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## **Restoring Justice as Purpose of Punishment and Its Interrelation with the Resocialization of Criminal**

*The current article is dedicated to the purpose of punishment – the restoration of justice and its interrelation with the resocialization of criminal.*

*Studying restoration of justice as a purpose of punishment is important in terms of Criminal Law policy, as well as it is topical from a practical and scientific point of view.*

*The topicality of the study is caused by the fact that it discusses the purpose of restoring justice in relation to the resocialization of criminal.*

*The article also studies certain circumstances that must be taken into account during the imposition of punishment, which serves the restoration of justice and at the same time facilitate subsequent resocialization of criminal.*

*In this article, the essence of justice and the purpose of restoring justice are discussed taking into consideration proportionality of punishment and the principle of individualization of punishment.*

*The current study represents an analysis of judicial practice in view of the restoration of justice and resocialization of criminal, which in most cases is related to distinctive comprehension and specific difficulties. This study suggests certain recommendations for overcoming these difficulties.*

**Keywords:** *Justice, restoration of justice, resocialization, punishment, the purpose of punishment, criminal law policy, the proportionality of punishment, individualization of punishment, imposing punishment.*

### **1. Introduction**

Research of purposes of punishment is very topical, in view of the criminal law, as well as criminal law principles.

Punishment imposed by the Judge must be just in all particular cases, in order to prevent crime afterwards and resocialize convict.<sup>1</sup> The principle of justice must be considered not only during imposition of punishment, but also during the release from punishment. Therefore, the practice existing nowadays in case of parole is inadmissible and it is particularly important that only court shall discuss the issue of putting on parole.

The topicality of article is related to the huge interest of society towards restoration of justice. Properly chosen punishment by the judge must convince society in the fairness of the decision and must facilitate resocialization of criminal.

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<sup>1</sup> *Vardzelashvili I.*, Purposes of Punishment, Tbilisi, 2016, 6 (in Georgian).

Aristotle assessed justice in the following manner: “Justice is perceived by everyone specifically and they arrive to certain point... Justice must be equality and this is correct.”<sup>2</sup>

“Justice is only a concept, but it has unlimited influence on the happiness of person.”<sup>3</sup> – write Cesare Beccaria in the legal, philosophic, diplomatic and political book “On crimes and punishments.”

In the modern understanding, justice is connected to the notion of state, fair laws and just punishment, and it is put on the same level as equality. In the opinion of some scientists, along with equality, justice is formed by proportionality as well.<sup>4</sup>

Article 4 of the Constitution of Georgia declares the concept of just state and at the same time reinforces principle of social justice (article 5) and equality right (article 11). Constitution is the major law of the country, the value of which is presented by justice and equality.

The fairness of Constitution itself is checked through comparison to what extent the major law complies with general societal values, which are expressed in Human Rights Declaration and particular international acts.<sup>5</sup> According to the practice established by the Constitutional Court of Georgia, the purpose of restoration of justice is defined as follows: “As far as the freedom is equal good for everyone and it implies equal opportunity of each member of the society, chance to development and self-realization, everyone who abuses this freedom, steps over the limit, infringes freedom (any right) of others, the justice requires to restore initial equilibrium and to avoid the danger to everyone’s equal right to freedom in future. Therefore, the purpose to restore justice by punishment implies restoration and maintenance of balance in the legal order.”<sup>6</sup>

Opinions of law scientists on the importance of restoration of social justice and resocialization are presented in this article.

In the point of view of famous Georgian scientist *Zurab Gotua*, “restoration of social justice, as purpose of punishment is attained by using fair punishment corresponding to various crimes of respective gravity.”<sup>7</sup>

Social justice means restoration of interest of person, society or state infringed by the criminal act.<sup>8</sup>

The aim of this study is to summarize opinions existing in legal doctrine and elaborate new recommendations. “While presenting new standards, the Strasbourg Court often uses comparative

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<sup>2</sup> *Aristotle*, Politics, Part I, *Kukava T. (transl.)*, Tbilisi, 1995, 78 (in Georgian).

<sup>3</sup> *Beccaria C.*, On Crimes and Punishments, *Khutsurauli I. (transl.)*, *Lezhava E. (ed.)*, Tbilisi, 2003, 35 (in Georgian).

<sup>4</sup> *Dvalidze I.*, General part of the Criminal Law, other Criminal Law Outcomes of the Punishment and Crime, Tbilisi, 2013, 21 (in Georgian).

<sup>5</sup> *Gamkrelidze O.*, Criminal Law Problems, Vol. III, Tbilisi, 2013, 53 (in Georgian).

<sup>6</sup> Decision of October 24, 2015, № 1/4/592, Constitutional Court of Georgia on the case: “Citizen of Georgia Beka Tsikarishvili against Parliament of Georgia”, <<https://constcourt.ge/ka/judicial-acts?legal=2133>> [23.01.2021].

<sup>7</sup> *Gotua Z.*, Criminal Law, General Part, Punishment, Course of Lectures, Tbilisi, 2001, 9 (in Georgian).

<sup>8</sup> *Lekveishvili M.*, Notion and Aims of Punishment, Group of Authors, General part of the Criminal Law, 4<sup>th</sup> ed., Tbilisi, 532 (in Georgian).

legal analysis of member states' law and jurisprudence.”<sup>9</sup> “As a rule, comparative legal materials become part of the decision.”<sup>10</sup> Hence, the article describes approaches envisaged by legislations of foreign countries with regard to the current issue.

