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The Meaning of Prohibition of Discrimination for the Freedom of Contract (In the perspective of horizontal effect of human rights)

The presented research is another attempt to analyze the issue of the interrelation of private law and human rights. The legislation prohibiting discrimination limits freedom of contract significantly. The latter represent the basis of private law and expression of the free development of personality. That's why, it is interesting to observe, how the "antidiscrimination" legislation operates in the field of contract law and to what extent does it limit the freedom of private persons. When the constitutional principle of equality is applied in horizontal relations, particularly, in the sphere of contractual freedom, the conflict of the private interests occurs. The resolution of this conflict requires analysis of the essence of both institutions of law in the light of modern values.

The article covers doctrinal issues, as well as the analysis of the Georgian legislation and overview of the EU experience.

The aim of the research is to emphasize the important problems related to the coexistence of the prohibition of discrimination and contractual freedom and offer the reader the ways towards its solution.

Key Words: *Prohibition of discrimination, freedom of contract, horizontal effect of human rights*

1. Introduction

The presented inquiry is one more attempt to analyse a problem of the the interrelation of human rights and private law. The main target of modern legislation of prohibition of discrimination is one of the important institutes of civil law - the contractual freedom. The latter is a pillar of private law, whilst the private law itself, as a legal institute, is an expression of personality. That's why, it is interesting to observe, how the "antidiscrimination" legislation operates in the field of contract law and to what extent it limits the freedom of private persons.

The aim of the research is to discuss aspects of the interrelation of the freedom of contract and the constitutional principle of equality, to demonstrate the possibility of the horizontal effect of Law of Georgia " on Prohibition of All Forms of Discrimination" and difficulties, that are related to it.

The work is based on the comparative, normative and systematic research methods.

Firstly, the paper will review a legal phenomenon, which is called a horizontal effect of human rights. Afterwards, the content of the private autonomy and the freedom of contract will be discussed. The work also contains the analysis of typical cases of the infringed contractual parity. The article reviews the principle of equality, its constitutional basis and Georgian, as well as, European antidiscrim-

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ination regulations. The function of the prohibition of discrimination and its importance for the contract law will also be discussed. In the end, the problematic of the balance between the contractual freedom and the prohibition of discrimination will be presented to the reader.

2. The Horizontal Effect of Human Rights

While discussing the problem of the interrelation of the prohibition of discrimination and contract law, it is necessary, to address such important issue of the modern jurisprudence, as the effect of human rights on private law.

Human rights and the private law, at least, on the European scale, were viewed as two different spheres of law. Traditionally, human rights are part of public law, which operated in the vertical relations between private persons and the state, whilst, the private law regulates the horizontal relations between the privates. The relationship between the state and the private person was viewed as one of fundamentally different nature, in comparison to the relation between the privates, as the state had a monopoly on the coercion of the private persons. In a traditional sense, human rights influence only vertical relations, because, first of all, they represent terms, to which a state must comply with, according to the social contract and the sovereignty granted by the citizens.[1]

During the last years, there have been a lot of academic works published in Europe about interaction of human rights and private law. As a result, the connection between human rights and private law has been widely acknowledged. In addition, a vision of judges and lawyers have also changed – they rely more often on human rights in private law disputes. The reasons for such tendency are many: firstly, the influence of multinational companies in the society has increased. The state governments are often trying to avoid responsibility by delegating their power to private persons/entities. As a result, the border between the private and public entities has got blurred and it has become necessary to protect individuals from the infringement of their human rights by private entities.[2] The growing tendency of abuse of rights by non-state actors and difficulty of prevention of such acts by legislative authorities makes it difficult to preserve pure "vertical" approach if the final goal is to protect human rights to effective extent and content. [3] As a matter of fact, some private actors have an influence on the fundamental rights of individuals. For example, the social pressure of concrete group or family can be more powerful, than the coercion undertaken by the state. Sometimes, social reality pressures people to break legal rules, although, they might realize the state reaction to their actions.[4]

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1 *Somers S.,* Protecting Human Rights in Horizontal Relationships by Tort Law or Elaborating Tort Law from a Human Rights Perspective, European Human Rights Law Review, 2015, 150.

2 Ibid, 149-150.

3 *Colm O'C.,* Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights, Hibernian Law Journal, 2003, 81.

4 *Somers S.,* Protecting Human Rights in Horizontal Relationships by Tort Law or Elaborating Tort Law from a Human Rights Perspective, European Human Rights Law Review, 2015, 150.

According to the advocates of the "horizontal" effect of human rights, there is no significant difference between public and private law, because the interpretation and enforcement of law depend on state authorities. The proponents of this position see human rights as fundamental norms, that are relevant for the whole system of law: If a right is violated, the identity of the perpetrator should not matter for the appropriate defense. The fact, that the public authority did not participate in violation of a right, should not prevent protection of a person by human rights. The effective protection of human rights necessitates their use, at least, towards some private persons.[5]

It's self-evident, that, today, it's impossible to envision private law without effect of human rights. The main scholarly problem in relation to this issue is to determine how and to what extent, do the human rights intervene in private law. Although the debate about this topic traces back to 50's of the 20th century, it remains as a point of controversy even today, among the schools of continental Europe and that of the common law. The majority of scholars agree, that human rights effect private law indirectly. In German law, the abovementioned theory was most comprehensively developed by *Günter Dürig*. The doctrine of the indirect effect of human rights is a dominating theory in jurisprudence. According to *Dürig* human rights, as a part of the constitution, represent a system of values for every institute of law. In his opinion, the direct and absolute application of constitution to private law contradicts the principle of private autonomy, which is the basis for the whole system of private law. Consequently, due to the independent nature of private law, the violation of private law norms can't be identical to the violation of constitutional norms neither in contract nor in tort law. The constitutional law can only demand from the private law the fulfillment of the vacuum free from the constitutional values. The application of constitutional values in relation to private law is carried out through interpretation of "open" concepts and general clauses of private law.[6] Correspondingly, the order of constitutional values should be taken into account, when using norms of private law, especially, while concretizing general clauses and legal notions, that require interpretation through these values.[7]

The most active advocate of the direct effect of human rights in German jurisprudence was *Hans Carl Nipperdey*. He was the president of the federal labor court of Germany in 1950-60's. According to *Nipperdey*, the limitation of the scope of human rights only with the relations between the state and the private person belittles the aim and the meaning of the modern, democratic constitution. According to his prognosis, human rights will develop into the directly applicable regulations, rather than remain just ends and guiding principles. In his opinion, human rights, as norms of the highest ranking, would be fully protected, when not only the state branches but also ordinary civilians would take them into account. Under the guidance of *Nipperdey*, the German Federal Labour Court has acknowledged the theory of direct effect and used it actively in labor disputes.[8]

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5 *Colm O'C.,* Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights, Hibernian Law Journal, 2003, 80-81.

6 *Park K.,* Die Drittwirkung von Grundrechte des Grundgesetzes im Vergleich zum koreanischen Verfassungsrecht, Halle (Saale) 2004, 14-19, 37-39.

7 *Koch J.,* Münchener Kommentar zum BGB, 5 Aufl. 2010,196.

8 *Mak C*., Fundamental Rights in European Contract Law, Amsterdam, 2007, 50.

