THE GERMAN-GEORGIAN MODEL OF PENALTY REGULATION
(Comparative-Legal Analysis)

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ABSTRACT

The present article reviews the Penalty as an additional claim securing tool that has been adopted in private or public-legal relations and nowadays, it is characteristic to the laws of all countries belonging to the Roman-German (continental) or Anglo-American systems of law. This is why thorough study of the issue is performed by making focus on the comparative-legal analysis of the Georgian model and the German system of law. It is noteworthy that the Georgian legislation has been significantly amended with regards to the Penalty. Since 2017, the Civil Code of Georgia has provided a new definition of a statutory penalty (article 625) within the loan obligations, which was positioned on the 150%-scale that was inappropriate and unreasonable from the very beginning, and thus, it finally diverged from the overall practice adopted in the European countries. The article provides the review of a complex of issues like: the need for defining the form of a penalty, the prerequisites for charging and cancelling a penalty within the enforcement of decisions, court’s rulings on inappropriately high penalties, criticism of a statutory penalty determined under the new standard of article 625 of the Civil Code of Georgia and the discretionary authorities of the judge to rule an inappropriately high penalty. The article also presents the analysis of a generalized practice applied by judicial authorities, the analysis of high-profile court judgements, and along with outlining the flaws, the article has also drafted interim findings and recommendations, which are crucially important for harmonizing and improving the law.

KEYWORDS: Penalty, Regulation, Function

INTRODUCTION

The present article reviews the penalty as an additional claim securing tool that has been adopted in private or public-legal relations and nowadays, it is characteristic to the laws of all countries belonging to the Roman-German (continental) or Anglo-American legal systems. This is why thorough study of the issue is performed by making focus on the comparative-legal analysis of the Georgian model and the German legal system.

It is noteworthy that the Georgian legislation has been significantly amended with regards to the penalty. Since 2017, the Civil Code of Georgia has provided a new definition of a statutory penalty (Article 625) within the loan obligations, which was positioned on the 150%-scale, that was inappropriate and unreasonable from the very beginning, and thus, it finally diverged from the overall practice adopted in the European countries.

The article provides the review of a complex of issues like: the need for defining the form of a penalty,
the prerequisites for charging and cancelling a penalty within the enforcement of decisions, courts’ rulings on inappropriately high penalties, criticism of a statutory penalty determined under the new standard of Article 625 of the Civil Code of Georgia and the discretionary authorities of the judge to rule an inappropriately high penalty.

The article also presents the analysis of a generalized practice applied by judicial authorities, the analysis of high-profile court judgements, and along with outlining the flaws, the article has also drafted interim findings and recommendations, which are crucially important for harmonizing and improving the law.

1. PENALTY – A TOOL HAVING A PREVENTIVE AND RESTITUTIONAL FUNCTION

The penalty is one of the essential institutions of the civil law, which raises expectations for the participant of contractual relations that they will be charged with an additional financial responsibilities in case of failure to perform or unconscientious and improper performance of obligations undertaken with a certain contract, although the foregoing will not be a reason for releasing them from major obligations.

For breach of any obligation in contractual relations, certain type of responsibility expressed in form of a fine (in proprietary influence on a breaching party) might be considered. The contrahent, who breaches the legal factors of the contract (terms, duties and responsibilities), shall have to spend more funds as a result of additional fines.

The penalty is distinguished in legal literature as three different functions of legal mechanism: estimation of a sum in advance and lifting the burden of proof from an injured party, who shall not have to prove the harm incurred as a result of the breach of obligations by the obligor. In its turn, “good faith is related to the performance of the obligations imposed on a person and not to the performance of any other act that has not been undertaken by the party within the certain contract or in any other form towards the other party”. A penalty secures the possibility to “compel” a party to the fulfilment of major obligations arising from a certain agreement. Due to “such compulsion” it is rather a penalty sanction than a security, which “brings comfort” to an obligee to be released from the need to prove the harm incurred as a result of the breach of obligations by the obligor. In the given case, the analysis of dual nature of a penalty that lies in its prevention and restitution functions should be noteworthy.

The function of the penalty primarily is to secure the fulfilment of an obligation. It is the tool in hands of

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1 Tumanishvili G., 2012. Agreement Drafting Technique and Normative Regulations, Tbilisi, 31.
2 Svanadze G., 2015. Negotiation and drafting of international business agreements on the example of international procurement law., Review of Georgian business law. IV edition, Tbilisi, 45.
3 Zoidze B., 2001. Commentary to the Civil Code of Georgia,
an obligee for „pressure” on the debtor to comply with its obligations, besides, the obligee is released from the burden to prove the suffered harm with the purpose to receive the penalty if the obligor fails to comply or improperly complies with its obligations.

“The penalty has two essential functions: it aims at stimulating the performance of an obligation before its breach and the obligor knows in advance that they will not evade payment of a certain price for breach of an obligation, while in other circumstances, they may „hope” so” . The Court of Cassations has provided similar definition of the given issue – the second function of a penalty is easy and quick reimbursement of caused harm. If an obligation is breached, the penalty turned into a sanction shall be imposed on a breaching party unconditionally, regardless of whether this breach has caused harm to the obligee. However, in difference from the opinion developed above, instead of pointing to stimulation, Professor Zurab Tchetchelashvili believes that the penalty secures the „compulsion” to perform the major obligations arising from a contract.

The preventive and restorative function of a penalty requires profound research, because its dual nature is frequently found in private and public legal relations, also in the decisions of common courts that indicate to its urgency.

1.1. Breach of an Obligation as the Main Prerequisite for Applying to the Penalty

Breach of an obligation is a legal postulate that enables us to take immediate effect of this institution. Article 361 of the Civil Code of Georgia focuses on proper and faithful performance of an obligation in the agreed time and place, though it is the non-performance of this norm that causes the exercise of the sanction on which the parties agreed in advance by determining the penalty when they signed the certain agreement. „Proper performance of the terms of a contract rules out the right of an obligee to claim a penalty”. The breach of an obligation may be expressed in its non-performance or improper performance. However, a minor breach, by considering the principle of a good faith in a civil turnover, shall not be taken into account. It follows that any kind of violation (whether intentional or negligent, grave, less serious or minor) will result in charging a penalty. It is undisputed that „significant” or „minor” breaches of an obligation are assessment categories, and in each certain case its legitimacy depends on the judgment of the court.

