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The Georgian Model of Compensation of Non-property Damage for Violating Personal Rights in Line with European Standards

Personal origin is reflected in civil law in personal rights, which are closely linked to personality and the inner self of a human. Accordingly, private legal protection of personal rights is a guarantee of Individuality. Though guaranties of defense of personality have been reflected in Georgian civil law accounting for the European experience, but with some specificities. The purpose of the research is to understand the European standard in order to clarify the relation between Georgian and European approaches.

IT should be mentioned right from beginning that besides term of "personal right", The Civil Code of Georgia (hereinafter - CCG) envisages a term of "personal non-property rights". But it is appropriate to also use a term of "personality rights" recognized in Europe for a comprehensive protection individuals.

Objects of some personal rights can be separated from the person (name, image, personal data and etc.), while some of them cannot (honor, dignity...). There are protected by Article 18, 18[1], 992 of CCG. Also, the personal non-property rights were nominated in general part of CCG, meanwhile Article 992-993 of CCG strengthened the extended protection of personality rights in tort law, accounting for the European experience, which created a solid mechanism for protection of Personality. In addition, the Georgian legislation moved much closer to the European standards on one hand with the adoption of "Personal Data Protection Act" and implementation of international demans and on the other hand by spreading private law protection by CCG Article 18[1] on additional personal data.

Compensation of non-material damage, which in itself is quite a difficult problem because it is linked to many aspects, plays an important role for civil legal protection of personal non-property rights. Research showed that a common characteristic rule of Continental Europe is actually laid out in Article 413, paragraph 1, in which it is stated that the non-property damages shall be compensated only in cases prescribed by the law. Accordingly, the amount of cases of compensation for non-material damages is limited and only substantial non-property damage is compensated. It is important to generalize the problems by using a deep theoretical knowledge and in full compliance with the law. Considering these details would help create a higher standard of protection for Personality.

Keywords: *Personal Non-property Rights, Personality Rights, Individuality, Personality, Dignity and Honor, Name, Image, Personal Data, European Standard, Non-material Damage, Theleological Reduction, Criteria of Compensation, Function of Compensation, Satisfaction and Prevention.*

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1. Introduction

In Democratic state, a human being is the unique value in the face of God, as well as, people; the state must serve the Individual and not on the contrary. "Sociological" individualism corresponds to individual ethics, according to which the humanity is not to be treated as means only but also as an end goal. This is why the teachings of the basic rights is based on personal individuality.[1]

For Georgia, which is part of European space, it is essential to accept modern European values.[2] One of them is the value of human identity[3], which is the subject of sociology, philosophy and other sciences. It is not left beyond attention of Jurisprudence either.

The purpose of research is to determine the scope of Individuality in general sociological point of view using analysis and synthesis methods, while the normative-dogmatic methods help us determine what forms it takes in civil law. It should be determined, does the protection of Individuality and compensation of non-material damage in Georgian civil law rely on the European standard, national bases or a mix of the two. In addition, it must be defined what is the particular characteristics of protection of personality in Georgian private law. Accordingly, in order to determine based on the method of comparison between Georgian and European approaches, it is important to know what a European standard is. However, the paper will focus on only a few problems of protection of personality because it is impossible to exhaust the topic within the framework. In this regard it is important that the essence of non-property damage compensation for violation of personal rights is properly understood, so it should be based on solid methodological foundations and theleological definition of the norm.

Also, the topic is timely in the era of technological development and Internet, when the threat of violation of personal rights is higher than ever. It has a high theoretical and practical significance in the process of Europeanization of Georgian legislation to study the abovementioned issues.

2. The Concept of Individuality and its Various Forms in Civil Law

2.1. Concept of Individuality

Considering Georgia as a part of the legal culture of continental Europe is somewhat a big challenge in the process of Europeanization of Georgian law. It is related to formation of a new legal culture in Georgia with the help of various event leading to it. Also, the Europeanization of Georgian law is considered to be a cultural-historical process and its successful completion is influenced by few factors. In this direction close collaboration with European universities or scientists and lawyers is

1 *Chanturia L.*, Introduction to the General Part of Georgian Civil Law, Tbilisi, 2000, 77 (in Georgian).

2 About Europeanization see *Samkharadze I.*, Europization of Georgia: Key Legal Aspects of EU Membership, Journal "Justice and Law", №5, 2015, 39-54 (in Georgian).

3 *Meißner, H.*, Griechische Wurzeln des europäischen Wertkanons, In: Die kulturelle Eigenart Europas (Herausgeber *Buchstab G.*), Freiburg, 2010, 24.

especially important[4]. Georgia took a path to Europe which goes through Germany and the process of development of legal reforms happened through cooperation with German lawyers without omitting any field of law. Such trace of the relationship has been reflected in private law as well.[5]

Taking into account well-established principle in Europe, personality and individuality have become the foremost value in the legal protection in Georgia too, which was reflected in private law with different means of protection for those values.

The personality is not only a matter of psychology studies but also philosophy and human history.[6] However, any attempt of defining the notion of personality cannot be perfect because it is based on abstract idea of person's ability to act freely.[7]

Personality can be considered as a unique combination of different personal traits. These traits create an individual inner, original unity with the awareness of own identity, spirituality, intellect and free will.[8] In addition, the personality is not only human by the general features but also human by its social, spiritual and physical characteristic as well. To be a personality it means to be free, intelligent, have a choice, make a decision and have a responsibility. The notion of a "human" is generic in character and reflects common characteristics of the human race, while a human becomes Individual thanks to being special.[9] Therefore, individuality reflects the difference from other subjects. Who is special, is unique, thus he is also individual.[10] It is linked to the content of a right because a right is the area of power, in which the subject acts freely according to the opinion and the will of their own.[11] Therefore, human's individuality is the combination of natural, social, physical, mental, or other properties, what distinguishes one person from others. It is human interest to protect own identity, be presented uniquely in front of the public, free from alien physical or social characteristics that could be forced on him intentionally or unintentionally.[12]

2.2. Various Forms of Personality in Civil Law

GCC took into account an experience, accumulated in western countries (such as France, Germany), on legislative rule about personal non-property rights, and created an institute in civil law by

4 see in Details *Chanturia, L.*, Die Europäisierung des georgischen Rechts – bloßer Wunsch oder große Herausforderung? In Rabels Zeitschrift, Band 74, Heft 1, 2010, 154-181.

5 *Zoidze B.*, Reception of European Private Law in Georgia, Tbilisi, 2005, 105 (in Georgian).

6 *Aleksej N. Leont'ev*, Tätigkeit - Bewusstsein - Persönlichkeit, Band 40, Neu übersetzt von *E. Hoffmann*, Bearbeitet und herausgegeben von *G. Rückriem*, Berlin, 2012, 141.

7 *Westermann H.,* Person und Persönlichkeit als Wert im Zivilrecht, Heft, 47, Wiesbaden, 1957, 17.

8 *Unseld F.*, Die Kommerzialisierung personenbezogener Daten, München, 2010, 11-12.

9 *Tcomaia N.*, A Role of Personality in Development of Society, Journal "Intercultural Communications", №17, 2012,, 173-175 (in Georgian).

10 *Peifer K.N.,* Individualität im Zivilrecht, Mohr Siebeck, Tübingen, 2001, 8-9.

11 *Stuhlmann Chr.*, Der zivilrechtliche Persönlichkeitsschutz bei Ehrenverletzung und kommerzieller Vermarktung in Deutschland, Taschenbuch, 2001, 83.

12 *Ninidze T.*, Individuality of Human – Subject of Soviet Civil Law Protection, Bulletin of SSR Scientific Academy of Georgia; Philosophy, Psychology, Economy and Law Series No. 4, 1977, 88 (in Georgian).

developing judicial practice. These rights are reflected in general part of Georgian civil law.[13] But some fundamental norms, which make it possible to have a wide spectrum of protection of personal rights under Articles 992 and 993 GCC, have appeared in tort law. Sharing European experience in Georgia first of all caused recognition of personal non-property rights and then protection of those right. That was prompted by the necessity to realize that human is not only creator of wealth but actually is a creature with a dignity.[14]

In GCC now can be found a term "private relationships" in Article 1, i.e. non-property relationships that are associated with the property, as well as, those that are associated with the property.[15] "Personal non-property relations" was used in civil law of old regime (SSR of Georgia) and it was a contextual analog of "personal relations". But these concepts are not essentially different from each other by their meaning. In addition, the new term of "personal rights" is used in civil law (Article 19 CCG) except for the term of "personal non-property rights", which was derived from the term of "personal relation" (Article 18 CCG). A term "non-property" is characterized by absence of a property feature in it but it does not reflect the content of the phenomenon itself. Objects of some personal rights are inseparable from the person, while some of them can be separated from subjects and can be objectified immaterial goods (name, image, personal data and etc.). Separable personal goods are protected by civil legislation, while personal relations, object of which is non-material good that can be separated from person, is regulated by civil legislation. Accordingly, the idea of classifying personal non-property relations classified as regulated and protected relations, which was partially shared by the legal doctrine of old regime, is not reflected in CCG. Therefore, private legal impacts on protected and regulated relations are expressed in the term "regulation" under Article 1 CCG.[16]

But the thing is that in Article 18 GCC private non-property rights are listed in singular principle, while personal rights are universal in nature and are not exhaustive.[17] It is appropriate to use both terms, instead of replacing one, and, thus, adopt a term "personal" too, which is recognized in Europe.[18]

Honor, dignity, name, portrait, voice and other goods have mutually independent roles in individualization of a human.[19]

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13 *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 74 (in Georgian).

14 *Chanturia L.*, Personal Non-property Rights in Modern Civil Law, Journal "Law", №11-12, 1997, 24-30 (in Georgian).

15 *Zoidze B.*, Reception of European Private Law in Georgia, Tbilisi, 2005, 178 (in Georgian).

16 *Ninidze T.,* Structure of first Article of Civil Code, In anniversary Collection of Akaky Labartkava 80th (red. *Chanturia L.*,) Tbilisi, 2013, 167-169 (in Georgian).

17 *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tbilisi, 2012, 330 (in Georgian).

18 There is an idea that it is preferable to use a term "personality right" (Persönlichkeitsrecht) because it expresses personality better than a term "personal non-property right". See *Kereselidze D.*, The Most General Notions of Private Law, Tbilisi, 2009, 132-133 (in Georgian).

19 *Ninidze T.*, Individuality of Human – Subject of Soviet Civil Law Protection, Bulletin of SSR Scientific Academy of Georgia; Philosophy, Psychology, Economy and Law Series №4, 1977, 88 (in Georgian).

2.2.1. Dignity and Honor

The constitution of Georgia, which sets the necessary boundaries for development of private law, is considered as the measurement of valuable order in civil law of Georgia (part 1, article 2 of CCG). But by main rights, identified by constitution, are used indirectly in private law relations. Dignity, honor, privacy, freedom of creativity and the protection of the rights of other goods belong to those rights. They may be revealed in the basic defining nature of private law, such as freedom of individual and private autonomy. Obviously, freedom of individual is limited by law. One of the means of such restriction in tort law are prohibitions. According to most general formula, a person who unlawfully and intentionally caused damage to other person, must compensate him for the damage (under Article 992 CCG).[20] Thus, participation of private persons in civil relations is limited by laws, which state that it is unacceptable to use rights in order to cause damage to others.

Indeed, the constitutional law determines an individuality in the form of principle, but the civil law gives the specific civil legal form to protection of personal rights, in order to the person implement them themselves, through granting various rights. Primary rights are the person's self-protective rights from actions of the state, when the purpose of civil law is to regulate the legal relationships between the separate private persons.[21] Thus, the Constitution of Georgia regulates the private law (horizontal) relationships, through indirect norms of private law.[22]

In addition, the primary value in Europe is a human being, as original, free and equal to other human beings. The respect for human being's dignity, as an absolute right, means personal acknowledgement of each human being, deprivation and restriction of which, by any reason, is inadmissible[23] In ethical and legal terms the honour and dignity belong to normative sphere, because humans, who are actually unequal and, in social terms, have unequal honour, normative construct is making it possible for them to be considered as equal.[24] But in legal terms, an individual's self-evaluation, which more or less coincides with the public evaluation, is important. Thus, an individual's social (external) evaluation must be protected at full volume. On the other hand, internal evaluation is protected to the degree that coincides with the external assessment, as human qualities (dignity) is protected only to the extent that is valued by the society.[25]

In civil legal terms, the attitude of society towards the person and evaluation of own meaning by a person is considered in moral categories of honour and dignity, which have to comply with appropriate facts of reality.[26]

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20 *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 82-89 (in Georgian).

21 *Siebrecht I.*, Der Schutz der Ehre im Zivilrecht, in: JuS, Heft 4, 2001, 337.

22 *Phirtskhalashvili A.*, Schutzpflichten und die horizontale Wirkung von Grundrechten in der Verfassung Georgiens vom 24. August 1995, Berlin, Universitätsverlag Potsdam, 2010, 47, 49-52.

23 Decision of Constitutional Court of Georgia, 26 October, 2007 №2/2/-389 (in Georgian).

24 *Rühl, Ulli F.H.*, Die Semantik der Ehre im Rechtsdiskurs, "Kritische Justiz", Heft 2, 2002, 201-203.

25 *Todua M., Qurdadze Sh.*, Peculiarities of Decision-making on Certain Categories of Civil Cases, Tbilisi, Association of Georgian Judges, 2005, 49 (in Georgian).

26 Decision of August 3, 2012 №as-1739-1720-2011 of the Chamber of the Civil Category Cases of the Supreme Court of Georgia (in Georgian).

2.2.2. Name

The right on name is an absolute right. According to dogmatic standpoint, it is be treated as a right on personal or non-material good, which could belong to physical and legal persons, as well as a union of persons.[27]

A right on name, as a non-property right, is not included in the inheritance mass and is closely linked to personality. Therefore, this right cannot be split[28] and cannot be transferred. However, the civil name can be transformed into a trade name as a part of the enterprise property in commercial relations and it can be considered as non-material property right. The right on name exhibits such a double (dualistic) nature.[29]

The right on name is of dichotomous nature by its content and includes the authority to (a) bearing the name and demanding its recognition from everyone (positive side), (b) as well as prohibiting others from using the same name and avoiding the mixing of names, because the "interest of identity" takes the foremost priority (negative aspect).[30]

In addition, third persons are prohibited not the use of the same name but the use of that name that will cause damage to the person authorized with the name, if that will make the wrong impression about the name in the public eye. Therefore, here we mean the threat to the individuality of person that bears the name (and not use the same name).[31]

Right of owning a name can apply to 3 elements: 1) usage of pseudonym or fictitious name, 2) public name and 3) right of family members to submit a claim. Main aim of using pseudonym is to conceal the real name. By using the pseudonym, the author creates a unique literary, artistic, or acting individuality. They differ by scope of application. Civil name individualizes the person as a member of society. It is used in area of public and private life. Person may have one civil name and several pseudonyms, depending on how many fields does he participate in. But the person may have several pseudonyms in one field in order to be in center of attention in the field of newspapers and magazines. The aim of name and surname is to individualize person. Surname confirms person's affiliation toward certain family. As for the right to submit a claim, it is owned by carrier of the name.[32]

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27 *Ohrmann Chr.*, Der Schutz der Persönlichkeit in Onlien-Medien, Unter besonderer Berücksichtigung von Weblogs, Meinungsforen und Onlinearchiven, Frankfurt am Main, 2010, 29.

28 *Agarkov M.M.*, The Right to Name, In Collection of Articles on Civil and Business Law, Dedicated to the Jubilee of prof. *Garielia F.Sh.*, M., 2005, 150 (in Russian).

29 *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 199-201 (in Georgian).

30 *Heermann P.*, Verwertung von Persönlichkeitsrechten der Bundesligafußballspieler durch die Bundesligaclubs sowie die Deutsche Fußball Liga GmbH (Seminar zum Sportrecht), 2008, 7, 8; *Agarkov M.M.*, The Right to Name, In Collection of Articles on Civil and Business Law, Dedicated to the Jubilee of prof. *Garielia F.Sh.*, M., 2005, 147 (in Russian).

31 *Agarkov M.M.*, The Right to Name, In Collection of Articles on Civil and Business Law, Dedicated to the Jubilee of prof. *Garielia F.Sh.*, M., 2005, 148-149 (in Russian).

32 Ibid, 154-156, 158.

Preconditions for claims about protection of own name are: 1) the name must be owned by the petitioner; 2) respondent must have used this name in violation of the law; 3) It should be followed by violation of the applicant's interests (material or non-material damage).[33]

Thus, special features of the name include, mostly, an interest of identifying (identification) a person from others, and a person's interest to be individualized from others (individualization).[34] In addition, some separate individuation function of the name, which distinguishes a style of the labor product from other products.[35]

2.2.3. Image

Person has a non-property right to prohibit painter from publishing a picture, where he is depicted.[36] Right to personal image is a form of a general personal right. This is why publishing personal image without a consent is considered inadmissible interference in general personal rights. In addition, a person's general personal rights are violated if his personal image was from the private sphere, as well as, if it's made available to the public.[37]

The right of protection of image is considered in conjunction with personal life in Europe because a bases for imposing non-property damage is interference in a person's private sphere. Wrongful depiction of a person in advertisement is bases for claims for a non-material damage. However, this assumption is rebutted when the owner of the image was paid for it.[38] This idea was reflected in Article 18 of the Civil Code's Section 5, according to which, publishing person's image (photo image, movie, video film) without his consent is equivalent to infringing person's honor and dignity. The consent is not required when a person's image is published in relation to his public notoriety, the position held, or in demand of the police or the administration of justice. In addition, property claims can be made in case of culpable infringement. It is important novelty of the civil code to include principle of material compensation for non-material damages. Person is entitled to demand compensation for non-property damages in case of culpable infringement of personal right (Under Article 18 of Section 6 of CCG). However, publishing personal image for commercial purposes always requires consent of the person. For example, if a model is payed for her image, the consent is not needed, because it is considered as consent.[39] In this case, moral good (A person's appearance) and his/her material good (posture effort) is considered as an object for contract.[40]

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33 Ibid, 161.

34 *Peifer K.N.*, Individualität im Zivilrecht, Mohr Siebeck, Tübingen, 2001, 168.

35 *Bichia M.,* Protection of Personal life, in Accordance with the Civil Law of Georgia, Tbilisi, 2012, 149 (in Georgian).

36 *Ninidze T.*, Moral Damage in Civil Law, "Soviet Law", №2, 1978, 51 (in Georgian).

37 *Höhne T.*, Persönlichkeits und Medienrecht, Gezieltes Fotografieren einer Person - Verletzung des Rechts am eigene Bildnis, In: "Zeitschrift für Informationsrecht" (ZIR), Heft3, 2013, 207-208.

38 *Bartnik M.*, Der Bildnisschutz im deutschen und französischen Zivilrecht, Mohr Siebeck, Tübingen, 2004, 259-260.

39 *Chanturia L.*, Personal non-property rights in modern civil law, journal "Law", №11-12, 1997, 30, 28 (in Georgian).

40 *Ninidze T.*, Moral Damage in Civil Law, "Soviet Law", №2, 1978, 51 (in Georgian).

The issue is particularly relevant in the light of technical development,[41] because as for today it's very easy to display a person's image with some technical means. If a person's image is falsified using photomontage, the person is entitled for compensation for non-property damages. Two cases must be distinguished: a) whether it comes to imitation of person's appearance using his/her twin, b) or whether it reflects the image of a person's portrait.[42] Thus, protection of personal image must be considered as one of the legal guarantees for the protection of individuality and privacy.[43]

2.2.4. Voice

Right on own voice is equated to the right on own image.[44] Just like protection of the image, protection of the phonogram recordings, on one hand, must be considered as means for protection of person's individuality, and, on the other, as one of the legal guarantees of the right to privacy protection. Illegally recorded sound could lead to violation of the right to person's individuality; one person speaking or doing a performance (song) may be attributed to others, which should be avoided especially in radio or film synchronization.[45]

Sound, much like image, is a natural good, which is attributed to a person for a long term and is developing. However, it bears less information then an image. An image can transfer information through visual communication. Mainly, protection of one's voice comes in 3 fields: a) originality, b) confidentiality, c) and protection of expressed will.[46]

Protection of voice is considered special personal right and the right of its usage and management is only in disposal of an authorized person. Voice, on its own is enough for identification of the person.[47]

In addition, with respect to the right of protection of the phonogram recordings, it must be determined how important is it to distinguish public and nonpublic speeches. But it is noteworthy, that, in both cases, the speech may be insincere or less thought through, which depends on the person's inner attitudes. Also, if a person's speech were recorded and released without his consent, this may adversely affect his honor and dignity. It's prohibited to use hidden microphones, if recording of the sound is not intended for public (state) or scientific purposes.[48]

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41 *Höhne T.*, Persönlichkeits und Medienrecht, Gezieltes Fotografieren einer Person - Verletzung des Rechts am eigene Bildnis, In: ZIR, Heft 3, 2013, 207-208.

42 *Bartnik M.*, Der Bildnisschutz im deutschen und französischen Zivilrecht, Mohr Siebeck, Tübingen, 2004, 259-260, 58.

43 *Ninidze T.*, Civil law Guarantees of Protection of Personal Confidentiality, Journal „Soviet Law", №1, 1977, 24 (in Georgian).

44 *Chanturia L.*, Personal Non-property Rights in Modern Civil Law, Journal "Law", №11-12, 1997, 28 (in Georgian).

45 *Ninidze T.*, Individuality of Human – Subject of Soviet Civil Law Protection, Bulletin of SSR Scientific Academy of Georgia; Philosophy, Psychology, Economy and Law Series №4, 1977, 94 (in Georgian).

46 *Peifer K.N.*, Individualität im Zivilrecht, Mohr Siebeck, Tübingen, 2001, 162.

47 *Werthwein S.*, Das Persönlichkeitsrecht im Privatrecht der VR China, Berlin, 2009, 95.

48 *Ninidze T.*, Individuality of Human – Subject of Soviet Civil Law Protection, Bulletin of SSR Scientific Academy of Georgia; Philosophy, Psychology, Economy and Law Series №4, 1977, 94-95 (in Georgian).

2.2.5. Personal Data

The personal data is considered as means for person's identification. The owner of these kind of information is authorized to decide whether it should be allowed to give them to others or not.[49] Accordingly, the personal data here is considered as an object of commercialization[50] that can be separated from a person.

Personal data is a mean to identify an individual. Data owner has the authority to decide whether it is allowed to issue them to others.[51] Personal information is: person's bank account, information about health condition, genetic code, and information concerning personnel, shop visiting habits and sexual interests.[52] At the same time, we deal with personal space, where each person develops his/her own individuality and protects his/her personal information from commercial or similar use, in the forms of publication or distribution. There are often conflicts between private and public interests in this process. However, in certain cases, the intervention of private sphere may be justified by the protection of public interest.[53]

Until 2009, the Constitution of Georgia and General Administrative Code protected personal data. However, it was necessary to protect personal data by private law norms too, a fortiori, the Constitution of Georgia foresaw it. Thus, the Civil Code's paragraph 18^1 was added, which refers to the possibility of getting personal data.[54]

Today this gap has been filled by the private law, under the article 18^1 of civil code Protection of personal data fell within the framework of private law, and is in compliance with international law. This subjected Georgian legislation to international harmonization and part of private life fell under the scope of legal regulation.[55] Namely, in 2008 under legislative change concerning the possibility of getting personal data, the article 18^1 was added to the civil code.[56] It was necessary to fil the vacuum. A person has been granted the right to access the personal data, and records relating to its financial or other private matters, and make copies of this information (under Article 18^1 Part 1). Under article 18^1 section 3 a person is obligated to transfer personal data under the written request, if he submits a written consent of

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49 *Prins C.*, When personal data, behavior and virtual identities become a commodity: Would a property rights approach matter? SCRIPT-ed, Vol. 3, Issue 4, 2006, 278.

50 *Unseld F.*, Die Kommerzialisierung personenbezogener Daten, München, 2010, 11-14.

51 *Schemitsch M.*, Identitätsdaten als Persönlichkeitsgüter (Dissertation), Darmstadt, 2004, 125.

52 *Bichia M.,* Protection of Personal life, in accordance with the Civil Law of Georgia, Tbilisi, 2012, 167 (in Georgian).

53 *Amelung U.*, Der Schutz der Privatheit im Zivilrecht, Schadenersatz und Gewinnabschöpfung bei Verletzung des Rechts auf Selbstbestimmung über personenbezogene Informationen im deutschen, englischen und US-amerikanishen Recht, Tübingen, 2002, 19.

54 *Moniava P.(T.),* The Right to Obtaining Personal Data in Civil Law, Journal "World and law", №2 (6), 2009, 17 (in Georgian).

55 Explanatory Card about a Amendment in Civil Code of Georgia Bill "On March 14, 2008 № 5919_I-'s Law (in Georgian).

56 *Moniava P. (T.),* The Right to obtaining Personal Data in Civil Law, Journal "World and Law", №2 (6), 2009, 17 (in Georgian).

the person, whose personal data is relevant information. In this case, a person has to protect the confidentiality of this information.