As a primary designation of human rights is to protect a citizen from the state, the majority of the scholars refrain from acknowledging their direct effect, although there is objective value order put in the human rights, which is common for all fields of law.[9] Apart from this, the meaning and the scope of human rights does not enable us to use them identically, horizontally between private persons. One can't always demand from private persons and organs the same approach that is awaited from public structures. For example, a private person might have a wish to establish a fund that helps representatives of certain ethnicity or sex, without any legitimate reason. As a rule, the same unjustified action of the state would be recognized as a violation of the obligation of equal treatment, but if press the same requirement are being pressed onto a private person, it will result in inadmissible interference into the private autonomy.[10]

3. The Content of Private Autonomy and Contractual Freedom

In order to characterize private law order with just one word, then it should be called it a "property order". The latter explains the essence of bargaining power of private autonomy, which means "the principle of establishment of legal relations according to the will of the privates".[11] That's why, the contract, that is concluded according to the legal requirements, has a binding force of law towards its parties. Even the Napoleon Civil Code of 1804 was full of the pathos of liberal contract law, as it expressed the private autonomy between the freedom and the binding force of the contract. After two decades, its philosophical foundations were represented by *Emmanuel Kant* in his work "Metaphysics of Morals". Yet, a decade earlier, *Adam Smith* has remarked, that from contract and trade of goods, the society receives a common benefit. The principle of contractual freedom hasn't lost its meaning even under the socialist pressure. Despite the fact, that, at a glance, this concept has stopped its evolution and returned to the foundations, that were established in 19th century, today, it is being constantly questioned in Europe, due to different private law regulations, as the legislation for the prohibition of discrimination.[12]

A contract is the most basic and widespread instrument of regulation of economic relations between the subjects of private law.[13] It is an essential mean for distribution of social and material goods. In Europe, modern society is often described as a "contractual society", through which the role of the contract in legal order and in the effective functioning of civil trade is being emphasized.[14]

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9 *Koch J.,* Münchener Kommentar zum BGB, 5 Aufl. 2010, 196.

10 *Colm O'C.,* Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights, Hibernian Law Journal, 2003, 82.

11 *Lobinger T.*, Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil - und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 102-103.

12 *Basedow J.,* Freedom of Contract in the European Union, European Review of Private Law, 6-2008, 902-903.

13 *Chechelashvili Z.*, Contract Law (Comparative Law Inquiry Essentially on the Basis of Georgian Law), Tbilisi, 2014, 17.

14 *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.:* Contract Law, Tbilisi, 2014, 50-51.

Freedom of contract is directly connected to the principle of private autonomy. The private autonomy, primarily, means freedom of choice – a person's freedom to choose a contractual partner and establish a relationship according to the mutual wish and expectations. [15] Thus, contractual freedom can be characterized as a personal freedom to determine relations with other through the agreement.

Firstly, contractual freedom means, that the parties enjoy freedom to enter the contract they desire, with the terms, they find most favorable. Secondly, contractual freedom involves a right to abstain from entering into a contract.[16] The positive part of the contractual freedom operates on the basis of the freedom of self-determination and free development of personality, while the negative side means freedom from the state interference with contractual relations. The rules regarding the drafting of contracts, their non-fulfilment and termination can serve as an example of the latter. It can be prescribed, through these rules, that in certain situations, parties have no right to enter into a contract (for example, in case of legal incapability) or on the contrary, a party may be obliged to enter into a contract (for example, in the case of establishment of monopoly on the market).[17] "Obligation to contract is not strange to the modern civil trade and its aim is to facilitate protection of interests of the participants of this trade. In other words, the protection of a right may be expressed not only in the freedom of action but also in coercion".[18] Furthermore, the basis of the emergence of legal obligations can be not only terms exclusively prescribed by the contract but also pre-contractual relations. Generally speaking, contract law can be considered as the legal limitation of party manoeuvrability.[19]

State interference with contractual relations is necessary for the both parties to realize their rights of self-determination to the fullest. The interference by legislator and court may be required to balance the bargaining power of the parties. The court review of the content of the contract may also be necessary to determine the fact, whether the parties did have a possibility to participate in the determination of essential terms of the contract. Thus, the principle of contractual freedom is not limitless. The contractual law offers us rules for the regulation of the freedom of the parties with regard to formal aspects of the contract, as well as, to the content of the latter.[20] It's worth noting, that in the German jurisprudence, the freedom of contract is considered not only as an expression of individual freedom but also as an expression of individual responsibility for facilitation of own business, that is derived from the acknowledgment of the human dignity.[21]

If parties to the contract are in equal conditions, then they can enforce their interests and consequently, they are in less need to be protected by human rights mechanisms, but the situation is different, when there is a structural inequality between the parties, where the stronger party can influence

15 Ibid, 55.
16 *Mak Ch.,* Fundamental Rights in European Contract Law, Amsterdam, 2007, 32.
17 Ibid, 32-33.
18 *Zoidze B.,* Constitutional Control and Value Order in Georgia, Tbilisi, 2007, 18.
19 *Mak Ch.,* Fundamental Rights in European Contract Law, Amsterdam, 2007, 32-33.
20 Ibid.
21 *Basedow J.,* Freedom of Contract in the European Union, European Review of Private Law 6-2008, 903-904.

the will of the weaker. For example, there could be an economic dependency or informational asymmetry between the parties during the conclusion of the contract. Exactly, in relation to such constructions, it might be necessary to use the horizontal effect of human rights, in order to protect individual freedoms. When there is the model, which is similar to the relationship between the state and the citizen, the subject of private law may be limited in effective enforcement of his/her individual autonomy.[22] With the application of human rights in contract law, the contract will become not only the mean of the distribution of wealth but will fulfill the main goal of contract law – ensure the fairness of this distribution.[23] "The rights of the participants of the trade must be determined in a way, for the trade to be accomplished and that its stability - to be in the interests of the both parties"[24].

Private autonomy, as well as the freedom of contract, is a defining element of the self-determination right of the individual. The self-determination primarily influences the value of private autonomy and contractual freedom. The contract and the contractual freedom promote free development of productive force and therefore are significant foundations for the evolution of the society. The basis of the freedom of contract can be found in the human right of personal development. The acknowledgment of this freedom, as of one of the constitutional values, also influences the evaluation of contractual freedom in civil law. As it was noted above, human rights, as an expression of the basic value order, also effect the private law. The difficulty consists not in the question, whether the contractual freedom should be considered in the context of the right of free development of personality, but in the issue of, how the boundaries of this basic right should be determined.[25] It should not be forgotten, that in the contractual relations each party is trying to realize his/her own right of free development of personality.

4.The Infringed Contractual Parity

In order to ensure contractual justice, the equal bargaining power of the parties is of an essential importance. The restitution of the contractual justice is mostly needed in relationships, where the contractual parity is infringed. Consequently, the prohibition of discrimination and other human rights may play a great role in balancing process of contractual interests.[26]

In this context, firstly, it's necessary, to discuss a right of an individual to choose a contractual partner. The freedom to choose a contractual partner also means a right to refuse to consider a certain person as one. For the full realization of contractual freedom, a person should have the ability to refrain from entering into a contract with a certain person, despite the reasons for his/her decision. This

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22 *Seifert A*., Die Horizontale Wirkung von Grundrechte Europarechtliche und rechtsvergeichende Überlegung, EuZW, 2011, 699.

23 *Compare: Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.,* Contract Law, Tbilisi, 2014, 51.

24 *Zoidze B.,* Constitutional Control and Value Order in Georgia, Tbilisi, 2007, 17.

25 *Wolf M*., Rechtsgeschäftliche Entscheidungsfreiheit und vertraglicher Interessenausgleich, Tübingen, 1970, 19-22.

26 Ibid, 12.

(negative) aspect of the freedom has an influence on others: The person who has been denied a contract might be deprived of a chance to receive a certain job position or of satisfying his/her essential needs for food or shelter. Sometimes, these results are derived from quite rational and effective decisions. For example, a job candidate got refused to employment, because the employer rationally considered another applicant better. But it's not excluded, that these results have been derived from inappropriate or groundless reasons. For example, the refusal to contract may be based on grounds of race, ethnicity, sex, sexual orientation, membership of the religious union or mere appearance.