## **2. Restoration of Justice as a Purpose of Punishment**

### **2.1. Essence of Justice**

“The law is art of legal order and justice” – these words start the collection of Roman Civil Law – Corpus Juris Civilis. Its essence is that legal problems emerged in the society should have been solved justly.<sup>11</sup>

The statement that unjust law is not law – *lex iniusta non est lex*, belongs to the follower of natural law Thomas Aquinas.<sup>12</sup> Ancient Greek philosopher Demosthenes considered that laws must be obeyed as they derive from eternal moral code.<sup>13</sup>

Science also was interested in the problem of justice. “Jurisprudence is the science about just and unjust” – was mentioned by Ulpian. Law originates from justice, as from mother; Therefore, law is preceded by justice (digests). Justice is a value scale of the (positive) law.”<sup>14</sup>

In relation to justice philosophers talk about three main points:

- 1) Justice implies equality and morality;
- 2) Justice is mutuality, which is related to prohibition, not to damage anyone, hence: “wellbeing of everyone and nobody’s pain”;
- 3) Justice also requires social fairness.<sup>15</sup>

It is difficult to form, to conceptualize positive notion of justice. It is much easier to determine what is injustice.<sup>16</sup>

In general justice is evaluative category and at the same time is related to the legal state. “As far as the first function of legal state to completely implement and adequately protect human rights and

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<sup>9</sup> *Jacobs F. G., White R., Ovey C., The European Convention on Human Rights, 6<sup>th</sup> ed., Oxford, 2014, 78, see citation: Chanturia L., The Application of the European Convention on Human Rights and Judicial Dialogue, Law Journal, № 2, 2019, 9-10.*

<sup>10</sup> *Advisory Opinion P16-2018-001, ECHR 132(2019), delivered on April 10, 2019, 22-24, see citation: Chanturia L., The Application of the European Convention on Human Rights and Judicial Dialogue, Law Journal № 2, 2019, 10.*

<sup>11</sup> *Zippelius R., Doctrine of Legal Methods, Totladze L. (transl.), Turava M. (ed.), 10<sup>th</sup> ed., Tbilisi, 2016, 11 (in Georgian).*

<sup>12</sup> *Wacks R., Philosophy of Law (A very short introduction), Babukhadia M. (transl.), Kurdovanidze K. (ed.), 2012, Tbilisi, 5 (in Georgian).*

<sup>13</sup> *Roscoe P., An Introduction to the Philosophy of Law, Revised ed., Chelsea, Michigan, 1982, 7.*

<sup>14</sup> *Khubua G., The Theory of Law, Tbilisi, 2015, 83 (in Georgian).*

<sup>15</sup> *Monterbruck A., Strafrechtsphilosophie (1195-2010), Vergeltung, Strafzeit, Südenbock, Menschenrechtsstrafe, Naturrecht, 2, Erweiterte Auflage, 2010, Freie Universität Berlin, 5, see citation: Vardzelashviuli I., Aims of Punishment, Tbilisi, 2016, 55 (in Georgian).*

<sup>16</sup> *Materni M., Criminal Punishment and the Pursuit of Justice, British Journal of American Legal Studies, Vol. 2, Issue 1, 2013, 283.*

freedoms, right to fair trial, as certain measure of implementation of legal state principle, implies possibility to protect all those goods that represent rights in their essence.”<sup>17</sup>

The main subject of study is the issue whether it is possible to resocialize criminal by the just decision.

In the opinion of Professor *Otar Gamkrelidze*, the main feature of legal state is not the rule of law, but rule of just law.<sup>18</sup>

“Crime provokes not only material, but also moral-political damage. Hence, restoration of justice comes on the agenda as with the material, as well as moral-political aspect.”<sup>19</sup>

Justice, at the same time, derives from ethics as well. Justice as an ethical category is characterized by certain correlation in terms of distribution of good between people, characterized by correlation between human rights and obligations, between its action and revenge. The latter (revenge) according to the evaluation of *Giorgi Tkesheliadze*, is private occasion of correlation between crime and punishment. Person who damages other person for his/her own purposes, must understand that his/her such act will not be left unpunished.<sup>20</sup>

While talking about the essence of justice the opinion appears, whether revenge is part of justice or not. In the article 22 of the Criminal Code of Communist-socialist republic: “sentence is not only punishment for committed crime, but it aims at...” therefore, this code considered punishment – revenge as purpose of sentence. According to scientist *Duiunov*, recognizing purpose of restoration of justice by the Criminal Code represents official declaration of revenge as purpose of punishment by the legislator, moreover this scientist make proposition that term restoration of justice must be altered with term – “satisfying sense of justice of citizens.”<sup>21</sup>

Modern approaches exist in relation to this issue. In particular, “members of the society, scientists and practitioners recognize importance of resocialization in comparison with punishment. As well as, they recognize importance of the principle of proportionality. Purposes must be applied in such a manner that they appraise major principles of fairness and proportionality.”<sup>22</sup>

Resocialization of criminal becomes possible by the just decision. Here the interrelation between restoration of justice and resocialization of criminal is outlined.

Research of the essence and importance of justice is interesting in terms of the fact that just decision must serve the resocialization of criminal. This is the purpose of legal and social state.

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<sup>17</sup> Decision of November 5, 2013, № 3/1/531, Constitutional Court of Georgia on the case: “Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili versus Parliament of Georgia”, <<https://constcourt.ge/ka/judicial-acts?legal=536>> [30.01.2021].