However, it is not specified in the Civil Code what are the legal consequences can be caused by denying or issuing personal data. There is an expressed opinion in the legal literature that this issue should be regulated similar to administrative law, by strictly defined framework. Accordingly, if denial or issue of personal data causes material or moral damage, the last one must be compansated.[57]

Thus, in Europe it is highlighted that any action must serve a person, as a final goal. Georgia shares this view and tries to identify special significance of a person, which requires specific changes in legislation as well in practice.

3. Compensation for Non-property Damages

3.1. General Basis for Compensation for Non-property Damages

As Europe recognized person as supreme virtue, for its defense was established principle of compensation for non-property damages. This rule is also reflected in the Civil Code. Namely, under article 18^1 section 6, in case of culpable infringement of private virtues (honor, dignity, image etc.) person is given right to claim compensation for non-property damages.[58] Since the concept of non-property damage is difficult to imagine, the EU member states consider it in general terms, as the opposite of material damage, which monetary equivalent can't be determined.[59] However it can be noted that non-property damage is "physical or mental pain." In this case, the actions of the intruder must be reflected in the victim's state of mind, and must cause some mental reactions. These are negative feelings or sensations.[60]

General basis of liability (damages, illegitimacy, causal link, fault) is used for monetary compensation for inflicted suffering (non-material damages) (Under the article 992 of CCG).[61] Fault, in turn, can be expressed with the intention or negligence.[62] For the most part, however, infringement of individuality, e.g. publishing image and unacceptable infringement of personal space is done with intent.[63]

Claims for non-property damages may be filed in conjunction with other claims, as well as independently. In the cases concerning non-pecuniary damages Plaintiff is a person who has suffered

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57 *Jorbenadze S.,* Onleincommentary of the Civil Code, gccc.ge, 08.10.2015, Art. 18^1, Abs. 18-19 (in Georgian).

58 *Chanturia L.*, Personal Non-property Rights in Modern Civil Law, Journal "Law", №11-12, 1997, 30, 28 (in Georgian).

59 *Wurmnest W.*, Grundzüge eines europäischen Haftungsrechts: eine rechtsvergleichende Untersuchung des Gemeinschaftsrechts, Tübingen, 2003, 280, 287.

60 *Erdelevsky A.*, Compensation of Morale Damage: Analysis and Commentary of Legislation and Judicial Practice, 3rd ed., revised and enlarged, Moscow, 2007, 1 (in Russian).

61 *Erdelevsky A.*, Compensation of Morale Damage: Analysis and Commentary of Legislation and Judicial Practice, 3rd ed., revised and enlarged, Moscow, 2007, 57 (in Russian).

62 *Fuchs M.*, Deliktsrecht, 4-te Auflage, Heidelberg, 2003, 79.

63 *Höhne T.*, Persönlichkeits und Medienrecht, Gezieltes Fotografieren einer Person - Verletzung des Rechts am eigene Bildnis, In: ZIR, Heft 3, 2013, 208.

physical or mental pain, and the respondent is a person who has inflicted such pain with its action (or omission).[64]

In this case the burden of proof is on the plaintiff. He must prove: a) that specific person has caused damage, b) the character of physical or mental pain, c) causal link between action and the result, d) the amount of monetary compensation. Object of Proof includes following legal facts: 1) Does a defendant's action cause or not moral or physical suffering of a plaintiff, the nature of the actions and when the damage is done; 2) which personal rights of a plaintiff are violated; 3) What reveals physical or moral suffering of a claimant; 4) Quality of guilt of a person who has done damage (when it should be taken into consideration). 5) Amount of compensation.[65]

3.2. Theleological Reduction of Article 413 of Civil Code[66]

Under article 413 section 1 of GCC for non-property damages compensation in money can only be claimed in cases prescribed by law (statute), with reasonable and fair compensation. Aim of this law is to reduce and diminish unjustified expansion of the scope of this norm, which ensures the stability and order of the civil turnover.[67] If there is mentioned only "compensation for damages" in the provision and not exactly "compensation for non-material damages", it means that material damages would be entitled.[68]

Thus, legislation allows to grant a compensation for significant (severe) non-material damage in the case of encroachment on legal wealth (such are honor, dignity, health, privacy, and others) and its existence. In this way legislator differentiated essential and nonessential damages. Non-material damage may be entitled if it is legally considerable, since it is difficult to confirm the existence and define the exact price of the damage.[69]

This rule is mandatory because non-property losses are recoverable only in the cases precisely prescribed by law. Moral damage can exist, yet it can not be compensated, unless the law prescribes it. Moreover, according to CCG, part 2, article 413 in cases of bodily injury or harm inflicted to a person's health, the injured party may claim non-property damages as well. Non-property damages, illegitimacy, causal link and fault should exist simultaneously for monetary compensation of non-material damages. Non-material damage may occur but it will not be compansated if law does not consider any kind of

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64 *Todua M., Qurdadze Sh.*, Peculiarities of Decision-making on Certain Categories of Civil Cases, Tbilisi, Association of Georgian Judges, 2005, 70 (in Russian).

65 Ibid, 74-75.

66 About theleological reduction see *Beaucamp G., Treder L.*, Methoden und Technik der Rechtsanwendung, 2, neu bearbeitete Auflage, Hamburg, 2011, 78-79.

67 Decision of Januar 20, 2012 №as-1156-1176-2011 of the Chamber of the Civil Category Cases of the Supreme Court of Georgia (in Georgian).

68 *Ciskadze M.*, The Problem of Compensation of Non-property Damage for Body Injury in Georgian Legislation, Journal "Justice and law", №2, 2008, 17 (in Georgian).

69 *Doghonadze L.,* The Compensation of Moral Damage (Dissertation), Tbilisi, 2010, 174-175, 181 (in Georgian).

compensation for such a damage.[70] Hence, compensation for purely mental pain, which is not a direct result of injury to body or health, cannot be awarded. Compensation for pain and suffering may only be claimed if the shock is of such severity that it amounts to bodily injury.[71] Herein "victim" is the person damaged and not his or her family members. Current legislation excludes immaterial damage for death,[72] since the purpose of satisfy the victim cannot be fulfilled by the granting monetary compensation.[73]

3.3. Compensation for Non-property Damages in Europa

3.3.1. Compensation for Non-property Damages in Germany

A Georgia took a path to Europe through Germany[74], it is appropriate to briefly discuss the rule of compensation for non-property damages in Germany.

In 2002, according to changes in German Civil Code (later GCC), article 847 was excluded and completely placed in one part of the article 253. By the first part of the 253th paragraph, it was determined that non-property damage can only be granted in the amount of compensation prescribed by law. Also in case of encroachment of goods, that are enumerated in the second part, it is established the possibility of compensation for non-property damages.[75] Herewith, if there was determined only the tress-pass to woman in the 847th article, now non-material damages for sexual self-determination, despite the gender, is added in the 253th paragraph. In addition, non-material damages can be used for any encroachment of non-material welfare, including general personal welfare and not only for the encroachment of the rights that are listed in the second paragraph of the article 253.[76] It became possible to compensate for non-property damages even it is caused by fault, when the victim and violator are not in a contractual relations, also if the damage is caused by the source of increased danger. Thus, the goal of this change was to widen the cases of non-material damage compensation and to settle the issue as far as possible.[77]

By the formation of the general human right is provided reasonable protection of personal rights. That is why it is not necessary for any human right to be prescribed by Civil Law.[78] The article 253 (2)

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70 Decision of May 1, 2015 №as-113-108-2014 of the Chamber of the Civil Category Cases of the Supreme Court of Georgia (in Georgian).

71 *Spindler G., Reckers O.*, Tort Law In Germany, The Netherlands, 2011, 133.

72 Decision of May 1, 2015 №as-113-108-2014 of the Chamber of the Civil Category Cases of the Supreme Court of Georgia (in Georgian).

73 *Kropholler J.*, German Civil Code, Study Comment, 13th rev. ed., *Chechelashvili Z., Darjania T.* (Translators), Tbilisi, 2014, 636 (in Georgian).

74 *Zoidze B.*, Reception of European Private Law in Georgia, Tbilisi, 2005, 105 (in Georgian).

75 BGB § 253.

76 *Müller S.,* Überkompensatorische Schmerzengeldbemessung? Ein Beitrag zu den Grundlagen des 253 Abs. 2 BGB n. F., Berliner Reihe - Versicherungswissenschaft in Berlin, Band 29, Berlin, 2007, 9.

77 *Doghonadze L.,* The Compensation of Moral Damage (Dissertation), Tbilisi, 2010, 22 (in Georgian); *Barabadze N.*, Moral Damage and the Problem of Compensating it, Tbilisi, 2012, 32-33 (in Georgian).

78 *Kereselidze D.*, The Most General Notions of Private Law, Tbilisi, 2009, 138 (in Georgian).

creates basis not only for separate requirements, but also provides the legislative obligation for damages by the obligator (debtor), such as GCC's 823th[79] paragraph. German court practice shows that minor non-property damage is not compensated.[80]

3.3.2. Compensation for Non-property Damages in France

Compensation for non-material damage is not an independent sort of compensation In French legislation. Thus, pre-requisites of liability for non-property damages coincide with the ones of the general responsibility.[81]

Therefore, since the non-property damage comes from judicial practice, courts use old judgments when calculating damages. That is what French judicial practice has in common with German one. Neither French law nor German law limits the list of rights and goods. They allow compensation of non-property damages in many cases and this increases the level of protection of these goods.[82] As a result, (as well as in England) compensation for non-material damages in France are much less limited than in Germany.[83]

3.3.4. Compensation of Non-property Damages According to European Convention on Human Rights

3.3.4.1. Purpose of Article 8 of Convention

Private life is a broad concept which is incapable of exhaustive definition. It concerns a sphere within which everyone can freely pursue the development and fulfilment of his personality. Thus, private life necessarily includes the right to develop relationships with other persons and the outside world.[84]

Thus, as well as the negative obligation not to interfere arbitrarily with a person's family and private life, the State may also have to act affirmatively to respect the wide range of personal interests set out in the provision. In certain circumstances, therefore, the Convention will require the State to take

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79 BGB § 823.

80 *Kropholler J.*, German Civil Code, Study Comment, 13th revised ed., *Chechelashvili Z., Darjani*a *T.* (Translators), Tbilisi, 2014, 135-136 (in Georgian).

81 *Barabadze N.*, Moral Damage and the Problem of Compensating it, Tbilisi, 2012 (in Georgian), 40.

82 *Honore A.M. (1971),* Causation and Remoteness of Damage. In International Encyclopedia of Comparative Law, Vol. 11, Ch. 7. The Hague: *M. Nijhoff*, 108, cit.: *Barabadze N.*, Moral Damage and the Problem of Compensating it, Tbilisi, 2012, 41 (in Georgian).

83 *Wurmnest W.,* Grundzüge eines europäischen Haftungsrechts: eine rechtsvergleichende Untersuchung des Gemeinschaftsrechts, Tübingen, 2003*,* 288.

84 *Kilkelly U.,* The Right to Respect for Private and Family Life, A Guide to the Implementation of Article 8 of the European Convention on Human Rights, Germany, 2003, 10-11; *Kilkely U.*, The Right to Respect for Privacy and Family Life, realization of the Article 8 of Human Rights of European Convention, *Chelidze L., Bokhashvili B., and Mamukelashvili T.*(Transl.), Tbilisi, 2005, 14, 9 (in Georgian).

steps to provide individuals with their Article 8 rights and it may also require them to protect persons from the activities of other private individuals which prevent the effective enjoyment of their rights.[85]

The practice of the European Court on Human Rights clearly shows that the reputation is a part of a private sphere, because society's attitude toward a person is considered as an element of this person's uniqueness and psychological integrity.[86] Although the protection of dignity, name, image and identity in general is not directly identified in the European Convention on Human Rights, it can be said that these rights should be considered together with the physical and moral integrity and guarantee of personal identification and information with the right to respect private life.[87]

3.3.4.2. Compensation for Non-property Damages

European Court on Human Rights classifies the cases of compensation for non-material damages. They are divided into different types: bodily injury, mental harm, expression threatening someone's dignity and loss of chance (success). After the long trail process European Court provides an opportunity to be granted with fair compensation. EU Law focuses on English and French law while systematizing the compensation for non-material damages.[88]

A compensation for mental harm can be granted if the serious breach in German law; on the other hand in English and French law unimportant damage could be enough. That confirms the high standard to protect individuals from government that is fulfilled by the European. [89]

3.3.4.3. Conflict of Private and Public Interests

In certain cases, the private interest collides with the public interest, it gives rise to a conflict of its interests. Decisive is the public interests value, since, as big the information value is, as more patience obligation is required from the person whom about the information is spread. The less the public interests base is, the bigger becomes obligation of protecting personal life.[90] Accordingly, for example, while protecting personal image should be established, is there or not an entitled persons agreement and on the

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85 *Kilkelly U.,* The Right to Respect for Private and Family Life, A Guide to the Implementation of Article 8 of the European Convention on Human Rights, Germany, 2003, 20-21; *Kroon v.* Netherlands [1994] ECHR, 31*; Gurgenidze v.* Georgia [2006] ECHR, 37.

86 *Pfeifer v.* Austria, [2007] ECHR, 33.

87 about physical and moral integrity see *Kilkelly U.,* The Right to Respect for Private and Family Life, A Guide to the Implementation of Article 8 of the European Convention on Human Rights, Germany, 2003, 14-15, 42*; Kilkely U.*, The Right to Respect for Privacy and Family Life, realization of the Article 8 of Human Rights of European Convention, *Chelidze L., Bokhashvili B. and Mamukelashvili T.* (Translators), Tbilisi, 2005, 25-27, 58 (in Georgian).

88 *Wurmnest W.,* Grundzüge eines europäischen Haftungsrechts: eine rechtsvergleichende Untersuchung des Gemeinschaftsrechts, Tübingen, 2003, 300.

89 Ibid, 301.

90 *Tcomaia N.*, Trends of Judicial Practice Regarding the Free Development of One's Own Personality and Right to Respect one's Privacy and Family Life, Journal "Justice and Law", №4, 2014, 140 (in Georgian).

other hand, represented person is a civil servant or a private individual, to determine would there be a public interest or not.[91]

There where the public interest is higher, the interest of protecting privacy can come into collision with the public interest, to get and examine necessary information.[92] Public interest is bigger toward politicians than ordinary citizens. When the public interest is high, the conflict is possible between an interest of personal welfare and public interest to get and freely discuss necessary information.[93] Thought the european precedent determined, that critics limits is wider towards the civil servant, than to a private man.[94] Also private interest is being limited while it`s necessary for the democratic society. But the dignity enjoys an absolute protection, regardless of everything, especially if it's concerned with intimate sphere. Also, conflict of interests must be settled individually, by taking on discount specific circumstances, because each occasion is different.[95]

3.4. Indemnification and Functions of Non-property Damage

Non-property damage (unlike economic damage) is being compensated not equivalence principle, but also the specific features of, in particular, the quality and nature of the damage, the duration and gravity of the fault (of course, if that responsibility is a necessary condition), taking into point the material state of party. In addition, it is important to compensate the gravity of the damage, as light as a spiritual feeling so light physical pain will not be considered.[96] The point is that the severity of the damage, which causes the body with spiritual and (or) a decrease in the perception of a rational, is considered as a criterion to increase the amount of non-property damage.[97]

In addition, non-material damages is used for specific functions. Here the main goal is not deprived rights restitution (a violation of the spirit recovery). In this case it is impossible to find out exact monetary damage. While the compensation is directed for claimants justification in the eyes of the public, facilitating physical and moral suffering and alleviate the negative emotions. In addition, the volume of non-property damage must be compensated by court at the request of the plaintiff. [98]

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91 *Peters N.*, Zur Pressefreiheit auf dem Prüfstand des deutschen Bundesverfassungsgerichts und des Europäischen gerichtshofs für Menschenrechte, Justiz in aller Welt, Betrifft JUSTIZ Nr. 83, September, 2005, 161.

92 *Freesoz and Roire v.* France [1999], ECHR, 52.

93 Decision of Jule 18, 2001 №3/376-01 the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia (in Georgian).

94 *Castells v.* Spain [1992], ECHR, 28-29.

95 *Bichia M.,* Conflict of Values between the Freedom of Expression and Right to Privacy, Journal "Justice and law", No3, 2013, 128-147 (in Georgian).

96 *Chikvashvili Sh.*, The Responsibility for Moral Damage, Tbilisi, 2003, 105, 107, 97-98 (in Georgian); *Kropholler J.*, German Civil Code, Study Comment, 13th rev. ed., *Chechelashvili Z., Darjania T.* (Translators), Tbilisi, 2014, 135-136 (in Georgian).

97 *Erdelevsky A.*, Compensation of Morale Damage: Analisys and Commentary of Legislation and Judicial Practice, 3rd ed., revised and enlarged, Moscow, 2007, 58 (in Russian).

98 Supreme Court of Georgia, Recommendations of the Supreme Court of Georgia on Problematic Cuestions of Civil Law Practice, Tbilisi, 2007, 70-71.

Out of functions of Liability for non-material damage is preferred stimulating and preventive role. Compensating non-property damages in legally provided cases will be used for compensating damage, recognition of trespasser's rights, private and general prevention functions.[99] Compensating non-material damage at the cash requirement preferably have the victims satisfying (moral) function. Encroachment on the rights the idea of compensation is playing in the background (secondary). In addition, it serves to violation.[100] For the Faulty liability is essential so called moral compensation of damages suffered. However, liability without fault during moral satisfaction function has shifted to the back burner.[101]

There should be considered the responsibility of Correctional warning impacts of the use of repression and the possibility of redress for the duty. Here one finds that the repression of the property will be treated according to the terms of prevention.[102]

4. Conclusion

Establishing individuality and personal rights protection in Georgian private law is the one of the most important results of moving towards of European law. Georgian and European experience make it clear that protection of individuality manifests in protection of personal non-property rights and personal rights. It is true that personal non-property rights are closely linked to personal rights but there are differences between them. List of personal moral rights is based on a singular principle and personal rights are based on a basis of generalization. Personal rights are considered an inexhaustible field, which is related origination of more new human rights due to constant development of personality. This topic is urgent more so in terms of commercialization of the personality, which is well highlighted in Europe. The legislator has granted it a function of a filler by determining the 992 Article of CCG, because the Article 18 of CCG, which is a benchmark in terms of human rights protection, requires to be filled with other general rules. European experience showed that human dignity is universal, which is why they are able to cover and provide other personal rights. This ability makes it particularly broad in nature in private law. At the same time, dignity is protected in Article 18 of CCG and it is considered to be the central area of general personal right and provides the remedy for protection of other forms of detecting individuality.

Europe is based on a principal statute that any action should serve the human, as a goal. Legislation and judicial practice of European countries must be based on this principle. It is necessary to develop Georgia's legal basis in a way of European harmonization in order to achieve maximum protection of

99 *Ninidze T.*, Moral Damage in Civil Law, Journal "Soviet Law", № 2, 1978, 55 (in Georgian).

100 *Ohrmann Chr.,* Der Schutz der Persönlichkeit in Onlien-Medien, Unter besonderer Berücksichtigung von Weblogs, Meinungsforen und Onlinearchiven, Frankfurt am Main, 2010, 130.

101 *Kropholler J.*, German Civil Code, Study Comment, 13th rev. ed., *Chechelashvili Z., Darjania T.* (Translators), Tbilisi, 2014, 135-136 (in Georgian).

102 In this connection See *Varkalo V.*, About Liability on Civil Law (compensation for damage - function, species, boundaries), translated from the Polish by *W. Zaleski*, Moscow, 1978, 38, 44-45 (in Russian).

personality. Obviously, it does not mean that characteristic features of Georgian state should be disregard though.

In addition, the Georgian legislation moved much closer to European standards with protection of Personal Data. It would be better to establish the compensation of non-material damage for the unauthorized use of the most sensitive personal data via legislative changes because the compensation of non-property damage is limited by the law.

So, the guarantees of protection of personality are characterized with some specificities in Georgia. But the recognition of the general personal right in Georgian judicial practice will better protect personal rights. It appeared that CCG has reflected a general European approach by which non-property damages will be compensated only in cases prescribed by the law.

At the same time, Europe has imposed a principle of compensation in material form for non-material damage in order to protect individuality, as the most important value. This regulation reflected in the Civil Code of Georgia as well. The study concludes that Georgian judicial practice mostly discusses the compensation of non-property damage on the basis of theleological reduction. Seems that a universal characteristic rule "about the compensation of non-material damage in cases determined by law" is taken in developed countries, such as Germany but in Georgia there are different specific features. The Thing is that Germany took path of generalization the compensation of non-material damage on the basis of the legislative changes and the "general personality right" nowadays. In this sense, France is freer and allows a bigger opportunity for generalization. As for the judicial practice of the European Court of Human Rights, Individuality has apparent the connection with private life here and individuality is as one manifestation of private life. In this sense, in this judicial practice is not the compensation of non-property damage connected with canonizing the damage maximum seriously. Here the moral damage shall be compensated by way of determining its concrete manifestation, by which is it actually approaching English law.

It is obvious that there are attempts to extend examples of compensation of non-property damages in civil code of Germany with the help of most general article 823. Georgian approach to compensation of damage of non-property rights confirms that civil law adopts novelties difficultly. Both - the protection of the purpose of the law and extension to the examples of compensation of non-property damage using scientific knowledge are important for westernization of the judicial practice and creation of high standard of protection. The above-mentioned demonstrates that Georgia, which shares main provisions of the Civil Code of Germany, must take into account its experience and also judicial practice must encourage itself to embrace the innovative way of compensation of non-property damage.

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63. Gurgenidze v. Georgia [2006] ECHR, 37.
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65. Decision of Jule 18, 2001 N3k/376-01 the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia (in Georgian).
66. Freesoz and Roire v. France [1999], ECHR, 52.
67. Kroon v. Netherlands [1994] ECHR, 31.
68. Castells v. Spain [1992] ECHR, 28-29.

Vakhtang Zaalishvili*

Certain Problematic Issue of Standard Terms – Freedom of Agreement and its Limits

Freedom of contract can not be perceived without autonomy in content formation of the agreement; Though, it is evident also, that the freedom at stake relates to all parties concerned, as usually, the term contract is applied to mean at least bilateral expression of wills. Real relations show that equality prescribed by the law is frequently limited due to certain circumstances. One of the parties' stronger position is also part of the range of those circumstances and it may induce, "coerce" others to agree to the unilateral, uncompromising terms offered. Such a practice concerns all societies with market economy both in the sphere of consumer or other types of legal interaction. Usage of standard terms is the most evident form to reinforce positions of stronger party through contractual ties and the legislator is opposing this with the tool of good faith equipped with additional features to confront abuse of power on different levels. Procedural and substantive control mechanisms for standard terms are part of Civil Code since its adoption based on realities of that time. Those realities as altered for now condition existing mechanisms to appear as less adequate; due to internal systemic inconsistencies and based on practical experience they seem no more convincing and effective. The present essay attempts to show existing normatives form different angle and through foreign practice background. This could be useful through the process of implementation of European principles into Georgian law.

Key words: Standard terms of the contract, ambigouos standrd terms, procedural fairness control, essential fairness control, *contra proferentem*, "grey" and "black" lists of standard terms, harmonisation with EU law

1. Introductıon

Freedom of contracting[1] is one of the central, crucial, irreplaceable cornerstones for civil circulation. It is constructed on core values[2] of individual freedom and free self-realization. Contract itself steams from the notion of transaction[3], which is described as expression of coinciding, uninfluenced wills by which parties undertake certain obligations to saitsfy certain interests. Contractual parties themselves decided its essence and form. Not to agree or to chose couterpart is a part of their

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1 Civil Code of Georgia (CC), Art 319, I, first sentence: "Subjects of Private Law may Conclude Contracts within the Limits of llaw and Define its Content", <https://matsne.gov.ge/ka/document/view/31702>.

2 Arts. 14 ("Evry Human is Free by Birth...") and 16 ("Evrybody has a Right to Freely Development his Personality"), <https://matsne.gov.ge/ka/document/view/30346>.

3 See *Kereselidze D.,* General Systemic Notions of Private Law, European and Comparative Law Institute, Tbilisi, 2009, 233 ff..

freedom. While formation of inner will and then fulfillment of the promise are completely upon the parties, the only thing that is left for state is to enforce promise if for whatever reason one of the parties is not willing any more to act as obliged. Parties are themselves guarantors of their contractual rights; Save the presumption of responsible conduct, parties are bearing the risk on content of expressed promise and the agreement itself implies fairness.[4]

Standard terms are providing for the part of the content of agreement; they are formed by the practice steaming form objective necessity of business. They illuminate the content by which one party is willing to contract and in variuous formes presented to potential counterparts; Frequently the market operator offering product or services to consumer or other counterpart on the market is contracting with multiple customers on a daily basis which means formig the consensus on essential terms each time from the legal viewpoint. Simultaneously, as a rule, the sales of producut at concrete moment can only be justified on certain terms and not the others from economic viewpoint for offeror; Thus it is in the interest of the business operator to put those favourable terms in the agreement and failing this concrete transaction may transform to unprofitable and unwanted. Obviously, the high volume of customers demand goods and services can be afforded by no trader if proceeded in a manner of negotiating each and every imortant term with anyone willing to contract. It is therefore why the business seeks to operate with preformulated contract terms.[5] This serves for saving time and economic resources.[67] Anyone tries to include the most beneficial terms into preformulated contract terms for himself.