The limitation of choice of a contractual partner is a dilemma of a modern market society. On one hand, the concept of individual freedom and free market supports unrestricted freedom of choice. On the other hand, this kind of decision may mean the refusal to equal opportunities and social isolation for the refused groups. Consequently, the sphere of freedom to choose a contractual partner has undergone re-evaluation and restrictions. The legislation prohibiting discrimination on offensive grounds has significantly limited the right to refusal to contract. In the past, the market transactions were typically viewed in the private dimension, but today, the freedom to choose a contractual partner is restricted by the legislator in certain contexts, in accordance with various criterions. In order to preserve their autonomy, individuals deserve to have a chance of rational choice, so that they won't be excluded from the market opportunities due to irrelevant personal characteristics – individuals should be proud of their own identities.[27]

In order to understand the issue at hand thoroughly, it's required to observe common examples of the infringed contractual parity, that are most frequent in the case law and legislation.[28]

4.1 Employer – Employee

The labor market, where personal characteristics play a more important role, is by its nature, more inclined towards discrimination, because here, it is necessary to not only authentically interpret market signals and implement them but also to use the potential of creativity and innovation, which stipulates collaboration of people of different qualification.[29] In the labor relationship, the need to balance interests is self-evident, because the employees and often their families' subsistence is depending on the employer. This means, weakening the bargaining power of the employee, as he/she is not able to wait until the moment he/she is can conduct a successful negotiation. The employer can choose another candidate when a potential employee doesn't agree to his/her terms. In the enterprise of mass production, lack of one worker is not regarded as a serious threat. Apart from this, the employee is often chained to

[27] *Collins H*., The Vanishing Freedom to Choose a Contractual Partner, Law and Contemporary Problems, 76 (2), 2013, 71-74.

[28] See *Wolf M*., Rechtsgeschäftliche Entscheidungsfreiheit und vertraglicher Interessenausgleich, Tübingen 1970, 12.

[29] *Lobinger T.,* Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 107.

his/her living place and consequently, local entities can confront workers with the same, unfavorable conditions.[30]

4.2. Landlord – Residential Tenant

An Analogous situation can be observed in a relationship between a landlord and a residential tenant. The housing is of an essential importance and he/she can't wait for the favorable conditions on the market. This kind of structural inequality is caused by the lack of housing on the market, that enables a landlord to look for another tenant.[31]

4.3. Supplier – Consumer

In comparison to the supplier, the consumer is also considered to be a weaker party of the contract, due to the lack of the bargaining power. In economics, this phenomenon is called "an exploitation theory". The consumer is in need of a special protection for two reasons: He/She doesn't have a choice, other than to agree to the terms of the big, strong companies and the latter can use informational asymmetry to its advantage. However, the shortcoming of this theory is the fact, that the competition between the parties is not taken into account, which limits the bargaining power towards the consumers. That's why, a consumer is mostly considered a weak party of the contract not because he/she lacks bargaining power, but because he/she doesn't have as much information about a product as its producers.[32] However, it should also be considered, that the market treats the consumers differently due to their social and financial status or education. The goods, service and especially credit is much more expensive for the poor than for the ones well-off. Of course, this can't be explained just by discrimination undertaken by a certain lender. In many countries, poor pay more, because he/she chooses a different kind of credit or buys the goods at a different place, other than the rich. There were times when it was thought, that education and information would solve the problem. But even in the developed states like Scandinavian countries, unprivileged groups are forced to agree to the more expensive type of credit, because they are refused by "ordinary" lenders. Thus, the issue of equality is more or less ignored in the credit consumer sphere. Here, terms like "risky consumer" and "unprivileged consumer" are frequently used.[33] However, it is a false conclusion, that discrimination in this kind of consumer relationships is just the result of the undignified treatment. The important problem consists in the fact, that the market system itself often produces discrimination in contractual relations. [34] Credit consumer

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30 *Wolf M.*, Rechtsgeschäftliche Entscheidungsfreiheit und vertraglicher Interessenausgleich, Tübingen, 1970, 12-13.

31 Ibid, 13.

32 *Rühl G.*, Consumer Protection in Choice of Law, Cornell International Law Journal, Vol.44, Issue 3, 2011, 571-572, < www.heinonline.org >.

33 *Wilhelmsson T.*, Contracts and Equality, Scandinavian Studies in Law, Vol. 40, Stockholm 2000, 146-147, <http://www.scandinavianlaw.se>.

34 Ibid,150.

market is not the example of the traditional market, where discrimination would exist on the rational (market) grounds. The price of credit always involves the price of risk, that will cover the risk of the due credit and of course, the risks are different according to the financial status of the consumer. This is the reason of the construction like "Poor pay more". Also, in the insurance relations, classification of the insurance risks and costs of insurance, the age, sex, and place of living of the insured might also be taken into account. The different degree of the risk is an important ground for discrimination on the market.[35] The differences, which stem from economic conditions i.e. prescribing different price to different types of consumers, is difficult to qualify as discrimination.[36]

Discrimination undertaken on the grounds of sex, race, religious or sexual orientation is much more easier to regulate, than the discrimination related to the financial status of consumer, because, in the first, often consists of subjective elements, although economic reason might also exist, whilst, the latter is compatible with the main idea of market economy.[37]

5. Prohibition of Discrimination, as Objective Legal Boundary for the Private Autonomy

The independent determination of relations, of the personal as well as of the economic character, is a primary human need. The clear example of this can be a process of child upbringing. The will of the latter contradicts order of the society every day. Thus, the private legal order providing the freedom corresponds with the primary need of human for the justice.[38] The prohibition of discrimination limits private autonomy and changes its content.

5.1 The Principle of Equality in Georgian Constitution and the Concept of Discrimination

The term discrimination means a different treatment – it's the violation of the right to equal treatment.[39] "The right to equality before the law is acknowledged in different forms almost in every legal system."[40] "The quality of guarantee of equality before the law is an objective criterion to evaluate a countries' quality of the democracy and rule of law limited by the supremacy of human rights. Thus, the principle represents not only a foundation of a state of law and democracy but also its goal".[41]

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35 Ibid,151.

36 Ibid,155.

37 Ibid,159.

38 *Lobinger T.,* Vertragsfreiheit und Diskriminierungsverbote, Vertragsfreiheit und Diskriminierung, 01.03.2007, 104-105.

39 *Dzamashvili B.*, Discrimination as a Legal Category and Forms of its Expression, The protection of Human Rights and Judicial Reform in Georgia *(Red. K. Korkelia),* Tbilisi, 2014, 271.

40 *Tughushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Case Law of Constitutional Court of Georgia, Tbilisi, 2013, 30.

41 Constitutional Court of Georgia, Decision of 27th December 2010, №1/1/493, Political Unions "Akhali Memarjveneebi" and "Conservative Party of Georgia" against the Parliament of Georgia, II,1;/See

The acknowledgment of any human right would lose its sense, if the ability of equal access to it, is not guaranteed.[42] The 14th article of Constitution of Georgia "determines fundamental constitutional principle of equality before the law. Its aim is to restrict the differentiated treatment of the essentially equals and visa-verse".[43] In the framework of the principle of equality, a state's main goal and function can't be the complete equalization of people, as this would contradict the idea of equality — the essence of the right. "The idea of equality serves as the guarantee of equal capabilities." [44] The right to equal treatment consists of following elements: 1) Equality before the law, which means the equal application of the law for everyone by state organs 2) Equality in accordance with law, which means, that the law must operate equally for everyone. Subsequently, "the right to equality does not require the achievement of absolute and total equality, but it demands the equality before the law and in boundaries of the law."[45]

In some cases, a different treatment is forbidden in concrete cases, exhaustively prescribed by the constitution. In other cases, the differentiation is forbidden just in the framework of enjoyment of a constitutional right. Also, there are cases, when the differentiation forbidden by the constitution is of a general character. According to the court practice, approaches for interference in the right are different, in accordance with a right or an aspect of social life to which the differentiation refers to.[46]

The 14th Article of the Constitution enumerates grounds, on which, the discrimination is prohibited: "Every human is born free and equal before the law indiscriminately of race, colour of skin, language, sex, religion, political or other beliefs, national, ethnic or social belonging, origin, economic or titular conditions, or place of residence." The Constitutional Court of Georgia, similar to other European courts, had to define the issue, whether, grounds enumerated in the 14th article of the constitution were exhaustive i.e. whether other grounds for the qualification of unconstitutional differentiation may exist.[47] It's worth noting that, constitutions enumerated signs of discrimination on the basis of the huge experience of human discrimination on these grounds and due to fear of a continuation of such treatment.[48]

Tughushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V., Human Rights and Case Law of Constitutional Court of Georgia, Tbilisi, 2013, 30.

42 *Eremadze K.,* Balance of Interests in Democratic Society, 2013, 166.