<sup>18</sup> *Gamkrelidze O.*, Problems of Criminal Law, Vol. III, Tbilisi, 2013, 52 (in Georgian).

<sup>19</sup> *Malania T.*, Purposes of Punishment, Criminal Law Journal, № 2, 2019, 86 (in Georgian).

<sup>20</sup> *Tkesheliadze G.*, Concept and Purposes of Punishment, Group of Authors, General part of Criminal Law, Tbilisi, 2007, 354 (in Georgian).

<sup>21</sup> *Duyunov V. K.*, Mechanism of Criminal Law Impact Theoretical Grounds and Practice of Realization, Moscow, 2001, 162 (in Russian).

<sup>22</sup> Principles and Purposes of Sentencing, Scottish Sentencing Council, 2017, 16, <<https://www.advocates.org.uk/media/2601/principles-and-purposes-ofsentencing-consultation.pdf>> [04.02.2021].

## **2.2. Restoration of Justice as One of the Purposes of Punishment**

According to the Article 39 of the Criminal Code of Georgia, the purpose of punishment is to restore justice, prevent new crime and resocialize criminal.

In the hierarchy of purposes of punishment, the first place has the restoration of justice. Imposition of fair punishment is the basis for the restoration of justice.

Legislator has given leading place to the restoration of justice in relation to other purposes. By imposing fair punishment, it must be possible to prevent crime and resocialize criminal. Moreover, the purpose of punishment must be implemented with the impact on the convict and other person, in order to inspire them to obey legal order and feel responsible before law (CCG Article 39 paragraph 2).<sup>23</sup>

According to the American doctrine, actually it is impossible to define specifically all purposes of punishment, because they are interconnected and sometimes their differentiation and separate determination is almost impossible.<sup>24</sup> Here the active role of restoration of justice as purpose of punishment is demonstrated. Its effective implementation facilitates effective application of other purposes.

**Restoration of justice is not only the purpose of punishment, but it also serves for protection of individual, society and state.**

“In the Criminal Law restoration of justice implies going back to equal conditions, restoring balance in legal order. It is proven by the fact that if just punishment serves for restoration of legal order, unjust punishment infringes the legal order.”<sup>25</sup> The purpose of the Criminal Code of Georgia is also to prevent crime and defend legal order.

**The main essence of the purpose of restoration of justice is that judge renders fair decision.**

In the opinion of Professor *Mzia Lekveishvili*, “restoration of justice entails in itself imposition of just punishment to criminal, which corresponds to the moral requirements prevailing in the society.”<sup>26</sup>

Restoration of justice is clearly demonstrated while imposing punishment by the judge in particular criminal case. Fairly chosen punishment finally facilitates resocialization of criminal.

According to the paragraph 4 of Article 259 of the Criminal Procedure Code of Georgia, “court decision is just if the imposed punishment corresponds to the personality of convict and to the gravity of committed crime.” The judge applies article 53 of the Criminal Code when imposing punishment.

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<sup>23</sup> Despite the fact that there are three purposes of punishment envisaged in the Criminal Code, which ideally must be achieved cumulatively, in the current article two purposes (restoration of justice and resocialization) and their interrelation are discussed.

<sup>24</sup> *Nikiforov B. S., Reshetnikov F. M.*, Modern American Criminal Law, Moscow, 1990, 47 (in Russian).

<sup>25</sup> *Dvalidze I.*, General Part of the Criminal Law, Other Criminal Law Outcomes of the Punishment and Crime, Tbilisi, 2013, 28 (in Georgian).

<sup>26</sup> *Lekveishvili M.*, Purpose of Punishment and Criminal Law and Criminological Aspects of Imposition of a Sanction, “Justice and Law”, № 4(43), 2014, 18 (in Georgian).

During sentencing the judge must take into consideration marital status of the person, his/her age, health condition, education, personal relations, his/her income, etc. It is natural that in each particular case personal features are individual.

While rendering fair decision, along with the personal features, the judge must evaluate act committed by the person.

He/she must focus on the type of committed act, method, and at the same time the caused result. All these must be summarized and substantiated by the judge fairly.

“Restoration of justice by imposition of punishment implies choosing such punishment which is adequate, appropriate, proportionate to the dangers caused by the action, considering its gravity.”<sup>27</sup> It is very important how fair decision impacts further resocialization of criminal. In order to develop respect and sense of responsibility towards rules established in the society, it is necessary to rehabilitate criminal by involving him/her in various rehabilitation programs.

The purpose of restoring justice is connected with choosing the type and amount of just punishment.

In order to restore disregarded justice, the judge imposes certain type of punishment on the criminal, but **imposition of just fair punishment must not be connected to causing pain**, revenge. The purpose of punishment is not physical suffering of person and humiliation of his/her dignity. (Paragraph 3 of Article 39 of CCG)

“One of the main rules will be following: not to cause pain, and the other not less important rule: cause as less pain as possible. Search for alternatives to punishment and not only alternative punishments.”<sup>28</sup>

**At last, in the fairness of punishment we must imply legal decision of imposing punishment, maximum benefit for the public and using such rehabilitation measures, which make possible to resocialize criminal.**

### **2.3. Role of the Criminal Law Policy in the Determination of Fair Punishment**

Problems of interrelation and correspondence between politics and law, including state policy and criminal law represented subject of scientific research from ancient times.<sup>29</sup>

Criminal Law policy entails such issues as: principles of criminal law, issues of criminalization and decriminalization, types of punishment, purposes of punishment, particularities of juvenile responsibility, crimes against human rights and freedoms.