On the other hand, contract as one of the expression of principle of freedom is also based on equality and state, is the gurantor of that value as well.[8] Once actual equality is ensured the existence of standard terms itself shall not create problems, however in consumer realations weak position of consumer leads to contrary result. The reasons of this are the strong economic position of business and less informed and motivation state of consumer[9] steamed form low value of routin transaction. The similar logic applies to transaction with non-consumer counterparts, where offeror posseses stronger market position.

Regulation of contractual relations, in general, which in Georgia is basically done by the Civil Code, does not imply the essential control of proportionality of obligations undertaken. Surely the

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4 Cf. *Markesinis B., Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treaties, 2nd ed., Hart Publishing, 2006, 46 ff.

5 Cf. *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 2, <http://www.jura-welt.com/sunrise/media/mediafiles/14586/German_Standard_Terms_of_Contract_Thomas_Zerres.pdf>.

6 *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M.* (eds.), Universität Bielefeld, April 2007, 352, <http://www.eu-consumer-law.org/consumerstudy_part3a_en.pdf>.

7 On these and other advantages see *Kakoishvili D.*, Standard Terms of the Contract, Georgia Business Law Review, 2nd ed., Tbilisi, Center of National Business Law at Tbilisi Free University and the Judicial Independence and Legal Empowerment Project (JILEP) Academic Publication, 2013, 68, <http://nccl.ge/m/u/ck/files/Geo_Comm_Law_Review_2013.pdf>.

8 Art. 1 of the CC.

9 Factors enumerated in *Reich N., Micklitz Hans-W., P. Rott, Tonner K.*, European Consumer Law, 2nd ed., Itersentia 2014, 127.

principle of good faith is aknowledged[10], but similarly to its German analog, limitation is directed to the manner of right's realisation and not to control of the content.[11] As a starting point, general norms on good faith, on the one hand, is provided for exceptional cases and illuminate negative attitude towards content control, on the other hand. Where, consideration for performance is present the adequacy of the latter with the former is practically out of policing. Despite this, special rules to ballance interests of the parties in the relations with particular character is also known in Georgian law and the mechanism of standard terms rewiev stands as one of the examples[12] for such allegation.

As partly mentioned above, it is obvious that party who prepared standard terms in advance is oriented to secure own interest and this is natural. However, if counterpart, despite this fact agrees on the proposal, general contract law logic dictates that problem is solved. But where factors like intense daily routine variety of goods and services which market offers come into play, it is not always reasonable to comprehensively negotiate every single term of the contract and arrive to consensus each time. This applies to both parties' positions. Thus, distinguished negotiation power leaves small chances for another to influence the offered content. Aim of the legislator therefore should be to reveal situations of this kind, take into account continuously altered forms and promote the balance the interests of each party.

Form different perspectives, usage of standard terms for the sole drafter's interest is limited on two stages. These mechanisms[13] were present in EU member states national laws before adopting common European instrument in 1990.[14] They were transposed into Georgian law with Art. 342 and ff.

Present study shall attempt to show up certain problematic aspects of current Georgian regulation in comparison with European mechanisms. Georgia signed Association Agreement with the EU[15] and undertook to make its legislation compatible with European standards. Partly these standards are at place in law, but since 1997 the practice shows that their comprehension and usage face difficulties. Draft law on consumer protection is under consideration[16], which provides for concrete additional regulation to "increase" standard terms control but it is limited to involvement of consumer rights organization into negotiations on standard terms used by dominant market actors. Hence, the purpose of the present study is not only to identify formulation deficiencies of rules in force, but also to illuminate those barriers which addressee of rules face through everyday life and court proceedings. By putting forward European

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10 Art. 8, III ("Parties to Legal Relation are Obliged to Fairly Carry out their Rights and Duties") and Art. 115 ("Civil right shall be lawfully Realised. Realisation of right for the sole purpose to harm another is prohibited") of the CC.

11 §242 German Civil Code (GCC): "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration".

12 E.g. the possibility of decrease of duty under the penalty clause as per art. 420 of the CC.

13 Directive 93/13/EEC. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=EN>. Further modified by 2011/83/EU Directive, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&from=EN>.

14 Prominent models prior to the adoption of the directive are discussed in *Reich N., Micklitz Hans-W., Rott P., Tonner K.,* European Consumer Law, 2nd ed., Itersentia 2014, 131.

15 Between the European Union (EU), its Member States and Georgia, in force from 1, May, 2016, <https://matsne.gov.ge/ka/document/view/2496959>.

16 On Legislative initiative and its status see <http://info.parliament.ge/#law-drafting/9950>.

model the attempt to highlight modern trends in regulation of contracts with standard terms herewith shall be made.

2. Scope of the Application of Standard Terms

The meaning of standard term shall be discussed prior of touching specific features of control mechanisms. In general, it is to be underlined that prime purpose of standard terms' control mechanism is to protect weaker party from relevantly stronger offeror and the genesis of norms steams from the necessity of policing consumer contracts. The same reason conditioned the formation of creation of common legal framework within the European ambit. Despite this the range of member states' laws[17] are not limited to the coverage of consumer contracts and it is deemd that any contract can be subject of control where there is superiority one party over another. It follows than that consequently contract under family, succession, labour (both collective and employment) and corporate laws can be agreed including standard terms. Such interpretation does not conform the aims and etimology of the mechanisms. Exclusion of these fields form regulation was resolved by explicit reference in Gemran law[18], though still in general, fairness test is applied to all types of contracts with standard terms.[19] Same can be equaly said about Georgian law as art. 342 if formulated in an abstract way. These norms[20] are placed in general part of contract law and hypotheticaly cover marriage[21] contracts, succession agreements and contracts regulated by corporate law[22] as well.

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17 Germany, Netherlands, Protugal, see *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M.*(eds.), Universität Bielefeld, April 2007, 351.

18 Rule provided for in §310, IV of GCC. Though, it should be underlined here that application of it is subject to certain modifications (see 2nd and 3rd sentences of the rule referred).

19 See the comment related to §307 in European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules, *Fauvarque-Cosson B.* and *Mazeaud D. Eds.,* Sellier, European Publishers, 2008, 527.

20 Despite systemic place, rules specially designed for consumer contracts (arts. 343, I; 347 and 348) are excluded; Typically standard terms are used in consumer transaction like sales and service/works contracts (however, in a broad terms others such as lease of an apapartment, consumer credit are in a same status) and this leaeves less chance for converage of transaction in succession, family and corporate matters, but they are not still completely out of circle of regulation.

21 Marriage contract as per art. 1174 of CC requires written form, which prescribes notary involvement in control of contractual content to conform requirements of law as provided by art. 115, I of 2010 Minister of Justice' Order №71 on Performance of Notarial Actions, <https://matsne.gov.ge/ka/ document/ view/ 1010061>. Though, notarial control does not go beyond such imperative on extreem disproportion of contractual obligations as in e.g. "...terms putting one of the spouses to grave position in relation to another one" – art. 1179, II of the CC "...terms putting one of the spouses in extreamly unfavourable position" - art. 1181 of the CC, leaving the room to agree on terms with lesser degree inconformity with good faith as per art. 346.

22 Judgement of Supreme Court №AS-28-25-2015 of 2015 is notable in this respect. Court of Cassation upheld the position of Appelate Court on art. 343 of CC to be applied as a legal basis for the following factual circumstances: the defendant, natural person purchased an apartment in multiple dwelling block. Sales contract provided for the clause that by acquiring the title on property purchaser automatically

3. Content of Standard Term

Regulation of contractual relations are first of all made by the agreement itself and if by chance there is lack of consensus on whatever part of it, provisions of law serve to fill up gap for conflict resolution; most of those provisions are dispositive (*ius dispositivum*).[23] Dispositive norms are "proposal" form legislator, which may be altered by the parties. Moreover, parties may agree on their own rules and it derives from the principle of freedom of agreement as per art. 10 of CC. Therefore, quite wide area of actions and degree of freedom allows party to offer terms unilaterally to another. This implies the possibility for creator of contractual terms to deviate from rules and where there is no legal regulation offer own standard of conduct. This is provided for in art. 342: terms "…by which the rules different form legal norms or supplementing them are to be created". It is therefore evident that contractual terms copying the rules of law shall not be considered as standard terms.

It is especially to be underlined that that at the moment consumer protection special legal framework is extremely minimized in Georgia. Legislator practically does not delimitate consumer and ordinary transactions made in between equal counterparts. Thus, Civil Code comprises norms of all types of private legal relations, where *de facto* equal status of actors is presumed and no one enjoy any preferences in the present context. This state of affairs runs since the cancellation in 1996 of Law on Consumenr Protection[24], which defectively, but still provided for protection mechanisms. Therefore, by usage of standard terms' control mechanisms leads to the result that the CC legal freamework comes into play when it substitutes contractual term of bad faith, though this seems not completely satisfactory compared to modern standars. To exemplify, the country has the obligation to transpose European

became a member of apartment owners' community and assumed all obligations as prescribed by statute of community. The community itself had before contracted with third party for the service maintenance common share parts of immovable and the cause of action related to payment of service price against the defendant. The Judgement deserves attention because of reference to art. 343 implying that rules under community Statute are perceived by the court as standard terms of (sales) contract. At the same time internal relations of apartment owners' community is in its essence similar to corporate relations. The matters are governed by special Law of 2007 №5277 on Apartment Owners' Community, <https://matsne.gov.ge/ka/document/view/19798>. The clause envisaged by sales contract is at the same time rule directly prescribed by the Law. Thus, the possibility of its coverage by art. 343 is strongly doubtful. The obligations undertaken by community against the third party is another matter and they can hardly but still be deemed as standard terms of the sales contract with the new owner. It is clear that failing to provide information to purchaser on such a legal "defect" in rights on a thing constitutes breach of pre-contractual obligation and it steams form art. 21, II, h) of the mentioned Law. This aspect can be reviewed for standard terms perspective what has actually been done by the Appellate Court and then upheld by cassation. Such qualification raises many questions, but one thing is clear that issue (standard terms application scope) is to be carefully reconsidered in terms of systemic regulation.

[23] Cf. *Chachava S.*, Concurrency in Between Causes Actions and their Legal Grounds in Private Law, dissertation, Tbilisi State University, 2010, 7-9, https://www.tsu.ge/data/file_db/faculty-law-public/sofio_chachava.pdf. *Markesinis B., Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treaties, 2nd ed., Hart Publishing, 2006, 46 ff. 46.

[24] <https://matsne.gov.ge/ka/document/view/37780>, (document is under processing as archived).

Directive 1999/44/EC[25] on certain aspects of the sale of consumer goods and associated guarantees according to the Annex XXIX of Association Agreement. Art. 3.3 of the Directive provides for cure of the defect of product by repair or substitution as remedies for consumer. He is entitled to make choice between these two provided if it incures "unreasonable" expencess for business as compared to other altermative. Art. 490, III of the CC applies identical approach[26] but lacks an essential factor for the assessment of "reasonableness", which is inherent to Directive's model: this factor is a "significant inconvenience" that consumer may suffer if other party objects to the chosen remedy. It comes therefore that significant discomfort deprives seller the right to object and this is the special protection mechanism in consumer sales. Such factor is not taken into account with ordinary sales. It follows then that similar gaps in Georgian regulation affects final legal result as general rules apply where substituting void standard term.

Where one party alters legislative rule, he considers that standard of fairness and ballance, which legislator prescribed relevant, does not fit his requirements and thus is unacceptable. It is clear that there is already a danger of ignoring other party's interests. Regulation different from legal rule usually comes to exclusion clauses, however there are also examples of alteration of place and time of performace and creation of different format. Extremely radical exclussion clauses, in general, are usually barred by imperative rules form legislator,[27] but exclusion causes in a form of trandard terms come under special regulation.[28] These clauses in a contract are similar in essence with the notion of debt forgiveness. The latter is separately regulated as one type of transaction. Such agreements are admissible and moreover, they are not subject to any formal requirements; their essence may even be established by interpreting concludent action.[29] Thus it follows then that the purpose which a party applying standard term may have, can be achieved by separate agreement on debt forgivness. However, correctness of such conclusion in relation to standard terms with liability exclusion effect seems doubtful. One of the main features of standrad term, further discussed in detail below, is that addressee is unable to influence on its content. The debt forgiveness, on its part, is the key subject matter of the consensus and the lack of the latter leads to inexistance of the agreement. Hence, the achievement of (in advance) debt forgiveness through standard term unconditionally shall not be possible; As a prerequisite the assessment of fainess

25 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0044&from=EN>.

26 For alternative opinion on holder of right to claim as per art. 490 see *Chachava S.*, comm. on art. 490 of the CC, 17th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), <http://www.gccc.ge>.

27 E.g. art. 495 of the CC – voidance of term prescribing the exclusion of liability for the defect of a thing in case of intentional conduct.

28 Common law approach on such contractual clauses discussed in *Treitel G.*, The Law of Contract, Eleventh Edition, Sweet and Maxwel, 2003, 215 ff.

29 See *Svanadze G.,* comm. on art. 448 of the CC, especially 12th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), <www.gccc.ge>.

of such term shall be subject to the test in art. 343 following norms as those are special rules in relation to provisions on debt forgiveness.[30]

On the other hand, when we speak on autonomus regulation of matter not covered by law, it is relevant to mention that innovation is not itself dangerous. Party's aspiration may have mutually beneficial character and new rule invented could not lead to the nessecity of special control. [31] Here we mean unilaterally created and offered term advanced to other party and the latter lacks the possibility to change its content.[32] This character itself implies that offeror is not in a willing position to change despite objection from potential counterpart and the latter is leaded to "consent", it could be out of his interest.[33]

3.1 Essential Terms

Art. 327 of the CC prescribes for the rule that contract is only concluded, when parties agree on its essential terms. At the same time, art. 62 provides for that invalidity of any term of transaction does shall not lead to invalidity of entire transaction if the latter could survive without invalid part. Control mechanism of standard terms either completely excludes integration of a term into agreement or invalidates the one coming in contradiction to good faith.

Hence, it is crucial point whether essential term can be qualified as standard term as questioning the existence of such a term may entail the questioning of the existence of entire contract. Georgian scholars expressed the opinion that any contractual term can be qualified as standard, including price, time of performance or other.[34] Legislator considers the term essential if it is prescribed by law and serving for diferenciating various contracts or one of the party considers considers it as decisive to agree on.[35] For example, in sales contract[36] description of an object[37] (on which seller undertook to transfer

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30 This issue has tight connection with the question whether essential terms prescribed in art. 327 of the CC of the cotratct can be considered as standard terms..

31 Art. 342, II of the CC. Individually negotiated clause is not considered as standard term. In contrast, prior to the adoption of the Directive, French model subjected individually negotiated clauses to statutory control. Notwithstanding the fact that some of the enumerated rules in contract may be individually negotiated, the others do not lose the status of standard terms – art. 3.2 second indent of the Directive 93/13/EC, <http://www.jurawelt.com/sunrise/media/mediafiles/14586/German_Standard_Terms_ of_Contract_Thomas_Zerres.pdf>.

32 Art. 3.2 of the Directive 93/13/EEC. The CC does not explicitly provide for this criteria, but can be logically derived from art. 342, III.

33 So called "take it or leave" manner. *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 3.

34 *Zoidze B.*, comments on art. 342 of the CC, Comments on Georgian Civil Code, third Book, General Part of Law of Obligations, Samartali, 2001, 182; See also *Aladashvili A.,* comments on art. 342 of the CC, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), www.gccc.ge.

35 Art. 327, II of the CC.

36 Art. 447, I of the CC.

37 Greaten Britain shows an interesting approach to the issue by the 2015 Act on Consumer Rights (consolidating basic consumer rights; Schedule 2 – the so called grey and black lists of contractual terms –

title) is a term disappearance of which is unimaginable. In addition to it the assessment of its fairness leads to the question of adequacy of consideration – i.e. price. Adequacy of price itself it can be said that the desired quantity can be imposed to weak party by offeror, but at the same time, its subjection to control mechanism seems not to be the reasonable approach if it is clear, unambigious and definit. Price is a constitutive part of synallagmatic agreement. Art. 343 of the CC provides for the mechanism of inclusion of standard term into the contract; the rest of the provisions are for the assessment of fairness. Both cases require to have valid agreements as prerequisite. Invalidity of prerequisite or its inexistence entails the disappearance mentioned "standard" term and there is nothing left to control. Thus, it is essential that invalidity or non-inclusion of the term could be cured by interpretation. Otherwise relation transforms from contractual to legal obligatory one.

It certain cases, as an exclusion, legislator tends to be liberal on demanding consensus on price at the moment of agreement: in sales contract[38], as per art. 447, III it is immaterial to have concrete price defined at the moment of conclusion and allows parties to agree on it later, though the latter point shall be subject of consensus. Where definition of concrete price is dependent upon objective criteria (future event, e.g. world market quotation for a concrete moment), problem is solved.; If definition of the price is up to third party or one of the counterparts, art. 325 of the CC comes into play prescribing for good faith to be applied taking into account the fact that clause unilaterally defined does not stand the test of art. 346 of the CC.

In consumer contracts, European perspective is clear: Art. 4.2 of the Directive of European Council 1993/13/EEC on Unfair Terms in Consumer Contracts excludes the fairness assessment of main subject matter and price/remuneration. The purpose of the rule bar control of disproportion of price clause.[39] Contrary could lead us to market price control mechanism.[40] Court does not need standard term control mechanism to evaluate whether consumer concluded good or bad deal in terms of price.[41] Such policy is preconditioned by the preposition that price is simply and clearly set. This implies that vague price term is still under control. Itself the latter rule is not entirely clear and free from inconsistencies because of one of the criteria for standard terms incorporation into contract – clearness/transparency. We shall revert in detail to the latter point in the present paper.

Directive is not completely barring the price control, as art. 8 leaves the member states the possibility to introduce more stringent provisions for control.[42]

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is supplemented with (12th) rule, which enables trader to alter characters of main object, after the moment of contract comes effective, <http://www.legislation.gov.uk/ukpga/2015/15/schedule/2>. See also Guidance on the unfair contract terms provisions in the Consumer Rights Act 2015, Competition and Markets Authority <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf>.

38 There is similar situation in contract on works: art. 630 of the CC.

39 Cf. *Weatherill S.*, EU Consumer Law and Policy, Elgar European Law, 2005, 121.

40 Cf. *Treitel G.*, The Law of Contract, 11th ed., Sweet and Maxwel, 2003, 217.

41 Cf. *Markesinis B., Unberath H., Johnston A.*, Cf. *B. Markesinis, Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treaties, 2nd ed., Hart Publishing, 2006, 46 ff. 175.

42 Besides, art. 32 of the Directive 2011/83/EU (this Directive supplements the Directive 1993/13/EC with art. 8a) setting the information supply requirement for member states on any further changes on various issues including control of adequacy of price.

Policing of the spheres, where statutory formation of price is made, should be outside of application scope[43], these are so called communal expences: e.g. supply of water (including draining part of the price), natural gas[44], electricity[45], as well as services associated. Statutory price itself contains elements of public interest and in the democratic society abuse of public power conceptualy goes beyond pure private law regulation area.

In practice exclusions form general rule on impossibility of control of essential terms are quite a number. They are mainly directed to those contractual clauses, which are changeable unilaterally after conclusion and on which consumer agreed in advance.[46]

3.2 "Prepared in Advance...by One Party"

Quite an important feature of standard terms provided for in art. 342 is that it should be elaborated in advance, though it also should be supplemented with the second feature – it only should be done by offeror. It is necessary to exclude apllication of protection mechanisms to those cases, where term was eleborated by both parties in advance and the expressions of consent follows after while e.g. by signitures on one ducument. It is based on the logic that term can only qualify as standard if it protects only on eparty's interest. It is true as steams from the art. 342, III ("mutually agreed term" is separated as specifically). This is further connected to the combination where written term is later on changed by oral agreement. It is to be underlined that change should be effective even if written agreement specifies for the change only in a written form.[47]

3.3 Multiple Use

Addittional criteria for qualification of standard term is provided for in art. 342 – for multiple usage; this is an indicator that offeror attampts to carry out business in somewhat uniform, standardised manner and where it is clear that deals are to be made with different kind of potential customers relocation and thus minimisation of contractual risks is vital, to be on a save side. It does not itself unconditionally imply stronger position of offeror, though creates doubt that such an approach could hardly be changed during negotiation process. Hence it is an author's opinion that only the lack of discussed fiture could not serve as a ground for exclusion standard term status of a clause. This character

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43 Such approach is provided for in §310, II the GCC.

44 E.g. 2011 №18 Ordinance of National Regulatory Commission of Energy and Watersupply of Georgia on Tarrifs of Water Supply, <https://matsne.gov.ge/ka/document/view/1498805>.

45 2008 №33 Ordinance of National Regulatory Commission of Energy and Water supply of Georgia on Tarrifs of Electricity, <https://matsne.gov.ge/ka/document/view/80698>.

46 For the example see *Markesinis B., Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treaties, 2nd ed., Hart Publishing, 2006, 175-176.

47 See *Kropholler J.,* comments on §125, 12th indent, Study Comments of German Civil Code, 13th ed., transl. by *Chechelashvili Z.*, Georgian Young Lawyer's Association Publication, for GIZ, Tbilisi, 2014, 52.

is not a necessary attribute in the Directive 1993/13/EC, but is provided by German model,[48] where at least three times application of the term is accented. It makes purpose clear. However, it is also immediately underlined that the very first application already qualifies clause as a standard one.[49] Both the commentaries[50] and case law unambiguously refers to multiple usage in Georgia.[51] Simulteniously in a somewhat strange way, court of cassation provides in its Judgement №AS-376-357-2013 that "similarities in forms" of contract concluded with two separate customers do not create enough ground for the conclusion that text was supposed to be used multiple times. This contradicts not only German practice but also the part of the comments stipulating that more than one application of same terms with even one customer refers to the relevant purpose. Essence lies not in multiplicity of usage but in necessity of protection in case of danger of abuse of contractual freedom by one party. The relevant proof can be made not only by reference to the fact of multiple usages.[52, 53]

If we turn back to consumer transaction, contrary argument to criteria of multiple usage becomes evident. European legislator intentionally rejects such criteria as indicative as it not to be turned as

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48 *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M. (eds.)*, Universität Bielefeld, April 2007, 352. Also see *Aladashvli A.*, comments on the art. 342, 5th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG). Terms should be intended to be applied for more than one time even with the same customer.

49 *Kropholler J.,* comments on §305, 1st indent, Study Comments of German Civil Code, 13th ed., transl. by *Chechelashvili Z.*, Georgian Young Lawyer's Association Publication, for GIZ, Tbilisi, 2014, 186.

50 *Aladashvili A.,* comments on the art. 342, 5th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 2.

51 E.g. Judgments of Supreme Court №AS-376-357-2013 and №AS-755-811, where the court of cassation referrs to the importance of obligatory character of multiple usage; See also Supreme Court Judgement №AS-1225-1245-2011 of 2011, where claimant, the bank argued that the clause in contract on commercial lease of immovable property with natural person (owner) was unfair standard term. The cassation court paid the attention to the fact that there were no evidence provided to prove usage of clause in other transaction. It was underlined therefore that the critera of multiple usage was of indicative nature.

52 Here two principle approaches are dealt with: one is based on German model, where all, busines-to-consumer, business-to-business and consumer-to-consumer transactions' standard terms are controlled and multiple usage criteria serves as a sort of a filter; on the other hand, there is so called French model based on "abuse theory", where no classification of transactions is made; crucial point is to have one party's stronger position and attempt of its undue application. It implies then that individually negotiated term equaly comes under control. Euroean Court of Justice is for the "abuse theory" in the joint cases C-240/98 to C-244/98 - Océano Grupo Editorial SA v. Murciano Quintero [2000] ECR I-04941, also in the case C-168/05 – Elisa María Mostaza Claro v. Centro Móvil Milenium SL [2006] ECR I-10421. Cf. *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M. (eds.)*, Universität Bielefeld, April 2007, 351-353.

53 Supereme Court Judgement №AS-1225-1245-2011 (note 50), in addition to multiple usage, cassation draws attention to the fact that bank was an entity, sufficiently strong, possessing "enough resources at the moment of the conclusion of the contract to receive qualified legal consultation". By this the court underlined the main purpose of establishing weakness of contractual party as a crucial preposition for fairness control.

hindering point for protection of weaker party. §310, III, 2 of the GCC is an example of aknowledgment of the argument: the rule is to reject the criteria for consumer contracts in German model. It is logically based on rebutable presumption that in consumer transactions the positions of consumer is unequal to that of the business and it does not matter for how many times business intends to use standard term. Theoretically in between of equal parties unequality should be established each time in each case.