43 Constitutional Court of Georgia, Decision of 18th March 2011, №2/1/473, Citizen of Georgia Bichiko Chonkadze and other against the Minister of Energy of Georgia, II, 1./Constitutional Court of Georgia, Decision of 27th December 2010, №1/1/493, II, 1. / See: *Tughushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Case Law of Constitutional Court of Georgia, Tbilisi, 2013, 30.

44 Constitutional Court of Georgia, Decision of 27th December 2010, №1/1/493, II, I, 2; / See; *Tughushi, T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Case Law of Constitutional Court of Georgia, Tbilisi, 2013, 31.

45 *Dzamashvili B.*, Discrimination as a Legal Category and Forms of its Expression, The protection of Human Rights and Judicial Reform in Georgia *(Red. K. Korkelia),* Tbilisi, 2014, 270-271.

46 See *Tughushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Case Law of Constitutional Court of Georgia, Tbilisi, 2013, 30.

47 Ibid*,* 35.

48 *Eremadze K.,* Balance of Interests in Democratic Society, 2013,169.

Till 2008, the Constitutional Court of Georgia used a narrow definition of the 14th article of the constitution and through applying the grammatical method of interpretation, ruled, that the 14th article axhaustively enumerated all the ground of discrimination.[49] Later, the court changed its approach and determined, that "The 14th article establishes not only the basic right to equality before the law, but also the fundamental constitutional principle of equality before the law"; "The aim of the norm is much more wide than just discrimination on limited grounds enumerated in it."[50] The Constitutional Court also noted, that "the differentiation on these grounds represents cases of discrimination with bigger risk and requires special attention from a legislator. Although, this does not mean the exclusion of existence of other cases of unreasonable human differentiation and of the need for their constitutional protection."[51] As a result of this definition, the scope of the 14th article has widened and other cases of interference in the right were established.[52] Like the Georgian constitution, international acts do not define an exhaustive list of signs of discrimination and use the clause, that prescribes, that the discrimination is prohibited on "any other grounds". This, for its part, makes the fight against discrimination more flexible.[53]

5.2 The Importance of Law of Georgia "on Elimination of All Forms of Discrimination" for Private Law

On 7th May of the year 2014, the Parliament of Georgia adopted a law "on Elimination of All Forms of Discrimination". This law has placed constitutional principles of equality in the field of private law. Consequently, this raises a question about the horizontal effect of the 14th article of the constitution. How does the law, which is full of constitutional regulations, apply between the privates? The analysis of the content and structure of the law gives us the reason, to suspect, that, in this case, the basic right of the equality has a direct scope of application between private persons.

At one glance, the law is a harmless legal mechanism for the strengthening of the values protected by the constitution. Its aim is "elimination of all forms of discrimination and guarantee of the equal enjoyment of the rights provided by legislation of Georgia for physical and legal persons."[54] The law enumerates the most wide-spread marks of discrimination, but this list, like the grounds given in the constitution, is not exhaustive.[55] The law defines the notion of direct and indirect discrimination[56] and

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49 *Tughushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Case Law of Constitutional Court of Georgia, Tbilisi, 2013, 37.

50 Constitutional Court of Georgia, Decision of 31th March, №2/1-392 , Citizen Shota Beridze and others against Parliament of Goergia, II.P.I. / *Tughushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Case Law of Constitutional Court of Georgia, Tbilisi, 2013, 36.

51 Constitutional Court of Georgia, Decision of 18th March, №2/1/473 , II.P.I. / *Tughushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Case Law of Constitutional Court of Georgia, Tbilisi, 2013, 36.

52 *Tughushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Case Law of Constitutional Court of Georgia, Tbilisi, 2013, 40.

53 *Dzamashvili B.*, Discrimination as a Legal Category and Forms of its Expression, The protection of Human Rights and Judicial Reform in Georgia" *(Red. K. Korkelia),* Tbilisi, 2014, 275.

54 Law of Georgia "on Elimination of All Forms of Discrimination", 07/05/2014, article 1.

55 Ibid.

prohibits not only them but also any other act, that aims to coerce, encourage or facilitate a person to discriminate against the third person.[57] The law prescribes the obligation to undertake measures for elimination of discrimination.[58] In addition, it's important, that this legal act contains constitutional test of balancing of human rights: "The realization/protection of their rights by a person or group of persons, characterized by one of the grounds of discrimination, should not violate public order, social security or rights of others".[59]

What is more important is that, the scope of the law is quite wide and applies not only to public institutions, but also to organizations, actions of physical and legal persons in all areas, but only in those cases, when these actions are not regulated by other legal acts, which, in turn, should correspond to requirements of prohibition of discrimination.[60] It's clear, that application of the law to the private persons raises a question of horizontal effect of human rights, in particular, of constitutional prohibition of discrimination, because it is not of the essential practical importance, whether the constitution itself will be used or the additional legislative act, that repeats the constitutional regulation, while applying human rights between the privates. In this case, a private person carries a burden to act in accordance with constitutional values in the dimension of private law, while realizing his/her own right of free development of personality.

The law also contains additional procedural guarantees for the protection against discrimination. In particular, the supervision of the elimination of discrimination and guarantee of equality was assigned to the Ombudsman of Georgia.[61] One of the main obligations imposed on the ombudsman is an examination of the claims of physical or legal persons or groups of person, who consider themselves to be victims of discrimination.[62] As a result of consideration of a claim by the ombudsman, he issues a recommendation and refers to the organization in question to restore the rights of a victim.[63] In the case of ignorance of the recommendation, the ombudsman can refer to the court to issue an administrative act or demand the fulfillment of an action.[64]

The regulation of the division of legal burden between the claimant and the defendant is also important, as it significantly simplifies the process of the proof to the potential victim of discrimination: The claimant should present to the ombudsman relevant facts and adequate evidence, which give reason for presumption of the perpetuation of discriminatory action and if this presumption arises, the burden of proof will shift to potential perpetrator of the discriminatory action.[65]

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56 Ibid, Article 2, paragraph 2, 3.
57 Ibid, Article 2, pararagraph 5.
58 Ibid, Article 4.
59 Ibid, Article 5, pararagraph 3.
60 Ibid, Article 5, pararagraph 3.
61 Ibid, Article 6.
62 Ibid, Article 6, pararagraph 2, subpar."b".
63 Ibid, Article 6, pararagraph 2, subpar. "b", "v".
64 Ibid, Article 6, pararagraph 2, subpar. "z".
65 Ibid, Article 8, pararagraph 2.

5.3 The Review of Anti-Discrimination Legislation of EU

In last years, EU has adopted following directives prohibiting discrimination: 1) Directive 2000/43/EC of 29th June of the year 2000, which prohibits discrimination on the grounds of race and ethnicity (the so-called "Antiracism Directive") [66]; 2) The directive 2000/78/EC of 27th November of the year 2000, which defines a general framework for guarantee of the equal treatment in the field of the employment and profession (the so-called "Framework Directive" [67] 3) Directive 2002/73/EC of 23rd September of the year 2002, which refers to equal treatment of men and women in the fields of eccess to employment, professional education and development, as well as in relation to the conditions of labour; [68]4) Directive 2004/113/EC of 13th December of the year 2004 [69], which serves as the guarantee of equal treatment of women and men in the field of the supplement of goods and services.[70]

The directive against racial discrimination — the so-called "Antiracism Directive" — regulates discrimination on the grounds of race and ethnicity in labor and social relations and in the sphere of the supplement of goods and services, including housing, that is publicly offered.[71]

Directive 2004/113/EC guarantees the equal treatment of men and women in the field of the supplement of goods and services. It repeats the structure of "Antiracism Directive" and prohibits discrimination on the grounds of sex in a field of the supplement of goods and services that are offered to the public. In addition, the directive excludes from its scope transaction of the sphere of private and family life or transactions that are in the context of the latter.