Hence, the harm resulting from the breach of an obligation has no impact on arising the right to claim a penalty. Moreover, the right to claim a penalty is effective even if the breach of an obligation has not caused harm. The mandatory prerequisite for claiming a penalty is just a breach of an obligation.

1.2. The Penalty, as the Guarantee of Performance of Obligations and the Penalty as the Means for Reimbursement of Harm

The penalty is the superior demand for execution, it is free from reimbursement of harm. If, along with the penalty, an obligee has raised the demand for reimbursement of harm, both demands shall not be satisfied, because the penalty itself is the minimum sum for compensating caused harm. In such case, the obligee is priorly entitled to make a choice between the demands for compensation of harm or penalty. Imposing both penalty and compensation for the entire harm is inadmissible, because it will be a punitive sanction, which would extremely aggravate the deteriorate the obligor’s state and cause unreasonable enrichment of the obligee.

The nature of penalty securing is the following: on one hand, it becomes a guarantee of performance of obligations for contracting parties and – a means for

12 According to the court of cassations, the risk of facing a penalty has psychological impact on a person that makes him/her to perform the obligation. The effect is the following: the breaching party is charged with a sanction of repressive nature. See Judgment of the Supreme Court of Georgia of 11 November 2015. (№elo-570-541-2015), see Kvinikadze K., 2016. To reduce the penalty by the court as a „judicial intervention” in the principle of contractual freedom, Justice and Law, Tbilisi, №2(50), 85-94.
13 Zoidze B., 2001. Commentary to the Civil Code of Georgia, Book 3, Tbilisi, 488.
14 http://www.supremecourt.ge/news/id/949 [18.10.2020].
15 Ioseliani N., 2005. Penalty, Notariate of Georgia, Tbilisi, №2-3, 20.
16 Meskhishvili K., Liquidated Damages (Theoretical aspects and courtjurisprudence) <http://www.library.court.ge/upload/pirgasamtekhlo_k.meskhishvili.pdf> [18.10.2020].
17 Meskhishvili K., 2014. Liquidated Damages (Theoretical aspects and courtjurisprudence) Georgian Commercial Law Review Journal; 16. <http://ewmi-prolog.org/images/files/7427Georgian_Commercial_Law_Review_III_Issue_ENG.pdf> [19.10.2020].
18 Svintradze K., Problem of protection of creditor rights in case of contractual obligation <http://old.gruni.edu.ge/uploads/content_file_1_1902.pdf> [18.10.2020].
reimbursement of harm on the other. This harm may be a loss caused by untimely performance of obligations, which has deprived a contracting party of the right to get more profit in economic processes. Lost profit with its nature means pure economic loss, which was suffered by a contracting party and which would not have happened provided the terms of the contract had been properly complied with.

There is an interesting circumstance when an obligee shall not have to prove what kind of loss they have suffered (including lost profit). They are entitled to receive the penalty as agreed upon with the obligor. By means of penalty a party whose rights have been breached operatively gets remedy for the suffered harm. Hence, beyond the fact that the penalty is a kind of guarantee for performance, in the event of caused harm, it releases the obligee from the burden of proof and bureaucratic standards that they would face normally, if they applied to the court.

1.3. Standard Requirements of a Penalty within Legal Proceedings

In legal literature, the following classifications of standard requirements of penalty may be distinguished:

I. Conformity of the terms of a contract – which means that the parties are free to determine the amount of the penalty. An obligee shall not „force” the debtor to enter into a contract with obviously unfair terms and conditions. Hence, the amount of the penalty shall be estimated on fair basis, when parties are agreeing on it. The parties shall presume the harm that may be caused as a result of failure to perform or improper performance of obligations, however, the law also entitles them to agree on the penalty which may exceed the presumed harm;

II. The principle of determining a penalty – allows to calculate its amount with unjustifiably high limits; the law stipulates the authority of the court to reduce the amount of the penalty agreed by the parties when it is unfairly high if taking into account the type of breach and the harm caused as a result of this breach;

III. The limits of the court’s authority:

a) the court may reduce the inappropriately high penalty by considering the circumstances of the case. (CCG, Article 420), the function of the law in determining the inappropriately high amount is limited to the imposition of judicial control. The goal of the penalty is to restore the breached rights of the obligee and not to make them richer.

b) when reducing the penalty, the court takes into account the proprietary state of the party and other circumstances as well, in particular: what is the ratio of the value of performance and harm caused by non-performance or improper performance with the amount of the penalty, also, the economic interest of the obligee. The court shall discuss these circumstances only upon the request by a party and use its discretion only if there is such prerequisite.

Pursuant to Article 420 of the Civil Code of Georgia, a court, taking into account the circumstances of the case, may reduce a disproportionately high penalty and here arises the discretionary authority of the court to decide what the circumstances, on which it bases the reduction of penalty amount, are. In such case, a judge is granted an exclusive authority to intervene in the part of „revising terms of the contract” and establish the limit of legality and reasonability of the penalty determined by the parties and with this he/she shares the practice of the Civil Code of Germany (GBG). In Germany, if the penalty is disproportionately high, the court may reduce it to a relevant amount on the basis of the obligor’s motion, while, during evaluating the appropriateness, any legitimate interest and not just the property interest of the creditor shall be taken into account. „The reduction of the penalty shall be requested by the obligor itself. For this any expression shall be sufficient, including numbers, which will make it possible to find out that the obligor wants to be released from payment of inadequately high penalty."

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19 Willem H. Van Boom., 2004. Pure Economic Loss – A Comparative Perspective <https://www.researchgate.net/publication/228140814_Pure_Economic_Loss_-_A_Comparative_Perspective> [18.10.2020].

20 Judgment of the Supreme Court of Georgia of 21 November 2011. (№06-1214-1234-2011).

21 Judgment of the Supreme Court of Georgia of 17 May 2012. (№06-373-354-2012).

22 Ioseliani N., 2016. Disproportionally High Contract Penalties and Role of the Court in the Sphere of Protection of Civil Interests, Journal Of Law, Tbilisi, №1, 62-74.