Kind of detalisation is not possible with the formulation currently provided by art. 342 of the CC.

3.4 Suprimacy of Individualy and in Detail Negotiated Terms; Form

Art. 342 provides for the rule that in detail negotiatied clauses are not considered as standard terms (par. 2), on the one hand and on the other side, individually negotiated clauses are superior over terms prepared in advance (par. 3).

Par. 2 is in tight connection with offering of the term with the requirement to give consent where there is no room influencing the content. Thus, offeror does not even admit to negotiate and arrive to consensus. It is therefore true that only presenting the term can not speak itself that addressee could change the content and there should be something more to prove that offeror was ready to negotiate.[54] Par. 3 steams form the logic of par. 2, stating that individually negotiated terms are superior. Evidence presented at court proceedings showing the content beneficial for offeror is hardly rebuttable and thus, the rule above would loose all its meaning if burden of proof that he lacked possibility influence content is on addressee. Hence, the fact that the term was individually negotiated is to be proved by offeror. European legislator shifts that burden of proof to business by art. 3.2 of the Directive 1993/13/EC. It comes further that addressee shall only prove that the term was presented to him by the other party. Then it is up to defendant to argue that he gave possibility to the counterpart to take account of his own iterest in the clause.

One aditional conclusion steams from the above analysis: all kind of evidence from negotiation process has to have equal value.

Further it is interesting how this rules affect state of affairs form offeror's perspective. This issue shall be considered in relation to form. There comes no restriction from legislator related to formal validity (thus, the term can orally be agreed). Written text of the contract or linked to it standard terms in any form are the evidence of the kind showing sufficiently persuasive picture on completeness, integrity and conclusiveness of the consensus. It means therefore that the offeror always will underline that clear, unambiguous signed by addressee is the final agreement. The same can less be possible if the term can be differently iterpreted, though this case is related to the criteria of transparency and shall be separately discussed. If the written term is unambiguous the contrary can be proved by the same manner in written

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54 *Kropholler J.,* comments on §305, 2nd indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 186.

with parties in equal position in the deal and no other evidence shall be admitted. In contrary to this, where addressee argues that the document was presented to him by the other party, shift of the burden of proof comes into play and addressee would not further try to collect additional evidence. The presumption to apply presented written memorandum and standard term offeror's mere clarifications shall not suffice.

Terms with the listed characteristics further undergo bi-level assessment. a) Procedural and b) substantive fairness tests.

4. Procedural Fairness Test

4.1 Separation of Deals of Different Type

Art 343 introduces two tests taking into acount whether addressee is consumer or entrepreneur. It is not directly shown in par. 1 that it applies to consumer transaction, but multiple usage terms, usually are prepared by business which it uses in everyday transactions. Thus, it is clear that the most of the deals to which par. 1 applies are deals with consumer. Besides, the existance of arts. 347 and 348 (including phrase "...to natural perosns, which do not pursue entrepreneurial activities") reinforces this logic. Teleologic interpretation leads us to the same direction. Legislator aimed at exactly to cover "unordinary" daily (meaning fast transactions of small value within the personal consumption context and in the environment precluding the negotiations on all point of deal) situations. Covers or not par. 1 deals in between businesses is debatable as multiple usage criteria should be of effect of their exclusion. Though cases envisage by "abuse theory" may well exist even here.

Art. 343, II provides for less stringent test for inclusion of standard term against business than it is envisaged in first par.

4.2 Consumer Transactions

Procedural fairness test in consumer transaction means the assessment of those preconditions which shall be present the standard term to be integrated in contract. The preconditions to be discussed shall cumulatively be present.[55] They can be devided into two groups – "transparancy" and "voluntariness". Transparancy itself is present when standard term is specifically referred[56] and

[55] *Aladashvili A.,* comments on the art. 343, 1st indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 1.

[56] Art. 343 – visible script and reference. This means that e.g. in case of written memorandum referece to aditional terms shall be made on first or on the page which consumer reads in detail for sure; offeror shall specifically refer to those terms (in contracts automatically concluded e.g. carwash service terms shall be

explained to consmer and it at place and is easily accessable before conclusion of contract[57]; content of the contract shall be visually well perceptable (where verabaly communicated perceptability is dependent on factual circumstances) meaning that ordinary consumer can read it;[58] content shall be formulated in comprehensibe and undestandable way for a person without special knowledge. In particular, the rule and its consequences shall be clear, thus complicated legal terminology and cross referenes in the text is impermissable. Defence of offeror in this regard shall be the allegation that addressee, despite the presumption on cumsumer's weaker postion possessed enough legal competence to properly understand complicated construction. Transparency created to time factor as well: before conclusion consumer shall be given enough time to understand terms. If the requirement is fulfilled shall be assessed on each ocasion.

Finally, it is necessary that addressee give consent, which may be expressed concludently.[59, 60] In proving the consent, e.g. in a written contract, siganature of consumer on the page where standard terms are printed is vital. Even in case of body text (signed) refers to volumnous annex signature of which is impracticable, business caries out the risk refered text could be left out the contract and cannot for its part; it is therefore the burden of proof is on him and it is quite high.

4.3 "Non-consumer" Transactions

The procedure for integration of stanard terms into contract with entrepreneur addressee of is considerably simplified by art. 343, II. To include them in contract it suffieces the offeror to give clear reference on usage of such terms and make them reachable in any of the form.[61] This is justified by

placed on clearly visible place). Addressee shall have clear understanding that proposed document deals with rules regulating the relations.

57 For example, printing of terms on paycheck or its back side or information memo-paper, receipt paper shall not be claimed to be as perceptable. First, it is the availability of term prior consent and second it is to be ensured that the documetn used can fit content of the term in full. Besides, duty of care of offeror is so high that he shall take into account all possible obstacle the comprehension of the term may face: e.g. vision hadicaps, iliteracy, ect. Italian and English practice can be seen in *Nebbia P.*, Unfair Contract Terms in European Law, A Study in Comparative and EC Law, Hart Publishing, 2007, 46-48

58 Relevantly inordinarily small script may raise doubts.

59 See *Aladashvili A.,* comments on the art. 343, 3rd indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 2. Concludent actions are not deemed to equate with consent by scielence; E.g. if on the request of consumer business refers to standard term in responce on acceptance of order, consumer's scielence is not an "expression" of consent.

60 In general, control of standard terms shall not only be carried out in relation to consumer contract, but also in relation to others . Procedural control test relevantly implies increased care form business (compared to consumer). See art. 343, II.

61 *Aladashvili A.,* comments on the art. 343, II part, 4th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 2; See also *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 9.

stronger position of enrepreneur compared to that of the consumer. His duty of care is higher. His standard of behaviour may well be conditioned by customs of the sphere in which he acts.

Consent component is also to be mentioned here: while there is consent requirement to be made by consumer specifically to standard terms, it is only needed to make reference (to those terms) with an entrepreneur. In some specific circumstance the silence[62] is deemed to be the acceptance.[63]

5. Unusual Standard Term

The same logic is applied to filter the so called unusual standard terms.[64] Standard term is unusual if its content is though related to the subject matter of the contract, but still taking into account of the purpose and other circumstance of the case may well be unexpected for consumer. Unexpected effect relates not only to the content and remoteness of the obligation in essence, but also technically to its place in the text of agreement. E.g. inclusion of the rule under inapropriate title is uncexpected as ussually consumer does not read the text in detail and relies on counterpart.[65]

In case the standard term successfully passes procedural fairness test its usage is nevertheless questioned in terms of substantive fairness. But before that one issue shall be separately addressed as it bears characteristics of both procedural and substantive fairness tests.

6. Ambiguous Standard Term

Art. 345 of the CC deals with interpretation of ambiguous standard terms. Wording is not directly referring to the substantive fairness test, though the latter can become a passageway through which the applicable rule is deduced in certain situations.

Sort of generalized classification of ambiguity cases can appear as follows: ambiguity can steam either from the possibility to interpret wording differently or from incompleteness of formulation or from indeterminacy of rule's scope of application.[66]-[67] The term itself may also be clear, but raise questions in combination with other clauses of the contract.

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62 Consent by silence discussed in *Baghishvili E.,* comments on art. 334, especially 8th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 2. See also *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 2.

63 Arts. 334 and 335 of the CC. These cases are associated to the problem of so called "battle of forms". Solution is of a quite rigid one – "last shot" principle: see *Treitel G.*, The Law of Contract, Eleventh Edition, Sweet and Maxwel, 2003, 20 ff.; See also *Charman M.*, Contract Law, Fourth Edition, Willan Publishing, 2007, 15. The same result is reached in fact by Georgian law, as if offeror of standard terms is answered positively in essential elements of the deal but altered own standard terms and the offeror starts performance not paying attention to counteroffer he in fact agrees by concludent actions.

64 Art. 344 of the CC.

65 *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 11.

66 *Oughton D., Davis M.*, Sourcebook on Contract Law, 2nd ed., Cavendish, 2000, 205.

In such a cases, obviously the term needs to be interpreted in order the rule to be applied and relevant legal consequences determined. In general, interpretation of contract is made on objective basis, giving priority to real meaning of content over internal will attached to the expression.[68] Art. 345 provides for special method of interpretation (overriding the general one) – the so called *contra proferentem* rule – interpretation in against offeror. It modifies the mechanism of contract interpretation. This is reinforced by the text of the Directive for consumer contracts with applying phrase "most favourable" instead of "favourable".[69] In case of standard terms starting point of analysis is that they either alter dispositve rules of law or create new ones in a way to be beneficial for the offeror; thus, it should be presumed that statutory (provided for by the dispositive legal regulation) rule is more favorable for consumer.[70]-[71] In case of lack of statutory rule, where offeror himself creates new rule and integrates it into the contract the situation starts to complicate; where for the classification given above the phrase is ambiguous, interpretation shall be made according to the meaning attached to it at common residence of the parties (if they reside in different places, then the meaning at consumer's residence place is decisive); where formulation is incomplete or scope of application is doubtful, the necessity of interest balancing arise, i.e. principle of good faith comes into play. This should mean application of substantive fairness test (art. 346), because there is not an ordinary clause at stake but standard term and the addressee had no influence on the content during negotiations. It is further tightly connected to the transparency criteria to be satisfied by standard term for its integration into contract. These requirements can emerge as unavoidable obstacle for the term to become a part of agreement. Thus, there comes a

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67 See also Judgment of the Supreme Court №AS-291-273-2014 from 2014. Court of cassation did not accept for review the decision of appellate court, where the main reason for ambiguity of term in insurance contract was the phrase "other similar considerable breaches". The term was related to release of insurance company from payment obligation in cases listed in contract, in case of fault of driver. The (appellate) court considered that "fault component [was] evaluative category" and "reasonable natural person, who aimed at insuring risks at a maximum and thus reverting to big prestigious insurance company with the [relevant] history as a reliable partner", was not able to adequately assess difference in cases listed in contract and real insurance case as to the above component.

68 The general mechanisms of will interpretation are – objective, perceptible for addressee meaning of the content Art. 52 of the CC is an exclusion, where true inner will is paid attention ("established by objective assessmemt", [and] "not by the exact meaning of wording"), as a rule, this provision is applicable to the unilateral expression not be communicated to addressee; Art. 325 regulates the establishment of the meaning of the term on the basis of principle of good faith to be unilateraly prescribed by one of the parties (or third party); Arts. 337–339 provide for objective criteria of interpretation (meaning assigned at common place of residence of offeror and accepter – in case of ambiguity of expression; closest meaning to the content overall of the contract – in case of contradictory clauses in contract; trade customs and traditions – in need of determination of parties' rights and obligations), where objective evaluation method is applied and only that could have been desirable for the parties is decisive.

69 Art. 5 of the Directive 93/13/EEC.

70 Cf. *Zerres T.,* Principles of German Law on Standard Terms of the Contract, 9.

71 Current provisions in contract law are basically designed to regulate transactions between equal parties and legislator distributes risks, rights and obligation on that basis. This in fact means that general dispositive rules are not designed to regulate consumer relations and thus in interpretation filling gaps with general rules may not lead to the result appropriate for the adequate protection of "weaker" party.

question: what should be assessed and on which stage? If a standard term is designed for atypical case and do not alter statutory rule and simultaneously is ambiguous, can it be integrated into contract?[72] If the term itself is clear, but contradicts to another one in the contract, then as per general rules on interpretation (art. 338) one shall use the meaning mostly corresponding to the contract, but at the same time there is a possibility not to consider inconsistent clauses not to form the part of agreement due to failure to pass procedural fairness test. Any of the clear term which may still remain as part of the contract is further subject to substantive fairness test under art. 346. In any case, at least, substantive fairness test shall be applied, otherwise it will contradict to the legal result prescribed in art. 345. Here comes another distinctive case where due to any of the methods described above, the term is invalidated and there exists is neither statutory rule nor the clear agreement. This is the most complicated situation which should be resolved by the so called "gap filling interpretative" method[73]. The detailed analysis of the latter seems to go beyond the scope of present research.

It is provided in the doctrine that special rule of interpretation is to induce business to draft and include clear, precise and just term in the contract.[74] Otherwise, offeror shall lack the possibility to rely on a clause which is only favourable to him.

7."Grey" and "Black" Lists of Unfair Terms

Evaluation of the fairness of standard term is made by two level tests (arts. 347 and 348 of the CC). Precondition for the application of both tests is that there should be consumer-to-business relation, while art. 346 (general test of fairness for standard terms) applies to all transactions. One of these two can only conditionally be named as a test, because the content of the contractual clause is simply compared to the list provided by the law. It is named as "black list"[75] and is given in art. 348 of the CC. The term within the list is *ex lege* void and does not require further assessment. The norm is more special than the general fairness test for standard terms (art. 346 of the CC) and has the supremacy over it. It conditions the sequence of its application in assessment of substantive fairness. Wording in force is deficient as the descriptive part of art. 348 of the CC does not avail to identify that terms enlisted there are void without

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72 This problem was initially evident though analysis of 93/13/EEC Directive's implementation process into national law of member countries. See *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M. (eds.)*, Universität Bielefeld, April 2007, 347.

73 "Ergänzende Vertragsauslegung". For detailed description see *Kropholler J.,* comments on §157, 5th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 77.

74 *Aladashvili A.,* comments on art. 345 of the CC, 16th indent, I part, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 1.

75 The term is frequently used by scholars. For example, see *Tichŷ L.,* Unfair Terms in Consumer Contracts, Sourcebook on Contract Law, Second Edition, Cavendish, 2000, 63.

further aditional check.[76] Conclusion, that terms in art. 348 are different rather then those in the list of art. 347 can be derived from the content of black list terms, at least with cases[77], where they deprive addressee stututory rights. Argument is fragile and theoretocal view could be doubted, thus the problem remains to be solved.

However, distinctive from art. 348 of the CC, art. 347 of the CC (grey list) evidently shows the need of further evaluation as legislator uses the categories of comparative nature: "irrelevanly high", "irrelevanly long", "unjustifiably".[78] Term in this list are not considered *a pirori* void and their permissibility is assessed through formula in art. 346 of the CC taking into account of other circumstances. Formulation of art. 348 isteslf clearly shows that legislator had in mind pure limitation clauses where no room is left for the evaluation.

8. "General"[79] Fairness Test

Art. 346 of the CC provides for the "general" test controling all standard terms integrated into contract. There obviously should be two things to compare. One is the clause in the contract and second is the rule to which the validity of the former is assessed; The second should logically be better for addressee. Hence, the position of addressee should be worsened. While the standard term deviates from dispositive rules of law effect of worsening should be compare to these norms.[80]

Rule discussed herewith contains inner contradiction by phrases used and commenters also point out this: "...contrary to good faith it is detrimental…". Problem underlined by scholars is that if term is detrimental it is automatically contrary to good faith – it is not possible the detriment to be fair. Thus the construction is ambiguous.[81]

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76 Only one distinction in between descriptive parts of arts. 347 and 348 is the word "also", which literarily refers to additional terms.

77 Not considering pars. a), b), g) 2nd part.

78 Cf. also *Kropholler J.,* comments on §307, 2nd indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 190.

79 Term "genereal" is meant to show the relation to arts. 347 and 348 of the CC.

80 Cf. §307, II, 1 of GCC. See also *M. Ebers,* Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M. (eds.)*, Universität Bielefeld, April 2007, 385.

81 Ibid, *Ebers M.*, Consumer Law Compendium, the Consumer Acquis and its Transposition to Member States, *Schulte-Nölke H., Twigg-Flesner C., Ebers M. (eds.),* Universität Bielefeld, April 2007. Despite this there is a detailed explanation as what caused to maintain this criterion in the text. Argument is based on the proposition that good faith component relates not to the detriment but to all the circumstance of the case as a whole. It means that entire scenario shall be taken into account and the evaluation of detrimentally of the agreement for consumer should not refer to content of concrete deal but should count all circumstances and reasons why parties decided to conclude such a deal. See *Nebbia P.*, Unfair Contract Terms in European Law, A Study in Comparative and EC Law, Hart Publishing, 2007, 145-149; argumentation is based on recital 16 of the Directive 1993/13/EC.

When there is no corresponding to standard term statutory rule there should exist disproportion between parties' rights and obligation.[82]

Degree of worsening of consumer's position is the most interesting. Georgian law refers to mere "detriment". In contrary the as per the Directive 1993/13/EC[83] there shall be "significant imbalance" in parties' rights and obligations. The term "significant" indicates that minor imbalance does not count. It may be possible that certain obligation undertaken by consumer with the standard term is compromised e.g. by low price and in this case there will be no imbalance as to general concept of good faith. On the other hand, there is a view that concrete obligation should be measured as against its synallagmatic part attached to business and if, in spite of imbalance between them, other consumer would not conclude the same deal in that situation, then there imbalance exists. Argumentation varies from country to country both as to context and degree. Positions on significant imbalance are not homogeneous and subject to many critics.[84] One thing is clear that minor disproportion can not ground invalidation of standard term.

Art. 346 of the CC refers to the detriment without amplification by "significant". With rough look Georgian version is less stringent than European one, though this can be debated as reliance and good faith also is related to the concept.[85] Art. 115 of the CC limits the enforcement of right if it is done purely to the detriment of other. On the other hand, parties to the relation are to take into account each other's interests and act faithfully as per art. 8 of the CC. Application of these rules are considerably limited: first, they are rarely reverted to;[86] besides, reference is made to obvious injustice;[87] aim of pure detriment as per art. 115 significantly limits the scope of application[88]-[89].

Second sentence of art. 346 of the CC is alleviating proof of unfairness in case of standard terms. In particular, the criteria on which assessment should be made are circumstances at the moment of

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82 For the regulation of these cases §307, II, 2 of the GCC provides for more concrete rule stating that "endangering attainment of contractual purpose" is one of the criteria for the evaluation of the degree of detrimennt.

83 Art. 3.1.

84 For details see *Nebbia P.,* Unfair Contract Terms in European Law, A Study in Comparative and EC Law, Hart Publishing, 2007, 148-152.

85 Despite literal meaning of the wording, scholars pursue the same line. Cf. *Aladashvili A.,* comments on art. 346 of the CC, 11th indent, , mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 5.

86 *Chanturia L.,* Commets on art. 8 of the CC, 2nd part, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 5.

87 Ibid, 11th indent.

88 *Chachava S.,* Comments on art. 115, II part, 4th indent, mutual Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and United States Agency on International Development (USAID) the Judicial Independence and Legal Empowerment Project (JILEP) and Promoting Rule of Law in Georgia (PROLoG), 2.

89 For German regulation see *Markesinis B., Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treaties, 2nd ed., Hart Publishing, 2006, 130. Control of contractual terms is possible only in extreme cases, when enforcement of right is grossly unfair. See also *Kereselidze D.*, General Systemic Notions of Private Law, European and Comparative Law Institute, Tbilisi, 2009, 95.

conclusion of contract, interests of the parties[90], "etc.". Balance of the interests of the parties are dependent upon distribution of rights and obligations between parties; its analysis is made in relation to fairness evaluation in any case for the purpose of determination of degeree of imbalace as inherent component. Court is directly authorized to take into account of circumstances existent at the time of conclusion of the contract and thus, this part of the rule is quite significant.

9. Conclusion

Analysis provided for in the present paper reveals range of problems, which are inadequately resolved by the current rules and in specific cases, require complicated interpretation of statutory rules to achieve satisfactory legal results. In particular:

- Scope of application of norms on standard terms are to be clearly outlined. Case law is unconvincing in this regard. For example, contracts of corporate or similar nature are enough specific not to be covered by the rule under consideration herewith.

- Criteria of multiple usage is still applicable as a general one, while European experience neglects it at least for consumer transactions. It is referred not only in the Directive 1993/13/EC to be implemented in Georgian law, but also by national laws of member countries.

- Possibility to qualify essential terms as standard should be reasonable in liberal market economy settings. Though, such exclusion can easily be made by systemic interpretation of existing provisions without extra legislative interference. Notwithstanding this, where the necessity of interpretation arise, there the clarity and predictability of law decrease. Thus, it negatively serves stability of civil circulation.

- It is evident that there is a lack of special regulation of consumer relations. This issue itself is one of wider than scope of the present paper, but with the present context it reveals the problem that interpretation mechanism of standard term turns less effective; Stronger party to a deal retains stimulus to careless approach drafting of standard terms, feeling that in case of ambiguity applicable regime shall nevertheless leave him in favorable position due to statutory norms created for the purpose of regulation of relations with in fact equal parties.

- Descriptive parts of arts. 347 and 348 of the CC need changes as by existing formulations enough clarity is hardly achievable. It is not evident which of the list provides terms unconditionally void and requiring no further evaluation.

- General fairness test provided for in art. 346 of the CC raises questions on cumulative application of general evaluation criteria for good faith (arts. 8 and 115 of the CC) and detrimentality. In case of standard terms, it is initially evident that inequality exist already on the level of negotiations, because addressee is unable to influence on the content; relience in everyday transactions may be doubted as well. Thus, to introduce element of significance with the component of detriment could resolve the inconvenience related to reliance and good faith.

[90] Example of usage of this criteria is provided in Judgment of Supreme Court №AS-291-273-2014 (note 67).

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Davit Maisuradze[*]

The Implementation of Additional Rights of Shareholders (Poison Pills) as Defensive Measures within the Scopes of the Best Interests of the Corporation

(Critical Analysis)

1. Introduction

In the modern corporate law, Public Joint Stock Companies,[1] which trade with securities on Stock Exchange Markets, actively use the corporate defensive measures.[2]

Public Joint Stock Companies (hereafter - JSC) can become the targets of the friendly and hostile acquisitions.[3] Implementation of corporate defensive measures is one of the ways of protecting the target corporation.

The main aim of the corporate legal defesinve measures is securing the target corporation from the possible hostile aqcuisitions, and also protecting the safe implementation of the transaction between the parties and preventing it from involvement of the third parties.

The court cases prove that these measures support the safety, free and strategic development of the corporations against any hostile offer. Furtheremore, these measures maintain and increase the price on shares.[4]

The court practice of USA confirms that the most important ground for implementing the corporate defensive measures are the protection of the best interests of the corporation. Management of the corporation has to act in accordance with the best interests of the corporation. Moreover, this court practice considers the Board of the Corporation as the actor responsible for implementation of the corporate defesinve measures.[5]

Among the corporate defensive measures one of the most popular and complex are the rights that can be granted to the shareholders of the target corporation.[6]

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1 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 34-42.

2 For more information about corporate defensive measures, please, refer to *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015.

3 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 26-30.

4 *Lipton M*., Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T*., Carolina Academic Press, 2nd ed., Durham, 2010, 576-577.

5 *Paramount Communications v. Time*, Inc. Delaware Supreme Court, 1990, 571 A.2d 1140.

6 *Oesterle A.D*., The Law of Mergers and Acquisitions, Thomson/West, 3 rd ed., Ohio, 2005, 514.

Most importantly these rights are interesting within the context of the selective equal treatment[7] of the shareholders that is legitimated by the protection of the best interests of the corporation.

Among the corporate defensive measures, particularly important is Poison Pills, Shareholder Rights Plan, the implementation of which started from the 80-ies of the 20th century against hostile acquisitions.[8] Nowadays, Posion Pills are envisaged by more than 1000 USA Public JSCs and by more than a half of the 500 biggest corporations. This makes Poison Pills as one of the most widespread corporate defensive measures.[9]

It is acknowledged that the basement for implementation of the corporate defensive measures is the protection of the best interests of the corporation. Therefore, it is vital to discuss the Poison Pills within the scopes of the best interests of the corporation. Hence, it is important to define the best interests of the corporation and whether or not to consider the interests of the shareholders[10] and the stakeholders[11] for determining the concept of the best interests of the corporation. Moreover, it is crucial to specify which governing body has the athourity to make a decision in accordance to the best interests of the corporation and implement the defensive measures, respectively.