Criminal Law policy determines main directions of criminal law, but as far as the research topic is restoration of justice and its interrelation with resocialization of criminal, criminal law policy will be discussed only in terms of punishment and its purposes.

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<sup>27</sup> Decision of October 24, 2015, № 1/4/592, Constitutional Court of Georgia on the case: “Citizen of Georgia Beka Tsikarishvili against Parliament of Georgia”, <<https://constcourt.ge/ka/judicial-acts?legal=2133>> [23.01.2021].

<sup>28</sup> Christie N., Limits to Pain, *Bakhtadze U. (transl.), Shalikashvili M., Giorgadze G. (eds.), The Role of Punishment in the Penal Policy*, Tbilisi, 2017, 20 (in Georgian).

<sup>29</sup> *Ivanidze M.*, Essence of the Criminal Law Policy, *Journal “Justice”*, № 2, 2008, 55 (in Georgian).

Modern policy of criminal law is characterized as humane. This is evident in types of punishments envisaged under Criminal Code of Georgia and purposes of punishment. The importance of humane punishment was underlined by Cesare Beccaria as well, who considered that for preventing crime the severity of punishment is less important than its inevitability.<sup>30</sup>

Criminal Law principles is the important issue of Criminal Law policy. Principle of justice is the ground for determining fair punishment.

It is of wide nature and “it must not be limited by the fairness of punishment. The Criminal Code envisages other measures of impact. These are for instance conditional sentence, which must respond to the requirement of justice. In this regard rule and conditions of exempting from responsibility and sentence are not an exception.”<sup>31</sup> In terms of Criminal Law policy, amnesty and pardon are also important.

Article 40 of CCG along with other sentences comprises alternative types of punishments as well (community service, fine, house arrest). In the judicial practice of Georgia, in recent period, alternative types of punishment are often applied and their proper selection serves the purpose of restoration of justice. Criminal Law policy is important in terms of resocialization of criminal as well. In this view, Criminal Law policy entails implementation of various rehabilitation programs. It must be mentioned, that the European Court on Human Rights in the case *Murray v. Netherlands* declared that rehabilitation of convict is the positive obligation of the state.<sup>32</sup> Even though rehabilitation was declared as positive obligation of the state, the substance of rehabilitation differs in EU member states and the country may determine its substance within the free margin of appreciation.

Moreover, part of European countries considers resocialization-rehabilitation as a purpose of punishment. For Instance, according to the Constitution of Spain (paragraph 2 of Article 25), punishments related to imprisonment must be focused on re-education and social rehabilitation of the convict. According to the Constitution of Italy, the purpose of punishment is to transform person before the expiration of sentence term (article 27 of the Constitution of Italy).<sup>33</sup>

It is noteworthy that the Federal Court of Germany in the decision of 1973 declared resocialization as inseparable part of rights guaranteed under constitution. In particular, according to court definition resocialization is based on two grounds – 1. Right to dignity 2. Principle of Social State. Person’s reintegration into society is the aim, which must be set by the state while imposing punishment.<sup>34</sup>

Issue of purposes of punishment in juvenile justice is interesting. In Georgia there is not much time passed after adoption of Juvenile Justice Code (12 June 2015). By adoption of juvenile justice

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<sup>30</sup> *Beccaria C.*, On Crime and Punishment, *Khutsurauli I. (transl.), Lezhava E. (ed.)*, Tbilisi, 2003, 33 (in Georgian).

<sup>31</sup> *Nachkebia G.*, Criminal Law, General Part, 4<sup>th</sup> ed., Tbilisi, 2015, 52 (in Georgian).

<sup>32</sup> *Murray v. The Netherlands* [26.04.2016], ECHR, no.10511/10, §104.

<sup>33</sup> *Meijer S.*, Rehabilitation as a Positive Obligation, *European Journal of Crime, Criminal Law and Justice*, Vol. 25, Issue 2, 2017, 152.

<sup>34</sup> BVerfGE, 35. Band, 1973, Rn. 85, <BVerfG, Urteil vom 05.06.1973 - 1 BvR 536/72 - openJur> [04.02.2021].



code, our State particularly has noted the necessity to use liberalization policy when determining liability of juveniles being in conflict with the law.

Comparing to article 39 of the Criminal Code of Georgia, Juvenile Justice Code (article 65) does not consider restoration of justice as purpose of punishment. Here the hierarchy (order) of punishment purposes is formed differently.

As a purpose of juvenile punishment, firstly the resocialization-rehabilitation of juvenile and prevention of new crime is envisaged.

Current issue is the part of Criminal Law policy. Deriving from the best interest of juvenile, the main purpose of imposing punishment on juvenile is his/her resocialization-rehabilitation. The process of resocialization for juvenile starts from imposition of sentence and in this way, it becomes possible to prevent new crime. While selecting punishment for juvenile, the judge firstly considers his/her best interest and report of individual evaluation. It is mentioned correctly in the law literature that justice is evaluative notion.<sup>35</sup> Even though the purpose of restoration of justice is not provided by the Juvenile Justice Code, but in each particular case, the judge who has taken special course in children psychology and pedagogy, makes decision by individual approach towards juvenile and imposes sentence proportionate to the committed act. In such case the judge considers personality of juvenile, his/her age, health, education and wellbeing... all those circumstances that are necessary for rendering fair decision.