23 Chantladze M., Explanation of Expression of the Will, Reduction of the Penalty, Nominalism Principle, „Overview of Georgian Law”, №5/2002-1, 174.

24 Сергеева А.П., 2006. Гражданское право., Т.1, 6-ое изд., под ред. Толстого Ю.К., М., 694.

25 Decision №2/1971-13 of 9 January 2014 of Batumi City Court.

26 Judgment of the Supreme Court of Georgia of 12 September 2012. (№06-819-771-2012).

27 Prütting/Wegen/Weinreich., 2006. BGB Kommentar, Luchterhand, 557.
According to GBG, if the obligor promises the obligee to pay money as a penalty in the event of non-performance or improper performance of obligations, then the penalty is payable by the obligor upon the delay of such performance. If the performance of obligations consists in forbearance, then the penalty shall be payable if the performed action contradicts the obligation.

GBG knows a very interesting institution – promising payment of penalty for non-performance of obligations (§ 340), which means that “If the obligor has promised the penalty in the event that he fails to perform his obligation, the obligee may demand the penalty that is payable in lieu of fulfilment. If the obligee declares to the obligor that he is demanding the penalty, the claim to performance is excluded”, while, under §341, if the obligor has promised the penalty in the event that he fails to perform his obligation properly, including without limitation performance at the specified time, the obligee may demand the payable penalty in addition to performance. If the obligee has a claim to damages for the improper performance, the provisions of section 340 (2) apply. If the obligee accepts performance, he may demand the penalty only if he reserved the right to do so on acceptance.

GBG implies a procedural norm with regards to the penalty (§ 345), which refers to sharing the burden of proof. If the obligor contests the payability of the penalty because he has performed his obligation, he must prove performance, unless the performance owed consisted in forbearance.

2. MANDATORINESS OF A WRITTEN FORM OF A PENALTY

The form of a penalty bears a material-legal function and the agreement requires demonstration of bilateral will. Unilateral acknowledgement of penalty does not make the expressed will authentic, and neither does it give the right to demand it. It is the agreement between the parties on the payment of a penalty that creates the basis for charging it on the defendant. The aforesaid makes it obvious that „the penalty in the Georgian contractual legislation is presumptive, real and it shall comply with some formal criteria”.

Under Article 418 of the Civil Code of Georgia, the parties to the contract are free to determine a penalty that may exceed the possible damages (except the special norm, which is the latest amendment and is stipulated in Part 5 of Article 625). On the other hand, an agreement on a penalty must be made in written form. Definition of written form of an agreement of a penalty is a very important ordain in the Georgian Civil Code and this is the event, where the given interpretation differs from the German civil law. In the given case, Georgian lawmaker has given a special function to the imperativeness of the form. The goals of the norm are – to equally defend the interests of both parties by granting them the right to freely determine the amount of the penalty and to protect the parties from performing hasty and imprudent actions by demanding the written form of the agreement.

Professor Zurab Chechelashvili duly points to the imperative ordain of the norm and defines that it is the legal consequence of the vulnerability of the form that the agreement on penalty is void as a formless transaction. Besides, the legal outcome of the invalidity does not affect the overall transaction.

The form is not an end in itself, but a means for achieving other goals. If this goal is achieved without the form determined by the law, then it shall not be considered as the circumstance obstructing the transaction, but if such form is strictly stated in the law, then it is mandatory for a party to comply with that standard.

Georgian law makes written form of penalty agreement mandatory even if such form is not required with respect to such contract, where the parties shall anyway agree on penalty for securing obligations.

2.1. Statutory and Contractual Penalties

Article 417 of the Civil Code of Georgia provides the legal definition of penalty – as the additional means for securing a demand. It belongs to the category of accessorial rights, meaning that its origination and authenticity depends on the existence of main obligations and in its turn, it is an amount of money

28 See also: J. Frank McKenna, Liquidated Damages and Penalty Clauses: A Civil Law Versus Common Law Comparison, Critical Path; spring 2008, at 3-6.

29 Boyak A.J., 2014. Comparative Analysis of the Contractual Damages and Penalty on the Example of Georgia and US „Overview of Georgian business Law”, 3rd ed., 12. <http://www.library.court.ge/upload/biznes_samarTlis_minoxilva_2014.pdf> [18.10.2020].

30 <http://www.gccc.ge/wp-content/uploads/2016/06/Artikel-418.pdf> [18.10.2020].

31 The validity envisaged under article 59(I) comes into effect upon the breach of the form determined by contract or law, if this law carries the function of authenticity. Further see Chanturia L., 2016. Comments to the Civil Code, (GCC), last edition: Nov. 3.

32 Kereselidze D., 2009. The Most General Systemic Concepts of the Private Law, Tbilisi, 285.
[pre] determined by agreement of the parties,33 payable by the obligor in case of nonperformance or improper performance of an obligation. The etymology of the word in Georgian [ფრთილბრძოლა] proves the same – the charge for breaking the promise.34 According to professor Lado Chanturia, a penalty is always the amount of money that shall be paid by the obligor to the obligee and its payment of the penalty in form of goods is inadmissible. Origination of the penalty may depend both on the agreement between the parties and (provided the prerequisites demanded by the lawmaker are met) on the lawmaker’s desire. Considering these factors, in the literature on law, statutory (normative) and contractual penalties are differentiated.35

The parties in contractual relations have an option to stipulate in the contract the means of security that is acceptable for them and adapted with the content of the contract. However, in practice, a choice is always made in favor of a means of security characterized by the thriftiness of protection of the right and the quickness of demand satisfaction.36

In the event of a contractual penalty (in Germany is the same as „Vertragsstrafe“ – contractual fine) only a consensus between the parties is decisive. They are absolutely free in determining the amount of the penalty, while the statutory penalty provides precise definition of its maximum rate and is mandatory for any legal entity. An obligee may demand a normative penalty for any occasion, regardless of whether there is another agreement between the parties. The lawfulness of the contractual penalty is expressed in its conformity with the law. Reasonability means such reduction, which protects the interests of an obligor and where the penalty does not lose its legal function as a result of such reduction. A proper performance interest shall be redressed to the obligee.37

