

UNLAWFULNESS AS A LEGAL CATEGORY

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Abstract: This article concerns a problem of unlawfulness. The subject under consideration is the relationship between the elements of an act, as the first sign of a crime, and unlawfulness, as well as the formal and material aspects of unlawfulness, and the relationship between unlawfulness and a criminal wrong. This article also considers whether there is a legally free space, and whether a provision regarding the establishment of unlawfulness according to the unified legal order is valid, and the appropriateness of the division of unlawfulness according to the branches of law is justified.

Keywords: elements of an act, unlawfulness, criminal wrong.

1. Introduction

According to the prevailing opinion in the Georgian and German literature of criminal law, compliance with the elements of an act and unlawfulness are subjects of independent assessment, and thus subjects of special examination, behind which, from a material point of view, there is a philosophical and sociological standpoint of criminal law both in terms of the function of the legal order of a state and its constitutional conditions¹.

The English system of common law makes no distinction between a wrong and guilt. Therefore, in contrast to Georgian and German criminal law, they are not separately examined and established.

Georgian law, which is part of continental European law and is influenced by German law, and similar to German criminal law, differentiates between three elements of a crime, which are examined in the following order: the elements of an act, unlawfulness, and guilt.

2. An unlawful act as a wrong, and denial of a wrong with justification

a) Elements of an act

The elements of an act have different functions, one of which is a guarantee function, which

1. *Paeffgen H-U.*, Rechtswidrigkeit als juristische Kategorie, in: Hilgendorf E., (Hrsg.), Rechtswidrigkeit in der Diskussion, 2018, S. pp. 3-4.

means that without law there is no crime. This principle derives from the Constitution. One of the components of a wrong is the elements of an act.

The elements of an act describe a prohibited and punishable act. The elements of all intended acts include objective and subjective signs. The commission of an act provided for by the elements of an act contradicts prohibition and requirement, unless circumstances excluding unlawfulness are present². The compliance of a committed act with the elements of an act does not allow us to draw a final conclusion regarding the unlawfulness of an act, and until it is established whether the act has been committed in circumstances excluding unlawfulness, the act cannot be evaluated as lawful or unlawful.

A criminal wrong cannot be committed without compliance with the elements of an act. In the words of Metzger, it can be said that the elements of an act are *ratio essendi*³ for unlawfulness, or more precisely, *ratio essendi* for considering an act as unlawful, and instead, only *ratio cognoscendi*⁴ for unlawfulness in a certain case.

b) Unlawfulness

c) Formal side

According to an opinion expressed in German literature, taking into consideration certain factors, an unlawful act contradicts the entire criminal legal order, and therefore specific criminal law duties⁵. The said provision is important from the point of view that the German criminal law does not consist only of the criminal code, but there are additional, i.e. subordinate laws as well. If one of the criminal laws prohibits a certain act, it cannot be declared permissible by another criminal law. From the standpoint of the Georgian legal system, in addition to the criminal code, there are other criminal norms applicable in Georgia as well, although the elements of an act and punishment are determined only by the Criminal Code of Georgia. If one of the Georgian criminal laws contains a reference to the prohibition of a certain act and to an unauthorised act, it is not enough to establish the unlawfulness of an act committed in a specific case, but rather it is necessary to establish that the act has not been committed in circumstances excluding unlawfulness. The indication in criminal law of the prohibition of an act may, in certain cases in Georgian criminal law, not be a sign of unlawfulness, but rather a normative sign with blanket elements. However, taking into account the above, it does not exclude its importance for establishing unlawfulness. An example of this can be the elements of a crime of illegal abortion (Article 133) and a transport-related crime.

Along with the norms related to prohibition and requirement, there are justifying circumstances which imply legal permission. However, it should be noted that some authors differentiate

2. Paeffgen H-U., ebenda, S. p. 6.

3. The cause or ground of existence in Aristotle's philosophy.

4. The ground of knowledge.

5. Paeffgen H-U., ebenda, S. p. 7.

between permission and justification. For example, if an extreme necessity is a justifying circumstance, in the case of a necessary self-defence, reference is made to permission. By means of justifying circumstances the legislator acknowledges (abstractly and generally, similar to the description of prohibition through the elements of an act) that it is permitted to commit the elements of an act under certain conditions⁶.

