.[35] Hence, the scope of applicability of the GPIL in comparison to the Rome I regulation is wider. Article 1 provides the substantive and formal scope of applicability of the GPIL. The limitation of the scope is set out in Article 2, according to which *"the rules under international agreements shall prevail over the rules..."* of the GPIL. Therefore, if an issue at hand falls under the scope of an international agreement as well as under the GPIL, the rules of the former will prevail over the latter.[36] The GPIL upholds party autonomy to choose the law applicable to a contract.[37] Similar to the Rome I regulation, the GPIL also safeguards its public order and fundamental principles under Article 5. Article 5 restrains application of the norms of foreign law which abrogates the *"order public"* of Georgia.[38]

4.2. Consumer Protection

The importance of consumer protection is recognized by the GPIL. Article 38 sets out the following: *"the choice of law shall be considered void if it disregards the imperative rules that are adopted to protect the customers*[39] *and employees from discrimination. This rule shall also apply to the delivery and financing of movable property, labour or service contracts if they are agreed upon or concluded in a country in which the customers and employees have their place of residence and where these protective rules operate."* The wording of the first sentence of Article 38 demonstrates party autonomy regarding the choice of applicable law, including with regards to consumer

34 All the relevant articles of the GPIL are translated by the Legislative Herald of Georgia: <https://matsne.gov.ge/en/document/view/93712?publication=2>, Law of Georgia on Private International Law 1998, Article 1.

35 Tengiz Liluashvili, *Saertashoriso Kerdzo Samartali* [Private International Law] (GCI 2001) 18.

36 Giorgi Svanadze 'Jurisdiction Clauses and the Recognition and Enforcement of Foreign Judgments in Georgia (Brief Comment on recent developments in Georgian Supreme Court case law)' (Max-Planck-Institut fur auslandisches und internationals Privaterecht 2009) < https://www.mpipriv.de/files/pdf4/2016_05_23.pdf> accessed 18 May 2018, 13-14.

37 Law of Georgia on Private International Law 1998, Article 35.

38 Zviad Gabisonia, *Kartuli Saertashoriso Kerdzo Samartali* [Georgian Private International Law] (Meridiani, 2011) 117.

39 Definition of a 'Customer': the party that uses or is affected by a companies' product, Black's Law Online Dictionary, 2nd ed.

contracts. Nevertheless, similar to the Rome I regulation, certain restrictions apply to such a choice.

The first sentence of Article 38 aims to protect the *"customer"* from any discriminatory treatment. Therefore, any choice of law resulting in discrimination against customers will be considered void and national norms will instead apply to the contract.[40] The second sentence of Article 38 specifies certain types of contracts to which the aforesaid rule can be applied. The requirement imposed for invalidating the listed contracts is connected with the habitual residence of the customer. As stated above, these agreements have to be *"[...] agreed upon or concluded in a country in which the customers and employees have their place of residence and where these protective rules operate."*

Despite the fact that Georgian legislators seek to provide mandatory protective rules for customers, Article 38 may not be sufficient for fulfilling that aim.[41] The consumer protection afforded by the aforesaid article only covers discriminatory treatment against consumers, while consumer interest is not limited to the abovementioned treatment. Therefore, the reference to discrimination narrows the scope of applicability of Article 38 and consequently the protection provided by it.

Article 38 aims to guard the fundamental interests of employees and customers in the same provision, which as a consequence results in a lack of certainty and predictability regarding the provision. Consumer and employment relations are complex and sensitive legal matters. Therefore, the respective protective measures have to be drafted and executed deliberately.[42] Moreover, the absence of a definition of customer contracts as well as the absence of a definition of parties obscures the applicability of Article 38.

40 Zviad Gabisonia, *Kartuli Saertashoriso Kerdzo Samartali* [Georgian Private International Law] (Meridiani, 2011) 301-302.
41 Ibid, 302.
42 Ibid, 303.

5. Conclusion

The brief description of Article 6 of the Rome I regulation provided in this paper aimed to better understand the consumer protection standard it provides. The purpose of describing Article 38 of the GPIL was to identify any existing incompatibility with the protection standard afforded *"weaker parties"* under the Rome I regulation. Such description is beneficial for determining whether the need for revising Article 38 of the GPIL is currently presented.

Articles 345, 346 and 347 of the Agreement impose the obligation to approximate Georgia's consumer protection law with the relevant EU directives in order to sufficiently protect the interest of consumers.[43] The fulfillment of said obligations imposed under the Agreement, discussed at length in this paper, constitutes a prerequisite for the successful development of consumer protection standards currently established in Georgia's legal framework as well as for Georgia's successful approximation with the EU. The legal instruments set forth in Annex XXIX safeguard consumer interests and, therefore, alignment with the given instruments aims to *"ensure a high level consumer protection"*[44]. Notwithstanding the fact that Articles 345, 346 and 347 and Annex XXIX of the Agreement do not refer to the Rome I regulation, enhancing Article 38 of the GPIL is crucial to establishing a fully-viable legal framework that guarantees consumer protection. Articles 345, 346 and 347 of the Agreement also implicitly necessitate developing consumer protection standards under the respective Private International Law act, in particular, the GIPL.

[43] Michael Emerson and Tamara Kovziridze (eds), *Deepening EU-Georgian Relations. What Why and How?* (Roman & Littlefield International Ltd. 2016) 153-155.

[44] Council Decision 2014/49 4/EU of 16 June 2014 on the signing, on behalf of the European Union, and Provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261, Article 345.