The aim of the article is to analyze the Poison Pills, determine the grounds for its implementation, define the creation and development of the Poison Pills and show the governing body responsible for the implementation of the Poison Pills in accordance to the best interests of the corporation.

The Article below is based on the comparative legal analysis of the Delaware and Georgian corporate law. Delaware is acknowledged to have as one of the most successful corporate law and court practice that supported the creation of the most important institutes of corporate law.[12]

Though the Law of Georgia "On Entrepreneurs" was under heavy influence of German Law that was also caused by the active participation of German scholars in the process of elaboration of the Law of Georgia "On Entrepreneurs", from 2008, after the enactment of various amendments, the mentioned law started to be more influenced by the Anglo-American legal institutes.[13] One of the aims of the given research is to analyze the possibilities of implementation of Poison Pills as American legal institute, in Georgian corporate law.

Shareholder rights plan is regulated based on the corporate law and bylaws of the corporations. Therefore, corporations can further envisage various models of implementation of Poison Pills. Hence, it

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7 *Maisuradze D.,* Implementation of Defensive Measures Based on "Selective Equal Treatment" of Shareholders (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Journal of Law №1, Tbilisi, 2014, 139-142.

8 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 573.

9 *Thompson O.,* Corporations and Other Business Associations, 5th ed., Aspen Publishers, N.Y., 2006, 779.

10 *Makharoblishvili G.,* General Review of Corporate Governance, Tbilisi, 2015, 315-317.

11 *Greenfield K.,* There's a Forest in Those Trees: Teaching About the Role of Corporations in Society, Corporate Governance, Law, Theory and Policy, Edited By Joo W. T., Carolina Academic Press, 2 nd ed., Durham, 2010, 12-17.

12 *Black S.L.Jr.,* Why Corporations Choose Delaware, Delaware Department of State, Del., 2007, <http://corp.delaware.gov/pdfs/whycorporations_english.pdf>.

13 *Burduli I.,* Foundations of Corporate Law, Vol.1, Tbilisi, 2010, 410.

is important to analyze the implementation of the Poison Pills base on the bylaws, most importantly whithin the broad autonomous model of bylaws that is offered by the law of Georgia "On Entrepreneurs".

2. Elucidation of the Poison Pills (Warrant Dividend Plan)

Poison Pills is the corporate defensive measure used by the target corporation wheareas the shareholders of the target corporation can acquire the newly issued shares with the better conditions including with the lower than market price.[14]

"Poison Pills" has a long history of development and its area of elucidation is very big. But still, its fundamentals were explained by the legal doctrine and court cases. It is *ex ante* method against hostile acquisition. The term Poison Pills refers the rights to the shareholders given by the board regarding the hostile transaction. Poison Pills strengthens the positions of the owners with creating adding the special economic value to the shares, thus it makes acquisition of target corporation much more expensive. The acquirer will be obliged to pay higher value for the shares to overcome the Poison Pills".[15]

Poison Pills, as takeover defensive measure was created in 1982. Lipton was the first lawyer who created and implemented the Poison Pills as defensive measure. But the original name of Poison Pills was different than the current name.[16]

First name of the Poison Pills was Warrant Divident Plan where Warrant was considered as a security that would have been issued by the Board of target corporation in order to increase the time period against the hostile acquisition. With using this method, Board of Directors would have more time to answer the hostile offer. The name Poison Pills was given by the investment banker who used this term during the interview with the Wall Street Journal. Beginning from that period Warrant Dividend Plan is colloquially known as Poison Pills.[17] Poison Pills can be also used with the term Shareholder rights plan.[18]

Beginning from the 1982 the Board of Directors of the Target Corporation started to use successfully various form of Warrant Dividend Plan.[19]

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14 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239.

15 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 161-162.

16 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 573-576.

17 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 576.

18 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 162-163.

19 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239.

2.1 Common Types of Additional Rights (Poison Pills)

There are two basic types of Poison Pills: flip-in and flip-over.[20]

Flip-in envisages the corporate defensive measure implemented within the target corporation, particularly, with issuing additional shares that can be obtained by the selected number of shareholders.[21] For instance, if A is a target corporation where B is an acquirer bought 10% of shares of the target corporation, Board of Directors of the A corporation have the right to issue additional shares that can be bought by the shareholders of target corporation and corporation B, as a shareholder of corporation A, is excluded to acquire newly issued shares. If corporation A has 1000 issued shares where corporation B holds 100 shares, corporaton A can issue additional 1000 shares and it will have totally 2000 shares where corporation B will still have 100 shares but this amount will be equal to 5% instead of 10% of shares.

Being acquired by the corporation B is the potential threat for corporation A but even with holding the 10% or 5% of shares, B corporation will have rights in corporation A that might be threat for the management and for the effective functioning of the corporation A. For example, according to the 3rd Article of the law of Georgia "On Entrepreneurs", the partners of the company have basic control and scrutiny rigths,[22] and the article 53 of the mentioned law,[23] also entitles shareholders who own separately or jointly 5% of shares, also holders of the 5% voting stock to execute such rights as assembling a special meeting, withdrawal of the copies of transaction material, special examination of the economic activities of the corporation, as well as requesting the dismissal of the directors. Based on the abovementioned, holding minimal amount of shares might be a threat for the target corporation as the acquiring corporation has the right to involve in the internal activities of the target corporation. Therefore, flip-in poison pills aims to neutralize that threat.[24]

Article 54 of the law of Georgia "On Entrepreneurs" envisages the opportunity for the implementation of Poison Pills through abolishing partially or fully the preemptive rights of the shareholders.[25] The preemptive rights stipulated in the mentioned article apply to the newly issued shares.

According to the section 4 and 5 of the article 59 of the law of Georgia "On Entrepreneurs", the Meeting of the Shareholders can entitle Director or Supervisory Council to issue the new shares within the scopes of the generally allowed shares.[26] Therefore, the Board of Directors of the Corporation can issue the new shares and Meeting of Shareholders can abolish the preemptive rights.

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20 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 216-217.

21 *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, N.Y., 2006, 779.

22 Law of Georgia „On Entrepreneurs", 1994, Article 3.10.

23 Law of Georgia „On Entrepreneurs", 1994, Article 53.

24 *Ji L.X.,* A New Look at Dead Hand Provisions in Poison Pills: Are They Per Se Invalid After Toll Brothers and Quiturn? 44 Saint Louis University Law Journal 223, 2000, 3-4.

25 Law of Georgia „On Entrepreneurs", 1994, Article 54.6..

26 Law of Georgia „On Entrepreneurs", 1994, Article 59.

"The preemptive right is a lawful right of shareholders and deprive them of this right must be considered as the interference in their legal status. So depriving the shareholders of this right must be exceptional and only under certain conditions. Depriving or restricting the preemptive right is only admissible when otherwise is impossible to achieve the purpose without increasing the capital and the restriction of the shareholders' rights serves the interests of the corporation as a whole".[27]

It must be highlighted that the last sentence of the section 6 of the article 54 of the law of Georgia "On Entrepreneurs", entitles the corporation, with the consideration of the principle of autonomy of bylaws, to transfer the authority of depriving the preemptive rights from Meeting of Shareholders to the Directors and/or Supervisory Council.[28] As it was mentioned in the previous paragraph transfer the abolishment of the preemptive rights and depriving the preemptive rights from shareholders "must serve the interests of the corporation as a whole".

Thus, if it is proved based on the interests of the corporation, it is possible to grant Directors' the right for issuing the shares and depriving the preemptive rights from shareholders.

The implementation of flip-in Poison Pills is also accompanied with the material adverse economic affects to the acquiring corporation, particularly, with diminishing the percentage of shares. Because in case of the abovementioned example, after enacting the Additional Rights of shareholders, the percentage of shares will decrease from 10% to 1% or 2%. Still, even in such shareholding participation, the acquiring corporation will have the certain rights in target corporation, including the rights envisaged by the article 53 of the law of Georgia "On Entrepreneurs",[29] but as it is accompanied with the economic loss, the existence of "Poison Pills" is the incentive for the acquiring corporation to start negotiations with the management of the target corporation and restrain from the hostile offer.

According to the abovementioned, we can stipulate that it is possible to implement the Additional Rights of Shareholder (Poison Pills) in the corporate law of Georgia based on the increase of capital with issuing the additional shares and completely or partially depriving the shareholders of preemptive rights.

Flip-over Poison Pills is interesting corporate legal institute as well. In this case, the shareholders of the target corporation have the additional rights towards the shares of the acquiring corporation. This additional right can be envisaged in the bylaw of the target corporation. Particularly, if on the first phase of the transaction the acquiring corporation gets the amount of shares that are necessary to merge the target into the acquirer, the bylaws of the target corporation might envisage the additional rights to the shareholders of the target corporation and these rights will be triggered by the merger of the two mentioned corporations.[30] For example, if the acquirer decides to merge with the target corporation, the shareholders of the target corporation will have the rights to buy the newly issued shares of the acquiring corporation at a nominal and/or lower than market price.[31]

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27 *Chanturia L., Ninidze T.,* Commentary on the Law about Entrepreneurs, 3th ed., Tbilisi, 2002, 2002, 376.

28 Law of Georgia „On Entrepreneurs", 1994, Article 54.6.

29 Law of Georgia „On Entrepreneurs", 1994, Article 53.3[1].

30 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239.

31 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 165.

Moreover, target corporation can envisage in the bylaws that, in case of a merger, acquiring corporation should transfer certain percentage of its shares to the shareholders of the target corporation. This corporate defensive measure aims to prevent the merger between the acquirer and the target. If the acquirer overcomes the flip-in version of the Poison Pills, the flip-over version of the Poison Pills prevents the merger of the two corporations and supports the free development of the target corporation. Based on the autonomy of the principle of bylaws, the flip-over version of the Poison Pills can also be enacted in the corporate law of Georgia.

Additional Rights of shareholders are connected with the various institutes of corporate law such as functions and authority of the Board of Directors, the ways of adopting the decisions by the governing bodies, mergers and acquisitions, etc.

Furthermore, one of the main issue regarding the corporate defensive measures is the validity of their implementation within the context of the selective equal treatment of the shareholders.

2.2 The Validity of the Additional Rights and its Interrelationship with the "Selective Equal Treatment" of Shareholders

Law of Georgia "On Entrepreneurs" stipulates the principle of Equal Treatment of shareholders.[32] According to the section 9 of the 3rd Article of the mentioned law, "Partners of a general partnership, limited partnership, limited liability company, joint-stock company and cooperative shall have equal rights and obligations in equal circumstances, unless otherwise provided for in this Law or in the Charter. The Charter may define different rights and obligations irrespective of the contributions made by the partners".[33] "… Possession of any class of shares doesn't mean that holder of the preferred shares has a better legal position than the holder of the common shares. Both of these types of shares have positive and negative, priority and less privileged features. Thus, which shares are better to possess is a specific matter of opinion".[34]

Section 1st of the article 52 of the Law of Georgia "On Entrepreneurs" defines the possibility to stipulate the voting right and the right to receive the dividend differently in bylaws than it is in the mentioned law. But at the same time, the law designates that "All shares of the same class shall provide equal rights to their holders".[35] Therefore, Georgian corporate law determines the equal rights of the shareholders of the same class regarding the voting right and acceptance of the dividend.[36]

Pargraph 1^1 of the article 52 also defines the opportunity for the existence of other class of shares and designation their rights and obligations by the bylaws, though in this section it is not highlighted that the

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32 *Burduli I.,* Foundations of Corporate Law, Vol. 1, Tbilisi, 2010, 330-331.
33 Law of Georgia „On Entrepreneurs", 1994, Article 3.9.
34 *Burduli I.,* Foundations of Corporate Law, Vol. 1, Tbilisi, 2010, 331.
35 Law of Georgia „On Entrepreneurs", 1994, Article 52.1.
36 *Maisuradze D.,* Implementation of Defensive Measures Based on "Selective Equal Treatment" of Shareholders (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Journal of Law №1, Tbilisi, 2014, 128.

owners of the same class of shares have the equal rights.[37] Therefore, law of Georgia "On Entrepreneurs" provides the principle of equal treatment regarding the voting rights and the right of accepting the dividend but in other circumstances applies the principle of selective equal treatment as gives the corporations opportunity to deprive completely or partially the shareholders of the preemptive rights.[38]

It must be also highlighted that the acquiring corporation, with starting the hostile acquisition, initiates the non-equal treatment towards the shareholders because it obliges them to sell shares.

The coercive treatment of shareholders is mostly visible during the two-tier tender offer when the aim of the offeror is to acquirer 51% of shares of the target corporation in the first phase of the transaction, and on the second stage of the acquisition, to acquire the rest of the shares.[39] This type of an acquisition illustrates the structural coercion.[40] During the two tier-tender offer the corporation can be sold even if the shareholders don't want to sell their shares. Because they don't know what decision will their colleagues make and they don't want to be among minority shareholders on the second stage of the acquisition. Therefore, they are trying to sell their shares on the first stage of the acquisition.[41]

The Introduction of the mandatory tender-offers, that is also envisaged by the law of Georgia "On Entrepreneurs",[42] weakened the coerciveness of the two-tier tender offer on the free will of shareholders but it is also stated that even in the case the acquirer offers to buy 100% of shares of target corporation during the initial phase of offer, it is still a threat for the shareholders because the tender-offers are not functional equivalents of the shareholders vote,[43] thus it doesn't contain the signs of a free will. But Delaware Court thinks that offering to buy 100% of shares on the first stage of the acquisition will not cause threat for shareholders.[44]

Therefore, there is a principle of equal treatment established among shareholders but it is only enacted regarding the voting right and the acceptance of the dividend. With regards to other issues the principle of selective equal treatment is implemented that is also proved by the Delware court practice.

The fundamental validity test of corporate defensive measures was elaborated in the decision of the court on the Unocal case where the court legitimated the corporate defensive measure of Board of Directors of Unocal to divide shareholders between target and acquiring shareholders.[45] Particularly,

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37 Law of Georgia „On Entrepreneurs", 1994, Article 52.1^1.

38 *Maisuradze D.,* Implementation of Defensive Measures Based on "Selective Equal Treatment" of Shareholders (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Journal of Law №1, Tbilisi, 2014, 128-129.

39 *Cohen M.M.,* "Poison pills" as a negotiating tool: seeking a cease-fire in the corporate takeover wars, Columbia Business Law Review 459, 1987, 11.

40 Air Products and Chemicals, Inc. v. Airgas, Inc. 2011 WL 806417 (Del. Ch. 2011).

41 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 208-209.

42 Law of Georgia „On Entrepreneurs", 1994, Article 53^2.

43 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 575.

44 Air Products and Chemicals, Inc. v. Airgas, Inc. 2011 WL 806417 (Del. Ch. 2011).

45 Unocal Corp. v. Mesa Petroleum Co. Delaware Supreme Court, 1985, 493 A.2d 946.

Board of Unocal has implemented so called Selective Self-tender Offer and didn't offer to buy the shares from the acquiring corporation which was already holding part of the shares of the target. In result, the shareholders sold the shares to their own corporation and not to the acquiring one.

In Unocal, the court established two-prong validity test of corporate defensive measures. The Unocal test states that in order for the coporate defensive measures to be valid, the threat should be real for the shareholders of the target corporation, and the implemented defensive measures must be in accordance with the threat. Though the abovementioned defensive measure executed by the Board of Unocal, established the "discrimination" between the shareholders of the target corporation, the court still legalized the conduct of the Board.[46] Although the Selectivity of Tender-offer was prohibited by the Securities Exchange Act,[47] Unocal test still remains as the validity standard for corporate defensive measures.

Subsequent cases have refined the issue of selective equal treatment of shareholders. For example, in Unitrin, the target corporation implemented redemption as a corporate defensive measure.[48] Redemption is also envisaged by the law of Georgia "On Entrepreneurs".[49]

In Unitrin, the target corporation offered buying the shares from both the acquiring and indigineous shareholders of the target corporation as during the redemption the acquiring corporation was already a shareholder of the target. Aftermath, the target corporation became the owner of the stock of the short-term shareholders that were planning to sell the shares, and the long-term shareholders remained loyal to the target corporation as they weren't going to sell their shares at all. Therefore, based on the Unocal Test, the target corporation separated shareholders based on the short-term and long-term perspective. [50]

The principle of Selective Equal Treatment of shareholders can be established in the Georgian corporate law as well assuming the fact that the Georgian scientific doctrine is in accordance with the Unocal Test.[51] Specifically, the threat should exist against the corporation and the implemented corporate defensive measure should be in accordance with the posed threat. [52] Flip-in Poison Pills that is implemented in Georgian corporate law in the form of depriving from the preemptive rights, is based on the selective equal treatment of shareholders.

Based on the abovementioned, the author of the Poison Pills, the scientific doctrine and the court practice agree that the Poison Pills must not influence the voting right of the shareholder, otherwise it will be considered as unreasonable towards the existed threat,[53] and therefore, it won't be considered as valid.[54]

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46 *Velasco J.,* The Enduring Illegitimacy of the Poison Pill, 27 Iowa Journal of Corporation Law 381, 2002, 4.

47 Rules and Regulations under the Securities Exchange Act of 1934, rule 13e-4, 14d-10.

48 Unitrin, Inc. v. American General Corp., Supreme Court of Delaware, 1995, 651 A.2d 1361.

49 Law of Georgia „On Entrepreneurs", 1994, Article 53[1].

50 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 276-280.

51 *Chanturia L., Ninidze T.,* Commentary on the Law about Entrepreneurs, 3th ed., Tbilisi, 2002, 376-377.

52 "…upon annulling the preemptive right when capital is growing, the interests of the corporate enterprise are the most important. So the legal ground for annulment of the preemptive right must serve (1) the purpose and welfare of the corporation and (2) the measure for achieving this purpose must be reasonable, necessary and proportional", *Burduli I.,* Foundations of Corporate Law, Vol.2, Tbilisi, 2013, 254.

53 *Henry L.G.,* Continuing Directors Provisions: These Next Generation Shareholder Rights Plans Are Fair and Reasoned Responses to Hostile Takeover Measures, 79 Boston Law Review 989, 1999, 7-8.

2.3 The Phases of Development of the Poison Pills

It is noteworthy that the Additional Rights of shareholders, Poison Pills, had interesting path of development.

First of all, as it was mentioned above, its creator and first implementator in practice is lawyer Martin Lipton. During the years 1988-1989, Poison Pills, as corporate defensive measures were implemented by more than half of the largest corporations of USA and by 2001 more than 2200 corporations have enacted Poison Pills.[55] The implementation of Poison Pills were further enhanced by the USA court practice. [56]

"The evolution of Poison Pills made it as the most widespread takeover defensive measure. Though other defensive measures might seem to be more effective against takeovers that is also strengthened by the court decisions, Poison Pills still remains as the valuable takeover defensive measure. It is the counter tactical move and offers various mechanisms for the Board of target corporation against takeovers. But at the same time it is not the absolute method for halting the takeover".[57]

First generation of Additional Rights are considered as weak defensive instruments. Furthermore, first generation Poison Pills didn't have the redemption feature. Thus, once they were triggered it would have been impossible to redeem them.[58]

Implementing the flip-over Poison Pills by Corporation Lenox in 1983, is the example of using the first generation Poison Pills. [59] The flip-over Poison Pills of Lenox where based on the preferred stock which rights were defined before their were issued without participation of shareholders. The flip-over Poison Pills of Lenox was issued as a special dividend that was consisted with a stock of non-voting preferred shares. Holders of the 40 common shares were receiving one special dividend.[60]

The defensive features of the Poison Pills of the corporation Lenox was illustrated in their convertible character. Particularly, if Lenox was merged into the acquiring corporation, preferred shares, have to be converted, below the market price, into the common shares of the acquiring corporation, and this would make the acquisition of Lenox more difficult.[61]

As it was mentioned above, the Lenox version of flip-over Poison Pills was the early model of the Additional Rights of the shareholders. Modern version of flip-over Poison Pills issue the Rights Plan

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54 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 278.

55 See <https://www.sharkrepellent.net/request?an=dt.getPage&st=1&pg=/pub/rs_20100401.html&Specific_Purpose_Poison_Pills&rnd=372936>.

56 *Moran v.* Houshold International, Inc. Delaware Supreme Court, 1985, 500 A.2d 1346.

57 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 161.

58 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 242-243.

59 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239-240.

60 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239.

61 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 239.

instead of common shares and not the preferred stock. These Rights are not traded separately from the shares and gives the right to shareholders to acquire the shares in the acquiring corporation 50% below the market price.[62]

The flip-in version of Poison Pills represents the second generation of additional rights of shareholders. Flip-over version was not enough to protect the target from acquiring corporation. This was mostly evident during the acquisition of Crown Zellerbach by James Goldsmith. Crown Zellerbach had Poison Pills but they were activated on the second stage of acquisition, only in case of a merger of Crown Zellerbach into the acquiring corporation. Goldsmith bought the controlling amount of shares in Crown Zellerbach but decided not to merge the target in the acquiring corporation. Therefore, flip-over version of Poison Pills didn't stop the acquirer to buy the controlling part of shares in the target. Furthermore, James Goldsmith used the flip-over version of Poison Pills on his advantage as the Pills didn't have the redemption right, it precluded the Crown Zellerbach to start negotiations with other bidders, to potential White Knights on the better terms of the agreement.[63]

As the flip-over version of the Poison Pills was not effective enough to meet all the requirement of the target corporations against takeovers, lawyers have elaborated flip-in version of additional rights that was used within the corporation, and the Goldsmith tactics discussed above wouldn't have been the sufficient instrument for the acquiring corporation. With using the flip-in version of Poison Pills, the shareholders of the target corporation have the right to buy the additional shares of the target far below the market price. Therefore, flip-in version of the additional rights might cause material economic adverse affects to the acquirer.[64]

Though the Poison Pills are acknowledged as a strong defensive measures, with using the tender-offer and proxy fight, the acquiring corporation can oust the members of the corporation Board and the newly elected Board whose members support the tender-offer may redeem the additional rights of the shareholders. In order to reduce this possibility, the third generation versions of Poison Pills, such as Dead Hand Pill and No Hand Pill, offer the opportunity to redeem the Poison Pills only by the current members of the Board or by the newly elected Board members only in this case, the newly elected Board should be approved by the old members.[65]

"The tactics of Dead Hand Pill precludes the authority of the newly elected Board members to redeem already implemented rights plan". [66] In comparison to Dead Hand Pill, No Hand Pill is less effective.[67] No Hand Pill cannot be redeemed for six months after the acquisition of the controlling

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62 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 240.

63 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 241-242.

64 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 242.

65 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 245.

66 *Makharoblishvili G.,* Fundamental Structural Changes in Corporations on the Basis of Corporate And Legal Acts (Mergers & Acquisitions) Comparative-Legal Analysis), Tbilisi, 2014, 166.

67 For more information about „Dead Hand Pill" please, refer to *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 230-237.

shares of the target corporation. Thus, it only temporarily prevents the full disposal of the target corporation by the acquirer.[68]

It is noteworthy, that unlike other states, the court of State of Delaware, considered the implementation of No Hand Pill and Dead Hand Pill as an interference in the rights of shareholders and as an irrelevant defensive method to the posed threat for the corporation.[69]

3. Substantial Event for Triggering the Additional Rights

The triggering events for the Additional Rights can be defined by the bylaws of the corporation. The most widespread grounds for implementing the Additional Rights are the acquisition of 5%, 10%, 20% or more percentage of shares in the target corporation.[70] Thus,we can define in bylaws that one of the grounds for enacting the Poisong Pills will be the acquisition of certain percentage of shares in target corporation.

In Georgian corporate law, the acquisition of 5% of voting shares can be the substantial event for triggering the Poison Pills. We have mentioned above that the owners of the 5% of voting shares can have various rights according to the article 53 of the law of Georgia "On Entrepreneurs", for instance, including the convening of the special meeting and proposing the amendments to its Agenda, owners of the 5% of voting shares can demand the audit of the annual balance and the information regarding the future transactions.[71] Therefore, acquiring corporation will have the opportunity to actively execute its legally envisaged rights within the target corporation.

Another ground for triggering the Additional Rights can be the "significant acquisition" that is determined by the law of Georgia "On Securities Market" and estimates to more than 10% of voting shares.[72]

Substantial event for implementing the Poison Pills can be the issue of conflict of interests that is determined by article 16^1 of the law of Georgia "On Securities Market". Particularly the second section of this article envisages that one of the grounds for conflict of interests are holding at least 20% or more percent of voting shares on the both side of the transaction.[73] This last ground can be referred to the second stage of the acquisition when the acquiring corporation tries to merge with the target. Therefore, acquiring this amount of shares can be the grounds for implementing the flip-over version of Poison Pills, as well as to executing the flip-in model of Poison Pills.

Corporation can also determine the amount of controlling stake of shares in the corporation, and the change of ownership of controlling stake can trigger the enactement of Poison Pills.

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68 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 245.

69 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 230-237.

70 *Bainbridge M.S.,* Mergers and Acquisitions, Foundation Press, 3rd ed., N.Y., 2012, 242.