The German scholar Paeffgen considers the elements of an act as a precondition for justifying circumstances as well, and states that an act that is not prohibited is *per se* one that does not need justification, and in such cases, reference is made to the freedom of action⁷. The above opinion should be agreed with in the sense that not all acts actually require justification. The need to justify an act arises when there is an act on which prohibition may be based. An act on which prohibition cannot be based does not need justification either. However, it should also be noted that such an act is a lawful act from the legal standpoint, since it does not contravene the law.

d) Material content of unlawfulness

A central problem related to unlawfulness is the material content of the word ‘unlawfulness’. A question arises: when does the legislator decide that a socially dysfunctional act is so severe that it is necessary to apply criminal law to it? This question is considered difficult to answer and results in a difference of opinion in the literature of criminal law. From this standpoint, legally protected interests are considered as the main concept⁸. Some acts, such as murder, have been punishable throughout the whole existence of law. However, there are acts that raise the question of whether they should be punishable under criminal law and where the line is drawn between acts punishable under criminal law and acts punishable under police law (administrative law). The above is associated with the violation of legally protected interests, and a high degree of social and ethical reprehensibility⁹. As one of the controversial issues related to legally protected interests, some authors refer to cases of the torture of animals as an example, which in their opinion can hardly be related to legally protected interests¹⁰, and which therefore would raise a question regarding the necessity of criminal punishment. This opinion should not be agreed with¹¹. The torture of animals, in terms of social and ethical reprehensibility, should be punishable under criminal law and its punishability should not be doubted. An opinion questioning the appropriateness of the criminal punishability of the torture of animals may be based on an old-fashioned view, which considered animals as creatures without rights and equated them with things, or inanimate objects¹².

6. Paeffgen H-U., ebenda, S. p. 7.

7. Paeffgen H-U., ebenda, S. p. 7.

8. Paeffgen H-U., ebenda, S. p. 10.

9. Paeffgen H-U., ebenda, S. p. 11.

10. Paeffgen H-U., ebenda, S. p. 12.

11. With respect to the protection of animals under criminal law see Tskitishvili, T., Criminal Law Protection of Animals, Review of Private Law, 2021-2022, No 3-4, pp. 165-182.

12. A famous philosopher *Immanuel Kant* equated animals with things. See *Kant, I.*, Groundwork of the Metaphysic of Morals, Tbilisi, 2013, p. 179.

In addition to the above, in terms of the dubiousness of the expediency of criminal punishability, they refer to the area of criminal law, which provides for the punishability of drug-related crimes. Namely, the criminal punishability of the possession, production and import of narcotic drugs in small quantities.¹³ It is noteworthy that drug policy is constantly changing, which has been reflected in Georgian legislation based on the decisions of the Constitutional Court of Georgia. The punishability of the consumption of marijuana has been abolished, while there is a special norm regulating the purchase, storage, transportation, and transfer of narcotic drugs in small quantities (Article 273). In all the above, the liberalisation of criminal legislation and the constant changes clearly indicate the problematic nature of the issue under concern, an issue raised in this article, namely, where the line should be drawn between criminally punishable and non-punishable acts.

3. Correlation Between the Compliance of the Elements of an Act and Unlawfulness

The elements of an act describe the main content of possible injustice and/or reprehensibility. This must be established by a judge in relation to a wrong. In addition, in order to establish the fact of a commission of a wrong, a judge must also establish the existence of justifiable circumstances. The compliance of the elements of an act does not include an evaluation stage. In relation to the wrong of an action, the elements of an act play only an incidental function¹⁴. In this case, with respect to the evaluation stage, it means evaluation from the standpoint of lawfulness and unlawfulness, since in addition to a descriptive sign, the elements of an act may also include an evaluative sign. This is especially true in the case of blanket torts.

The establishment of unlawfulness raises the question of whether the existence of justifying circumstances is excluded. If the existence of justifying circumstances is excluded, the compliance of the elements of an act will be the basis for the compliance of the act with unlawfulness.

4. Doctrine of the Negative Signs of the Elements of an Act

Some authors see a negative sign of the elements of an act in justifying circumstances. From this standpoint, compliance with the elements of an act and unlawfulness coincide, the result of which is a two-element crime model. This, however, contradicts the view according to which there is a material difference between the signs of the elements of an act and justifying circumstances¹⁵. This opinion should not be agreed with, since it contradicts a three-element

13. *Paeffgen H-U.*, ebenda, S. p. 12.