T.J.A. BARRETT*

Improving Legal Education in Georgia

This paper provides several recommendations for improving the state of legal education in Georgia. The author is an American who teaches law in Georgia. The recommendations include: improving student attendance by emphasizing the importance of attendance; raising overall standards and expectations of law students, including emphasizing GPA and class rank; providing more practical skill development (law clinics, simulation courses), instruction in legal writing and analysis, and moot court competitions; and general student skills, including cultivating attention to detail. The paper discusses each of these recommendations, including how they might be adopted or improved upon, and includes comparative analysis with American law schools where relevant.

1. Introduction

I have a unique perspective: before moving to Georgia and teaching law in this country, I practiced law in the United States. As such, I have an appre-

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ciation for the state of legal education in both countries. During my time here, I have had the honor of teaching some truly brilliant students and working with some excellent colleagues. What follows are a few humble proposals (based on my observations as well as discussions with students and other lecturers) regarding the improvement of legal education in Georgia.

Attendance is a perennial problem; problematic because if students do not attend class, their mastery of the subject matter is inherently limited (or, if they can master the material without going to class, then what value is the lecture adding?). We should raise both our standards and our expectations for law students; I am confident the students would rise to meet the challenge and become better lawyers for it. We ought to provide more practical skills development in order to prepare our students for the employment market. We also need to teach new law students proper study skills which they can utilize throughout their studies and beyond.

2. Attendance

Attendance is key. When students do not come to class, it is difficult and rare for them to make up the missed material through self-study. There is a significant body of research correlating attendance and grades: "While a relatively few studies have failed to find a significant correlation between attendance and academic performance, the overwhelming majority of them have found a positive correlation between attendance and academic performance."[1] When student attendance increases, student performance increases. In fact, this may be the most effective way to improve student performance: "Class attendance appears to be a better predictor of college grades than any other known predictor of college grades – including SAT scores, HSGPA [high school grade point average], studying skills, and the amount of time spent studying. Indeed, the relationship is so strong as to suggest that *dramatic improvements in average grades (and failure rates) could be*

[1] B. Senior, 'Correlation between Absences and Final Grades in a College Course' http://ascpro0.ascweb.org/archives/cd/2008/paper/CEUE275002008.pdf, (accessed 28 June 2018), (internal citations omitted), p. 2.

achieved by efforts to increase class attendance rates among college students."[2]

2.1 Employment Hours

Students who are working full-time cannot also be full-time students. Law schools should restrict employment to a certain number of hours, perhaps 15-20 hours per week, for full-time students. If students want to work full-time, they should be limited to part-time student status. Currently, many students, especially 3rd and 4th year students, work full-time while simultaneously taking a full-time course load. Not surprisingly, such students' attendance is sporadic and their grasp of the material is usually incomplete.

Until 2014, the American Bar Association ("ABA"), which accredits law schools in the US,[3] required rules limiting students' working hours to 20 hours per week.[4] Although this was often difficult to verify, most law firms, who were the most likely employers, were aware of this rule and followed it. Although this is no longer required by the ABA, many law schools continue to adhere to this rule. In fact, some law schools limit employment hours even further.[5]

The reason for the rule was that law students are required, by necessity if not by university regulations, to dedicate a substantial amount of time to their studies – usually calculated as at least two hours of study for each hour

2 M. Credé, et al., 'Class Attendance in College: A Meta-Analytic Review of the Relationship of Class Attendance With Grades and Student Characteristics', *Review of Educational Research*, Vol 80, Issue 2, 2010, https://doi.org/10.3102/0034654310362998, (accessed 28 June 2018), (internal citations omitted; emphasis added), pp 288-289.

3 "Since 1952, the Council of the ABA Section of Legal Education and Admissions to the Bar of the American Bar Association has been recognized by the United States Department of Education as the national agency for the accreditation of programs leading to the J.D. degree in the United States. Law schools that are ABA-approved provide a legal education that meets a minimum set of standards promulgated by the Council and Accreditation Committee of the Section of Legal Education and Admissions to the Bar. Every U.S. jurisdiction has determined that graduates of ABA-approved law schools are eligible to sit for the bar exam in their respective jurisdiction." ABA, *Frequently Asked Questions*, [website] https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions.html (accessed 28 June 2018).

4 Ibid.

5 William & Mary Law School, *Working while in Law School*, [website] https://law.wm.edu/academics/whatabout/workingwhileinlawschool/index.php, (accessed 28 June 2018).

of class time.[6] Although there is more flexibility in the European Credit Transfer System (ECTS), the same 1:2 ratio is often followed.[7]

A student who is working full-time and taking a full course-load cannot excel in both; often, it is their studies that suffer. Students with a course-load of 30 ECTS should generally be spending 40 hours per week during the semester on their studies.[8] When students miss class sessions and do not have ample time to read and study the materials, their learning and grades suffer greatly. Few students (or graduates, for that matter) have the ability or discipline to effectively perform two full-time jobs at the same time.

However, one law school cannot effectively enforce this principle on its own. The only way it would work is if all the country's law schools, or more likely a bar association or association of law schools, adopted and enforced this rule. Such an association would also have influence over law firms and government agencies, which constitute a large number of employers in the legal field.

2.2 Compulsory Attendance

Law students are training to be professionals; as such, we should expect them to act like professionals. We would not retain lawyers who regularly failed to appear for court or for client or settlement meetings; by not holding our students to a high standard, we are doing them a great disservice. Class attendance should be compulsory.

ABA standards require "regular class attendance"[9] which is interpreted as compulsory attendance. If a student misses more than a certain number or percentage of class sessions, commonly 80%, then the student cannot

6 ABA Standard 310(b)(1).

7 D. Evans, *How the measurement of Contact Hours is Evolving*, [website] 2018, http://blog.educpros.fr/daniel-evans/2018/04/22/how-the-measurement-of-contact-hours-is-evolving/, (accessed 28 June 2018).