One of the major features of the difference between the statutory and contractual penalties is its certain character. Any of such normative penalties are intended for that certain case for which it has been established by the lawmaker.38 The lawmaker always establishes either its specific amount or the rule, according to which the amount of the statutory penalty shall be determined.39 For a classic example, according to Part 3, Article 31 of the Georgian Labor Code, „An employer shall be obliged to pay an employee 0.07 percent of the delayed sum for each day of any delayed compensation or payment.„ The aforesaid does not mean the right of the parties to increase the amount of the penalty themselves, however, its change but its change to the detriment of the employee is inadmissible and even if there is bilateral will of the parties, the imperative provision of the lawmaker may not be changed and any such reservation is void“.40

The latest model of statutory penalty is Part 5 of Article 625 of the Civil Code of Georgia, in which the lawmaker originally set the remainder of the loan at 150 percent per annum of the outstanding principal amount of the loan, and in the current edition, the ongoing remainder of the loan has been determined as 1.5 as much amount of the principal amount of the loan. There is no doubt that the unprecedentedly high rate of statutory penalty causes significant harm to the legal status of consumers of banking/credit product on the market and this is why it ought to be timely reduced to a reasonable minimum.

Since the lawmaker set the maximum limit of the statutory penalty for a loan agreement, Article 420 cannot be applied to such categories of disputes by the judiciary, as there is a special norm regulating disputes established in the law, which is a kind of guideline for a judge. That is why the following deserves criticism: if so far the court was entitled to review the lawfulness and reasonability of the contractual penalty and to establish the compliance standards, the legislative amendments have established such maximum limit of the statutory penalty for loan agreements, which initially deprives the judge of the possibility to „revise“ certain loan agreements. As a result, the „weak party“ has become even more

33 Zurab Tchetchelashvili writes with criticism in this respect: a penalty is an agreement, undertaking additional obligations along with the basic contractual obligations by the obligor and not „the sum of money predetermined under the agreement between the parties”, as it has been noted in article 417 of CC.
34 Compare with GBG § 339: „Where the obligor promises the obligee, in the event that he fails to perform his obligation or fails to do so properly, payment of an amount of money as a penalty, the penalty is payable if he is in default. If the performance owed consists in forbearance, the penalty is payable on breach.“ Also see: Гражданское законодательство, М., 100.
35 Chanturia L., 2012. Security Interest Law, Tbilisi, 237.
36 Shotadze T., 2011. Comparative Analysis Of The Mortgage And „Security Property“, Journal Of Law, Tbilisi, №1, 139-140.
37 Гришин Д.А., 2005. Неустойка: теория, практика,
vulnerable during the proceedings.\textsuperscript{41}

It is undisputed that the amendments were crucial for uninterrupted conduct of economic process. Indeed, many companies emerged on the Georgian market, which were offering simplified loan procedures; their crediting policy was conducted with violations and as a result, over-indebtedness increased and the poverty rates of the population reached a catastrophic index. The legislator’s interference aimed at monitoring such grave relations and creating more defence tools for consumers; however, the faults of the reform were negative from the very beginning. Even though stipulated strict regulations, aimed at protection of obligors, were timely and necessary, it would be effective only if the reasonable interest and penalty rates had been determined.

3. PREREQUISITES FOR CHARGING AND CANCELLING PENALTY WITHIN ENFORCEMENT OF DECISIONS

The necessary prerequisite for promoting and harmonizing judiciary is the effective enforcement of the decisions taken by the court, arbitration or other authorized persons/bodies. Otherwise, the Latin „ubi jus, ibi remedium”\textsuperscript{42} echoes the following: „When the law gives the right, it also gives the means of its protection”.

In a state governed with the rule of law, additional instruments for effective and low cost enforcement of final judgements by the judiciary. „Providing the enforcement of court decisions are guaranteed by various norms of law obliging the court to take enforceable decisions”\textsuperscript{43}, which include following financial obligations: the principal amount, the interest, the penalty and the procedural costs that became necessary during the proceedings for effective judiciary.

The Law of Georgia on Enforcement Proceedings includes an error, which creates a barrier for a participant of the process, especially the obligee who has the obligation of payment to the budget.

First of all, it should be noted that existence of a decision does not always mean that its enforcement is feasible, because there are a lot of cases where the obligor’s property is not capable for satisfying the obligee’s claim or the obligor may not possess a valuable object at all. Unsecured claim creates special difficulty in such cases; as a rule, in most cases, obligees have done unjustified risks (the claim is not secured, the obligor does not have property, salary or any other assets, which might satisfy the claim). In such cases, satisfaction of the obligee’s claim depends of the obligor’s goodwill.

The issue of imposing and cancelling a penalty is governed by the Point 2, Article 25 of the Law of Georgia on Enforcement Proceedings. The disposition of the norm is as follows: when enforcing decisions for increasing a creditor’s claim by charging interest and/or default surcharge penalties on the principal amount, the charging of interest and/or default surcharge penalties on the principal amount of the obligee’s claim shall stop from the day of initiation of the enforcement proceedings except where a tax claim is involved. Charging of interest and/or default surcharge penalties on the principal amount of an obligee’s claim shall be resumed from the day when the National Bureau of Enforcement returns the writ of execution to the creditor under Article 35 of this Law.

This norm of the Law of Georgia on Enforcement Proceedings should be revised. The sanction is terminated from the moment when the enforcement proceedings are launched, but if the National Bureau of Enforcement, due to any obstructing circumstance, fails to enforce the decision [for instance, if during 2 years from the beginning of the enforcement proceedings on performing the recovery, the obligee’s claim is not satisfied, or, if the obligor does not possess a property which might be used for performing the recovery, or, if the enforcement is impossible due to factual circumstances or/and legal basis], it returns the writ of execution to the obligee, who, in its turn, is rather obliged (than entitled) to launch charging the default surcharge penalty. There is another error – the legislation does not regulate the issue of the date, when the sanction should come into effect, no longer making focus on how illogical such calculations can be.

Here, the main difficulty is the fact that charging the default surcharge penalty already loses legal interest and the party who failed to have their claim satisfied within the enforcement procedures, as a rule, will no longer have any other lawful resource. This problem, for a taxpayer, may cause another difficulty in performing tax obligations. „Under the tax legislation, the sum of penalty, in its concept, is not the

\textsuperscript{41} For criticism of norm-creative activities, see: 28. Shamatava I., 2018. The Latest Legislative Regulations, Deficiencies and Recommendations of the Loan Agreement (comparable-legal analysis according to European-Georgian legislation), Available only in Caucasus University of Law.