14. *Welzel H.*, Das Deutsche Strafrecht, 11. Aufl., 1969, S. 80; *Kühl K.*, Strafrecht, AT, 6. Aufl., München, 2008, S. 108; *Haft F.*, Strafrecht, AT, 8. Aufl., München, 1998, S. 71; *Baumann/Weber/Mitsch/Eisele*, Strafrecht, AT, Lehrbuch, 12. Aufl., Bielefeld, 2016, S. 336, § 14 Rn.9; *Ebert U.*, Strafrecht, AT, 3. Aufl., Heidelberg, 2001, S. 64; *Paeffgen H-U.*, ebenda, S. 15; *Mchedlishvili-Hedrich K.*, Criminal Law, General Part, Separate Forms of Crime. Manifestation, Tbilisi, 2011, p. 339.

15. *Paeffgen H-U.*, ebenda, S. pp. 16-17.

crime model, which is provided for by Article 7 of the Criminal Code of Georgia and which differentiates between the elements of an act, as a descriptive sign, and unlawfulness, as an evaluative sign.

Considering the absence of justifying circumstances as a negative sign of the elements of an act means equating ‘that which is’ with ‘that which must be’, because the signs of the elements of an act are related to factual circumstances despite the fact that they include an evaluative sign as well. Evaluation related to unlawfulness is a normative evaluation. Establishing that a person has been murdered by an intentional act means the establishment of the commission of the elements of an intentional murder, which by default does not refer to the lawfulness or unlawfulness of the act. The clarification of the above issue is the next step in the process of determining the elements of a crime. The elements of an act may be committed both lawfully and unlawfully.

Regarding the criticism of the doctrine of the negative signs of the elements of an act, Welzel paraphrases Kohlrausch and states that the representatives of the said doctrine think that killing a person in a state of necessary self-defence is the same as killing a mosquito¹⁶.

If we agree with the doctrine of the negative signs of the elements of an act and consider the absence of justifying circumstances as a sign of the elements of an act, by that we will equate an intention, as a sign of the elements of an act, with the subjective signs of the justifying circumstances of an act. In addition, the differentiation between the elements of an act and unlawfulness is also important for differentiating between a mistake related to the elements of an act and a mistake related to prohibition. A mistake related to the elements of an act may imply a misrepresentation regarding the permissibility of a committed act. For example, when an actor is mistaken in thinking that he/she is killing game, but the committed action results in the deprivation of a human life. In this case, on the one hand, the person was mistaken in the object of an act, and at the same time, he/she was mistaken in the legal aspects of the act. However, this cannot be applied to all cases, and a person may be mistaken about the prohibition of a committed act, but not be mistaken about the signs of the elements of an act. An example of this is a putative self-defence, where an actor knows that he/she is killing a person, but thinks that it is being done in a state of necessary self-defence. This case differs in that it concerns a mistake related to the factual circumstances, which leads to a mistake about prohibition. A mistake related to the signs of the elements of an act also implies a mistake about factual circumstances. An example of this is a mistake about the object of an act.

5. Is There a Legally Free Space?

In the literature of criminal law, there are different opinions regarding whether, in addition to a lawful and unlawful act, there is a third act, which implies neither lawfulness nor

16. Tsereteli T., Problems of Criminal Law, Volume IV, Tbilisi, 2010, p. 119; Paeffgen H-U., ebenda, S. p. 17.

unlawfulness. For example, G. Nachkebia stated that there may be an act which is neither lawful nor unlawful. In his opinion, by committing the elements of an act, a person moves into a legally free space. If there is a circumstance that excludes unlawfulness, this does not mean that an act is lawful. The author comes to this conclusion based on the argument that the elements of an act are neither lawful nor unlawful¹⁷.