8 University of Groningen, *Workload of a Student*. https://www.rug.nl/education/find-out-more/studying-at-university/workload?lang=en, (accessed 28 June 2018); also see: NUI Galway, ECTS, [website] https://www.nuigalway.ie/media/celt/files/coursedesign/ECTS.pdf, (accessed 28 June 2018).

9 ABA Standard 311, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf , (accessed 28 June 2018).

pass the course.[10] In some law schools, the final grade is reduced.[11] This is usually enforced by attendance sheets circulated at the beginning of class.[12] The instructor of the course who is mandated to enforce this rule, however, may choose to apply *more stringent* standards.[13] "Our experience is that failing attendance is often one of the first signs that a student is having serious personal or academic difficulty."[14]

3. Raise Standards

Law schools and the legal community should raise the standards to which we hold law students. Lawyers are leaders in society and pillars of their communities; law school should accordingly be a demanding course of study.

The minimum entrance exam scores for law students should be increased. The law is a difficult and challenging profession. There should be an emphasis on quality of students, over quantity.

The legal community should begin to emphasize the importance of a graduate's Grade Point Average ("GPA"). Currently, GPAs are not considered to be very important or relevant. Consequently, many students have the goal of simply passing their courses and are not interested in passing with a high grade. This is a rational decision; if it does not matter whether one graduates with a 4.0 or a 2.0, students are simply recognizing that fact and acting (as they consider) appropriately.

10 PittLaw, *Attendance Policy*, [website] http://law.pitt.edu/pp/attendance, (accessed 28 June 2018); also see: University of Washington, *Attendance* [website] https://www.law.washington.edu/students/academics/attendance.aspx, (accessed 28 June 2018); Whittier Law School, FAQ, [website] https://www.law.whittier.edu/index/student-affairs/faqs/ (accessed 28 June 2018) ; UNC School of Law, Class Attendance, [website] http://www.law.unc.edu/academics/policies/evaluation/attendance/, (accessed 28 June 2018).

11 UC Hastings, Attendance, http://www.uchastings.edu/about/admin-offices/records/registration/attendance/index.php, (accessed 28 June 2018).

12 PittLaw, Attendance Policy, [website] http://law.pitt.edu/pp/attendance, (accessed 28 June 2018).

13 Ibid.

14 UC Hastings, Attendance, [website] http://www.uchastings.edu/about/admin-offices/records/registration/attendance/index.php, (accessed 28 June 2018).

Unfortunately, this means that students that could master the material instead learn only enough to pass. Instead of pushing themselves to excel, to learn as much as they can and to prepare as well as they can, they instead learn "just enough". This is unsatisfactory for two reasons: first, we are turning out many graduates who know "just enough" law to pass, instead of cultivating legal experts and scholars; and second, our students are learning bad habits which will make them poor lawyers. Once a bad habit is learned, it is twice as hard to unlearn. We should be teaching them not just the law, but also the good habits that are necessary to be successful.

Of course, this should not happen overnight. However, law firms and other legal employers should begin to recognize the importance of high-achieving students. The skills and abilities that allow students to earn high marks frequently translate into their being successful lawyers and employees. Working at a fast-paced law firm is not the appropriate time to learn the importance of good work ethic, effective time management and self-discipline. A high GPA may be evidence of a potential employee who has already learned these very important, albeit basic, life skills; not to mention the importance of a deep understanding of the legal course material studied.

It is common in American universities to publish a Dean's List; this is a list of students who achieved a 3.5 GPA during the prior semester. Public praise such as this can be an effective method to encourage some students. The "Red Diploma" is another good way to recognize a student's high achievement.

Besides GPA, class rank is often used in American law schools. It is quite impressive to see on a CV: "graduated in the top 10%", or top 25% or even top third. Class rank is also a successful hedge against grade inflation. Law schools could easily keep track of this and provide the information to their students.

4. Practical Applications

Often the emphasis in legal education is placed on theory with the practical aspects of law being given scant attention. Although theory is fundamental and does have an important place, practical skills must be taught and students must be able to practice these skills – in real-life situations

(law clinics), competitive environments (domestic or international competitions) and in the classroom (simulation courses). Additionally, legal writing and analysis needs to be incorporated as a fundamental component of the legal curriculum.

In 2016, the East-West Management Institute and USAID conducted a Legal Market Study in Georgia.[15] One of the common complaints referenced by employers in the study is the deficit of practical skills by new graduates.[16] Although most law school courses focus on theoretical knowledge, many employers are looking for graduates that have training or experience in practical matters. Law clinics, internships, and practical application workshops (often called "simulation courses" by the ABA) would help students learn these pragmatic skills.

Another notable weakness is writing, specifically in legal writing and argumentation. This is a common complaint in the United States as well; often, employers are disappointed with the writing and critical thinking displayed by recent graduates.[17] The substantive law will change over time and a good lawyer can, to some extent, teach themselves the "black-letter law"; however, legal writing and analysis are skills not easily self-taught.

Legal writing and analysis are skills vital to every lawyer and form the basic building blocks of any legal career. A law student will take several courses during their education and in the course of their career never practice these fields of law; however, every lawyer will need to analyze data and reports, synthesize a conclusion or decide a course of action while articulating all of this in writing, often while advocating their (or their client's) position. These are the core skills lawyers will utilize for the entirety of their careers. If law students are graduating without a basic level of such skills, we (legal educators and law schools) are doing our students a great disservice. In American law schools, legal writing is an integral part of the curriculum and takes place in courses delivered over multiple semesters.

15 EWMI & USAID, Legal Market Study in Georgia: Final Report, ACT, 2016.

16 Ibid, p. 10.

17 K. Strauss, 'These Are The Skills Bosses Say New College Grads Do Not Have', Forbes Magazine, 17 May 2016. https://www.forbes.com/sites/karstenstrauss/2016/05/17/these-are-the-skills-bosses-say-new-college-grads-do-not-have/#5db5c72f5491, (accessed 28 June 2018).