71 Law of Georgia „On Entrepreneurs", 1994, Article 53.

72 Law of Georgia "On Securities Market", 1998, Article 14.

73 Law of Georgia "On Securities Market", 1998, Article 16^1.

4. The Governing Bodies Entitled to Implement and Redempt the Additional Rights

While disscuing the issues of Poison Pills it is of utmost importance to highlight the governing body of the corporation which is entitled to implement the corporate defensive measures.[74]

Based on the Delaware corporate law[75] and court practice,[76] it can be underlined that the governing body which is empowered to execute corporate defensive measures based on the general fiduciary powers and within the best interests of the corporation, is Board of Directors.[77] Moreover, many researchers also agree with the court decisions.[78] But there are some scientists who think that as shareholders hold additional rights, thus, they should have the opportunity to implement Poison Pills and decide whether to agree or not to the proposition of the acquiring corporation.[79]

Unlike Anglo-American law where the corporate governance system is one-tiered and the executive and supervisory branches are combined in one body,[80] Georgian corporate law envisages the existence of a separate Supervisory Board.[81] After the amendments of the law of Georgia "On Entrepreneurs" in 2008, Directors can also be the members of the Supervisory Boards and according to the mentioned law and in certain circumstances, the number of such Directors mustn't be the majority in Supervisory Board.[82] Thus, which governing body is entitled to implement corporate defensive measures in Georgian corporate law?

First section of the 9th Article of the law of Georgia "On Entrepreneurs" grants the management responsibilities to the Directors,[83] but the 6th section of the same article attaches fiduciary duties to the members of the Supervisory Board as well.[84] As it was mentioned above, Directors are responsible for everyday functioning of the corporation and regarding the Supervisory Board, according to the section 5 of the article 55 of the law of Georgia "On Entrepreneurs" its meetings are held at least once in quarter of year.[85] At least one member of the Supervisory Board must be an independent person who is not

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74 *Henry L.G.,* Continuing Directors Provisions: These Next Generation Shareholder Rights Plans Are Fair and Reasoned Responses to Hostile Takeover Measures, 79 Boston Law Review 989, 1999, 2.

75 DGCL, §144.

76 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015.

77 *Bainbridge M.S.,* Director Primacy in Corporate Takeovers: Preliminary Reflections, 55 Stanford Law Review 791, 2002, 4.

78 *Lipton M*., Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T*., Carolina Academic Press, 2nd ed., Durham, 2010, 576-577.

79 *Bebchuk A.L*., The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T*., Carolina Academic Press, 2nd ed., Durham, 2010, 562.

80 *Chanturia L*., Corporate Governance and Liability of Directors in Corporation Law, Tbilisi, 2006, 110-111.

81 *Makharoblishvili G.,* General Review of Corporate Governance, Tbilisi, 2015, 140.

82 Law of Georgia „On Entrepreneurs", 1994, Article 55.2.

83 Law of Georgia „On Entrepreneurs", 1994, Article 9.1.

84 Law of Georgia „On Entrepreneurs", 1994, Article 9.6.

85 Law of Georgia „On Entrepreneurs", 1994, Article 55.5.

involved in every day affairs of the corporation.[86] Therefore, as the executive management, Directors, are responsible for everyday functioning of the corporation, they should be also considered as the governing body responsible for the implementation of the corporate defensive measures.

In American court practice, in order to determine the legal authority of the corporate defensive measures, courts pay a lot of attention to the outside directors who are involved in the decision making process.[87] If the majority of the members of the Board are outside Directors and/or make decisions separately from the inside Directors, the courts consider such cases as examples as protecting the fiduciary duties and best interests of the corporation. Therefore, in the decision making process it is particulary important to define the role of the Supervisory Board because in two-tier corporate governance systems the major function of supervisory boards is the control of the executive branch. Thus, participation of the Supervisory Board in the implementation of the corporate defensive measures will strengthen the legal authority of the executed defensive measures.

In conclusion, in Georgian corporate law, decision of implementing the corporate defensive measures are done by Directors but the involvement of the Supervisory Board and sharing their recommendations is very important.

4.1 Interrelations of the Additional Rights and the Business Judgement Rule

Business Judgement Rule is the corporate legal institute evolved mainly based on the fiduciary duty of care.[88] Business Judgement Rule is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation.[89]

The decision of the implementation of the defensive measures should comply with the requirements of the *Unocal Test*, and only after both standards of *Unocal Test* are met,[90] the Business Judgement Rule will apply to the decision of the Board.[91]

5. General Analysis of the Best Interests of the Corporation

One of the most interesting, and interrelated topics of corporate law, is the Best Interests of the Corporation. The execution of the corporate defensive measures, including Additional Rights, are based

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86 Law of Georgia „On Entrepreneurs", 1994, Article 55.2[1].

87 *Unocal Corp. v. Mesa Petroleum Co. Delaware Supreme Court*, 1985, 493 A.2d 946.

88 *Maisuradze D.,* Elucidation of the Business Judgement Rule, Journal of Law №1-2, Tbilisi, 2010 109-111.

89 *Hanewicz O.W.,* When Silence is Golden: Why the Business Judgment Rule Should Apply to No-Shops in Stock-for-Stock Merger Agreements, 28 Iowa Journal of Corporation Law 205, 2003, 5.

90 *Turner L.K.,* Settling the Debate: A Response to Professor Bebchuk's Proposed Reform of Hostile Takeover Defenses, 57 Alabama Law Review 907, 2006, 4.

91 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 201-206.

on the protection of the best interests of the corporation.[92] Though the Georgian corporate law doesn't define the best interests of the corporation, based on the corporate law and scientific doctrine, it is possible to make an analysis of the best interests of the corporation.

According to the section 6 of the article 9 of the law of Georgia "On Entrepreneurs", the managers and the members of the Supervisory Board should act "in the belief that their action is most advantageous to the corporation".[93] Section 1 of the article 16 of the law of Georgia "On Securities Market" defines that the members of the governing bodies of the corporation "should act in the belief that their action is in accordance with the best for the corporation and its securities holders".[94] Therefore, the mentioned legal acts define the best interests of the corporation as a most advantageous for the corporation and as the best for the corporation and its securities holders.

Can the governing body implement such action that is in accordance with the best interests of the corporation but contradicts the interests of the shareholders?

It is acknowledged that the shareholders, employees, affiliated companies, the community where the corporation is functioning and other stakeholders are influenced by the development of the corporation.[95] At the same time, the interests of the mentioned parties can be different from each other and opposite as well.[96] The raise of the salary of the employee can affect the dividends of the shareholder; big corporations can be good for the employement and for the community but can harm the environment, etc.

Therefore, it is important to protect and balance the interests of the shareholders and all stakeholders. Such an approach can be one of the basements for defining the best interests of the corporation. But it also leads to the issues of corporate governance, where various theories determine the Board as the governing body empowered to protect the best interests of the shareholders[97] and/or balance the interests among all stakeholders. Board is obliged to act in accordance with the best interests of the shareholders and stakeholders, and based on the balance of their interests, the overall best interests of the corporation can be designated.

Moreover, the decision adopted by the ruling body in accordance with the best interest of the corporation might affect the interests of the shareholders. It is acknowledged in the corporate law that, with not including several exceptions, shareholders lack specific qualifications necessary to make

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92 *Maisuradze D.,* Implementation of Defensive Measures Based on "Selective Equal Treatment" of Shareholders (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Journal of Law №1, Tbilisi, 2014, 123.

93 Law of Georgia „On Entrepreneurs", 1994, Article 9.6.

94 Law of Georgia "On Securities Market", 1998, Article 16.1.

95 *Greenfield K.,* There's a Forest in Those Trees: Teaching About the Role of Corporations in Society, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 12-17.

96 *Makharoblishvili G.,* General Review of Corporate Governance, Tbilisi, 2015, 311-325.

97 *Pinto R.A.,* Corporate Governance: Monitoring the Board of Directors in American Corporations, 46 the American Journal of Comparative Law 317, 1998, 1.

decisions in accordance with their best interests.[98] Therefore, shareholders might agree on the offer that is not profitable in the long run.[99]

In the court case *Air Products and Chemicals, Inc. v. Airgas, Inc*.,[100] after the offer of *Air Products* raised market value for the shares of *Airgas* more than a half of the shares of the *Airgas* were bought by resellers who wanted to sell their shares to *Air Products* and didn't follow the recommendations of the Board which wanted to raise the selling price from the offeror on the shares of *Airgas*. Directors were not generally against selling the corporation but were against selling the shares on the low price because they were sure that the value of the corporation was higher than the offered price.

In the abovementioned example and based on the selective equal treatment of shareholders, the interests of the long-term shareholders are in accordance with the best interests of the corporation. Though the Directors were not considering the demands of the short-term shareholders doesn't mean that the Directors were not protecting the interests of such shareholders. But considering the interests of the short-term shareholders would have been a neglect of the strategic goals of the corporation that would have also affected the interests of the long-term shareholders and the stakeholders and lead to the violation of the fiduciary duties of the Directors.

Section 3^1 of the article 53 of the law of Georgia "On Entrepreneurs" is an interesting example for defining the best interests of the corporation. According to the mentioned article, if the shareholder requests the information from the governing body, such request may be rejected if it is in the substantial interests of the corporation.[101] Therefore, the request of the shareholder may contradict the best interests of the corporation. This issue can be also connected with the cancelling the preemptive rights to the shareholders that is based on the best interests of the corporation. "Depriving or restricting the preemptive right is only admissible when otherwise is impossible to achieve the purpose without increasing the capital and the restriction of the shareholders' rights serves the interests of the corporation as a whole".[102] The restriction of the shareholders rights for "the interests of the corporation as a whole" is connected with the aim and prosperity of the corporation. "…For annulling the preemptive right when capital is growing, the interests of the corporation are the most important. So the legal ground for annulment of the preemptive right must serve (1) the purpose and welfare of the corporation and (2) the measure for achieving this purpose must be reasonable, necessary and proportional".[103]

It must be also noted that the best interests of the corporation is not equal to the interests of the majority shareholders. The governing body is equally liable before the minority and majority shareholders. For the best interests of the corporation, the ruling body should support the adoption of

98 *Oesterle A.D.,* The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court, 72 Cornell Law Review 117, 1986, 3.

99 *Bainbridge M.S.,* Unocal at 20: Director Primacy in Corporate Takeovers, 31 Delaware Journal of Corporate Law 769, 2006, 5.

100 *Air Products and Chemicals, Inc. v. Airgas, Inc*. 2011 WL 806417 (Del. Ch. 2011).

101 Law of Georgia „On Entrepreneurs", 1994, Article 53.3^1.

102 *Chanturia L., Ninidze T.,* Commentary on the Law about Entrepreneurs, 3th ed, Tbilisi, 2002, 376.

103 *Burduli I.,* Foundations of Corporate Law, Vol. 2, Tbilisi, 2013, 254.

decisions by qualified majority, participation of the representatives of the minority shareholders in the meetings of the committees of the governing bodies and other meaningful measures that aim to protect the interests of the minority shareholders.

Based on the abovementioned, in Georgian corporate law, decisions adopted by the Directors of the corporation with participation of the Supervisory Board, based on the balance of interests of shareholders and stakeholders, in accordance with the welfare and strategy of the corporation as a whole, can be considered in compliance with the best interests of the corporation.

6. The Criticism of Poison Pills

It was mentioned in the second chapter of the Article, that the majority of the big corporations of USA have already implemented the Poion Pills. There are many court decisions regarding the Poison Pills that discussed the legal and factual grounds of the implementation of Poison Pills and supported designation of its grounds. Though Poison Pills are one of the basic antitakeover defensive measures, some experts criticize various aspects of its implementation.

First of all, experts criticize the authority of the board to implement the Additional Right and believe that such powers should be given to the general meeting of shareholders. Experts also think that the successful implementation of the Poison Pills is based on the economic capabalities of the corporation. Therefore, it will be impossible for the corporation which has weak financial portfolio to protect itself from the acquirer. It is also worth mentioning that the additional right, if it is used unproportional regarding the existing threat will be obstructing barrier for the free will of shareholders.

6.1 Governing Body Entitled to Implemented the Additional Righ in Accordance with the Best Interests of the Corporation

Significant number of scientists and the court cases acknowledge the Board as the governing body entitled to implement Poison Pills. Article 144 of the Delaware General Corporate Law broadly defines the authority of the Board[104] and includes the implementation of Poison Pills within the scopes of this authority that is also envisaged by the court practice.[105] Regarding the Georgian corporate law, it was mentioned above that the Directors are entitled to implement the corporate defensive measures but underlined the importance of Supervisory Board and outside Directors in execution of defensive measures. But there are also experts who think that the Directors don't have the right to deter the shareholders from selling the corporation and the impelemntation of the Additional Rights should be the authority of the general meeting of shareholders.[106]

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104 DGCL, §144.

105 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*. Delaware Supreme Court, 1986, 506 A.2d 173.

106 *Bebchuk A.L*., The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T*., Carolina Academic Press, 2nd ed., Durham, 2010, 554-573.

According to this opinion, shareholders know better than Directors what is their best interest. Moreover, they have to decide without interference whether to sell or not their shares.[107] Board decision of implementation of Poison Pills, automatically means that the shareholders are forced to be in defencive position.

Furtheremore, experts question the Board's ability to protect the long-term strategy of the corporation in case when the shareholders want to sell their shares. At the same time, experts believe that the Board's decision to implement the defensive measures is not profitable for the shareholders.[108]

Studies suggest that (though this study is conducted on the examples of staggered board[109]) with the execution of the defensive measures and refusing to accept the offer both short-term and long-term shareholders are being financially affected. Long-term shareholders, whose corporations retained independence, got 54% less profit than corporations that were sold during acquisition.[110]

It is also highlighted that the management of the corporation is interested in personal profit and decides the fate of acquisitions based on good or bad relationship with the management[111] of the acquiring corporations.[112] Studies reveal that in case of a personal benefit, the managers of the target corporation are ready to accept the offer even it offers low price. [113] It should be also mentioned that the executive management is ready to accept the low price offer in return fot the high ranking positions in the post-transaction corporation.[114]

Therefore, based on the abovementioned studies, though Directors have relevant qualification, they do not have the enough motivation to act in accordance with the best interests of the corporation and shareholders.[115]

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107 *Gordon N.J.*, Mergers and Acquisitions: "Just say never?" Poison Pills, Deadhand Pills, and Share-holder adopted bylaws: and essay for Warren Buffet, 19 Cardozo Law Review 511, Yeshiva University, 1997, 3-4.

108 *Bebchuk A.L.*, The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 558.

109 *Maisuradze D.,* The Implementation of Defensive Measures during the Reorganization of Capital Entity (Comparative-Legal Study Predominantly on the Example of Delaware and Georgian Corporate Law), Tbilisi, 2015, 251-255.

110 *Bebchuk A.L., Coates C. J. IV., Subramanian G.,* The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy, 54 Stan. L. Rev. 2002, 935.

111 *Bebchuk A.L.*, The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 558.

112 Bad relationship between the target and acquiring corporations was one of the issues in *Revlon* case, *Thompson O.*, Corporations and Other Business Associations, 5th ed., Aspen Publishers, N.Y., 2006, 788-793.

113 *Hartzell C.J., Ofek E., Yermack D.,* What's In It For Me? CEOs Whose Firms Are Acquired, NYU Working Paper №FIN-01-049, 2001, 23-24, <https://papers.ssrn.com/sol3/papers. fm?abstract_id= 1294594>.

114 Wulf J., Do CEOs in Mergers Trade Power for Premium? Evidence from "Mergers of Equals", Journal of Law, Economics and Organization, 2004, 24-26. <https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=469881>.

115 *Bebchuk A.L.*, The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 562-564.

It must be also mentioned that the implementation of the additional right is also based on the individual attitudes and beliefs. One of such example is the acquisition of Willammette by Weyerhaeuser. Corporation Willammette was trying to protect itself for 14 months. Particularly, Weyerhaeuser offered 48$ for shares of Willammette. In May, 2001, Weyerhaeuser increased its offer to 50$ and replaced 1/3 of the staggered board of Willammette. But the remaning part of the board was still against of selling the coporation. In January, 2002, Weyerhaeuser once again raised the price till 55$. The Board of Willammette, after the shareholders refused to sign the agreement with the third party, agreed to sell the shares per 55.50$. This price was 16% higher than the first offer. [116]

The abovementioned case is considered as an example of effectivnens of corporate defensive measures when the acquirer was obliged to buy the corporation 16% higher the offered price.[117] But those who criticize additional rights, highlight that though the price was 16% higher, it was achieved only after 14 months from the initial offer and during the final offer there were different conditions on the market. Moreover, if the Directors managed to have a better negotiations with the acquirer, the latter would have raised the price far earlier. Therefore, if the Board didn't implement the defensive measures, the shareholders would have been in a better condition.[118]

In order to thoroughly define the governing body entitled to implement the defensive measures, the broad context of management authorities and fiduciary duties should be analyzed. Single shareholders owe duty of loayalty to each other and to the corporation.[119] Majority or dominant shareholders have greater duty of loayalty to the corporation and other shareholders, than the minority shareholders.[120]

It must be also highlighted that the General Meeting of Shareholders has the authority to deprive the shareholder's preemptive rights[121] and as we mentioned above, it can be used as a flip-in version of Poison Pills in Georgian corporate law. But the law of Georgia "On Entrepreneurs" also envisages the opportunity to transfer this right to the Directors.[122] Also the right to issue additional shares as accompanying feature of the preemptive rights can be part either the General Meeting or Directors authority.[123]

Therefore, based on the autonomy of bylaws, Georgian corporate law grants the opportunity to the corporations to decide independently which will be the implementation body of additional rights.

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116 *Bebchuk A.L.*, The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 572.

117 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 580.

118 *Bebchuk A.L.*, The Case Against Board Veto in Corporate Takeover, Corporate Governance, Law, Theory and Policy, Edited By *Joo W. T.*, Carolina Academic Press, 2nd ed., Durham, 2010, 572-573.

119 *Burduli I.,* Foundations of Corporate Law, Vol.2, Tbilisi, 2013, 165-166.

120 *Burduli I.,* Foundations of Corporate Law, Vol. 2, Tbilisi, 2013, 174-187.

121 Law of Georgia „On Entrepreneurs", 1994, Article 54.6.

122 Law of Georgia „On Entrepreneurs", 1994, Article 54.6.

123 Law of Georgia „On Entrepreneurs", 1994, Article 59.

6.2 Bypassing Poison Pills

Some scholars believe that though the Poison Pills are acknowledged as an effective antitakeover device, it is still possible to bypass it. One of the ways to avoid the implementation of Poison Pills is the replacement of the Board members.[124] In case the offer of the acquirer is profitable, the shareholders of the target corporation can replace the old composition of the Board and elect the new members who will start negotiations for selling the corporation without implementing the additional rights.[125]

Regarding this issue, those scientists who favor the implementation of the Poison Pills think that the Poison Pills is the instrument that makes the acquisition more profitable because the acquiring corporation is aware of potential economic losses if it won't suggest the price that is high enough to be accepted by shareholders.

6.3 Additional Rights as a Threat and as a Mechanism Protecting from Threat

Poison Pills as a corporate defensive measure should comply with the requirements of *Unocal*, thus there should be an existing threat for the corporation and the implemented corporate defensive measures should be in accordance with posed threat.

After *Unocal*, the court cases have developed the proportionality issue. Particularly, the corporate defensive measure will be unproportional to the existing threat if it is coercive and/or preclusive against the free will of shareholders.[126] Thus, though the corporation has implemented the corporate defensive measures, the shareholders should still have the opportunity to freely sell their shares. Additional rights is the defensive measure against the threat to corporation and it cannot be used to influence the shareholders voting rights.[127] These issues are subject of equal treatment.

7. Conclusion

Additional Right of shareholders is a complex and interrelated issue with many corporate legal institutes. It can be also regulated based on the autonomy of bylaws. The implementation of Poison Pills affects the interests of shareholders and stakehoders and aims to prevent acquiring corporation from buying the target.

The above article discusses the development of Poison Pills, its various models, implementation grounds and connected legal institutes.

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124 *Velasco J.,* The Enduring Illegitimacy of the Poison Pill, 27 Iowa Journal of Corporation Law 381, 2002, 2.

125 *Lipton M.,* Pills, Polls, and Professors Redux, Corporate Governance, Law, Theory and Policy, Edited By *Joo W.T.,* Carolina Academic Press, 2 nd ed., Durham, 2010, 579-580.

126 *Paramaunt Communications, Inc. v. QVC Network*, *Inc*. Delaware Supreme Court, 1994, 637 A.2d 34.

127 *Werkheiser. W.G.,* Defending the Corporate Bastion: Proportionality and the Treatment of Draconian Defenses from Unocal to Unitrin, 21 Delware Journal of Corporate Law 103, 1996, 7-8.

As it was mentioned, Poison Pills is the creature of the American corporate law, but above analysis shows that its reception and introduction is also possible in Georgian corporate law including the implementation of Poison Pills in the bylaws of Georgian public JSCs.

There is no common approach towards Poison Pills and to the governing bodies entitled to implement it. Some scientists cast doubt on effectiveness of this defensive measure and its appropriatness to the best interests of the corporation. However, Poison Pills still remains as one of the most popular and widely used antitakeover defensive measure.

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Tamar Chitoshvili*

Acknowledgement of the Existence of Debt in the Light of Doctrine and Judicial Practice

Acknowledgement of debt is one of the major law-of-obligations relationship. Correct regulation of this relationship greatly depends on the form of manifestation of this relationship, its content, legal good faith, etc. The paper investigates the legal nature of the acknowledgement of debt, offers the general overview of key aspects like the concept of acknowledgement of the existence of debt, its content and form of expression, also delimitation from and links with other legal institutions, what is of major theoretical and practical importance.

Key words: *acknowledgement of the existence of debt, abstract contract, causal acknowledgement, novation, other performance, other obligation.*

1. Introduction

Legal viability of an obligation is conditioned by its form and content, which meets the requirement of imperative and discretionary rules. Fulfilment of this very type of obligation in practice is simplified. However, owing to subjective and objective circumstances the quality of fulfilment of an obligation often becomes grounds of a dispute. The situation is even more complicated when the content, type, form, etc. of an obligation is obscure.

The well-elaborate and explicitly clear is the content of legal rules, less problems arise in the course of fulfilment of different obligations. In this light, worth mentioning is the law-of-obligation relationship arising as a result of acknowledgement of debt and the procedure of its regulation, where the compulsion under morals and law and its regulation are equally combined.

Somewhat specific is the case when a claim for fulfilment an obligation is aged, when a debtor does not deny the existence of the obligation, but refuses its fulfilment. From practical point of view, legal analysis of such cases is very difficult as it becomes difficult to determine, whether or not this is the acknowledgement of debt, does the flow of the period of limitation start, is this the claim of the creditor, whose claim was already expired, etc.

Analysis of judicial practice evidences that these issues often prove to be painful and become the subject matter of disputes.

There are cases in judicial practice, when mutually contradictory assessments are made and it becomes unclear whether the acknowledgement of the existence of debt is a unilateral transaction or a

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unilateral contract. However it should be established on a case-by-case basis what we are dealing with: acknowledgement of the existence of debt as a unilateral declaration of intent, which is of full force and effect and may have consequence or the acknowledgement of the existence of debt as a unilateral contract.

Based on the foregoing it becomes necessary to evaluate a specific case on the basis of both correct interpretation of legislative rules and deep analysis of judicial practice. The comparative legal analysis of the acknowledgement of the existence of debt and other legal institutions is also necessary, what will also promote accurate regulation of litigations and protection of the interests of the parties.

Hence the issues discussed in this paper are topical both from theoretical and practical points of view. Correct regulation of law-of-obligations relationship, that originated on the basis of acknowledgement of the existence of debt, guarantees the protection of interests of not only the person, for whose benefit the debt was acknowledged, but also of the person, who acknowledges the existence of debt.

Worth mentioning is the problem, that the person for whose benefit the debt was acknowledged may or may not accept the intent of the person, who acknowledges the existence of debt. Such freedom of declaration of intent should not become grounds for voidance of the acknowledgement of the existence of will. Hence, the freedom of declaration of intent of one person should not restrict the declaration of intent of the other person without any legal grounds. This means, that the person, who acknowledged the existence of debt, should be given the legal opportunity to attain consequences.

2. Acknowledgement of the Existence of Debt (General Characteristics)

Every obligation and its fulfilment has its basis. This basis can be either contractual or statutory. Its fulfilment is the result of an act, actually performed by a citizen, which can be manifested either in an act or omission, what should be accompanied by the principle of good faith of fulfilment.

In practice dominating are the obligations that originate on a contractual bases. These obligations can be of different type.