The elements of an act neither imply a legal evaluation nor are a subject of evaluation. Indeed, compliance with the elements of an act does not imply the lawfulness or unlawfulness of the act, because on the one hand, an unlawful act is committed through the commission of the elements of an act, and on the other hand, unlawfulness is not a sign of the elements of an act, but is rather beyond the elements of an act. Otherwise, only the commission of the elements of an act would be sufficient for the commission of an unlawful act. However, it should be noted that an act complying with the elements of an act before its commission, and an act committed in the real world, should be differentiated from each other. For example, the deprivation of human life, as an act included in the elements of a murder, is neither lawful nor unlawful by itself, because it can be committed both lawfully and unlawfully. If it is established that the elements of a murder have been committed, there is an assumption that the act may be unlawful. When it is established that the deprivation of human life occurred in a state of necessary self-defence, the lawfulness of the act is considered established, despite the fact that the elements of a murder have been committed.

According to one view expressed in the German literature of criminal law, besides lawfulness and unlawfulness, there is also a legally free space, not behind the elements of an act or within the scope of the elements of an act, but rather beyond it. Namely, suicide is considered as such¹⁸. Since the elements of a punishable act have not been committed, it is impossible to establish the unlawfulness of the act, but the author also excludes the lawfulness of the act. The above statement can be confirmed based on the argument that a person does not have the right to commit suicide, since according to the above opinion, life is not a disposable legally protected interest¹⁹. The punishability of euthanasia is based on the said concept as well (see Article 110 of the Criminal Code). In this respect, the representatives of the doctrine of a free legal space refer to the freedom of action, which they do not equate with the right, or to the granting of the right, to an actor²⁰. It should also be noted that, if according to one opinion a person does not have

17. *Nachkebia, G.*, in 'General Part of Criminal Law', Textbook, Fourth Edition, Tbilisi, 2019, pp. 186-188; *Todua, N.*, Regarding the Matters of Interrelation Between the Elements of an Act and Unlawfulness, and Intention and Guilt, in *Revaz Gogshelidze* 65, Anniversary Edition, Tbilisi, 2022, p. 54.

18. *Roxin C.*, Strafrecht, Allgemeiner Teil, Band I, Grundlagen. Der Aufbau der Verbrechenslehre, 4. Auflage, 2006, S. 611, §14 Rn. 28.

19. *Kublashvili, K.*, Fundamental Rights, Tbilisi, 2014, p. 127; *Gamkrelidze, O.*, Introductory Letter in the book by Ir. Surguladze 'Government and Law', Tbilisi, 2002, p. 23.

20. *Kaufmann A.*, Rechtsfreier Raum und eigenverantwortliche Entscheidung, in: Reinhart Maurach, Festschrift zum 70. Geburtstag, 1972, S. 332.

the right to dispose of his/her own life, according to another opinion a person has both the right to life and the right to commit suicide²¹.

According to another opinion expressed in the German literature of criminal law, an act of illegal abortion is considered to be committed in a legally free space if it occurred in a situation of extreme necessity²². This opinion is based on the argument that extreme necessity, an act to save a mother's life, excludes the unlawfulness of the act, although on the other hand, it is a matter of born and unborn life. A reference is also made to the collision of duties, when a father acts to save one of his children, but in the meantime, another child dies due to the failure to provide help²³.

In the case of extreme necessity and the collision of duties, some authors allow, under the doctrine of personal wrong, the possibility of excluding the unworthiness of an act despite the unworthiness of the result, since in their opinion an actor cannot be blamed for a decision made regarding an action. According to the above reasoning, it is clear that the named authors believe that it is unjustified even to talk about the fact that an actor should be forgiven for the action taken. Referring to the expressed opinion, in such cases legal order cannot say what kind of decision of an actor would be correct²⁴. However, in this respect, the possibility of a valid answer is allowed by taking a decision to save the legally protected interest that is more important than the deprived one in the case of extreme necessity, and in the case of a collision of duties, to save one of the legally protected interests in conditions where both interests are at the risk of deprivation and it is impossible to save both legally protected interests.

The focus on a legally free space in the literature of criminal law is worth noting regarding the fact that the scope of law is so broad that the legislator cannot cover and regulate everything without gaps²⁵. In this regard, suprastatutory circumstances that exclude unlawfulness are worth noting. However, it should be noted that there is a special norm in the Criminal Code of Georgia in the form of Article 32. The fact that such circumstances are not mentioned in the Code as such is not a reason to say that the legal resolution of the issue is not regulated. In addition, even if justification was based on suprastatutory circumstances in the conditions of the absence of a special norm in the Criminal Code, this would still not be a reason to say that an act is neither lawful nor unlawful. The commission of the elements of an act in the absence of circumstances that exclude unlawfulness would be of essential importance for establishing the unlawfulness

21. In this regard, see the decision of the Constitutional Court of Germany of 26 February 2020. BVerfG 26.2.2020. Published in the journal: NJW 13/2020, pp. 905-921. Regarding the matter of a general personal right, see *Gotsiridze E.*, in the book 'Comments to the Constitution of Georgia, Chapter Two, Fundamental Human Rights and Freedoms, Tbilisi, 2013, p.102.