A writing curriculum ought to include several types of legal writing – from informal emails or internal memos, to formal letters to clients or opposing parties, and of course court documents (such as complaints, answers, argumentative briefs and motions, *inter alia*.). Undoubtedly, writing skills are improved by editing and revising; students should be given constructive feedback and then the opportunity to improve on their first drafts, and repeat this process. Peer-editing can be a very effective teaching tool as well; by editing the work of other students, students can see the mistakes they themselves made but did not fully understand or internalize until identifying it in someone else's writing.

Although some courses should particularly focus on these skills, other courses should further develop them; writing should be a significant component of many courses, not just for writing-specific courses. (For example, in a substantive law course such as family law, students could draft a complaint for a given hypothetical fact pattern and then respond to another student's complaint by drafting an answer.) Furthermore, it is important that all instructors at a law school are teaching in fundamentally the same style – students should not be taught one method in their writing course only to lose points for using that method of writing in their other courses. The entire law school should adopt the same basic writing techniques.[18] This can be a challenge in Georgian law schools, where so many lecturers are adjuncts and not full-time employees.

Moot court competitions are a great way to teach and practice many of these skills. I have taught several mooting teams in different international competitions. The mooters do the research and find the legal materials with which to make their arguments. They then develop coherent legal arguments and draft their briefs (for both the complainant and the respondent) supporting these arguments with the law. As a team, each member may have an issue that is their responsibility, but they also have to practice teamwork – helping and pushing each other to improve their arguments, understanding and writing.

[18] Unless there are valid reasons to support distinctions, such as the fact that drafting complaints for Georgian courts would be different than drafting complaints for the European Court of Human Rights.

After the briefs are completed, the mooters practice oral arguments. Oral advocacy is another important skill, and it is not just for courtroom lawyers; every graduate is going to advocate for their (or their client's) position. Naturally, many law graduates will frequently speak publicly – it is important to learn these core skills. How to address a court (or other tribunal, such as in arbitration), how to be persuasive and convincing, how to control body language and maintain poise, to be confident, to speak "Loud, Slow, & Clear" – these are vital skills for every lawyer.

Georgia is very active in many of these international moot competitions, and there are several domestic competitions as well. It would be advantageous for the law schools (or NGO's or legal societies) to host more of these competitions in order that more law students could gain from such experiences.

5. Student Skills

At the beginning of their studies, students should be taught how to be successful students. Often, methods that worked in prior studies are not sufficient for succeeding in law school.

At American law schools, outlining and study groups are ubiquitous. To create a study outline for each course in Microsoft Word can be a very effective way to learn the material. Students can continuously edit the outline, adding details, removing details that have been studied and memorized, and reorganizing the material as it becomes understood better. When students study in groups, they help each other learn the material.

Attention to detail is a hallmark of a good lawyer. I fear this is not emphasized enough in law school. I even notice this in CV's and cover letters received from applicants with masters' degrees or PhDs which feature numerous simple mistakes. In every communications format, a lawyer is judged for their writing, style and accuracy, inter alia. More is expected of lawyers than of members of most other professions. Attention to detail is a core skill for any lawyer and it is vital that we cultivate this appreciation among our students.

6. Conclusion

Every educational system has room for improvement. This paper identified several areas which should be seen as opportunities to improve the legal education system in Georgia. The format of this short paper makes it impossible to go into great detail or to cover all the possible areas of improvement. Nevertheless, hopefully this will be a starting point for future dialog.

One additional proposal would be to develop an active law school association. An association could become the conduit for such a dialog about improving the quality of legal education in the country. It could also foster cooperation to improve legal education and coordinate interuniversity conferences as well as moot or other competitions.

Giorgi Margiani Annual Law Student Essay Competition

GVANTSA ELGENDASHVILI*

Economic Analysis of Deterrence through Criminal Law

1. Introduction

Economic analysis of crime and punishment has emerged as a subject area with important implications for the fields of law, governance and public policy, *inter alia*. The Economic theory of Criminal Law states that in some cases injurers cannot internalize all costs that they have imposed. Accordingly, there is a need for criminal law and punishments, which are more severe than tort liability. Punishment is often necessary for the purposes of deterrence.[1] The deterrence effect that can be reached through punishment typically requires material and human resources, rendering it an important subject of study for the Law and Economics field with its emphasis on rationality, maximization and efficiency.[2]

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1 Cooter R., Introduction to Law and Economics, Berkeley Law, 2007, p. 493.

2 Ibid, p. 16.

This paper analyzes the concept of deterrence and its relationship with economic analysis of criminal law. Problems of marginal deterrence are analyzed based on real cases occurring in Georgia during a period of transformation in the fields of criminal policy and criminology. The paper also addresses the deterrence effect of optimal, monetary and non-monetary sanctions. The final section of the paper concerns the deterrent effect of capital punishment while presenting conclusions drawn from the issues discussed.

2. The Concept of Deterrence

Deterrence can be described as the prevention of crime through fear or actual experience of criminal sanction. The deterrence effect is one of the key objectives of criminal law. Punishments typically aim to deter future crimes, rehabilitate criminals or achieve other goals. General deterrence is designed to prevent instances of crime among the general population. Thus, the punishment of offenders by the state is intended to serve as an example to others in the general population who have not yet participated in criminal events.[3] It was thought that death penalties and other particular severe punishments had greater deterrence effects than less severe punishments. This discussion requires comparison of the concepts of severity and certainty. The severity of punishment does not have a deterrence effect if criminals know the likelihood of detection, i.e., certainty, is low. Here is a simple equation demonstrating how increasing probability of detection leads to greater deterrence effects:

10 percent chance of 2 years in jail = .1 (2 years in jail + 1 year in other costs)
= .3 years;
20 percent chance of 1 year in jail = .2 (1 year in jail + 1 year in other costs)
= .4 years.[4]

Contrary to general deterrence, individual deterrence aims to reduce crime by applying a sanction to a specific offender in order to dissuade him

[3] Dilulio, John J., Deterrence Theory, p. 233, (https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf).