Conclusion of a contract constitutes a free declaration of intent. "Freedom of contracting means that nobody is obliged to enter into a contract."[1] Hence, a contract is not concluded and the content thereof is not determined under compulsion. "The content is limited to the union of rights and obligations,"[2] and a contract is performed through legal compulsion. "Compulsion, which can be embodied in the essence of an obligation does not explicitly constitute a compulsion of some specific type (ethical, legal or other), it is a set of compulsions that form an obligation."[3]

1 *Zoidze B.,* Reception of the EU Private Law in Georgia, Tbilisi, 2005, 270 (in Georgian).
2 *Zoidze B.,* An Attempt to Understand Practical Existence of Law Mainly in the Context of Human Rights, Tbilisi, 2013, 95 (in Georgian).
3 Ibid.

The principle of freedom to contract and determine its content also applies to the conclusion of a contract on the acknowledgement of the existence of debt. This contract is a special case, having certain specific features. It is necessary to delimit between the acknowledgement of debt and a contract on the acknowledgement of the existence of debt.

We deal with the acknowledgement of the existence of debt when the fact of existence of an obligation is evidenced by an act performed by a person (drawn up document, or oral explanations), which obligation was not fulfilled by the person concerned in due time and the obligation is no more subject to fulfilment owing to period of limitation. If the person agrees to fulfil this obligation through declaration of his/her intent at his/her own free will in accordance with prescribed form, this will be the acknowledgement of debt, what may be followed by respective consequences, specifically: the right to claim and starting of the flow of the period limitation anew.

A debt should be acknowledged not during the flow of the period of limitation, but rather after the lapse thereof.

The situation, when debtor confirms the existence of an obligation but denies its fulfilment owing to the expiry of the period of limitation, is not the case of debt acknowledgement. This situation is also dealt with by judicial practice of the Supreme Court of Georgia, specifically "Amongst documents requested from "ZRCP" LLC on the basis of applicants' solicitation there is a table specifying the amount of wages, not received only by the applicants. The Chamber considered that the company recorded the claim, what in itself, does not mean the acknowledgement of the obligation to pay. The essence of the period of limitation is that the debtor does not deny the existence of tje obligation, but rather confirms it, but denies its fulfilment due to the lapse of the period."[4]

Hence, the confirmation of the obligation by the debtor should be followed by the declaration of intent on the part of the debtor regarding its fulfilment. Otherwise it will not be the acknowledgement of the existence of debt. Respectively the periods of limitations will not matter and the imperative nature of protection of right during the period of limitation will become meaningless, what is of major importance under the Civil Code of Georgia.

Acknowledgement of plaintiff's claim by the defendant during judicial proceedings and the declaration, that he supports the existence of obligation, does not constitute the acknowledgement of the existence of debt. Hence, the consent to fulfil an obligation declared by person on the basis of a claim does not mean the acknowledgement of the existence of debt envisaged by Article 341. This is the declaration of intent within the framework of existing contract and its fulfilment, what may be related to the procedure of fulfilment of the obligation, prescribed by the contract and amendments thereof, in which case the debtor does not deny the fulfilment of the existing obligation. In this respect, in my opinion, some incorrect assessments have been made in judicial practice. In this context worth mentioning the are the opinions of Cassation Court regarding the decisions of the Appeals Court, specifically: "The receipt, drawn up by the parties cannot be regarded as an agreement on acknowle-

[4] Ruling on the Acknowledgement of Debt, №AS-392-371-2013, November 8, 2013, Tbilisi, Collection of Court Decisions, №10, 2014, 24 (in Georgian).

dgement of the existence of debt prescribed by Article 341 of the Civil Code, as, according to the explanations of the parties, and also by the testimonies of witnesses, present upon drawing up the receipt, it is established for fair that the receipt determined the scope of the obligation originating from law-of-obligations relationships and subject to future fulfilment."[5]

There are cases, when a person acknowledges the existence of debt and tries to conceal some other, more complex obligation or the other obligation and avoid its fulfilment. In my opinion this is not the acknowledgement of debt under Article 341. For example, a person acknowledges the existence of debt through fulfilment and thus tries to avoid liability before law enforcement authorities. The acknowledgement of the existence of debt is allowed in private law relationships as well, when public interests are not violated. However, when a debt is acknowledged through mutual agreement of private persons, the settlement within the framework of mutual responsibilities, i.e. compensation of damages, the deal maintains its legal force, but the liability before the law enforcement authorities cannot be excluded on the basis of settlement. Also, the acknowledgement of debt may aim at misleading a third person (e.g. a victim) and avoidance of full liability in this way. For example: a person is well aware of the gravity of his guilt and fully declined his liability to the victim through acknowledgement of immediate fulfilment. In this case the principle of good faith fulfilment of obligation is violated, when the result may be become subject to voidance.

Acknowledgement of the existence of debt, according to initial grounds of its origin, may be either contractual or statutory.

The following cases can be regarded as the acknowledgement of contractual obligations:

a) A contractual (causal) obligation, which was not fulfilled within prescribed terms and conditions and it is impossible to satisfy the claim of the creditor for its fulfilment owing to the expiry of the period of limitation. The acknowledgement of such debt constitutes grounds for the origin of a new, independent claim.

b) Acknowledgement of contractual law-of-obligations relationship is also the case, when obligation might have initially originated on the basis of an oral arrangement and the person failed to prove the negotiation thereof due to the absence of evidences. Respectively, the debtor failed to perform it within prescribed timelines, however the latter personally admitted the existence thereof, etc.

The cases of acknowledgement of the obligations, that originated on the basis of statutory grounds are as follows:

a) A person acknowledges the inflicting of damage upon some person and the existence of debt, that originated on the basis of foregoing. This may be related to cases, when a person is not aware of the fact of inflicting damage upon his proprietary or non-proprietary interest or the identity of the inflictor of damage, i.e. when he is not aware who inflicted damage upon him. In this case the person who inflicted damage, himself acknowledges the fact of inflicting damage and the existence of debt.

[5] Decision of the Supreme Court of Georgia №AS-839-890-2011, November 8, 2011, Acknowledgement of the Existence of Debt, 2012 Collection №2 (in Georgian).

b) When a statutory debt is not satisfied due to the lapse of the period of limitation. For example: due to the lapse of the period of limitation a hair is not able to receive due share from the estate, which is already distributed between the other heirs. However, the heirs may assign due share to such heir on the basis of acknowledgement, which share he/she would have legally received had he/she not missed the period of claiming the estate.

Hence, as already mentioned, the acknowledgement of the existence of debt is the grounds for origin of a new, independent claim. The claim is related to fulfilment of initial (statutory, contractual) obligation. When the obligation seizes to exist owing to the period of limitation or some other reason and the claim of the creditor is no more subject to fulfilment, it is impossible to apply the aggregate of compulsions. This is the case of ethical compulsion, which is based on the freedom of declaration of intent, when the motivation thereof does not matter.

3. Acknowledgement of Debt as a Unilateral Transaction

Acknowledgement of the existence of debt is a unilateral transaction, when a person acknowledges the existence of obligation during the certain period.

Execution of a contract on acknowledgement of the existence of debt does not the obligation of the person, for whose benefit the debt was acknowledged. The latter is entitled to deny the acceptance of what was acknowledged. However, this does not always mean the voidance of the intent declared with regard to acknowledgement of the existence of debt.

Declaration of intent by a person regarding the acknowledgement of debt may be invalid in the light of general rules. For example: forced nature of declaration of intent regarding acknowledgement, or if the declaration of intent concerns the law-of-obligations relationship, the initial grounds of origin of which was found invalid, or acknowledgement was done without observance of form, etc.

In my opinion, acknowledgement of the existence of debt cannot be explicitly accepted as a unilateral contract.

Acknowledgement of debt by a person can also be regarded as a unilateral transaction, which may be followed by a legal consequence. For example in February 2016, "A" credited 3000 GEL to bank account, which money he borrowed from "B" and was to repay in January, 2012. The claim of "B" is no more enforceable with regard to "A" owing to the period of limitation. Based on the foregoing, crediting of the amount to bank account means the acknowledgement of debt.

We witness the acknowledgement of debt through fulfilment when a person makes fulfilment at notary's office (through deposition).

Hence, acknowledgement of debt through fulfilment (crediting of amount to bank account, deposition, etc.), as a unilateral declaration of intent, is valid until the opposite is proved with due justification. For example: this can be done when it is established that the obligation, which was acknowledged, has never existed at all.

In my opinion a notice on acknowledgement of debt, sent by one person and received by the other party, is valid. On the basis of the foregoing one party (the one, who acknowledged the obligation) undertakes its fulfilment, whilst the other party (for whose benefit the acknowledgement was done) acquires the tight to claim.

Based on the foregoing I believe, that unilaterally declared intent regarding the acknowledgement of debt in accordance with the established form, is of that category of transactions, "which, although, become legally valid as a result of declaration of intent by only one person, still give proprietary or other preference to third persons."[6]

For example: "A" sent a written notice to "B", that he is ready to return 1000 GEL to him, which amount he was to return on the basis of a loan agreement 5 years ago, but has not returned. This notice constitutes the acknowledgement of debt on the part of "A". From the date of receipt of such notice "B" acquired the right to claim and the flow of the period of limitation started anew for the latter. Hence, the intent to acknowledge debt, declared in this manner is valid as the other party acquires the right to claim on the basis of the foregoing.

Based on the foregoing, the definition stemming from judicial practice, that "Acknowledgement of the existence of debt is a unilateral and abstract contract, one party to which independently undertakes the fulfilment of certain actions for the benefit of the other party and thus, *the declaration of intent of one person is quite sufficient*" - is absolutely unacceptable. The abstract nature of the acknowledgement can be accepted, however the declaration of intent of only one person is not sufficient for a unilateral contract.

According to definition, given in the Doctrine, "In civil law transactions, for the validity of which the declaration of intent by one person is sufficient, are called unilateral transactions, because the origin, amendment or termination of legal relationships in the case of such transactions *depend on the intent of a single person.*" [7]

Acknowledgement of the existence of debt according to relevant form is a free declaration of intent by a person, which becomes independent and the basis of which a person agrees to make fulfilment for the benefit of another person. At the same time, the fulfilment concerns the obligation which was not performed in due course.

Hence, when a person acknowledges in accordance with the established form, that the obligation existed and, at the same time, agrees to fulfil this obligation, this will be unilateral declaration of intent, which equips the other person with the right to claim fulfilment from the person, who acknowledged debt. The flow of the period of limitation starts from the moment of acknowledgement of debt.

Private law relationship is regulated on the basis of imperative and discretionary rules, which establish harmonious relationship between the parties, meaning that the interests of all the parties of the relationship are equally protected. A right cannot be restricted by an obligation. Hence, a person, for

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6 *Chanturia L.,* General Part of Civil Code, "Samartali" Publishing House, Tbilisi, 2011, 298 (in Georgian).

7 *Chanturia L*., Introduction into General Part of Civil Code, "Samartali" Publishing House, Tbilisi, 1997, 315 (in Georgian).

whose benefit the debt was acknowledged, is entitled to accept or not to accept the consequence of acknowledgement. Insofar as the acknowledgement of the existence of debt and its motivation do not matter, it also does not matter from the legal point of view, why person, for whose benefit the debt was acknowledged, may deny the acceptance of the fulfilment. However the intent declared by the person regarding acknowledgement will be valid.

4. Acknowledgement of Debt as a Unilateral Contract

Declaration of intent by a person regarding the acknowledgement of the existence of debt and its fulfilment becomes a unilateral contract only when, on the basis of acceptance of declared will, the person, for whose benefit the debt was acknowledged, agrees to enter into contract on the acknowledgement of will, i.e. the acknowledgement is followed by an agreement, that is, the parties agree on the procedure and terms and conditions (time, place, etc.) of fulfilment. Respectively, the flow of the period of limitation starts anew.

However, the latter may refuse the execution of contract, or acceptance of already performed obligation, what, in its turn, will also be a unilateral transaction. To a certain extent the foregoing acquires the signs of pardoning. If this is unacceptable for the debtor, who acknowledged the existence of debt, and declared his intent to fulfil it, he is also entitled to deny what he takes as pardoning and fulfil it according to general rules, regulating the termination of obligation. Hence, the validity of the acknowledgement of the existence of debt by a person should not always depend on acceptance or non-acceptance thereof by the other party.

Based on the foregoing it can be said, that intent declared about the acknowledgement of the existence of debt, which should reach the persons, for whose benefit the debt was acknowledged, has certain features of an offer, that is, the latter may accept this proposal or not. However, the difference is that, that in the case of negative acceptance, or when the offer is not accepted, no contract will be executed and the offer will have no consequences. As regards the acknowledgement of the existence of debt, the person, for whose benefit the debt was acknowledged, refuses the consequences of fulfilment, the consequence may still occur through the fulfilment of acknowledgement, that is, an obligation may either be fulfilled or terminated on the basis of unilaterally declared intent, for example: through a document, drafted under the participation of a notary. Furthermore, the same document, which declared the intent of the person regarding the acknowledgement of debt, entitles the person (for whose benefit the debt was acknowledged) to claim fulfilment, until the claim expires.

Hence the debt may be acknowledged through mutual agreement of the parties, i.e. when the intent declared by person reaches the addressee and the latter accepts it. This acknowledgement may concern the confirmation and fulfilment of the law-of-obligations relationship, which is not subject to fulfilment any more due to the period of limitation or for some other reason, or the creditor may even be unaware of the claim. In this case we deal with a unilateral contract, which should fully meet the content-related requirements (quality, scope, time, timelines, etc. of fulfilment), about what the parties will agree. In this

respect, worth mentioning are the assessments of judicial practice of the Supreme Court of Georgia: "Insofar as the contract of acknowledgement of debt is an independent transaction, it should meet the terms and conditions, set for the validity of a transaction, as prescribed by statutory requirements. What is more, required is the agreement of the parties on essential terms of the contract. In this respect quite reasonable is the reference of the cassator to Article 327 of the Civil Code, under Parts 1 and 2 of which Article a contract is regarded concluded, if the parties agreed upon essential terms thereof in accordance with the form, prescribed to this end. Essential are those terms of the contract, with regard to which an agreement should be reached on request of one of the parties, or which are regarded as such by law. According to this opinion of the Chamber, the terms, like agreement of the parties on the subject matter of the contract, determination of basic rights and obligations, price, fulfilment timelines, etc., should be regarded essential. Hence, not every document, where the existence of debt is recorded, can be regarded as a contract on acknowledgement of the existence of debt, unless it is established that the parties have agreed upon essential terms of the contract."[8]

Hence the opinion, declared both in the doctrine and judicial practice, that a contract on acknowledgement of the existence of debt should include the agreement on all the essential terms,[9] is explicitly acceptable. However, the content should derive from the terms and conditions of the obligation, that existed (or exists) between the parties, but was not performed owing to the period of limitation or other grounds. In my opinion, the changes in the content of the contract on the acknowledgement of the existence of debt should not result in material difference from the content of the initial obligation, except for the case when it comes to other fulfilment, which guarantees the fulfilment of the outstanding obligation. Otherwise this will not be a contract on the acknowledgement of the existence of debt, but rather the other obligation.

As regards the recognition of debt, which originated on statutory basis (for example, compensation of damages), the parties thereof enjoy more freedom with the determination of the content of such contract.

5. The Form of Acknowledgement of the Existence of Debt

The law should be expressed in some way for us to acknowledge its existence and its impact upon us.[10] Legitimacy of the agreement reached by the parties depends on the form of its expression. It is common ground, that form is established through the agreement of the parties, on the basis of free choice, or is imperatively provided by law. Part 1 of Article 341 of the Civil Code directly states, that "For the validity of a contract, by virtue of which the existence of law-of-obligations relations will be acknowledged (acknowledgement of the existence of debt), its written acknowledgement is mandatory.

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8 Ruling № AS-1485-1401-2012, Supreme Court Decisions, Collection of 2013, №12, Tbilisi, November 11, 2013, 9 (in Georgian).

9 *Tsertsvadze L.*, Specific Grounds for Origin of an Obligation - Contract Law (Group of Authors), *Jugheli G. (ed.),* Meridiani Publishing House, Tbilisi, 2014, 201 (in Georgian).

10 *Zoidze B.,* An Attempt to Understand Practical Existence of Law Mainly in the Context of Human Rights, Essays, Tbilisi University Publication, Tbilisi, 2013, 51 (in Georgian).

If some other form is prescribed for the origin of law-of-obligations relations, the existence of which was acknowledged, acknowledgement also requires the same form." This part of the rule refers to written form of a transaction in its narrow meaning, meaning that the existence of debt should be acknowledged in writing, however it is not specified whether this should be a simple or complex written form. The foregoing should be decided on a case-by-case basis, i.e. important is the form of origin of law-of-obligations relations, which is being acknowledged.

Hence, a contract on the acknowledgement of the existence of debt should be executed in writing between the parties, otherwise it will not be legally valid. Written form serves the purposes of legal security and protects the interests of the parties. Owing to written agreement of the parties the essential terms, that parties agree upon in the course of execution of the contract on the acknowledgement of the existence of debt, are beyond doubt.

Worth mentioning is Part 2 of the above provision, according to which: "If the existence of debt is recognised on the basis of payment, or through settlement, observance of form is not necessary."

The study of judicial practice demonstrates and of no less importance is the written form, when the existence of debt is acknowledged on the basis of payment, when the indication of the purpose and grounds of payment is mandatory. In this case it does not matter whether the payment is made in cash or through money transfer. Mandatory nature of observance of form is particularly important in the case of payment in cash, when the parties are less protected without a written form. In this case the purpose, payment thresholds, exchange rate, type and scope of the acknowledged obligation are specified, as well as changed circumstances, etc. Hence, the parties distribute risks and determined contract terms by a contractual agreement or without it.[11]

As regard settlement, it is the manifestation of a compromise between the parties. when both parties make concessions to each other. A settlement agreement can be executed only between disputing subjects of material law (between a claimant, defendant and a third person, having an independent claim with regard to the subject of the dispute). A settlement agreement is approved by court, meaning that it verifies the validity of the terms and conditions of the contract, whether or not they contradict the law or rules of ethics, whether or not they violate the statutory rights of third persons.[12]

A settlement with regard to disputes, arising between private persons out of law-of-obligations relationships, can be reached either judicially or under the participation of a notary. In both cases the outcome of settlement is recorded in writing, specifically in a court decision, or a notarized act on settlement.[13] Insofar as the stipulation of Part 2 of Article 241 is not general, it can be presumed, that

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[11] *Chitashvili N.,* Impact of Changed Circumstances on the Fulfilment of Obligation and Potential Secondary Claims of the Parties (Comparative Analysis), Bona Causa Publishing House, Tbilisi, 2015, 256-257 (in Georgian).

[12] *Kurdadze Sh.*, Trial of Civil Cases at First Instance Courts, Meridiani Publishing House, Tbilisi, 2005, 124 (in Georgian).

[13] The Law of Georgia on Notary, December 4, 2009 № 2283-IIS, Art. 38^1 and Order of the Minister of Justice of Georgia №71 On Approval of the Guidelines Regarding Procedure of Performance of Notary Actions, March 31, 2010, Tbilisi.

parties may settle about the acknowledgement of the existence of debt without a court or notary. In this case, observance of written form is mandatory in my opinion.

Based on the foregoing, the necessity of observance of written form will be acceptable, when the existence of debt is recognised on the basis of payment or settlement.

6. Delimitation Between the Acknowledgement of the Existence of Abstract Debt and Causal Debt

Acknowledgement of abstract debt is an independent promise of the debtor to the creditor.[14] Acknowledgement serves the fulfilment of the obligation, which is not subject to fulfilment due to some reason.

Causal debt is acknowledged within the framework of its fulfilment, when the parties agree upon changing or adding some term, which serves the purposes of fulfilment of the obligation. Acknowledgement of causal debt may fully, or at least, to some extent ensure the prevention of a dispute or disagreement and the latter may be finally settled.[15] Based on the foregoing there are several modes of acknowledgement of causal debt: firstly, when a party confirms or specifies some term upon fulfilment of obligation and this may concern the quality of fulfilment, amount of money, place of fulfilment, etc. On the other hand, acknowledgement may serve the prevention of complications, what may be associated with the fulfilment of obligation. This is the case of other performance, when the parties agree only with regard to fulfilment of obligation, in order to attain the termination of obligation.[16] In the case concerned the debtor offers some other performance to creditor. i.e. even before the fulfilment of obligations it is possible for the parties to determine, that the debtor is entitled to make some other performance instead of fulfilment of assumed obligation. In this case the debtor is granted with the right to substitute the performance.[17] For example: according to contract, the company, producing soft drinks, is to supply 1000 bottles of the lemonade "Mziuri" to the restaurant. The company offered the restaurant the same amount of lemonade "Gvirila" because he failed to manufacture the aforementioned soft drink and the restaurant accepted the offer. This will be the other performance within the framework of the existing obligation, that is, the acknowledgement of causal and not abstract debt.

Agreement of the parties about other obligations also constitutes the acknowledgement causal debt, which, in its turn differs from other performance. For example: a borrower is not in the position to perform the obligation under the loan agreement and repay 1000 GEL to the lender. The parties agreed that the borrower with instead conduct refurbishment works in lender's apartment. The other performance (novation) originates on the basis of this agreement, which does not entail the termination

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14 *Kropholler J.*, German Civil Code, Educational Comments, 13th rev.ed.,, Translated by: *T.Darjania, Z. Chechelashvili,* Tbilisi, 2014, 580 (in Georgian).

15 Ibid.

16 *Chanturia L.,* Comments on Article 428 of the Civil Code of Georgia, Commentary on the Civil Code of Georgia, III Book, Samartali Publishing House, Tbilisi, 2001, 518 (in Georgian).

17 *Kropholler J.*, German Civil Code, Educational Comments, 13th rev. ed., Translated by: *T.Darjania, Z. Chechelashvili*, Tbilisi, 2014, 264 (in Georgian).

of initial obligation unlike the other performance. According to the foregoing, if the new obligation is not performed, the creditor is entitled to claim the fulfilment of initial obligation.

It should be said, that one of essential differences of acknowledgement of abstract debt is the option, enjoyed by the debtor upon acknowledgement of debt, who is entitled to have his declaration of intent on the acknowledgement of the existence of debt and in general, about its fulfilment, recorded in writing (e.g. with a notary) irrespective of the consent of the creditor. From this very moment the flow of the period of limitation will start with regard to exercise of the right to claim by proper creditor. In the case of acknowledgement of causal debt the respective consequences occur only under the consent of the creditor, through other performance and novation.

Hence in the case of acknowledgement of causal debt it should be established whether we are dealing with the fulfilment of existing obligation, the other performance or other obligation. Respectively, it should be determined, whether what is the main goal of acknowledgement of debt: fulfilment of the existing obligation or origin of an independent one, that is - fulfilment of defaulted obligation within established timelines and under established terms and conditions.

Acknowledgement of causal debt and its consequences may be found void if it turns out that the existing law-of-obligations relationship, the fulfilment of which it served, is void.

Acknowledgement of debt also differs from a promise. Promise and obligation to fulfil it is an ordinary contractual obligation, which is subject to mandatory fulfilment. Failure to fulfil a promise results in the liability of the debtor (promissor) in accordance with the requirements of both general and special rules. For example: promise to donate, promise to give loan, etc.

7. Acknowledgement of Debt as Grounds for Unjust Enrichment

Fulfilment though acknowledgement of existence of abstract debt may become grounds for unjust enrichment. This is the case when a person wrongfully presumed that he was liable to make fulfilment and acknowledges this according to relevant form (in writing, through fulfilment, e.g. through transfer of money, etc.) This means that the debt was acknowledged groundlessly. The foregoing is directly linked with Article 986 of the Civil Code of Georgia, under which Article, a person, who pays off the debts of the other person by mistake, is entitled to claim the compensation of his expenses from that person.

In the case concerned the existence of debt was acknowledged through fulfilment, however, later its groundlessness was established. Although the obligation to compensate damages really existed, obliged was not the person, who did the compensation. As a result of such fulfilment the assets of the other person were saved, respectively, the latter should return the fulfilment.

Fulfilment through acknowledgement, which has no legal grounds, will be retuned under the provisions on unjust enrichment.

As regards the acknowledgement of causal debt, it may also become grounds for unjust enrichment, The foregoing will be the case when the law-of-obligations relationship, on the basis of which the acknowledgement was made, turns out to be void. Hence, the return of fulfilment made through void acknowledgement of debt will be claimed from fake creditor on the basis of unjust enrichment.

Prescription period provides for different consequences for a creditor and a debtor. "Lapse of prescription period of a claim does not mean the termination thereof. The claim still exists and the debtor is still able to fulfil this obligation on a voluntary basis. But the creditor loses opportunity to demand forced fulfilment of this claim from the debtor."[18] This means that after the lapse of the period of limitation the creditor loses "opportunity to claim forced fulfilment through court or other authority, but not the right to apply to the court or other authority." [19]

Hence, a debtor is not restricted and can acknowledge the existence of debt irrespective of its age. If the debt was acknowledged through fulfilment, this will become grounds for termination of the obligation, while acknowledgement in any other manner - grounds for termination of the flow of the period of limitation (Article 137, Civil Code of Georgia). Such acknowledgement is the guarantee for future fulfilment of the obligation. Respectively, the flow of the period of limitation starts anew as a result of acknowledgement of debt.