22. In this respect see *Roxin C.*, Strafrecht, Allgemeiner Teil, Band I, Grundlagen. Der Aufbau der Verbrechenslehre, 4. Auflage, 2006, S. 610, §14 Rn. 26.

23. In this respect see *Roxin C.*, ebenda; *Kaufmann A.*, ebenda, S. p. 337.

24. In this respect see *Kaufmann A.*, ebenda, S. p. 330.

25. *aufmann A.*, ebenda, S. p. 332.

of the act, while the existence of justifying circumstances, even in the absence of a special norm, would determine lawfulness²⁶.

According to an opinion expressed in the literature, if an act is regulated by legal order, it is either lawful or unlawful. However, this does not mean that every act should be regulated. There may be an act that is not provided for by a norm, and therefore is neither lawful nor unlawful²⁷.

The representatives of a legally free space actually associate its existence with the legislator's silence, but sometimes the legislator is silent deliberately, meaning that this is not a case which the legislator did not think about or evaluate legally, although it should also be noted that this is not always the case. Sometimes the legislator is silent, but the case does not remain without a legal resolution through the interpretation of a norm. Take the question of unsuccessful organisation: if, under Article 25(7) of the Criminal Code of Georgia, unsuccessful incitement is punishable as the preparation of a crime, the legislator does not say anything about unsuccessful organisation, but this does not mean that it should not be punished. Where little is punishable, big is even more punishable. Accordingly, the organisation of a crime will be punished, like unsuccessful incitement, as the preparation of a crime.

A. Kaufmann uses a term 'legally free space' with different meanings. According to one of the meanings, the term covers acts that are not of interest to law, such as eating, drinking, sleeping, listening to music, writing a letter, religious services, etc. He states that there may be 'legally neutral', 'legally indifferent', and 'legally irrelevant' acts. As for the second group, Kaufmann includes there acts that are free from legal consequences and do not lead to punishment. This may be caused by the absence of unlawfulness or guilt, or cases of exemption from punishment. At the same time, Kaufmann assumes that the second group of cases is related to legal evaluation²⁸.

If we agree with the above opinion, acts such as sleeping, walking, eating, or dressing, are neither lawful nor unlawful. However, those acts are lawful insofar as they do not contravene law. The fact that an act is not regulated by a legal norm does not mean that it has no relation to the legal norm. As for the commission of an act in the absence of unlawfulness or guilt, A. Kaufmann states that it is related to legal evaluation, due to which it is highly controversial to talk about a legally free space in this case.

In his paper A. Kaufmann separately discusses and pays special attention to abortion in the case of indications provided for by law and states that, in such case, the act is 'not prohibited' but not 'justified'. Kaufmann bases this reasoning on the argument

26. In the Criminal Code of Germany, there is no norm that would be similar to Article 32 of the Criminal Code of Georgia.

27. Kaufmann A., ebenda, S. p. 334.

28. Kaufmann A., ebenda, S. p. 336.

that nobody has the right to dispose of the life of an embryo²⁹. In this regard, it can be said that it is actually controversial in which cases abortion should not be punishable, whether a pregnant woman can be exempted from liability, and other matters, but the fact that positive law, the applicable legislation, leaves an act unpunished in certain cases, is a reason to say that the act is lawful. Another issue is whether liability should be excluded due to the absence of unlawfulness or guilt, but Georgian legislative regulation allows for the exclusion of liability by excluding wrong. Moreover, since illegality is a normative sign of the elements of an act under Article 133 of the Criminal Code of Georgia, and the said article does not even consider the unborn life as an interest under primary protection, in the presence of relevant indications, liability is excluded at the stage of the elements of an act. The use of the mentioned terminology and the consideration of the possibility of the exclusion of liability at different stages is also provided for by Article 7 of the Criminal Code of Georgia, which establishes the concept of a crime and offers a three-element structure of a crime. It would be illogical to look for the terms and the resolution of the problem that bypassed the three-element structure of a crime, because the latter is the main aspect in the consideration of the issue of excluding liability.