“The wide policy of Juvenile Justice must contain following major elements: prevention of crime among juveniles, minimal age of criminal law liability and marginal age of juvenile justice; guarantees for fair justice.”<sup>36</sup>

The starting point of the issue under study is the liberal criminal law policy. The policy, which has put best interest of juvenile at the first place. Even though purpose of juvenile’s punishment is not restoration of justice, the real interest is wider and entails unlimited circle of issues. While talking about importance of restoration of justice as purpose of punishment in juvenile justice, according to Prof. *Mzia Lekveishvili* “it is clear that there is no legal argumentation on not considering this purpose during imposition of punishment on juvenile.”<sup>37</sup>

Therefore, in the view of criminal law policy, in the current sub-chapter the restoration of justice, resocialization of criminal and issue of juvenile justice will be discussed.

### **3. Restoration of Justice During Imposition of Punishment**

#### **3.1. Justice as an Argument for Proportionality**

Restoration of justice as purpose of punishment will be implemented when the punishment imposed on criminal will be proportionate to the committed crime. For implementing the purpose of

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<sup>35</sup> *Khubua G.*, The Theory of Law, 2<sup>nd</sup> ed., Tbilisi, 2015, 87 (in Georgian).

<sup>36</sup> United Nations, General Commentary of the UNICEF № 10 “On the Rights of Children in the System of Juvenile Justice”, Geneva, 2007, point 16.

<sup>37</sup> *Lekveishvili M.*, Individualization of Punishment as an Important Principle of Imposing Sentence, Tendencies of Liberalization of Criminal Legislation in Georgia, Tbilisi, 2016, 187 (in Georgian).

punishment and to uphold proportionality of punishment, in each particular case the judge must consider gravity of committed crime, level of culpability of criminal, motive and purpose of crime, person's attitude towards committed crime (confessing, regretting, feeling emotional). Moreover, how the particular crime was committed and what was the result (whether it was terminated on preparation stage or during attempt). While making decision, the past life of criminal is also important (his/her personal characteristics), economic condition, his/her relation to the victim, the will to compensate the damage, reconcile or not with the victim.

Each case is individual, and in each case, there are respective particular circumstances. It is not less important how the judge evaluates each of these circumstances and how he/she substantiates it. The proportionality of punishment implies imposition of such sentence for committing crime, which ensures reaching the purpose of punishment.<sup>38</sup>

The Constitutional Court of Georgia validly points out that justice represents unconditional purpose of lawmaking, as well as application of law.<sup>39</sup>

The principle of proportionality of the punishment is established in the United States of America as well. According to modern Model Penal Code § 1.02, (2) (c)), criminal must be protected from exaggerated, disproportionate and spontaneous punishment. At the same time, according to the practice of the Constitutional Court of US, the 8<sup>th</sup> amendment of the US Constitution prohibits imposition of harshly disproportionate punishment.<sup>40</sup>

Justice as an argument of proportionality is evident when the imposed sentence corresponds to the person of convict and gravity of the committed crime. Professor *Temur Tskitishvili* deriving from the principle of proportionality of punishments, assesses each particular type of punishment. He also touches upon the alternative sentences in the view of proportionality of punishment, and also discussed specifics of fixed-term imprisonment. "For the proportionality of punishment, it is important that the determined sentence corresponds to the gravity of punishable act."

In this regard, the legislator must take into consideration the value of good to be protected, as well as other circumstances.<sup>41</sup> Let us bring an example from judicial practice.

On 27 October 2016, in the evening hours, in Tbilisi, in the dining room of one of the hotels, based on quarrel, Mirian intentionally and gravely damaged Ilia's health by stabbing him with the own knife.<sup>42</sup> Mirian was convicted for committing crime envisaged under Criminal Code of Georgia Article 117 paragraph one and as a type of punishment imprisonment for 4 (four) years was determined, which according to article 63, 64 of the CCG was considered conditional and he was charged with

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<sup>38</sup> *Tskitishvili T.*, Purpose of Punishment, as the Orientation for Sentence, Tendencies of Liberalization of Criminal Law Legislation in Georgia, Tbilisi, 2016, 523 (in Georgian).

<sup>39</sup> Decision of October 24, 2015, № 1/4/592, Constitutional Court of Georgia on the case: "Citizen of Georgia Beka Tsikarishvili against Parliament of Georgia", <<https://constcourt.ge/ka/judicial-acts?legal=2133>> [23.01.2021].

<sup>40</sup> *Dressler J.*, Understanding Criminal Law, 7<sup>th</sup> ed., San Francisco, CA, 2015, 49.

<sup>41</sup> *Tskitishvili T.*, Purpose of Punishment, as the Orientation for Sentence, Tendencies of Liberalization of Criminal Law Legislation in Georgia, Tbilisi, 2016, 562 (in Georgian).

<sup>42</sup> Decision of March 10, 2017, № 1b/99-17, Criminal Law Chamber of the Tbilisi Court of Appeals, available only in the archive of the court (personal data has been altered).

probationary period of 4 (four) years. The prosecution did not consider this decision as just and asked to change probationary period with imprisonment.