[4] Friedman David D., Law's Order, Princeton University Press, 2000, p. 236.

or her from reoffending.[5] For example, if a person has already been penalized for speeding and injuring another person, the punishment he receives is intended to deter him from speeding again in the future and injuring someone else. In theory he will be more deterred than would another person who has not received the same punishment for the same crime. The rationality of individual deterrence does not apply when the parties involved know the probability and magnitude of the sanctions for their illegal act. For instance, if a person knows that in case of speeding and injuring others there is 50 percent chance of being caught and the penalty is 200$, in this case it does not matter to him whether or not he was detected for the same crime. Following the same case, individual deterrence matters if the magnitude of the sanctions increase as a result of infraction[6] – in this case, the individual is presented with incentives not to commit the same crime even if the probability of being caught is the same. In the latter case, an individual is more deterred because the magnitude of sanction increases the deterrence effect. Individual deterrence also applies when the individual overestimates the chances of being detected and the magnitude of sanctions. If a person thinks the probability of being caught is 60 or 70 percent instead of 50 percent, he is more deterred since he has an incentive to avoid committing the crime. There is an inverse situation when an individual thinks the chance of being detected is 20 percent instead of 50 percent. Individual deterrence plays a role if an individual overestimates the probability of being caught or of the magnitude of sanction. When an individual is fully aware of these components, rational decision-making is a more important factor.

In addition to the stated above, when sanctions increase according to the severity of the act, the deterrence effect is stronger. Deterrence is stronger for a more harmful act because its expected sanction exceeds that of a less harmful act; this concept is referred to as marginal deterrence.[7]

5 Ritchie D., Does Imprisonment Deter? A review of the Evidence, 2011, p. 1. (https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Does%20Imprisonment%20Deter%20A%20Review%20of%20the%20Evidence.pdf).

6 Shavell S., Economic Analysis of Public Enforcement and Criminal Law, 2003, p. 17. (http://www.nber.org/papers/w9698.pdf).

7 The notion of marginal deterrence is addressed in some of the earliest writing on enforcement, see: Beccaria [1767] 1995, p. 21; and Bentham [1789] 1973, p. 171. The term "marginal deterrence" apparently was first used by Stigler in 1970.

3. Hanged for a Sheep – Economic Analysis of Marginal Deterrence

The concept of marginal deterrence is applicable in various hypothetical cases; for instance, if an individual is faced with only two alternative crimes – to steal a sheep or a lamb. If we suppose the sanction for these two crimes is the same, a potential criminal has greater incentive to steal the sheep rather than the lamb. This hypothetical situation is represented by the following proverb: "As good to be hanged for a sheep as a lamb."[8] If we assume that the probability of being caught is the same for stealing a sheep as for stealing a lamb, and the damage done to the animal's owner is greater in case of the sheep than in case of the lamb, one can conclude that identical punishments would have a stronger deterrent effect in the case of stealing a sheep. To further clarify this concept, I will discuss the criminal policy present in Georgia some years ago. At that time, offenders received the same sanction for stealing a camel as for stealing a needle. In any case, the possibility of being caught was 25-30 percent[9] and the sanction ranged from three to seven years of imprisonment.[10] The stated fact suggests that the economic analysis of law was not taken into account. Moreover, that situation reduces the incentive of someone who stole a camel to also steal a needle, but needle thieves have an incentive to obtain the more valuable item; i.e., the camel. Marginal deterrence in this case suggests applying more severe punishments to the theft of more valuable goods, as their theft does more damage to the victim.

Another interesting case related to marginal deterrence is that when a criminal is presented with multiple choices of crimes to commit. If armed robbery and armed robbery plus murder are punished equally, then the criminal is incentivized to kill the victim of the robbery.[11] According to Cesare Bec-

8 Friedman D., Sjostrom W., Hanged for a Sheep – The Economics of Marginal Deterrence, Journal of Legal Studies, 1993, p. 346.

9 Crime Statistics, Ministry of Internal Affairs of Georgia, 2013., (http://police.ge/files/pdf/statistika%20da%20kvlevebi_new/geo/danashaulis%20statistika/2013/Crime_Statistics_Registered_in_Georgia_January-March-GEO%282%29.pdf)

10 Article 177, Criminal Code of Georgia., (https://matsne.gov.ge/ka/document/view/16426).

11 Friedman D., Sjostrom W., Hanged for a Sheep – The Economics of Marginal Deterrence., Journal of Legal Studies, 1993, p. 346.

caria, criminals will commit additional crimes in order to avoid punishment for the first crime. The concept of marginal deterrence states that punishments should increase in case additional crimes are committed:

Punishment for armed robbery ≠ punishment for armed robbery + murder;
Punishment for armed robbery < punishment for armed robbery + murder.

According to this logic, the Georgian law that states that in cases of cumulative crimes the more severe punishment supersedes the less severe punishment[12], is inefficient. Suppose that individual X commits armed robbery and the most severe punishment for this crime in case of recidivism is 11–15 years imprisonment.[13] Individual Y commits armed robbery and murder with a sanction of 7–15 years imprisonment.[14] Individual X gets 15 years imprisonment for armed robbery while Y gets 11 years for robbery and 13 years for murder, but because the more severe punishment supersedes the less severe one, Y gets 13 only years of imprisonment. If the marginal deterrence concept is applied, this law is inefficient.