6. Unlawfulness and Unified Legal Order

According to one opinion, which is considered to be prevalent in the German literature of criminal law, unlawfulness means the (unified) opposition to the legal order. The establishment of unlawfulness means its establishment in all areas of the legal order. Law establishes unity. Therefore, there is no specific criminal unlawfulness according to which an action complying with the elements of an act would be unlawful within the scope of a delict punishable under criminal law, but would be lawful outside the scope of criminal law, or vice versa³⁰. According to some authors in the literature of criminal law, it is possible to justify sectorally in terms of compliance with the (unified) legal order³¹. An interest protected by a right may lead to compensatory damages in civil law. A police officer's defensive action may be justified in criminal law based on justifying circumstances, but still result in a disciplinary response, since the rules for using firearms were not observed when the defensive action was taken. *Based on the above, it is completely justified to talk about criminal unlawfulness*³². Accordingly, placing emphasis on the general significance of the assessment of criminal unlawfulness is correct as far

29. Kaufmann A., ebenda, S. p. 341.

30. See the overview of this opinion, Paeffgen H-U., ebenda, S. p. 19. On the issue of the establishment of unlawfulness according to the unified legal order, see Roxin C., Strafrecht, Allgemeiner Teil, Band I, Grundlagen. Der Aufbau der Verbrechenslehre, 4. Auflage, 2006, S. 613, §14 E Rn. 31, 32. The mentioned opinion is also supported in the Georgian literature of criminal law. See Turava, M., Criminal law, General Part, Doctrine of Crime, Tbilisi, 2011. p. 333.

31. In this respect see Felix, Einheit der Rechtsordnung, 1998, S. p. 290.

32. In this respect see Tsereteli T., Problems in Criminal Law, Volume IV, Tbilisi, 2010. 33; Tskitishvili, T., The Principle of Unified Legal Order and the Issue of Unlawfulness of an Act, in the book: Revaz Gogshelidze 65, Anniversary Edition, Tbilisi, 2022, pp. 109-140.

as establishing that a criminal case may exist outside the scope of a criminal wrong, when criminal justifying circumstances are present. Therefore, a criminally justified act cannot be incriminated on the basis of other justifying circumstances. In other words, ‘a necessary self-defence against a necessary self-defence is impermissible’³³. Since a criminal case cannot exist outside a criminal wrong, the justification of an act by criminal justifying circumstances is important for excluding a criminal wrong. Otherwise, criminal lawfulness is insignificant for other branches of (national) law³⁴. Since a verdict delivered regarding criminal unlawfulness is the most serious and weighty one, Paeffgen raises the question of whether it can influence other areas when it comes to criminal evaluation, the elements of an act, which is related to another associated discipline. The author answers by saying that it depends on the legislator. In this regard, tax and environmental law are worth noting³⁵.

7. Conclusion

The concepts of unlawfulness and a wrong do not have the same meaning. The predicate of unlawfulness is a categorical evaluation. It shows the relation of an act with the legal order. An act is either unlawful or lawful. A wrong entails evaluation, something substantive, and involves an act. A wrong has a degree that depends on the value of the good and the intensity of the attack on the good. The compliance of an act, the unlawfulness, and the reprehensibility, are metatheoretical concepts. A wrong has a degree similar to guilt.³⁶

Unlawfulness is categorical in nature, since it has areas of expression according to the branches of law. An act can be evaluated both in criminal law and in civil and administrative law. Similar to an offence, an unlawful act can be classified according to the branches of law.

33. „Deswegen ist die Redeweise von einer Strafrechtswidrigkeit (also einer strafrechtlichen Rechtswidrigkeit) sachlich bereichsweise durchaus berechtigt“. Paeffgen H-U., Rechtswidrigkeit als juristische Kategorie, in: Hilgendorf E., (Hrsg.), Rechtswidrigkeit in der Diskussion, 2018, S. 20.

34. Paeffgen H-U., ebenda, S. 20.

35. Paeffgen H-U., ebenda, S. 21.

36. Paeffgen H-U., ebenda, S. p. 23.

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