Unlike the "Antiracism Directive", the "Framework Directive" of equal treatment allows, differentiated treatment in certain circumstances. For example, in special exceptional cases in the field of insurance, that are carried out without assessment of one's personality, as well as, agreements, that are connected to the spheres of private, family life and education. Here, it is referred to the establishments like women shelter, ownership of the attached flats or rooms that are rented out. Private clubs can also be considered in this category. Of course, the discriminatory treatment is permitted, if it serves a legitimate aim and the differentiated treatment is a necessary and adequate mean to achieve this aim.

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66 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin **,** Official Journal L 180 , 19/07/2000 P. 0022 – 0026.

67 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**,** Official Journal L 303 , 02/12/2000 P. 0016 – 0022.

68 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Official Journal L 269 , 05/10/2002 P. 0015 – 0020.

69 Council Directive2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Official Journal of the European Union, 21.12.2004 L 373/37.

70 *Repgen T.,* Antidiskriminierung – die Totenglocke des Privatrechts läutet, Vertragsfreiheit und Diskriminierung, 01.03.2007, 20.

71 *Lobinger T*., Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 127.

2002/73/EC Directive ensures gender equality in the labour law field. Directive introduces nothing new in connection with the equal treatment between sexes. Instead, there is the "Antiracism Directive", along with the so-called "Framework Directive", actively used in the sphere of employment. The employers are prohibited to directly or indirectly discriminate potential employees on the grounds of sex as well as on the grounds of race, ethnicity, religious views or the ideology, disabilities, age or sexual orientation. The latter two directives define relatively wide exceptions for the differentiated treatment. These are cases, when the differentiated treatment on the grounds listed above is "essential and decisive" for the business or for the fulfilment of its terms. For example, participation of the black coloured in the film concerning 50-60's civil movement in USA, won't be qualified as discrimination. The special exceptions are defined by the "Framework Directive" in cases of discrimination on the grounds of religion and ideology, when the latter is carried out by the church, as the employer, or by other organisation, activity of which is based on the religion or particular ideology. The wide spectrum of exception contains the directive also in relation to the age discrimination, with the same formula justifying the unequal treatment: It must have a legitimate aim, be it an employment policy, labour market or professional education, should be proportionate to the aim pursued and necessary mean to achieve this aim. [72]

As a result of general analysis of the directives, it can be concluded, that the EU antidiscrimination program refers to the prohibition of discrimination on the grounds of race, ethnicity and sex in the fields of employment and profession, education and social security, as well as any type of discrimination in the field of access to publicly offered performances. As for the field of labour law, here, the grounds of discrimination expand and consist of prohibition of discrimination on the grounds of religion, ideology, disabilities, age and sexual orientation. [73] Seemingly, EU legislation refers only to the certain spheres and concrete grounds of discrimination. Its scope is not as wide as of its Georgian analogue. However, European scholars see hidden danger for the freedom of choice in the politics of the directives, because the grounds of the discrimination can easily be expanded according to the same principles. For example, in future, a membership of a certain sports association can be defined as one of the grounds of discrimination. According to the critiques, the fantasy has no rational borders.[74] Apart from that, some authors think that wide scope and vague character of the exceptional norms of the directives work against legal security.[75]

It seems, that the Georgian legislator has adopted the rule of the shift of the legal burden in favour of the victim, while taking into account the European experience. Like in the Georgian law, according to the directives, a victim of discrimination must present to the court evidences, which will arise the suspicion of the alleged discrimination. Later, the burden of proof shifts to the defendant – he/she must

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72 Ibid,129-133.

73 *Repgen T.,* Antidiskriminierung – die Totenglocke des Privatrechts läutet, Vertragsfreiheit und Diskriminierung, 01.03.2007, 22.

74 Ibid,40.

75 *Lobinger T.*, Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 135.

overcome the suspicions of the court.[76] The huge importance of this regulation is the following: If the ethnicity of the applicant asking for the housing, credit or other services is written "on his/her face", the supplier, who refuses to enter the contract, has to explain his/her decision. He/she definitely turns into a "suspect", when his/her choice is the person of other ethnicity, or when he/she merely refuses to enter a contract. In such case, he/she must prove before the court, that he/she has not violated regulations of equal treatment.[77]

Freedom of individuals is always connected with the principle of responsibility. The burden of the use of the right to self-determination is also on its subjects. The rule of the shift of the burden of proof can also be assumed as the expression of this phenomenon. It's true, that the civil law is already familiar with the mechanism of the shift of the burden of proof, but generally, in such cases, the debtor takes risks of the performance.[78] This kind of division of the burden of proof, can regularly subject the refusal to the applicant to the explanation, when the latter demonstrates characteristics, which are listed in the grounds of discrimination and are perceptible to the other party. This kind of assumption is quite reasonable in the field of trade of goods, where the personal characteristics are of no importance. Completely different is the case, when personal traits of the contractual party play their role or the relationship is established on trust. In cases like this, ones decision is based on subjective and rather irrational factors like appearance or communication skills. The regulation of burden of proof is not sufficient especially for the spheres of the residential tenancy and labour law. If the landlord will choose a coloured tenant, in order to avoid the suspicion of discrimination, this way he/she will discriminate against the white ones. Or if he/she will reach the decision in accordance with the income of the tenant, he/she is at risk of undertaking indirect discrimination. By using this kind of approach, decisions are no longer subject of criterions of rationality or subsequently, of the humanity. It seems, the decision should be reached either according to the time of application or by the dice. Apart from that, the regulation like this, may result in a situation, where am employers doesn't call the applicant from the circle of the potential victims of discrimination, even for positions, where the personal traits are unimportant.[79]

The EU directives do not prescribe sanctions for the discriminatory action, including the obligation to contract that, in turn, would have been inconsistent with Anglo-Saxon law.[80] Neither do directives define, whether the sanction for the discriminatory action should be of civil law character, or not,

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76 *Repgen T.,* Antidiskriminierung – die Totenglocke des Privatrechts läutet, Vertragsfreiheit und Diskriminierung, 01.03.2007, 37.

77 *Lobinger T.*, Vertragsfreiheit und Diskriminierungsverbote. Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 127-128.

78 *Repgen T.,* Antidiskriminierung – die Totenglocke des Privatrechts läutet, Vertragsfreiheit und Diskriminierung, 01.03.2007, 41-42.

79 *Lobinger T.*, "Vertragsfreiheit und Diskriminierungsverbote. Privatautonomie im modernen Zivil-und Arbeitsrecht", Vertragsfreiheit und Diskriminierung, 01.03.2007, 147-150.

80 *Repgen T.,* Antidiskriminierung – die Totenglocke des Privatrechts läutet, Vertragsfreiheit und Diskriminierung, 01.03.2007, 36.

although, the possibility to use the mechanism of reimbursement of the damage is emphasized. Directives merely demand for effective, proportional and interdictory sanctions. [81]

As a result of implementation of antidiscrimination program of EU, Germany has adopted "General Law of Equal Treatment" ("Allgemeines Gleichbehandlungsgesetz")[82], which is being actively used in the court practice, including, in the contractual disputes. Based on this legislative act, the Hannover Court of first instance has issued an interesting decision, on 23rd August of 2013: It has charged a nightclub to pay 1000 Euros of non-pecuniary damage to the civilian, who was refused to enter the club because of his Kurdish ethnicity. The victim of violation was refused to enter the club, because the club management didn't want a foreigner of masculine sex to enter the building. After the examination of the evidences, it was detected, that the men, with no alleged migrant background, entered the club with no problem. The court has prescribed in its decision, that in case of repetition of this kind of behaviour, the club would be charged with the fine of 250 000 Euros.[83] Also, the Köln Court of third instance, has issued a decision in favour of couple of African ethnicity, who were refused by one of the house managements of Aachen to rent a flat due to their skin colour. The house management was charged of 5.065 Euros of non-pecuniary damage. The court has ascertained the violation of personal rights – that discrimination that has violated the dignity of victims.[84] Analogously, in the future, it may be possible to find Georgian courts decisions based on combination of the law of Georgia "on Elimination of all Forms of Discrimination" and of 18th article of Civil Code of Georgia, that will protect private persons from discrimination against their dignity.