The appellate chamber approved this query based on following circumstances: it considered the fact that drunk Mirian was very aggressive, he disturbed and treated rudely the personnel, that is why the victim gave him a remark and asked to defend order. This was followed by the conflict. Deriving from the purposes of punishment, for criminal to reach proper conclusions, the appellate chamber imposed on Mirian 4 (four) years imprisonment based on paragraph 1 of article 117 of the CCG. The judge while imposing sentence took into account the nature of committed crime and personality of criminal as well.

In the legal framework the judge must impose punishment respective, just and proportionate punishment. Some cases are interesting, when the decision made by judge corresponds to legislative limits, but considering the result it is difficult to assess it as just and proportionate. In this regard it cases qualified by article 116 of the CCG are interesting in this regard. Even though the action in committed with negligence, often it is so grave that it is difficult to assess whether the purpose of restoration of justice was reached and with the imposed punishment whether society had sense of justice.

Let us make an example. The mistake of doctor resulted in birth of big embryo physiologically and with the atonic bleeding caused by asphyxia the embryo died. All these was result of wrong maneuver of the doctor (he started to sew uterus) and for this reason the woman giving birth died as well. In the presented indictment the defendant did not plead guilty. While assessing this action, we may discuss, that this is negligent crime, but all actions of doctor are preceded by certain decisions: a) he assessed condition of embryo with mistake; b) refuse to make Caesarean section; c) instead of cutting out uterus – he started its sewing. For this reason, the cause of death was anemia, which developed by atonic bleeding.<sup>43</sup>

Defendant was declared guilty under paragraph 1 of article 116 of the CCG and as a type and amount of punishment was defined imprisonment for 2 (two) years and 6 (six) months. When we think about result, analyze what happened and assess type and amount of the punishment, the question arises how proportionate is imprisonment from 2 to 4 years in relation to the outcome, such as death.

In the negligent crime while determining individualization of punishment, along with other circumstances a particular attention must be paid to the outcome, which was caused by criminal's assumption and negligence (death of person).

Consideration of person's obligation determines the gravity of guilt – its high or low grade.<sup>44</sup> The amount of punishment is determined by taking into account all mentioned above.

Often the issue is discussed in this manner – Article 116 of CCG is a negligent crime, in terms of legislative construction the amount of punishment presented in the sanctions of article envisages

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<sup>43</sup> Archive of criminal law cases from 2006 of Rustavi City Court. (As far as case materials were provided encrypted, it is impossible to indicate case numbers.)

<sup>44</sup> *Lekveishvili M.*, Notion and Aims of Punishment, Group of Authors, General Part of the Criminal Law, 4<sup>th</sup> ed., Tbilisi, 250 (in Georgian).

imprisonment from 2 to 4 years, however this is the case when the amount of punishment is liberal in relation to the outcome. In such cases the outcome is the heaviest – life of a person.

In cases of crime defined by the article 116 of CCG (crime committed by doctor), the court acts in the framework of law, legally assesses committed crime and therefore, defines punishment to the criminal. The punishment, which is subject to thought and discussion. This issue must be thought through in the view of legislative construction.

If we make a comparison – we have negligent crime also in occasions envisaged under article 276 of the CCG, which involves violation of traffic safety rules or rules for operating transport.

Paragraph 6 of article 276 of the CCG is related to death cause in the transport accident and is punished with the imprisonment from 4 to 7 years, and paragraph 8 of the same article prescribes transport accident which resulted in death of two or more people. This latter is punished by imprisonment from 6 to 10 years.

Articles 116 and 276 of the CCG foresees such outcome as negligently causing death of a person. However, in article 116 of the CCG, in first and in second paragraph, sanction is much lighter than in case of paragraphs 6 and 8 of article 276.<sup>45</sup> This once again proves that sanction of article 116 of the CCG (in terms of proportionality with the outcome) requires deliberation in view of legislative construction.

The issue of justice and proportionality of punishment is extremely important in the process of imposing sentence in various circumstances, in particular for unfinished crime, imposing punishment in case of collaboration or repeated crime, in case of cumulation of offences and verdicts.

The current article will discuss particularity of imposing punishment in case of cumulation of offences and verdicts. As a result of legislative amendment introduced in 2006, it was established that in case of cumulation of crimes the punishment was imposed for each crime and finally the overall punishment constituted sum of the sentences. In 2013 amendments were introduced to the law and the second paragraph of article 59 of the CCG was stipulated as follows: when imposing a final sentence for cumulative crimes, the more severe sentence shall absorb the less severe sentence, while when imposing equal sentences, one sentence shall absorb the other sentence. Paragraph three of the same article foresees case of recidivism and stipulates possibility to add up sentences in full, as well as partially and absorb.

It is interesting to discuss this issue in light of purpose of restoration of justice and proportionality.

Deriving from the individualization of punishment, when we discuss absorption of sentence in case of cumulation of crimes, it is advisable to equalize sentences.<sup>46</sup>

In some cases, it is possible to justify the idea of absorption of less severe sentence with more severe punishment,<sup>47</sup> but a lot of circumstances must be taken into account during imposition of the sentence.

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<sup>45</sup> Decision of June 25, 2018, № 1/549-17, Tbilisi City Court.

<sup>46</sup> *Lekveishvili M.*, Individualization of Punishment as an Important Principle of Imposing Sentence, Tendencies of Liberalization of Criminal Legislation in Georgia, Tbilisi, 2016, 220 (in Georgian).