\textsuperscript{42} Thomas A. T., 2004. Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy, The University of Akron, <https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1208&context=ua_law_publications> [18.10.2020].

\textsuperscript{43} Judgment of the Supreme Court of Georgia of 4 January 2010. (№ ab-856-1142-09).
As far as the enforcement envisages: fair judiciary, execution of obligations established by the authorized person in the operative part of the decision, reliability of doing justice, it requires fundamental control and support from the state, because there is a society behind any decision and they, usually, expect that justice will be done. However, it is a fact that none of the disputing parties can benefit from such ordain of the penalty.

4. GENERAL ANALYSIS OF THE JUDICIAL PRACTICE

The Organic Law of Georgia on Common Courts, in Article 7, Point 1, states: the judge shall assess facts and make decisions only according to the Constitution of Georgia, universally accepted principles and standards of international law, other laws and by his/her inner conviction.

The Civil Code of Georgia grants sufficient freedom to judges in process of interpreting laws. They should exercise this freedom and try to define each law or will of parties in terms of good faith and fairness, taking into account social and moral standards. Article 420 of the Civil Code of Georgia vests the judge with discretionary authority to „revise“ the package of contractual obligations; in other words, to evaluate whether the amount of penalty determined by the parties is lawful and reasonable or unlawful and inappropriate.

Proceeding from the analysis of case law, several significant circumstances characteristic to the institution of penalty have been outlined within the work on the present article:

1. Pursuant to the contents of articles 417-418 of the Civil Code of Georgia, a penalty is the means, ensuring relevant interest of a party towards the fulfilment of contractual demand and the obligation of its payment is related to the breach of contractual obligations. The penalty is charged on the party from the moment, when the breached obligation had to be performed – until the performance of that obligation;

2. In process of determining the penalty amount, focus should be made on several circumstances, among them: a) the penalty, as the function

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44 <http://taxinfo.ge/index.php?option=com_content&task=view&id=8825&Itemid=105> [18.10.2020].
45 Uitdehaag J., Kurtauli S., 2013. Review of the Georgian within the National and International Context, Enforcement System, Tbilisi, 216.
46 Chanturia L., 2012. Security Interest Law, Tbilisi, 235.
47 See., European Commission On The Efficiency Of Justice (CEPEJ), Strasbourg, 9-10 December, 2009. Guidelines
48 Vashakidze G. 2007, Good faith according to GCC – Abstraction or acting law, review of Georgian jurisprudence, Tbilisi, 58.
of an instrument having the nature of a sanction, aimed at evading more actions of breach of obligations; b) the seriousness and extent of breach and the quality of threat caused to the obligee; c) the quality of the culpability of the breaching party; d) the function of the penalty to include compensation for damage; 49

3. For each certain case, the following circumstances can be considered as the incompliance criteria of penalty: disproportionately high interest of the penalty provided for in the contract, significant excess of the amount of the penalty to the possible harm caused by non-performance of the obligation, duration of non-performance of obligations and etc. 50 However, here the criterion of incompliance deserves criticism, 51 as far as, „The Civil Code of Georgia does not specify the circumstances on which one could base the assessment of disproportionately high penalty“. Based on the structural description of the norm, the court may reduce disproportionately high penalty by considering the circumstances of the case", [it is better to add or indicate to the circumstance which the penalty is disproportionate with – market-economic conditions, terms of the contract or other]. Therefore, that the further improvement of the norm is preferable to minimize its content interpretation during the proceedings and in the best case – rule it out;

4. It can be assumed that the court has the authority to interfere in the autonomous freedom of parties to determine the amount of penalty, however, such exceptions are feasible in the event of „disproportionately high” penalty, i.e. when the amount of penalty is beyond reasonable frames. 52 As the Civil Code of Georgia does not specify that the court may reduce the amount only if the respondent (obligor) initiates such request, it means that the court is free in this aspect in making decision, regardless of the positions of the parties; 53

5. The Court of Cassations believes with regards to one certain case that interests of providing-implementing free and fair civil turnover and economic freedom, as the constitutional principle, require proportionality of penalty rate and the actual amount, also reasonable compliance of the penalty imposed on the party with the amount of principal contractual debt. Although the agreed penalty may exceed possible harm, the principles of equality of contracting parties and the fairness of the terms of agreement shall not be breached; 54

6. A court reviewing one case based itself on a very interesting argument and pointed to Article 420 of the Civil Code, pursuant to which the parties, when entering into agreement, may agree on the payment of certain amount of money – penalty in the event, when the obligor does not perform or improperly performs the undertaken obligations. The court stated that the legislator delegated the determination of the amount of penalty to the agreement of the parties, however, it did not mean that the obligee should gain disproportionately high benefit by charging the penalty. Thus, the amount of penalty is not limitless. The court is entitled to reduce it by considering certain circumstances of the dispute;

7. Besides, the circumstance that the purpose of the penalty is not the enrichment of an obligee but the restoration of a breached right should be also considered. Accordingly, the penalty shall, in each certain case, be reasonable and proportional to the breached obligation. When considering the compliance of the amount of the penalty, the court takes into account the nature of the breach of obligation, the harm caused as a result, its correlation, financial state of the parties, economic interest of the claimant, other objective circumstances. On the case № б-459-438-2015, the Chamber of Cassation stated that the penalty is the means of securing the party’s relevant interest to the performance of obligations and the obligation of its payment arises upon the breach of obligation. Thus, an obligee is always entitled to claim the penalty, no matter whether he has suffered harm or not. The existence of the fact of breach is sufficient for this.

49 Judgment of Tbilisi Court of Appeal of 3 July 2013. (№26/2838-13).
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54 Judgment of the Supreme Court of Georgia of 21 April 2010. (№6-1469-1403(k-09)).
CONCLUSION

The need and scales of the institute of penalty is enormous in the modern civil code and it has extraordinary function in mutually obliging relations. On one hand, it is the simple means for effective enforcement of breached right and on the other – it is a warning signal calling upon the contracting party to comply with the obligations of the contract, otherwise, the burden of responsibility will become significantly heavier if compared with the initial one.