5.4. The Functions of Discrimination and Their Importance for the Contract Law

There are three basic functions assigned to the prohibition of discrimination: Protection of human dignity, fair distribution of wealth and the educational one. It's interesting how each of these goals correspond to the antidiscrimination legislation itself and what importance do they have for the contract law.

5.4.1. The Prohibition of Discrimination as a Protection of Human Dignity

When using the antidiscrimination legislation, the civil law order responds with the mechanisms of a general character. Firstly, the protection of personal non-pecuniary rights – the protection of human

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81 *Lobinger T.,* "Vertragsfreiheit und Diskriminierungsverbote. Privatautonomie im modernen Zivil-und Arbeitsrecht", Vertragsfreiheit und Diskriminierung, 01.03.2007, 130-132.

82 Allgemeines Gleichbehandlungsgesetz, 14.08.2006.

83 Das Urteil des Amtsgerichts Hannover vom 14.08.2013 (Az.: 462 C 10744/12).

84 AZ: OLG Köln, 24 U. 51/09.

dignity – should be considered.[85] The action targeted against personal rights of certain groups, sends its member a signal, that he/she is not welcome as a valuable member of society and subsequently, he/she is not allowed to participate in the certain field of social life. In such case, the abuse of human dignity is present.[86]

Apart from this, in relation to the protection of the dignity, it should be noted, that the EU directives do not contain an exhaustive list of the grounds of discrimination. The grounds enumerated by the directives reflect the most frequent and obvious social expectations. However, the scope of protection of personal rights might involve not only discrimination on grounds of gender and ethnicity, but also a discrimination based on the characteristics like the shape of the body, color of eyes, expression or defect of the speech. However, it is not necessary to establish a thorough catalog of these cases, if the protected values will be clearly defined and the important triggering points of the prohibition of discrimination – easily identifiable.

Unlike the Georgian law, in EU directives, there is not only the deficit of the grounds of discrimination but also insufficiency in the definition of the discriminatory action. The EU directives consider the discriminatory action of the supplier and employer (the stronger party of the contract). But the same actions carried out by the consumer or the employee are not considered. For example, an applicant refuses to take up the position offered to him, because, later, he has found out, that the employer is a woman or the consumer refuses to sign the drafted contract because the supplier is of different ethnicity. Thus, the EU antidiscrimination program doesn't fully achieve its main aim – the equal protection of personal rights of every member of legal society. This kind of approach might be justified with the argument, that the discrimination carried out by the consumer is not to be taken into account because the supplier has a "market power". As it seems, regarding this kind of approach, the construction company must not refuse to employ the worker of the ethnical minority but can discriminate against the supplier of the construction materials. Consequently, although, the foreign supplier might sell the cheapest material of the best quality, the construction company may refuse to enter into the contract without any valid reason.[87]

The Georgian legislation can't be the subject of the same critique, as despite, its shortcomings, it equally protects the dignity of both parties to the contract.

Unlike the state, it is allowed to privates to differentiate without any valid reasons, while entering into the agreement. However, they must choose such means, that will not infringe the dignity of the person, which they don't want to see as another party of the contract.[88] How is it possible to protect the

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85 *Lobinger T.*, Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil - und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 141-142.

86 Ibid,120.

87 *Lobinger T.*, Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 143-146.

88 *Repgen T.,* Antidiskriminierung – die Totenglocke des Privatrechts läutet, Vertragsfreiheit und Diskriminierung, 01.03.2007, 91-92.

dignity with the coercion to contract, is another question, whilst, the performance of the contract without persons will, may, often, have no value at all.[89]

Thus, if according to the civil trade, the value of the consumer is not defined by personal characteristics, but by his/her financial capabilities, the violation of personal rights is more easily detectable. However, when the authority of a person is subjected to general social expectations and opinions of the supplier – the aim of the contract must be evaluated. If the aim of the contract can't be detected or it doesn't correspond to the action of the supplier, the violation of personal rights are present, as the refusal to the contract doesn't serve his/her rights and interest, but, instead, is used merely to infringe rights and interests of others.[90]

5.4.2 The Prohibition of Discrimination Motivated by the Fair Distribution of Wealth and Integration Policy

The prohibition of discrimination motivated by distribution and integration policy should be distinguished from the prohibition of discrimination protecting human dignity. Here, one deals not with defense of the established legal positions, but more likely, with aspiration for a new reality. In the field of private law, the aim of the prohibition of discrimination is the assistance of groups of persons, that suffer from negative influence on the market or struggle to achieve the abovementioned position with their own power. There is a principle of social state standing behind this kind of prohibition of discrimination. This function of the prohibition of discrimination means an improvement of economic and social participation of those persons, who have been "rewarded" with an essential disadvantage.[91]

For constitutional postulates of freedom and equality to come into the reasonable and viable relation, firstly, they must be realized in different subsystems of law: In the field of private law, the legal principle of freedom prevails, in the subsystem of public law, however, the principle of equality is the priority. Only this can be in correspondence with the Lockean notion of equal freedom based on equality of birth. The principle, that only state and not private parties are bound by the requirements of equal treatment, corresponds to the notion of modern, free state. The obligation of equal treatment motivated by distribution and integration policy is strange to the private law. However, one can think of the latter, when a private action is not undertaken based on mutual freedom. This is especially noticeable when one party of the contract gets the power over the goods of existential importance and in the case of refusal to the contract, there is no other supplier available. Here, firstly, one must mention the obligation to contract concerning supplement of the goods of existential importance by those suppliers, who have gained a monopoly on the market. However, EU directives, as well as Georgian legislation widen their scope beyond such construction.

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89 Ibid, 88.

90 *Lobinger T.,* Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 142-143.

91 Ibid, 121-122.

This doesn't mean, that private persons should never be used to achieve goals motivated by distribution and integration policy. Of course, members of society should contribute to the public welfare and this can, in fact, be achieved by sacrificing the goods protected by the private law. The example of this, can be the system of taxes and fees, that automatically causes an infringement of the private sphere, for the wealth is nothing, but the materialized freedom.

Infringement of private sphere motivated by fair distribution policy requires this interference to be placed in the constitutional criterions of limitation of basic rights. In particular, the infringement must be an adequate and sufficient mean to achieve a legitimate aim.[92]

Herein, worth consideration is the critique, that even indirect coercion to enter the contract with members of vulnerable groups, as a rule, is not a sufficient mean to ensure the improvement of participation of such groups in social life. The improvement of the "market insufficiency" can be carried out through education, financial aid and creation of fostering systems. The state often refers to the public law measures to achieve these goals. Although, these measures negatively effect private investors. As the losses and procedural expenses increase, the investors put money in other spheres that negatively effects the fair distribution policy itself.[93] Economic freedom is a precondition of welfare. However, according to the critics of the antidiscrimination law, prohibition of discrimination in certain spheres, discourages investors, that limits the market and consequently, also chances to participate in it.[94] The problem is also the prejudices that the owners of the resources have about representatives of the vulnerable groups, the neutralization of which is rarely managed by the state.[95]

In relation to the distribution and integration policy, the issues of discrimination are interesting in the field of labor law. The discrimination on the grounds of gender and disabilities in the labor law field can be observed as an example.[96] Women are threatened by discrimination due to the special protection regime of motherhood. The state can't ensure effective results in the sphere, for the employer will use every method at its hand to act in accordance with the market rationality. The same problems arise when an employer is obliged to take into account the special working conditions of disabled persons. It seems that these conditions may have a negative impact on the labor market of vulnerable groups.[97] The higher the price of the social treatment is, the more methods will the employer use, to avoid the employment of vulnerable groups. Thus, the private law mechanisms of the prohibition of discrimination is not enough to ease their position on the labor market.[98]

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92 *Lobinger T.*, Vertragsfreiheit und Diskriminierungsverbote. Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 152-155.

93 Ibid,156.

94 *Repgen T.,* Antidiskriminierung – die Totenglocke des Privatrechts läutet, Vertragsfreiheit und Diskriminierung, 01.03.2007, 80-81.

95 *Lobinger T.*, Vertragsfreiheit und Diskriminierungsverbote. Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 156-157.