In case of cumulation of crimes, in terms of proportionality of the punishment the partial adding up rule is interesting. In such occasion the judge must indicate in justification the condition based on which he/she decided to add up part of a certain sentence. At last, the full adding up of sentence is important, the past practice of which got criticism from the society. In such case the judge must particularly justify why he/she has chosen the rule of full add up. Current criminal law legislation gives us wide legislative possibility in this regard (adding up sentences, partial add up and principle of absorption).

Therefore, justice as an argument of proportionality when imposing punishment is revealed in various circumstances and is interesting subject for discussion.

### **3.2. Restoration of Justice and Individualization of Punishment**

Individualization of punishment is a specific activity based on the principles of criminal law, which is expressed by defining particular type and amount of punishment to a particular person.<sup>48</sup>

Achieving purpose of restoration of justice is closely connected to resocialization and rehabilitation of criminal. Experience of foreign countries with regard to this issue is interesting.

In the Criminal Code of France, the general criterion of individualization is established, according to which the court imposes punishment in the framework envisaged under the law, which is based on the circumstances of committed crime and personality of criminal. Instead of the term “individualization” in the Criminal Code of France there is a term “personalization”. The reason for this is the fact that in number of criminal codes legal persons are also recognized as subjects.<sup>49</sup>

Individualization of punishment must be made in the framework of law. Within those limits the judge must have enough freedom to evaluate all circumstances. Deriving from the principle of individualization of punishment, it is important that the judge studies personal characteristics of criminal, in particular his/her social type. This is necessary in case of collaboration in crime, when liability of each participant is evaluated individually.

Individualization of punishment is related to the number of issues, but in the current article the issue of parole with regard to the punishment of article 72 of the CCG will be discussed. This issue is connected to the purpose of restoration of justice, as not only during imposition of punishment, but also when releasing person from sentence justice and individualization of punishment must be upheld.

From 1<sup>st</sup> October 2010 the Imprisonment Code of Georgia was enacted, which radically changed the system of parole existing in the country and partially it was developed similarly to systems applied in Scotland and England.<sup>50</sup> In particular, local councils were created, which were tasked to deliberate cases of convicts and make decisions. Person who is imprisoned for definite

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<sup>47</sup> Interesting reasoning is provided on this issue by the Supreme Court of Georgia. See: Decision of July 6, 2018, № 2K-50AP-18, The Grand Chamber of the Supreme Court of Georgia.

<sup>48</sup> *Lekveishvili M.*, Individualization of Punishment as an Important Principle of Imposing Sentence, Tendencies of Liberalization of Criminal Legislation in Georgia, Tbilisi, 2016, 198 (in Georgian).

<sup>49</sup> *Papathodorou T.*, De Individualisation, des Peines et la Personnalisation de Sanctions, *Revue Internationale de Criminologie edde Police technique*, № 1, 1993, 109.

<sup>50</sup> *Arsoshvili G., Mikanadze G., Shalikhshvili M.*, Probation Law, Tbilisi, 2015, 119-120 (in Georgian).

period, except convict placed in the penitentiary institution of special risk, may be released on parole if the state subordinated institution within the system of the Ministry of Justice – Local Council of Special Penitentiary Service considers that for the correction of convict there is no more necessity to serve sentence fully. In such case person may be released fully or partially from serving the imposed sentence. Different rule applies in case when community service, correction work, restriction of military service or house arrest are imposed on person.

In such case convict may be released on parole by the court. In occasions mentioned above the issue is related to release from sentence, however when serving certain type of punishment, the decision maker is the court, while in case of imprisonment – Local Council.

Naturally the question arises – why there is a different approach toward the issue of release on parole. In particular, why different bodies are deliberating on this issue?

When discussing this topic, the starting point is only one. Nowadays in Georgia the Court is the body executing law and implementing justice<sup>51</sup> and that is why it must make a decision on imposing punishment, as well as releasing therefrom.

Existing position in this regard is justified by the condition that decision made by the Local Council represents an individual-administrative act and it may be challenged through administrative procedure. If the issue of putting person on parole goes to the court, would not it be better to have the Court making decision on that issue?

Considering the fact that in case of appealing the decision of Council through administrative procedure, it is vague whether the subject of the Control of Court would be following procedures envisaged under the legislation from the side of Council, or subjective and objective circumstances related to the convict. In particular, whether the Council studied all important grounds while making decision.<sup>52</sup> Right to fair trial entails making decision which is studied comprehensively, justified and fair. The issue of releasing person from sentence must be by all means decided by the Court. In addition, when discussing the issue by the Local Council the right of convict to have access to case materials, which will be evaluated by the Council, is not ensured.

The issue of conducting oral hearings is unclear, there is no effective appealing mechanism.<sup>53</sup> The practice shows that the decision is substantially unjustified in most cases.

The answer to the question, why is the issue of putting person on parole deliberated by different procedure, is following: the ground for such differentiation is unclear and the issue of releasing a person from sentence must be decided by the Court.

#### **4. Interrelation of Restoration of Justice and Resocialization of the Criminal**

Within the current article the purpose of restoration of justice is discussed in the view of criminal law policy, as well as in terms of principles of proportionality and individualization and as a

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<sup>51</sup> Article 59 paragraph 3, Article 62 paragraph 2, Constitution of Georgia, Decisions of the Parliament of Georgia, 31-33, 24/08/1995.

<sup>52</sup> *Nikoleishvili K.*, Compliance of the activity of the Local Council, Discussing Issue of Putting on Parole, with the Standards of Fair Justice (Analysis of some issues), *Law Journal*, № 2, 2014, 303-304.