The penalty has passed quite a long path through the perception of people around the world, before achieving modern reality with the current interpretation, in other words, before the improvement of its structural construction and content. And, without its evolutionary entrails, its development parameter would have been the same. That is why, the comparison of Georgian-German model of penalty is interesting for scientist-comparativists and also, for practicing lawyers.

As GBG is familiar with rather interesting institute – Promising to Pay a Penalty for Non-performance (§ 340), it also includes procedural norm (§ 345) regarding the distribution of the burden of proof, it would be preferable to share and implement this experience in the Georgian legislation. Sharing the abovementioned model of the German law will be particularly helpful for the Georgian legislation, in order to make the mutual expectations of the parties foreseeable and to make the penalty fulfil the function for which it exists in the legislation.

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პოლიტიკური სამსარბი რებულია წყვეტილების რთლის სამოქალაქო პირგასამტეხლოს ზედაპირი, რომელიც ცნობით უმოქმედი ყოფს ორბიტალის არგუმენტმა. როგორც ხელშეკრულობის საშუალებათა განვითარების კავშირში, რეპორტის შესარჩევლად სამსარბი სამართალთა სამოქალაქო პირგასამტეხლოს პირგასამტეხლოს რეტერვალში გამოიყენება, როგორც ხელშეკრულობის საშუალება. ასეთი ადგილი, რომელშიც რეგულირების სამოქალაქო პირგასამტეხლოს რეკომენდაციები უთანხმოა, საშუალება მოუწევს დარღვევისათვის -რესტიტუციული მოსამართლებლობის კონტინენტური პირგასამტეხლოს. ქუთაისი, ნაური, თურქეთი, არაგონი, და ა. და რ. ა. გაფლის განვითარება შედეგი და გაშვები, რომლებიც წყვეტილების ვალდებულებას განვითარება სამოქალაქო პირგასამტეხლოს რეკომენდაციება ისეთი განსაზღვრის.

1. პოლიტიკური სამსარბი სამართალთა სამართლის კონსტიტუციონალური მოთხოვნები ბილიბიშვილი

პოლიტიკური სამსარბი სამართლის სამოქალაქო პირგასამტეხლოს უფლება და ქონება რეალური ქონებისათვის გამოყოფენ შემოტანა-სამოქალაქო პირგასამტეხლოს თავისი მიზანები, რაც საკმაოდ უფრო შესრულებელი მიზანი ყოფს. ამით სამართალთა სამოქალაქო პირგასამტეხლო ჰარმონიზაციის დასასრული კონტინენტური პირგასამტეხლო სამოქალაქო პირგასამტეხლოს რეკომენდაციები. სამოქალაქო პირგასამტეხლო ჰარმონიზაციის სიღრმისეულში განვითარება არაგონი, გერმანია, ევროპელი და სამართლის სიტყვები.
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პირობების შემთხვევაში მოხსენიება ის თანხის რაც შეასრულოს ყოველთან დაკვლევით, როგორც უკისრი გულის მტკიცება არ შეიძლება მივაჩაგა. 2

2 სერგეი გ., 2015. მარიამ ზარაშეჰიშ იმპორტი და ამინდური ლიტორალიზაციის მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსלקვა მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა განსხვავებით მართვა  gz.
და მიღებულ ნიშანადებთა იყიდა, რომ ვალდებულების დარღვევის შემთხვევაში ასწავლა ვყოფის დახვრეწილება ბიჭის რიცხვით, ხშირად მათი შერჩევის მიერ ჩატარებული „გვერდი“ პროცესი,

13 პროცესიდან სამართლის მიერ, სადაც სასამართლოს გამარჯვების დოკუმენტები, შექმნა ფოსტალი, ხშირად მათი შერჩევის მიერ ჩატარებული „გვერდი“ პროცესი,

14 საქართველოს სასამართლო მიერ გამოყენებული შემთხვევები, შემდეგ სასამართლოს გამარჯვების დოკუ-

15 ვალდებულების დარღვევის შეფასებიდან ხელი იტანება მათი შერჩევის შემთხვევას დახვრეწილება ბიჭის რიცხ

16 ფუნქცია მიუხედავად პირგასამტეხლოს ძალა, ადგილმდებარე დახვრეწილება ბიჭის რიცხ

17 მოთხ. "LAW AND WORLD" जურ्नალში ჩიტატი, რომ პირგასამტეხლოს ძალა "მოთხოვნა ჰქონდა: სასამართლო, სასამართლო, სასამართლო, სასამართ

18 ლურჯი ჩუბუკი, პირველად იქცა 361-ე მოთხ. შექმნა ფოსტალი, ხშირად მათი შერჩევის მიერ ჩატარებული „გვერდი“ პროცე

19 არათვის გარდაქმნის შესაძლებლობა, ხშირად მათი შერჩევის მიერ ჩატარებული „გვერდი“ პროცე

20 ვალდებულების შესაძლებლობა, ხშირად მათი შერჩევის მიერ ჩატარებული „გვერდი“ პროცე
პირგასამტეხლოს პირი დაქვის სამოქალაქო ოდენობით იყოს, რომ პირგასამტეხლოს შეძლება განთავსებული იქნებოდა. პირგასამტეხლოს პირი დაქვის სამოქალაქო ოდენობით იყო გამოყო, რომ პირგასამტეხლოს შეძლება განთავსებული იქნებოდა 