96 Ibid,159.

97 Ibid,160.

98 Ibid,162-163.

According to the famous American philosopher *John Rawls*, private law, and contract la in particular provides individuals with equal opportunities to act in accordance with their preferences. Thus, contractual relationships between private persons can't be subjected to the distributive approach. The aggregate effect of contractual transactions may cause a distributive injustice, that can be regulated by public law, but not by pressing the obligation of the protection of social justice onto the privates.[99]

The distributive measure, through the specific distributive effect, at its core idea and at a glimpse, is quite justified, because this way, the wealth is given to those, who need it the most. As an "informational system", the market is trying to correspond this demand to its egoistic approach. When the system does not only serve the satisfaction of essential needs, the fair distribution of recourses might be a mere coincidence due to the human individuality – what is important for one, is not for the other. Thus, egalitarian distribution of wealth may not correspond to individual needs of the private persons.

The property and contract is unquestionably a foundation for the competition order of the market economy, but the "free play of the powers" cannot ensure egalitarian distribution of the wealth and possibilities, for, in the contractual system, the personal talent, intellect, capacity for wok and already existent inequality of property operate factually without filter. Some authors see the system, as the one with the function of improvement of economic conditions of social life, for the profit within it depends on the satisfaction of the demand of others. This interrelation causes the permanent urge of innovation that is oriented towards satisfaction of the maximum volume of the society. Consequently, some authors assume, that the system itself is directed against discrimination, whilst, sooner or later, the personal characteristics of the consumer, as the criteria for differentiation, will lose its power. This will cause the decrease of the number of potential victims of discrimination and individuals will view themselves as the credible target group.[100]

Of course, the shadow sides of the competition-oriented order cannot be left without attention. This kind of system also produces " losers" and requires "completion", whilst the state supports individual participation in the distribution of social resources.[101]

5.4.3 The Educational Function of Prohibition of Discrimination

There is also a prohibition of discrimination, that neither serves the protection of human dignity, nor is it oriented towards improvement of participation in the society, but, first and foremost, its function is the creation of new social and moral value, through which the private actors will stop orienting merely on the personal benefit, while making a decision and will show moral wisdom and political correctness.[102] Thus, one of the functions of the prohibition of discrimination is, in a manner, the

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99 *Gutmann T.,* Theories of Contract and the Concept of Autonomy, Preprints and Working Papers for the Centre of Advanced Study in Bioethics, Münster 2013/55, 8, < www.uni-muenster.de>.

100 *Repgen T.,* Antidiskriminierung – die Totenglocke des Privatrechts läutet, Vertragsfreiheit und Diskriminierung, 01.03.2007, 105-107.

101 Ibid,108.

102 *Lobinger T.,* Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil - und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 122.

education of the nation.[103] Particularly noticeable is this approach in the earliest EU directive of 13th December 2004 that resulted in the prescription of unified tariffs in the field of insurance. When defining insurance payment, the directive allows for the differentiated treatment of men and women only in exceptional cases and under the strict control. According to the 5th article of the directive, in such cases, the sex must be a "defining factor" for determination of the price, based on the field of the insurance and statistical data. Following the directive, the insurer has a "moral obligation" to ensure equal treatment of the sexes against his/her economic calculations. The legislator tried to change the social reality with new norms and thereby, to create "antidiscrimination culture" in the field of insurance.[104]

Of course, the aim of the law prohibiting discrimination is to raise awareness. The upbringing of the nation by a legislator is a good tradition, against which only a few arguments can be found. The problem consists of limitation of freedom through this kind of "upbringing".[105] The direct target of the prohibition of discrimination motivated by the social moral is the freedom as such. It is directed against the notion of "private person", as an individual is forced to obey to the higher (administrative) moral. This way, the antagonism between the state and the society erases, the private sphere becomes political. The disappearance of the principle of freedom of self-determination from the essential spheres of life creates a threat for the establishment of the totalitarian state. In order to avoid such results, the state has nothing left but to encourage the private persons to freely make morally and politically correct decisions by fostering them with educational and stimulating projects,

Apart from this, it's worth noting, that the EU policy of prohibition of discrimination is criticized due to the fact that it is directed, primarily, at the employer and the supplier on the market of goods and services and generally, at enterprises, while other members of the society may continue to live with "incorrect moral". This way, the burden of protection of social moral weighs only on the "selected" groups.[106]

6. The Conflict of Two Equal Rights

The analysis of legislation regulating freedom to choose a contractual partner and prohibition of discrimination necessarily requires the discussion of balancing of the conflicting basic rights.[107]

The balancing is a well-known practice to the national constitutional courts, as well as to the quasi-constitutional courts.[108] The most of the basic rights are not of absolute character. Their limitation is

103 *Repgen T.,* Antidiskriminierung – die Totenglocke des Privatrechts läutet, Vertragsfreiheit und Diskriminierung, 01.03.2007, 77.

104 *Lobinger T.,* Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 122-125.

105 *Repgen T.,* Antidiskriminierung – die Totenglocke des Privatrechts läutet, Vertragsfreiheit und Diskriminierung, 01.03.2007, 78.

106 *Lobinger T.*, Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 164-167.

107 *Collins H.*, The Vanishing Freedom to Choose a Contractual Partner, Law and Contemporary Problems, 76 (2), 2013, 74.

perfectly possible if the infringement is "necessary for democratic society" to attain a legitimate aim. These aims contain almost all possibilities, through which a human right can be limited. The interference should be necessary, predetermined and precise to achieve the common aim in question.[109]

Despite the active usage of "balance test", it's still a subject of debate among the scholars of law and political sciences. One of the leading participants in these debates are *Robert Alexy* and *Jurgen Habermas.* According to *Habermas*, the balancing reduces the relation between the rights and the public aim to political arguments. In his opinion, this approach leaves constitutional rights without their "strict priority" in relation to other factors. In other words, it is not possible to separate individual rights from the public policy. Apart from that, according to him, there is no rational standard, through which the judges could regulate conflicting political aims. Consequently, the decision reached by this method will be arbitrary or inconsistent with common standards and hierarchies. Apart from that, in the opinion of *Habermas*, this way the justice leaves dimension of legal regulation into unregulated discretion of adjudication. Thus, according to the opponents of the "Balancing Test", it represents irrational and illegitimate ignorance of the law in favor of arbitrary court discretion, that's justification is not possible by democracy, respect for human rights and rule of law.[110]

The proponents of the "Balance Test" defend the concept by the argument, that with its sufficient understanding and application it doesn't produce irrational or illegitimate results.[111]According to *Robert Alexy*, the balancing of individual rights in relation to public interests is an inevitable process and once used sufficiently, it is quite legitimate and rational. In *Alexy's* opinion, constitutional rights and public aims have the character of "principles" and the goals, that these principles support, must be realized to the maximum within legal and factual limits. According to *Alexy*, the optimization of any constitutional principle means its complete realization, when the other, opposite principle is not in resistance with it. The rational solution of conflict of principles is possible by balancing them, through the principle of proportionality, which consists of three sub-principles: "sufficiency", "necessity" and "proportionality in narrow sense". In addition, *Alexy* emphasizes the fact, that the balancing is not the procedure that leads to the one and the same results, but achievement even of one result through rational way justifies the balancing as the method.[112]

The nature of the public interest is a subject of debate in law and politics. For some, this is the sum of individual rights, but others point of view, it an inseparable interest, that may be considered only in

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108 *Greer S.,* "Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate", The Cambridge Law Journal, Vol.63, №2 (Jul., 2004), 413.

109 *Kay R. S.,* The European Convention on Human Rights and the Control of Private Law, European Human Rights Law Review, Issue 5, 2005, 476.

110 *Greer S.,* "Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate, The Cambridge Law Journal, Vol.63, №2 (Jul., 2004), 413-414.