Marginal deterrence also states that punishments for attempted crimes should be punished less severely than completed crimes. If not, potential criminals have incentives to complete their attempted crime, and to plan their crimes more diligently.

4. Criticism of Deterrence Theory

Deterrence theory is based on classic rational choice theory, which states that people measure the costs and benefits of action before making a decision. According to deterrence theory, people have knowledge of punishments for a particular act and accordingly make a rational choice to commit or not to commit a crime. In this scenario, the rational, amoral criminal chooses the

12 Article 59 Criminal Code of Georgia., (http://www.vertic.org/media/National%20Legislation/Georgia/GE_Criminal_Code.pdf).
13 Article 179(4) Criminal Code of Georgia., (https://matsne.gov.ge/ka/document/view/16426).
14 Article 108 Criminal Code of Georgia., (https://matsne.gov.ge/ka/document/view/16426).

seriousness of crime x to maximize his or her net payoff, which equals the payoff y(x) minus the expected punishment: max $y(x) - p(x)f(x)$.[15] This is a theoretical model in which the criminal calculates gains and consequences. Critics of this theory, however, believe that it is difficult to prove the effectiveness of deterrence as punishments are only applied to those people who are not deterred. Accordingly, those who do not offend are not studied. Moreover, it can be argued that there are various other factors that deter an individual from committing a crime.

5. Deterrence through Monetary Sanctions

This section starts with discussion of the basic theory of liability and then assumes that all parties bear the intended sanctions and all sanctions are based on probability. Maximizing social welfare has much to do with the concept of liability.

5.1. Strict Liability for Harm

According to the concept of liability, the criminal pays for the harm caused by his act, with the expected sanction equal to the expected harm. The criminal will commit a crime if the expected benefit is more than the expected sanction. If the sanction is less than the harm, individuals will sometimes act in ways that create greater net harm than net benefit. And if the sanction is greater than the harm, there will be a chilling effect on desirable acts; parties will be discouraged from acts that create greater benefits than harm.[16] The only information necessary to know in this case is the level of harm. The assets of a party must be sufficient to pay for the harm; otherwise, the party will not generally be induced to act optimally and may engage excessively in harmful acts.[17]

15 Cooter R., Introduction to Law and Economics, Berkeley Law, 2007, p. 489.
16 Shavell S., Economic Analysis of Public Enforcement and Criminal Law, 2003, p. 2. (http://www.nber.org/papers/w9698.pdf).
17 Ibid, p. 475.

The case of risk aversion case constitutes a situation in which benefits are high enough for an individual to commit a crime and willingly bear the sanction. In this case, it is important for the sanction to be less than the harm of the act.

5.2. Fault-based Liability

According to this concept, the criminal should bear the sanction that is equal to the harm caused. If the sanction is less than the harm caused, criminals may choose to commit more crimes when benefits exceed the sanction.[18]

5.3. Act-Based Liability

According to this concept, the criminal is responsible for the expected harm regardless of whether it actually occurs or not. Thus, if a party attempts an act that could cause harm of $1,000 with a 10 percent probability of being completed, he will be liable for $100 for having committed the act.[19] This suggests that it is important to know the amount of harm imposed by the wrongful act, and sanctions sometimes need to be made more or less severe in order to reach a situation where benefits to the criminal do not exceed the sanction that serves as a deterrent.

This paper mentioned that optimal probability and magnitude of sanctions constitute major elements of deterrence effects through criminal law. A risk-neutral person commits a crime if the gain is more than the harm. A risk-averse person is differently deterred according to the differing magnitude of sanction and optimal probability. For example, a risk-averse person will be more deterred by a sanction of $1,000 with a probability of 20 percent than by a sanction of $500 with a probability of 40 percent, even though their expected values, $200, are equal. The reason is that for a risk-averse persion, the disutility of sanctions rises more than the proportion of their size; i.e., when

[18] Polinsky M., Shavell S., Public Enforcement of Law, (http://www.law.harvard.edu/faculty/shavell/pdf/Public_enforcement_307.pdf).

[19] Shavell S., Economic Analysis of Public Enforcement and Criminal Law., Harvard University Press, 2003, p. 476.

the sanction rises from $500 to $1,000, its disutility more than doubles.[20] Optimal probability and the magnitude of sanctions both impact the deterrent effect. Optimal probability can increase the deterrence effect, but it is believed that the increasing magnitude of sanction creates more deterrence for the risk-averse person. If there is a 20 percent probability of imposition of a sanction of $500, and the probability doubles to 40 percent, the expected sanction will double from $100 to $200. Likewise, if the sanction doubles to $1,000 (and the probability remains at 20 percent), the expected sanction will double to $200. Thus, a risk-neutral party will be affected equally by either type of change.[21]

In order to calculate optimal sanctions for deterrence, the sanction must equal the harm multiplied by the inverse of the probability of its imposition. If the harm is $100 and the probability of being deterred is 50 percent, the sanction should be multiplied by 1/0.5=2, so the sanction equals $200.[22]. The social advantage associated with a low probability, high sanction enforcement strategy is the following: low probability means that the state conserves enforcement resources, and the high magnitude of sanctions prevents dilution of the desired deterrence. The optimal strategy involves maximal sanctions if the parties are risk-neutral, but lesser sanctions if the parties are risk-averse.[23]

6. Deterrence with Non-Monetary Sanctions

Non-monetary sanctions such as imprisonment, community service and other sanctions differ from monetary sanctions as long as they impose other social costs, such as the costs of building and operating prisons. For example, if a criminal act incurs $1,000harm and the social cost of enforcement of the non-monetary sanction is $1,500, not only the consequences of the harmful

20 Shepherd J., Rubin P., Economic Analysis of Criminal Law, p. 13, (http://economics.emory.edu/home/documents/workingpapers/rubin_13_04_paper.pdf).