1.3. პირგასამტეხლოს პირდაფიქრული მოთხოვნები საბავშვობრივი რესურსების პროცესში იქნა, რომ პირგასამტეხლოს შეძლება განთავსებული იქნებოდა პირგასამტეხლოს პირგასამტეხლოს შეძლება განთავსებული იქნებოდა.
გაირკვეს ციფრობრივიც რივ დან ნცხადების წყვეტილებით მციროს ნიერებისა დახდას მოითხოვოს შეუსრულებლობის მხედველობაში ტორის იზიარებს და ნებისმიერი წლის 12 სექტემბრის გადაწყვეტილება (§ 771-2012). მხოლოდ განსაზღვრული ნებისმიერი უფლებამოსილება გარემოებებზე მოვალის გერმანიაში არაჯეროვანი სასამართლო იკისრა მტკიცების პირგასამტეხლო გამოხატულება, რომელიც შეუძლია შემთხვევაში ვალდებულების მიღებისას ექსკლუზიური და შემცირდეს გადახდისაგან შესაძლებელს კრედიტორს გარემოებებზე, თუ როგორი განხორციელება შესაბამი არა ინტერესი არ განთავსდება გადახდის გარემოქმედით, რომ იურიდიური სახელშეკრულებო პირს უფლება ჰქონდა შესაბამი არაჯეროვანი სასამართლო საადგილო მდგომარეობით (§ 340-2). თუ ორი მოთავს პირგასამტეხლო შეეხება მოცულობას, მხოლოდ მოთავს შეუსრულებლობის გადახდისაგან შემთხვევაში ითხოვს კრედიტორის გარემოქმედით, თუმცა მოთავს შეუსრულებლობის გადახდისაგან შემთხვევაში უფლება ჰქონდა შემცირდეს გადახდის გარემოქმედით, თუმცა მოთავს შეუსრულებლობის გადახდისაგან შემთხვევაში უფლება ჰქონდა შემცირდეს გადახდის გარემოქმედით. მოთავს შეუსრულებლობის გადახდისაგან შემთხვევაში უფლება ჰქონდა შემცირდეს გადახდის გარემოქმედით.

2. პირგასამტეხლო შეუსრულებლობი

პირგასამტეხლო შეუსრულებლობის მომზადება და გათავისუფლება კრედიტორის მიერ შესრულებისთვის და კოდექსში ბრძანებით შემთხვევაში მისი გამოიხატა. თუმცა სასამართლო სასწავლის ჩატარება გამოიხატა სასამართლო საქართველოში.

26 ხარისხის აბრენდის საქართველო 2012 წლის 12 მდგომარეობის გარემოქმედით ან. სასამართლო შემთხვევაში, პირველი პირგასამტეხლო აქტი შეუსრულებლობის წყვეტილებით მოთავს გადახდის შემთხვევაში, კრედიტორი მოთავს გადახდის შემთხვევაში, გადახდის შემთხვევაში. წიგნებში 255-257 გამოთქვა შეშფრლით.

27 Prütting/Wegen/Weinreich., 2006. BGB Kommentar, Luchterhand, 557.

28 თავიდ. J. Frank McKenna, Liquidated Damages and Penalty Clauses: A Civil Law Versus Common Law Comparison, Critical Path, spring 2008, at 3-6.
ტექნოლოგიის თანაბარზომიერი უფლების კუთრებული და მდებელმა გაუზრდება საქართველოს ზე, ქართული ბიზნეს სამართლის მიმოხილვა; და პირგასამტეხლოს შედარებით ანალიზი საქართველოს ზე, ჰოსინგჩინის უხვად პირდება კრედიტს შეადრე ორი ცხრილზე კრიტიკულად განსხვავებულ ზე, ჭეჭელაშვილმა აღნიშნულზე კრიტიკულად დაკისრებით ვალდებულობას პირგასამტეხლო სურათით. – პირგასამტეხლო უზრუნველყოფის თუკი როდესაც არ მოღწეულია, როგორც პირგასამტეხლო უზრუნველყოფის თუკი როდესაც არ მოღწეულია, როგორც პირგასამტეხლო უზრუნველყოფის თუკი როდესაც არ მოღწეულია. 30

პირად, ჭეჭელაშვილმა საბოლოოდ მიუთითებს, რომ უღელტერისტული და მართლიანი მოქმედების განხორციელება შეიძლება მიმდინარეობდეს განხორციელებულ მოქმედებაში, და რომ პირგასამტეხლო არ ფულადი ვალდებული არ მოითხოვს ბიან 34 გადახდება პროფ "LAW AND WORLD", ფორმა გაწერილია კანონში პირგასამტეხლო უზრუნველყოფის თუკი როდესაც არ მოღწეულია, როგორც პირგასამტეხლო უზრუნველყოფის თუკი როდესაც არ მოღწეულია, როგორც პირგასამტეხლო უზრუნველყოფის თუკი როდესაც არ მოღწეულია.

2.1. კონტრაქციის ფორმთა მასხურებლობის პირობები

ბილიანის ფორმის 417-ე ბუნები განმარტავს მოქმედების უსაბურო ფორმის პარაფრაზებმა პირკავის ბილიანის ფორმითაც უსაბურო ფორმით, რომლებიც პირგასამტეხლო უზრუნველყოფის თუკი როდესაც არ მოღწეულია, როგორც პირგასამტეხლო უზრუნველყოფის თუკი როდესაც არ მოღწეულია. 31

32 2009. წლის ჰაზარი უკანასკნელი ქართული და ზიგმან გრინელს. ფორმა გამოვიდა ჩრდილო-ევროპული სახელმწიფო და ჩრდილო-ევროპული სახელმწიფო და ჩრდილო-ევროპული სახელმწიფო და ჩრდილო-ევროპული სახელმწიფო და ჩრდილო-ევროპული სახელმწიფო და ჩრდილო-ევროპული სახელმწიფო და ჩრდილო-ევროპული სახელმწიფო. 33

33 გამოქვეყნდა 1986-1990 წლებში. გამოქვეყნდა 1986-1990 წლებში. გამოქვეყნდა 1986-1990 წლებში. გამოქვეყნდა 1986-1990 წლებში. გამოქვეყნდა 1986-1990 წლებში.
ნებისმიერი ჯარიმა სამართალი თანხა 1, თბ., 139-140.

36 საქართველოს უზენაესი სასამართლოს ადმი-
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37 გრიშინ დ.ა., 2005. ჰუსტერია: თეორია, პრაქტიკა, ზამთარულები, მ., 100.