111 Ibid*,* 413.

112 *Greer S.,* "Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate, The Cambridge Law Journal, Vol.63, №2 (Jul., 2004), 415-416.

common context.[113]The "Balance Test" is presented quite interestingly in private law disputes, where it is possible for the interests and legal values of almost same importance to collide.[114]

The constitution does not define the hierarchical order of human rights, not does it provide any method for the solution of the conflict of private rights. When there is such conflict before courts, they tray to attain the balance according to the content of the concrete case.[115] Apart from that, it's worth considering, that the specific and special character of the right to equality has caused some peculiarities in the process of its realization and of achievement of justified balance between the interests:[116] The Constitutional Court of Georgia has defined different criterions for the determination of discrimination according to the character of the differentiated treatment. In the case of differentiation on classical, specific grounds, the court uses strict test of evaluation - it evaluates a norm through the principle of proportionality and while examining the legitimate aim, the state must prove, that the interference is absolutely necessary and in accordance with the "invincible state interest".[117] In other cases, the court determines the necessity of application of the strict test according to the degree of the intensity of differentiation. The criterions of degree of differentiation will differ in every concrete case according to the nature and scope of differentiation[118] If the intensity is low, the court uses "rational differentiation test", according to which, a) The proof of rationality of differentiated treatment is enough, when its reality, inevitability and necessity is clear at most; b) There is a real and rational connection between the objective reason of differentiation and the result of differentiating action.[119] One should not forget that the Constitutional Court of Georgia can apply the balance test only, when determining the compliance of the private law norm with the 14th article of the constitution, as it cannot solve a private law dispute.[120] Whilst, application of the Law of Georgia "on Elimination of All Forms of Discrimination" by the civil courts will require the application of the abovementioned balance test in private law disputes and this, in turn, will complicate the process for the courts to reach a just decision.

The decision of Supreme Court of United Kingdom *Bull and Bull v Hall and Preddy*[121] can be observed as an example: The owners of the small hotel had refused a homosexual couple to use a double-bed room for religious and moral reasons. In this case, there is a contradiction between the right to property and freedom of religion of owners and dignity and the right to personal life of the homosexual couple. The court gave priority to the interests of the couple. But what will the result be, if the situation is

113 Ibid, 417-418.
114 Ibid, 476-477.
115 *Greer S.,* "Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate, The Cambridge Law Journal, Vol.63, №2 (Jul., 2004), 419.
116 *Eremadze K.,* Balance of Interests in Democratic Society, 2013, 165.
117 See: Constitutional Court of Georgia, Decision of 27th December 2019, №1/1/493, II.P.6. See *Tughushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Case Law of Constitutional Court of Georgia, Tbilisi, 2013, 41.
118 Ibid.
119 Ibid.
120 See The Organic Law of Georgia "on Constitutional Court of Georgia", 31.01.1996, Article 19.
121 Bull and Bull v Hall and Preddy, UK Supreme Court, B2/2011/0313; B2/2011/0314; 27.11.2013.

turned around and the guests refuse to stay at a certain hotel, because the hotel building has religious decorations, while they prefer completely secular surroundings. Can such behavior of the consumer be the subject of the protest on the grounds, that it shows disrespect towards the owners' beliefs and autonomy, or should a contractual freedom of consumer have priority?[122]

If the issue is solved according to the EU legislation, the owner of the hotel, who offers the rooms to the consumers publicly, will be subjected to the requirements of the prohibition of discrimination, unlike the potential guests, who have refused to stay at a certain hotel due to their religious views. But it should not be forgotten, that in both situations, one deals with a behavior that means treating the other person with "less respect", although the aim of adoption of antidiscrimination legislation was the elimination of unequal treatment of the exactly same character not only in public sphere but also on the free market.[123]

It's interesting, how the case would have been solved in accordance with the Georgian law, because the Georgian law "on Elimination of All Forms of Discrimination" does not make emphasis on the public offer of the private persons, but it prohibits all forms of discrimination by privates.

The balance test is a necessary instrument to solve the conflicts of human rights of relative nature. The priority of a certain interest in a concrete case is dictated by social reality and policy of social welfare. This way, through balance test, the dispute will leave a legal dimension and be subjected to the influence of various outer factors that will help us, in the end, to prioritize one of the interests, in accordance with the modern values. However, the chaotic usage of this approach by the civil courts will threaten legal security and cause overlap of the powers of legislative and court authorities.

7. Conclusion

As a result of the presented inquiry, it can be deducted, that today, the legal system may be facing a new system of contract law, which is adapting to the reality. As it seems, the issue of equality will take the natural place in the notion of the contract.[124] But the dangers, that follow the thorough realization of the basic right of equality in the contract law, should not be forgotten. The division of the private and public law is neither a coincidence nor a preserved doctrinism, as the imposition of equal treatment on private persons touches the freedom in its core and through the coercion comes in conflict with the guarantee of freedom. [125] Accordingly, the legislator should have taken into account the dangers that the adoption of law "on Elimination of All Forms of Discrimination" causes. The application of the law between the private persons violates the principle division of the state power, as it enables the civil courts

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122 *Collins H.*, The Vanishing Freedom to Choose a Contractual Partner, Law and Contemporary Problems, 76 (2), 2013, 74-75.

123 Ibid, 83-84.

124 *Wilhelmsson T.*, Contracts and Equality, Scandinavian Studies in Law, Vol.40, Stockholm 2000, 161, <http://www.scandinavianlaw.se>.

125 *Lobinger T.*, Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 116-117.

to fill in the legal vacuum with political and social values, when the conflict between the contractual freedom and basic right to equality arises. This violates the legal security. Moreover, there is a tendency of the establishment of "common-social moral", that is a foundation of the totalitarian state. The liberal theory of contract law does not accept moralization of law through human rights.[126]

However, one should not forget, that the modern society lives in times, where there are important changes happening in the social order. The principle of social state changes its form (the form that the society got used to). The public property is decreasing through privatization and the public functions are assigned to the private entities through the contract. The goals, that characterized the public sector, are now assigned to the private sector.[127] As the primary purpose of human rights is to protect private persons from the interference of public authority, the constitutional principle of equality is, in the first place, required from state authority towards individuals, but not from individuals against each other. The obligation of equal treatment can be used in a civil law, for example, in the cases, when private persons have "the entitlement to discrimination" against each other.[128] Subsequently, when the legislation demands from private persons protection of the requirements of the prohibition of discrimination, it is important to take into account the function and aim that the expressed will of the private person serves. That's why, it is not surprising, that it was decided to limit EU legislation to the certain grounds of discrimination and in concrete spheres of private law, when its antidiscrimination policy was being elaborated. While drafting a contract, the principle of justice requires not only free will of the parties (consent) but also equal bargaining power of these parties. The constitutional principle of equality must protect a weaker party from oppression and exploitation. In relationships, where the imbalance of bargaining power is present, the stronger party has a social function. Consequently, he/she is fulfilling public function towards the other party. That's why it's easier to explain, why such party is subjected to the requirements of the prohibition of discrimination. In addition, it's important to consider the factors, that prohibition of discrimination, servers, primarily, the protection of human dignity. Thus, worth consideration is the fact, how important are personal characteristics for the performance of a certain contract. If the content of the contract doesn't give us the chance for interpretation and the refusal to contract does not serve one's own rights and interests, but is merely used for interference in others rights and interests, it is possible to use prohibition of discrimination even between the parties of equal bargaining power. Otherwise, a human dignity might be violated. The compensation mechanism of this kind of deed is foreseen not only by civil code but also by the law "on Elimination of All Forms of Discrimination".

The analysis of antidiscrimination law and freedom of contract make it clear, that it's impossible to view contract law from just one perspective. On the contrary, the contract law can be understood as a

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126 See *Gutmann T.,* Theories of contract and the concept of autonomy, Preprints and Working Papers of the Centre of Advanced Study in Bioethics, Münster 2013/55, 10 <www.uni-muenster.de>.

127 *Wilhelmsson T.*, Contracts and Equality, Scandinavian Studies in Law, Vol. 40, Stockholm 2000, 161, <http://www.scandinavianlaw.se>.

128 *Lobinger T.*, Vertragsfreiheit und Diskriminierungsverbote, Privatautonomie im modernen Zivil-und Arbeitsrecht, Vertragsfreiheit und Diskriminierung, 01.03.2007, 115-116.

system that is under the influence either of liberal or social approach and is constantly effected and transformed by human rights and the values that are established on the basis of these rights.

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