21 Shavell S., Economic Analysis of Public Enforcement and Criminal Law, Harvard University Press, 2003, p. 478.

22 Ibid, 487.

23 Ibid, 490.

acts but also the social costs should be borne. The strict liability concept states that the criminal would commit the crime if the benefits of the crime exceed $1,000and if social costs will also be generated in case of imprisonment. Fault-based liability, according to Shavell, has a stronger deterrent effect because it deters undesirable crimes when the punishment is sufficiently high and does not punish desirable crimes. Moreover, non-monetary sanctions can be severe according to the harm done for reaching the desired deterrence effect. The magnitude of sanctions and the probability of being caught also have significant deterrence effects through monetary sanctions. An individual may be risk-averse with regard to imprisonment and accordingly be more deterred by a 50 percent probability of a two-year sentence than by a 100 percent probability of a one-year sentence.[24] There is also the problem of a low probability of apprehension; in this case there is choice between: 1) possibility of apprehension and conviction with a ten-year prison term; or 2) probability of apprehension and conviction with a five-year prison term.[25] According to Posner, the second choice is costlier because half of the criminals will reoffend, so the first choice is rational because it results in reduced social costs such as policing and court proceedings.

Deterrence follows a simple mathematical formula: expected punishment = damage to victim – cost of deterring one more offense.[26] If the deterrence effect can be reached through monetary sanctions, it is rational to use this method since it does not generate social costs. However, there are cases where using monetary sanctions cannot be viewed as appropriate deterrence. In the field of criminology, it is usually believed that the most severe and inefficient crimes such as murder or armed robbery cannot be deterred through monetary sanctions since the costs cannot be internalized by the criminal that are imposed on the victims, state or society. It is also true that cases of first-time offenses need special attention.

Recent studies in the field of criminology suggest that imprisonment can increase the rate of recidivism. Imposing incarceration instead of non-custo-

[24] Shavell S., Economic Analysis of Public Enforcement and Criminal Law, Harvard University Press, 2003, Chapter 21, p. 8.

[25] Posner R., An Economic Theory of Criminal Law, Columbia Law Review, 1985, p. 1,213.

[26] Friedman David D., Law's Order, Princeton University Press, 2000, p. 228.

dial sanctions when possible can have an adverse effect on general deterrence. In the short-term, if all criminals who commit crimes are imprisoned, general deterrence will work because criminals are not able to reoffend. But from the perspective of special deterrence, this arrangement can lead to recidivism because: criminals might come to think that crime is socially acceptable; and criminals can make connections with other criminals and increase their rate of reoffending. The great majority of [competently carried out] studies point to a null or criminogenic effect of the prison experience on recidivism. This insight should caution against claims – at times found in 'get tough' rhetoric voiced by advocates of incarceration – that prisons have special powers to scare offenders straight.[27]

Community service attaches less social cost than imprisonment. Following this logic, criminologists state that it is more rational to use long-term community service sentences than short-term imprisonment, especially in the case of first offenses. First offenders who are sent to prison are more likely to reoffend than those who are sentenced to community service.

7. The Economics of Capital Punishment

The death penalty as a form of capital punishment is banned in various countries. According to the constitutions of various democratic countries, the death penalty is impermissible since it constitutes cruel and inhuman punishment. The constitution of my country, Georgia, prohibits capital punishment on grounds that it violates one's right to life.[28] The deterrence effect of the death penalty warrants discussion, as it represents the highest punishment in various US states. The recent execution by the State of California of the multiple murderer Stanley "Tookie" Williams has sparked renewed controversy about the practice of capital punishment, which has been abol-

[27] Nagin, Daniel S., Francis T. Cullen, and Cheryl Lero Jonson, Imprisonment and Reoffending. In Crime and Justice: A Review of Research (Tonry, Michael, ed.), Volume 38, University of Chicago Press, 2009.

[28] Article 15., Constitution of Georgia (http://www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf).

ished in roughly one-third of US states and in most of the nations which the United States considers its peers; e.g., the European Union will not admit to membership any nation that retains capital punishment.[29] From an economic standpoint, capital punishment has an incremental deterrence effect when used against murderers. The most feasible alternative to capital punishment is life imprisonment. In order to choose one of them, one must take into account the social costs of both life imprisonment and capital punishment. One must also consider the rate of false convictions[30] resulting in execution of the innocent, the utility of friends and family members of the victims and the disutility of friends and family members of the executed. Posner argues that utility and disutility rates are of minor importance. Earlier studies, such as the work of Isaac Ehrlich, suggest that capital punishment has an incremental deterrent effect. This approach does not take into account situations where a person has a choice between execution or a life sentence, which has led to criticism of Ehrlich's approach. Other economists such as Paul Rubin and Joanna Shepherd find that one execution can deter 18 other criminals from committing the same offense. Although this ratio may seem implausible given the probability of being executed for committing murder is less than 1 percent (most executions occur in southern states – 50 of the 59 total in 2004 – while a total of almost 7,000 murders occurred that year), the probability is misleading because only a subset of murderers are eligible for execution. Moreover, even a 1 percent or one-half of 1 percent probability of death is hardly trivial; most people would pay a substantial amount of money to eliminate such a probability.[31] The risk of executing the innocent is very small, but it bears mentioning that executing a person takes on average 10 years, during which time the convict remains imprisoned. Accordingly, imprisonment costs and endless appeal procedures impose additional financial costs. However, time spent on death row exerts a deterrent effect as well. It also provides the opportunity to avoid execution of innocent people. The increase in de-

29 Posner A., The Economics of Capital Punishment (http://www.becker-posner-blog.com/2005/12/the-economics-of-capital-punishment--posner.html).

30 Posner A., The Economics of Capital Punishment (http://www.becker-posner-blog.com/2005/12/the-economics-of-capital-punishment--posner.html).