<sup>53</sup> *Ibid*, 296-300.

result of their evaluation, it is evident that restoration of justice facilitates and provides resocialization of the criminal. Connection and synthesis of these two purposes of punishment is evident and is revealed in various conditions. In is natural that not all conditions may be discussed in this article, but some important issues will be underlined.

**The essence of justice is primarily expressed in the fair decision of the judge. The resocialization of convict also starts with the fair decision of the court and continues after the serving of sentence as well.** The Supreme Court of Georgia in one of the decisions mentions that despite committing grave crime, the personality of convict and general circumstances must be evaluated individually. Therefore, it is possible to correct and resocialize convict by imposing minimum amount of punishment.<sup>54</sup>

**Hence, the purpose of restoring justice is connected to the type of fair punishment and selection of its amount.** The issue of resocialization is interesting during the imprisonment. Naturally it is better to start rehabilitation from the day of imprisonment. The convict must have information on rehabilitation programs. In the penitentiary institution educational and labor programs must be implemented with full load. “Resocialization of criminal, i.e. correction implies such transformation of the criminal’s personality, when he/she does not violate criminal law and respects the rules of human cohabitation.”<sup>55</sup>

The convict with life sentence must take a very hard path for the resocialization process. “Lifetime imprisonment must not be used for convict of any category without possibility to put on parole.”<sup>56</sup>

**Restoration of justice and resocialization of the criminal is important during the imposition of punishment, as well as while putting person on parole.** It is crucial that all convicts that have been put on parole have proper support after leaving the penitentiary institutions, which ensures their behavior.<sup>57</sup> **Restoration of justice and resocialization of the criminal is directly connected to the rehabilitation process.**

“The state has positive obligation to create sufficient programs and initiatives for the correction of the criminal.”<sup>58</sup> We may suppose that there is a certain risk of recidivism from the side of convict. By applying rehabilitation method timely and properly, this risk may be decreased to the minimum. Decreasing the level of risk is possible within the framework of prison and out of prison programs, in particular, educational, labor skills development, and using other remedial impact.

In terms of the rehabilitation of the criminal it is important to share experience from foreign countries. “While implementing rehabilitation the punishment must be fitted to the personality of the criminal and not the crime. For achieving rehabilitation, the role of society is huge.”<sup>59</sup> “In the US the main purpose of punishment is resocialization of the convict. It entails transformation of the criminal

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<sup>54</sup> Decision of February 20, 2018, № 2K-527AP-17, Criminal Law Chamber of the Supreme Court of Georgia.

<sup>55</sup> *Arsoshvili G.*, Resocialization of the Criminal, Tbilisi, 2009, 6 (in Georgian).

<sup>56</sup> *Vardzelashvili I.*, Purposes of Punishment, Tbilisi, 2016, 109 (in Georgian).

<sup>57</sup> *Nikoleishvili K.*, Compliance of the Activity of the Local Council, Discussing Issue of Putting on Parole, with the Standards of Fair Justice (Analysis of some issues), Law Journal, № 2, 2014, 289.

<sup>58</sup> *Shalikashvili M., Miklanadze G., Khasia M.*, Penal Law, Tbilisi, 2014, 81 (in Georgian).

<sup>59</sup> *Banks C.*, Criminal Justice Ethics: Theory and Practice, Thousand Oaks, California, 2004, 116.

into a law obeying member of the society.”<sup>60</sup> As a result of punishment the purpose must be achieved – person’s legal, social and moral rehabilitation.<sup>61</sup>

In the opinion of English law scientists, the punishment must not be used with full severity. The benefit of resocialization is not in the severity of sentence, but in the application of relatively less severe punishment.”<sup>62</sup>

At the end of the article, purposes of restoration of justice and resocialization of the criminal must be assessed in the view of criminal law policy. Because of its particular importance, the purpose of restoration of justice serves and at the same time causes other purposes of the punishment. Its interrelation with resocialization of the criminal is special. Synthesis of these two provides prevention of new crime from the side of criminal.

## **5. Conclusion**

The current article touches upon such important purpose of punishment as restoration of justice and its interrelation with the resocialization of criminal. In this article importance of restoration of justice is discussed in the view of proportionality and individualization of the punishment, which at the end is the ground for resocialization of the criminal. Within the framework of this research, considering the scientific opinions and existing judicial practice the following views are presented.

Restoration of justice in its essence is connected to making fair decision. It can be ensured by correct qualification of the crime and based on it, selecting punishment of proper type and amount. And this is the ground for resocialization of the criminal.

For the restoration of justice, it is important to correctly define type and amount of punishment, which implies, in term of legislation, correctly chosen type and amount of sanction for each crime. (In case of negligent crimes, the grave outcome must be taken into consideration in terms of legislation).

In the view of restoration of justice and resocialization of the criminal, it is important that the judge imposes fair punishment. Moreover, it is important that the issue of putting convict on parole is decided by the court. Generalization of these issues will facilitate restoration of justice and resocialization of the criminal.

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<sup>60</sup> *Lippman M.*, Contemporary Criminal Law, Concepts, Cases, and Controversies, 2<sup>nd</sup> ed., Thousand Oaks, California, 2010, 56.

<sup>61</sup> *Conton R.*, Probation and the Philosophy of Punishment, Probation Journal, Vol. 65 (3), 2018, 266.

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