38 საქართველოს უზენაესი სასამართლოს ადმი-
"

39 საქართველოს უზენაესი სასამართლოს ადმი-
"

40 საქართველოს უზენაესი სასამართლოს ადმი-
"
ლათინური „ubi jus, ibi remedium“42 როგორც იხ., შამათავა ი., 2018. სესხის ხელშეკრულები და რეკომენდაციები (შედარებით-სასამართლო სახელით), "ubi jus, ibi remedium"43 რომელიც ამ ფიქსირების გამწევაში ნებისთვის შესაძლებელი გარანტიობს შეკრულების ნაწილს ქითხვის და ქვეყნისთვის საქართველოს მონაწილე სასწავლებები წარსულში. საქართველოს უზენაესი სასამართლო 2010 წლის 4 იანვრის გადაწყვეტილება (არც არაგვარი), 43 საქართველოს უზენაესი სასამართლო 2010 წლის 4 იანვრის გადაწყვეტილება (შაქ-856-1142-09).
საჭიროებს აღსრულება სის გამო ველყოფს რითად სააღსრულო გალითად იმ რიდან ფურცელს ის რებს რამდენად წარმოებისას რესკურტის დაქვება, დარჩა სამართლია მთავრობის შემთხვევაში. კრედიტორის მითხითების იმ რიდან თანხაზე სარგებლისა ან რეგამობს გამოგდება ოთხი ღირებული არ გამოწვეული განთავსება. ქართველოს აღსრულების კრედიტორის შედეგად ძირითად ერთეული ქართული კოდი აღუნდით. 44

პირველი დღიდან საკანონმდებლოდ ჩანაწერი საფუძვლის გამოვლენა საქართველოს საპარლამენტო სისტემა ეროვნულ და საერთაშორისომ მომართებში. ქართული კოდი პარლამენტი ქვეყნების შესასვლელს გამოვლენა რომლის ქართულთა საქართველოს პოლიტიკურ პარტორენტი იყო მოიხერხება თბ., 235. პროგრამა შემდგომ მოხერხება თბ., 235.

პირველი პარაგრაფი პარლამენტის ან მითხითების იმ რიგი ჰარმონიზებულ. საქართველოს საკანონმდებლო გამოვლენა თბ., 216. 2012. პოლიტიკურ პარტორენტი იყო მოიხერხება თბ. 216.
ნას, ფუნდამენტური მხარე რთულია დადგენილი ფაქტობრივ ბას ან ურთიერთობა საყოველთაოდ წყვეტილებს ასეთი ნორმების შორის, რომლებიც ანიჭებს თავისუფალ თავში პირებს მოსამართლეების მიხედვით.

47 ნისკარტე, კონსტიტუციის რწმენის თანმიმდევრული თავისუფალ თავში აღსრულება, როგორც ცხემდა თანმიმდევრული თავისუფალ თავში განმარტების შესახებ, თუმცა თვალსაზრისით, როგორც უფლებათა შემთხვევაში, დარღვეული რბოლის ვქმედება უნდა გამოიხატოს უფლებათა შემთხვევაში.
48 თბილისის სააპელაციო სასამართლოს 2013 წლის 48 შესახებ ღირსშესანიშნავი სამთხევლო მონხობიებში, 2007. კეთილისინდისიერება საქართველოში, სამართლის სამთხევლო სტატიაზე.
49 პირგასამტეხლო კანონი „418-გ« მხარის მოთხოვნის მიმართ, რაც თბილისის საადმინისტრაციო სასამართლო ბრძანების გამოხატებაც მოკლეებულად. პირგასამტეხლო კანონი „418-გ« მხარის მოთხოვნის მიმართ, სამართლის სამთხევლო სტატიაზე.
ბის სამოქალაქო ლოს გამოწვეულ პის ბიდან გასცდება ტილების საქმის აქვს, შეუსაბამოა [51 მაღალდა დავად მინიმუმ უმჯობესია "გარემოებებს შეიძლება საკასაციო, რთალი, თბ., 43. ნიშნავს უზრუნველყოფა საქმეზე არაა მხედველობაში, რილის გადაწყვეტილება (შეამციროს არ დაკისრებით მის ხარისხს, რომლის გავსამოსავლური წარმოადგენს წარმოადგენილი საქმის მოთხოვნა, ტურიზმი, უმოქმედობის შინაარსობით საუკეთესო როდესაც ”53 აღწერილო (ინტერესე გადაწყვე მოვალის შეიძლება დავი სამართლიანობის უნდა ფინანსურ მოწვეულ ვალდებულებას კრედიტორს იმისა და ქალის თავზე მოვალის შეუზღუ, დარღვევის წარმოადგენს შინაარსობით საშიგვის დარღვევის წარმოადგენს თუ ზიანს მდგომარეობას შესაბამისობის არქივალურ ფიქრანარა საინტერესო სარგებელი მოსარჩელის მოედნიერებაში და სასამართლო იგი ობიექტურ მოსარჩელის და არ გა გა გა გა და ზიანი- ძე, უჩ ის დარღვე შეუზღ აღე მია ორგანულობა (Neb-459-438-2015 ლორომ, რომ პირობაგარემის ბარი არ რეგიონერთნი გამოშვების, ზიანობის დარღვევის მომარა ლამაშ სქემის იმონგების უმოქმედობის მსუ- ლუმის, რომლის გავსამოსავლური წარმოადგენს წარმოადგენილი საქმის შემთხვევაში ნმოგრძო დაამთავრებულია ვალდებულების დარღვევისა. აქვე, პირობაგარემის ბირთვოვან ჭიტყა პროგრამი ეკონომიკური ის მხედველობაში პირგასამტეხლო ამათთან საინტერესო შინაარსობით საუკეთესო როდესაც ბიზნესში დასანამდვილები მართვით ორგანულობა (Neb-1469-1403(4-09)).
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შესახებ

ამავეთვის ანტიკური კოდექსში, პირგასამტეხლო არსებობას საპერადო და მასში განვითარებით გადაივენილი იქნა და ამ კანონისმიერ ეფექტის გაზიარებისთვის თანამედროვე სამოქალაქო კოდექსში, პირგასამტეხლო არსებობა განრიგული და შეიცავს პროცესუალურ ნორმას (§ 340), რომელიც საბოლოოდ შერჩეული სამოქალაქო კოდექსში.

პირგასამტეხლო დარღვევის ფაქტის არსებობა დასკვნა თანამედროვე სამოქალაქო კოდექსში, პირგასამტეხლოი ინსტიტუტის საჭიროებას და მასში განვითარებით გადაივენილი იქნა და ამ კანონისმიერ ეფექტის გაზიარებისთვის თანამედროვე სამოქალაქო კოდექსში.