31 Posner A., The Economics of Capital Punishment (http://www.becker-posner-blog.com/2005/12/the-economics-of-capital-punishment--posner.html).

terrence and reduction in associated costs are likely to exceed any increase in the very slight probability of executing an innocent person.[32] However, sometimes capital punishment costs exceed imprisonment costs. As a public policy choice, execution faces state legislators and local prosecutors with tradeoffs regarding public resources and investments. The costs of administering capital punishment are prohibitive. Even in states where prosecutors infrequently seek the death penalty, the cost of obtaining a conviction and execution ranges from $2.5 million to $5 million per case (in current dollars), compared to less than $1 million for each killer sentenced to life without parole. These costs create clear public policy choices. If the state is going to spend $5 million on law enforcement over the next few decades, that money could be used in other ways that better ensure deterrence.[33]

Justice Byron White, writing in *Furman v. Georgia* (1972) in which the Supreme Court outlawed capital punishment, noted that when only a tiny proportion of individuals who commit murder are executed, the penalty is unconstitutionally irrational. The lessons of *Furman* once again haunt the present-day reality of most states, where execution is used so rarely as to defy the logic of deterrence. As states across the country adopt reforms to reduce the pandemic of errors in capital punishment, one wonders whether such necessary and admirable efforts to avoid errors and the horror of executing innocent will not – after many hundreds of millions of dollars are spent trying – burden the country with a death penalty that is ineffective, unreasonably expensive and politically corrosive to the broader search for justice.[34]

Furthermore, the process of sitting on death row dilutes the deterrent effect of death penalty. According to the National Academy of Sciences, "research on the deterrent effect of capital punishment is uninformative about whether capital punishment increases, decreases, or has no effect on homicide rates."[35]

32 Posner A., The Economics of Capital Punishment (http://www.becker-posner-blog.com/2005/12/the-economics-of-capital-punishment--posner.html).

33 Fagan J., Capital Punishment: Deterrent Effects & Capital Costs., (https://www.law.columbia.edu/law_school/communications/reports/summer06/capitalpunish).

34 Fagan J., Capital Punishment: Deterrent Effects & Capital Costs., (https://www.law.columbia.edu/law_school/communications/reports/summer06/capitalpunish).

35 Nagin D., Deterrence in the 21st Century, Crime and Justice in America, University of Chicago Press, 2013.

8. Deterrence Effect of the Norwegian Model of Restorative Justice

The American justice system, like others in the Western world, is based on the concept of retributive justice; the punishment should be proportionate to the crime committed. In contrast, the Norwegian model is based on the idea of restorative justice, which aims to repair the harm caused by the crime rather than to punish the offender for punishment's sake. The Norwegian system focuses on rehabilitating prisoners[36] and aims to deter criminals from committing additional crimes. Deterrence through restorative justice is assumed to be more efficient than are traditional concepts of retributive justice. Despite the fact that extremely dangerous criminals such as Anders Breivik receive 21 years' imprisonment (considered very low in consideration of the severity of the crime committed), surveys show that Norway has one of the lowest recidivism rates in the world at 20%. The US, by contrast, has one of the highest: 76.6% of prisoners are rearrested within five years.[37] Individual deterrence is best achieved through restorative justice, a model which can be applied to various countries.

9. Conclusion

The deterrence effect of criminal law is based on two main elements – the magnitude of the sanction and the certainty of being caught. Punishments do not always serve as the best deterrent for offenders – where is a slight risk of being caught, the potential criminal usually has an incentive to commit a crime even when the most severe punishments apply.

Economic analysis of marginal deterrence suggests that severe crimes should be punished severely. People should not be hanged for a stealing a sheep as they would a lamb. Applying the same punishment to crimes of different severity creates distorted incentives and does not serve the aim of deterrence. Moreover, committing two crimes simultaneously should be

[36] Why Norway's Prison System is so Successful? (http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12).

[37] Why Norway's Prison System is so Successful? (http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12).

punished more severely than committing one, and attempted and completed crimes should be punished differently. The case of armed robbery and murder being committed together, for example, lead to the conclusion that the overlapping sanction rule in the Criminal Code of Georgia is inefficient.

Sending an offender to prison is not always the best way to deter crime. Monetary sanctions can be used when social costs are relatively low compared to imprisonment. Imprisonment can have an adverse effect on special deterrence if the offender establishes relationships with other criminals while in prison and resultantly organizes future criminal activity.

Increasing the perception that criminals will be caught is the best way to deter crimes, as it establishes effective incentives for individuals to make rational choices after weighing the costs and benefits of the crime they intend to commit. Increasing the severity of punishment also influences the deterrent effect. Criminals usually are not aware of specific sanctions and, for them, the perceived probability of being caught is more influential than the sanctions written down in criminal codes.

Economic analysis of capital punishment suggests that the death penalty cannot be the most effective available deterrent because it imposes great social costs – i.e., costs of imprisonment, appeals procedures and execution. In some cases, it is more beneficial for the state to apply a life sentence than capital punishment. Currently, economists such as Posner argue that the processes inherent to capital punishment dilute the deterrence effect. Recent surveys in the field of social science suggest that there is no proof the death penalty is effective in preventing crimes.

This insight leads us to general criticism of deterrence theory, which follows from the argument that we will never know who is effectively deterred from offending, since we can only study the behavior of those people who are not deterred.

However, economic analysis of crime and punishment and deterrence theory states that we should always punish crimes. Punishments should impose reduced social costs and effective deterrence effects to prevent others from committing the same crime, while also preventing the same individual from reoffending. The deterrence effect can be sufficiently increased by increasing the perception that criminals will be caught. Severe punishments usually impose more social costs and do not have a significant deterrence effect.