Furthermore, the debtor is entitled to acknowledge the debt after the lapse of the period of limitation, amongst them, through fulfilment; however, as per Article 144 of the Civil Code of Georgia, "If the obligor has performed the obligation after the lapse of the period of limitation, then he has no right to revoke the fulfilment, even if at the time of fulfilment he did not know that the period of limitation was expired."

Fulfilment through acknowledgement may be disputed in some cases and become subject to revocation on the basis of the provisions on unjust enrichment.

It is possible to claim back whatever was performed through acknowledgement, if it was possible to offset this fulfilment.

The foregoing is regulated by Article 443 of the Civil Code of Georgia, under which Article the lapse of the period of limitation does not exclude the setoff of the obligation if the period of limitation had not elapsed when its offset was still possible. I.e. fulfilment made by one of the parties through acknowledgement can be claimed back on the basis of requirements of Articles 443 and 976 of the Civil Code of Georgia.

Hence, if in the case of a bilateral obligation any of the parties performs his obligation through acknowledgement, but he would not have made this fulfilment had he known that is was possible to perform obligation through a setoff, he should have the right to claim back whatever was performed and this claim should be satisfied on the basis of unjust enrichment.

Although a person performs an obligation through acknowledgement at his own free will, it wrongfully thinks that the obligation is not performed. Hence when the other party also defaults with his obligation, fulfilment made for him through acknowledgement of debt should be considered as unjust enrichment and the latter should be charged with the return of the performed to the performer.[20]

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18 *Chanturia L.,* General Part of Civil Code, "Samartali" Publishing House, Tbilisi, 2011, 122 (in Georgian).

19 *Akhvlediani Z.,* Commentary on the Civil Code of Georgia, I Book, Article 128, Samartali Publishing House, Tbilisi, 1999, 317 (in Georgian).

20 For details, see *Chitoshvili T.*, Content and Types of Obligations, Stemming from Law-of-Obligations Relationship, Unjust Enrichment, Bona Causa Publishing House, Tbilisi, 2015, 98-107 (in Georgian).

8. Conclusion

Acknowledgement of the existence of debt, as abstract debt, is an important law-of-obligations relationship, which should equally protect the rights and obligations of the parties, meaning that the other party should not be entitled to reject the intent declared by first party with no reason. In the case of rejection, person, who acknowledged the existence of debt, should be able to freely enforce his intent. The intent, legally declared by the other person, should not be rejected at the expense of restriction of the freedom of the latter and breach of rights.

The intent about the existence of debt, unilaterally declared in full compliance with form, is not always regarded void and it causes relevant legal consequences. In most cases the acknowledgement of debt is a unilateral contract, which is a special case of origin of an obligation. Fulfilment of this contract and the consequences thereof are regulated on the basis of both general and special rules.

It is the case of acknowledgement of debt, when the grounds for satisfaction of creditor's claim have seized to exist and acknowledgement is still done.

Acknowledgement of some change in the course of fulfilment of basic obligation is causal and is different from the acknowledgement of debt, envisaged by Article 241 of the Civil Code of Georgia.

Of major practical importance is the acknowledgement of existence of debt, what may become grounds for unjust enrichment. Respectively, the regulation of its consequences on the basis of general and special norms is of paramount importance.

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11. *Kropholler J.*, German Civil Code, Educational Comments, 13th rev.ed.,Translated by: *T.Darjania, Z. Chechelashvili*, Tbilisi, 2014, 580, (in Georgian).
12. Civil Code of Georgia, 1997.
13. Law of Georgia on Notary, December 4, 2009 №2283-IIS.
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Zurab Dzlierishvili*

Grounds for and Legal Consequences of Revocation of Donation

The article provides the analysis of the legal grounds for revocation of donation like grievous insult or gross ingratitude on the part of the donee towards the donor or close relatives thereof or donor's falling in such financial straits after then donation when he is no more in the position to support himself or the persons dependent on him. The paper also offers the analysis of legal consequences of revocation of donation.

***Key words**: revocation of donation for ingratitude on the part of the donee (Article 529 of the Civil Code of Georgia), re-vindication of donated thing (Article 530 of the Civil Code of Georgia).*

1. Introduction

The Georgian legislation recognizes one of the fundamental principles of private law - the party autonomy, which becomes the basis of economic advancement and welfare in the market economy environment. This, firstly, is manifested in freedom of contract, which is guaranteed by Article 319 I of the Civil Code of Georgia (CCG).

A deed of gift is one of the most important contracts amongst the agreements on the transfer of some property under the ownership of the other person. It is of settlement nature and results in the transfer of title to the acquirer.[1] The necessity of analysis of the legal nature of the deed of gift is conditioned by its specific characteristics, differing it from the other agreements on the transfer of title to a thing.[2]

Analyzed in this paper is not the deed of gift in general, but rather the legal grounds and consequences of revocation of a deed of gift, as prescribed by Article 529 (Revocation of Donation for Ingratitude on the Part of the Donee) and Article 530 (Revindication of Donated Thing) of the CCG. Scholarly study of these issues is of not only theoretical, but of major practical importance as well. The problem is investigated both using the comparative law method and also through the generalization of judicial practice of general courts and the Constitutional Court of Georgia.

2. Historical Background

The situation envisaged by Article 529 of the CCG is one of the demonstrations of the essence of donation. The right of a donor to recover the donated property is conditioned by high morals of

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1 Ruling of the Civil Chamber of the Supreme Court of Georgia of July 24, 2012 on Case №AS-221-213-2012.

2 *Koch* in *MüKo,* BGB, Band 3, 5.Aufl., §516, Rn.6.

donation relationship. Historically, the donation developed into the relationship based on ethical fundament. "Fundamental relationship between law and morals should always be taken into consideration in law and particularly in civil law. It is necessary to take account of similarities and differences between the legal assessment and ethical evaluation, legal values and moral values".[3]

Donation is the demonstration of interconnection between law and morals. Hence, free of charge donation of some property wealth by a donor is directly related to the obligation, although not a retaliatory one, of the donated party to behave ethically.[4] This very obligation should be the reaction to the property wealth donated by the donor.[5]

Sometimes the revocation of donation is conditioned not by ingratitude on the part of the donee, but rather indigence of the donor himself.[6] The fault of the donee is excluded in this case. The donor has no material problem when the deed of gift is made. He voluntarily transfers his property under the ownership of the other person. [7] If after the donation the donor finds himself in the position, when he is no more able to support himself or the persons, depending on him, he is entitled to claim the return of donated thing from the donee on the basis of Article 530 of the CCG.

Even the Roman law was aware of the revocation of donation and recovery of a gift. Justinian provided the following interpretation with regard to the concept of revocation of donation: "We have established generally, that each and every legal deed of gift remains valid and cannot not be revoked except for the cases, when apparent ingratitude on the part of the donee towards the donor is proved." [8] The demonstration of such ingratitude was grievous insult *(iniunice atrioces)* of the donor on the part of the donee, jeopardizing the life of the donor or inflicting serious property damage.[9]

According to the resolution of Beka Mandaturtukhutsesi, "The donor would never recover property ("be it the estate, goods or something else") donated for in-law and good relationship, even if he would impoverish for a time. But in the case of termination of in-law and good relationships between the parties by fault of the donee, the donee was obliged to fully return the gift. [10]

3. Revocation of Donation for Ingratitude on the Part of the Donee

Gift as a contractual relation, imposes certain obligation on a donee.[11] This obligation is not provided as a specific condition in the case envisaged by Article 529 of the CCG, but rather exists as a

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3 *Zoidze B.*, Constitutional Control and Order of Values in Georgia, Tbilisi, 2007, 29 (in Georgian).
4 Decision of the Constitutional Court of Georgia of 01.04.2003 on Case: №1/2/155.
5 *Koch* in MüKo BGB, Band 3., 5.Aufl. §530, Rn. 3.
6 *Seyfarth,* Schenkungsruckforderung wegen Notbedarfs, 1998, 31ff.
7 *Zeranski,* Der Ruckforderungsanspruch des verarmten Schenkers, 1998, 21ff.
8 *Новицкий И.Б., Перетерский И.С. (ред),* Римское частное право. М., 1999, 499.
9 *Zimmermann R.,* The Law of Obligations - Roman Foundations of the Civilian Tradition, Breach of Contract, Chapter 25, Clarendon, Oxford University Press, 1996, 792.
10 *Dolidze I.,* Old Georgian Law, Tbilisi, 1953, 153 (in Georgian).
11 *Saenger* in HK-BGB, 7.Aufl., 2013, 755.

moral law obligation.[12] This obligation means the abstention from inflicting grievous insult upon the donor or demonstration of gross ingratitude and is not limited in time.[13] In this case, when revoking the donation, the court of law is doing the duty of supporting and protecting moral values.[14]

Article 529 I of the CCG provides for the mandatory preconditions for the origin of the claim, the elements of the rule: donee *grievously insults* the donor or a close relative thereof or demonstrates *gross ingratitude* towards either of them. When these preconditions are present, the donor is entitled to *revoke* the valid and, respectively, effective contract on the basis of Article 529 of the II through provision of a notice to the donee. Similar provision is provided by Section 530 *(Widerruf der Schenkung)* of German Civil Code (BGB).[15]

Grievous insult of or demonstration of *gross ingratitude* towards the donor or a close relative thereof on the part of the donee, as prescribed by Article 529 I of the CCG as grounds for the *revocation* of a contract, are provided as alternative preconditions.[16] (Section 530 of the BGB stipulates these preconditions as cumulative[17] and not alternative ones).[18]

The CCG does not explain, whether what is covered by the concept of ingratitude or who is a close relative, whilst in judicial practice it is commonly acknowledged that ingratitude on the part of the donee means: 1) wrongful act against the life, health, honor, dignity, freedom or business reputation of the donor, a family member or a relative thereof in ascending or descending line; b) willful act, aiming at inflicting material property damage upon the donor; c) avoiding of the statutory obligation to maintain the donor, etc. In one of its cases the court ruled that "Starting second family on the part of the defendant (donee) does not constitute the statutory precondition, on the basis of which a deed of gift can be revoked".[19]

Insulting a donor or a close relative thereof may mean both some physical act against him, e.g. endangering his life, health or property and using harsh language.[20]

The court is required to determine the level of ingratitude of the donee on a case-by-case basis. The foregoing is proved by the examples from judicial practice: a) Owing to gratuitous nature of a deed of gift the donee was not liable to counter performance, i.e. the donee was not obliged to ensure for the donor to be materially provided for. Respectively there is no demonstration of ingratitude on the part of

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12 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership*,* Tbilisi, 2010, 242 (in Georgian).

13 *Tonner,* Schuldrecht, 3.Aufl., 2013, §14, 132.

14 Decision of the Constitutional Court of Georgia of 01.04.2003 on Case: №1/2/155.

15 *Larenz, Wolf,* Allgemainer Teil des Burgerlichen Rechts, 9.Aufl., 2004, §18, Rn.15.

16 *Chachava S.,* Competition of Claim and Grounds for Claim in Private Law, Thesis Research, TSU, Tbilisi, 2010, 83, <http://press.tsu.ge/data/image_db_innova/Disertaciebi/sofio_chachava.pdf> (in Georgian)

17 *Weidankaff* in Palandt BGB Komm.67. Aufl. §530, Rn.8.

18 *Koch* in MüKo BGB, Band 3., 5.Aufl. §530, Rn.3.

19 Ruling of the Chamber of Civil, Company and Bankruptcy Cases of the Supreme Court of Georgia of July 10, 2006 on Case: №AS-195-617-06.

20 *Weidankaff* in Palandt BGB Komm., 67.Aufl. §530, Rn.6. Gehrlein, in Bamberger/Roth (Hrsg.) BGB Komm. 3. Aufl., §530, Rn. 4.

the defendant towards the donor"[21]; b) The defendant (donor) considered donee's testimony against him as a demonstration of insult and ingratitude, owing to this testimony he (the donor) was found guilty under Article 260 III (a) of the CCG. The court has not satisfied the claim as upon interpreting Article 529 of the CCG it stated that testifying in legal proceedings, when an individual names the donor as his "accomplice" (accessory) (lustration) cannot be regarded as a demonstration of ingratitude;[22] c) The main reason of bringing an action for the revocation of the deed of gift was the fact, that the donee mortgaged donated property with a view to securing the contractual obligation. The court did not satisfy the donor's claim and explained, that mortgaging the property received on the basis of a deed of gift by the donee in the capacity of the owner of the property concerned, cannot be presumed as a demonstration of ingratitude towards the donor under Article 529 as dealing with property, owned by a person, is the authority of the owner.[23] As regards non-assistance of the donor materially, the court is of the opinion, that this cannot be regarded as an act subject to moral condemnation or gross ingratitude.[24]

Sustained should be the interpretation of the Supreme Court of Georgia, that gross ingratitude and grievous insult constitute judgmental category. When these preconditions are present, the account should be taken of the comprehension of the circumstances by the donor - the so-called subjective vision, as well as the judgment of the judge how the other person, in the same conditions, would have comprehended these circumstances[25]. *Grievous insult* and *gross ingratitude*, i.e. ungrateful behavior constitute judgmental category, what is determined by the court as a result of mutual collation of circumstances"[26]. "Based on the assessment of the interrelationship between the parties, their opinions, behavior, accounting for the customs and habits and established beliefs of the society concerned the court is supposed to determine that, under Article 529 of the CCG, not each and every blameful behavior on the part of the donee creates grounds for the revocation of donation, but rather only grievous insult and gross ingratitude."[27] "None of the factual circumstances, referred to by the cassator (appellant, plaintiff) as grounds for the revocation of donation should be qualified as an ingratitude or/and insult against him insofar as the actions of the defendant - filing actions and complaints with the court of law and law enforcement agencies, also the conduct of free business activities in disputed premises - constitute the rights of the Plaintiff, that are guaranteed by the Constitution of Georgian and Georgian legislation."[28]

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21 Ruling of the Civil Chamber of the Supreme Court of Georgia of November 21, 2011 on Case: №AS-1275-1295-2011.

22 Ruling of the Chamber of Civil, Company and Bankruptcy Cases of the Supreme Court of Georgia of June 11, 2009 on Case: №AS-256-581-09.

23 Ruling of the Civil Chamber of the Supreme Court of Georgia of November 22, 2010 on Case: №AS-826-775-2010.

24 Ruling of the Civil Chamber of the Supreme Court of Georgia of April 18, 2011 on Case: №AS-176-166-11.

25 Ruling of the Civil Chamber of the Supreme Court of Georgia of February 24, 2015 on Case: №AS-1235-1176-2014.

26 Ruling of the Civil Chamber of the Supreme Court of Georgia of May 25, 2016 Case №AS-290-276-2016.

27 Ruling of the Civil Chamber of the Supreme Court of Georgia of April 15, 2016 on Case: №AS-157-153-2016.

28 Ruling of the Civil Chamber of the Supreme Court of Georgia of May 20, 2015 on Case: №AS-325-310-2015.

"The court explained, that just the refusal to live together as a family could not have been taken as such grievous insult or gross ingratitude that may have caused the revocation of donation.“[29] "The Cassation Chamber cannot uphold the judgment of the cassator, that for the revindication of the gift it was mandatory for the grievous insult to be inflicted after the execution of the deed of gift as the Appeals Chamber was correct when it explained that had the plaintiff know this fact (adultery on the part of donee's spouse) before the execution of the deed of gift, he would not have executed it."[30] "The Cassation Chamber believes, that insofar as the preconditions conditioning the consequences of revocation of donation of the first immovable thing, envisaged by Article 529 I of the CCG and there are no circumstances excluding the claim of the cassator, the plaintiff's claim is sound in this part and should be satisfied."[31]

Under Article 529 I of the CCG the grounds for the revocation of donation is gross ingratitude towards the donor or a close relative thereof or insulting either of them. The analysis of this stipulation evidences, that immoral behavior of the donee towards a close relative conditions the revocation of donation only when the foregoing is claimed by the donor, i.e. morally condemnable action of the donee committed against a close relative of the donor should be so touching him so much, that he should personally dispute the law-of-obligations relationship between himself and the donee.[32]

Upon deliberating about the connection between Article 529 I of the CCG and Article 21 of the Constitution of Georgia, the Constitutional Court of Georgia explained, that "In the case concerned the exercise of his right by one of the parties to contractual relationship, what results in the restitution of property by the donee, cannot be regarded as the breach of ownership right." The procedure of seizure of property, envisaged by Article 21 of the Constitution of Georgia applies to cases, when the foregoing is done by duly authorized entities (public authorities) for the fulfillment of public tasks. It is impossible to speak about the seizure of property in cases, envisaged by Article 526 of the CCG. The situation, when the restitution of property is conditioned by contractual relationships, cannot be regarded as the seizure of property.

Hence, it is groundless to assert, that Article 529 of the CCG violates the interests of a donee as an owner.[33]

4. Re-vindication of Donated Property by the Donor

Article 529 II of the CCG provides for legal consequence which authorizes the donor to *revoke* the deed of gift and demand the re-vindication of donated thing in the case of existence of the preconditions,

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29 Ruling of the Civil Chamber of the Supreme Court of Georgia of February 17, 2016 on Case: №AS-910-860-2015.

30 Ruling of the Civil Chamber of the Supreme Court of Georgia of July 24, 2015 on Case: №AS-887-848-2014.

31 Ruling of the Civil Chamber of the Supreme Court of Georgia of March 16, 2016 on Case: №AS-1011-954-2015.

32 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi, 2010, 245 (in Georgian).

33 Decision of the Constitutional Court of Georgia of April 1, 2003 on Case: №1/2/155.

prescribed by I Part of the same Article.[34] Article 529 of the CCG provides for the preconditions for the origin of the claim and also the respective legal consequence occurring in the case of existence of these preconditions.[35]

A deed of gift can be revoked through unilateral declaration of will to the donee, subject to mandatory acceptance by the latter.[36] Notification of revocation of donation becomes valid from the moment when the declaration of the respective will falls within the terms of reference of the recipient and the latter has the actual possibility to get familiarized with it.[37]

Donation is revoked though the declaration of will to the other party (donee), what gives origin to respective legal consequence as soon as it is done. Revocation of donation is the opportunity granted by the legislator to a person to unilaterally bring about the desirable legal consequence - i.e. without any cooperation of the other party.[38] It should specify the grounds for the revocation of donation.[39]

Whenever donation is revoked on the basis of a court decision due to ingratitude of the donee or grievous insult inflicted thereby, the donor is entitled to demand the revindication of donated property. In Georgian reality, like German law,[40] which basis the revindication of donated thing on the claim, regulated by the law on unjust enrichment,[41] the donated thing is also recovered on the basis of unjust enrichment. In one of its cases the Cassation Chamber explained, that "Insofar as the preconditions conditioning the consequences of revocation of donation of the first immovable thing, as envisaged by Article 529 I of the CCG, are present and there are no circumstances excluding the claim of the cassator, the plaintiff's claim is sound in this part and should be satisfied. The deed on donation of an apartment executed between the plaintiff and the first defendant on October 23, 1999 should be revoked. Respectively, the property donated on the basis of Article 976 I (a) and 979 I of the CCG should again be accounted as the property of the donor."[42] The Cassation Court maintained the same argumentation in the other case as well.[43]

"In the case of presence of the elements of Article 529 of the CCG the court allows for the application of the provisions on unjust enrichment only in the case, when the purpose of regulations of

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34 Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, 2007, 87 (in Georgian).

35 *Chachava S., Competition of Claim and Grounds for Claim in Private Law,* Thesis Research, TSU, Tbilisi, 2010, 85, <http://press.tsu.ge/data/image_db_innova/Disertaciebi/sofio_chachava.pdf> (in Georgian).

36 *Hoppenz* in Prutting,Wegen, Weinreich (Hrsg.), BGB Komm. 2006, §531, Rn.1.

37 *Wendtland* in Bamberger, Roth (Hrsg.), BGB Komm. 3.Aufl. §130, Rn. 9.

38 *Larenz, Wolf,* Allgemainer Teil des Burgerlichen Rechts, 9.Aufl., 2004, §18, Rn.7. Koch, in Münch. Komm.BGB. Band 3.5.Aufl., §531, Rn.4.

39 *Gehrlein* in Bamberger/Roth(Hrsg.) BGB Komm. 3. Aufl. §531, Rn.1.

40 *Gehrlein* in *Bamberger, Roth (Hrsg.),* BGB Komm. 3. Aufl. §531, Rn.2. Hoppenz in Prutting/Wegen/ Weinreich (Hrsg.), BGB Komm. 2006, §531, Rn.2.

41 *Koch* in *MüKo,* BGB, Band 3., 5.Aufl. §531, Rn.2.

42 Ruling of the Civil Chamber of the Supreme Court of Georgia of March 18, 2016 on Case: №AS-1011-954-2015**.**

43 Ruling of the Civil Chamber of the Supreme Court of Georgia of September 22, 2015 on Case: №AS-710-676-2015**.**

Article 529 - protection of donor's interests - cannot be otherwise attained due to the evasion of law or the abuse of right on the part of the donee."[44] In the case of restitution of donated property the donee is not entitled to demand the compensation of damages[45] suffered thereby due to the return of donated property.[46] However the donee may claim the compensation of costs and expenses disbursed thereby for the improvement of donated thing.[47]

5. Revindication of Donated Property due Donor's Indigence

Sometimes the revocation of donation is conditioned not by ingratitude of the donee, but rather donor's becoming indigent himself.[48] The fault of the donee in this case is excluded. The donor has no material problem upon the execution of the deed of gift. He transfers property under the ownership of the other person.[49] If within a certain period after the donation the donor finds himself in such a situation, when he is no more able to support himself or the persons dependent on him, he is entitled to claim the revindication of donated thing from the donee.[50]

Under Article 530 I of the CCG a donated thing can be revindicated, if the donor became indigent after the donation and is no more able to support himself or the persons dependent on him. In one of its cases the Supreme Court of Georgia explained: "In the case concerned it should be considered established, that after the donation the donee became indigent without his intention or gross negligence and is no more able to support himself as he has no other dwelling to live and also will not be able to arrange for living conditions due to incapacitation. The donated thing really exists and is under the ownership of the donee. The return of this donated thing to the donor will not cause the indigence of the donee, furthermore, Article 530 of the CCG does not require the guilt of the donee for donor's indigence."[51] "The Chamber has not sustained the reference of the plaintiff to the situation, that the donor became indigent after the act of donation or/and he lost his source of living. Based on the foregoing there are no preconditions, prescribed by Article 530 of the CCG, for the revocation of the deed of gift of November 9, 2012".[52]

If the donee has already alienated the donated thing or has otherwise disposed of it, the donor is not entitled to claim the revindication of the thing from a third person or receive the compensation of its

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44 Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, 2007, 86 (in Georgian).

45 Saenger in HK-BGB, 7.Aufl., 2013, 754.

46 *Tonner,* Schuldrecht, 3.Aufl., 2013, §14, 133.

47 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi, 2010, 243 (in Georgian).

48 *Seyfarth,* Schenkungsruckforderung wegen Notbedarfs, 1998, 31ff.

49 *Zeranski,* Der Ruckforderungsanspruch des verarmten Schenkers, 1998, 21ff.

50 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi, 2010, 254 (in Georgian).

51 Ruling of the Chamber of Civil, Company and Bankruptcy Cases of the Supreme Court of Georgia ofJune 4, 2007 on Case: №AS-73-419-07.

52 Ruling of the Civil Chamber of the Supreme Court of Georgia of October 3, 2016 on Case: №AS-634-605-2016.

value from the donee in the case of existence of the circumstances, envisaged by Article 530 of the CCG,[53] insofar as donation is a personal relationship established directly between the parties to the deed.[54]

"The Cassation Chamber is of the opinion, that insofar as the preconditions prescribed by Article 530 of the CCG are present and there is no condition excluding the claim of the cassator - indigence of the donee due to the return of the title to the thing to the donor - the plaintiff's claim is sound and should be met; respectively, the property donated on the basis of Article 976 I (a) and 979 of the CCG should again be accounted as the property of the donor."[55]

The donor acquires this right only when the restitution of donated thing will not result in indigence of the donee. I.e. only the fact of physical existence of donated thing with the donee is not sufficient.[56] It is mandatory to abide by the major requirement of law - the donee should not fall in almost the same condition, that gave rise to donor's right to claim the revindication of the gift. This is how the law protects the interests of the donee.[57] Indigence that creates grounds for the donor to claim the restitution of donated thing, allows the donee to refuse the restitution of the gift.[58] Of two persons, interrelated by contractual relationships and found in indigent condition, the law still gives preference to the donee and this is natural, as donation is gratuitous and actual deal. In this case it is also immoral to claim back the donated thing.[59] In one of its cases the court considered it trustworthy, that "The revocation of donation will definitely make the defendant indigent, as the latter has no alternative dwelling."[60]

As per Section 528 of BGB[61] the donee is entitled to refuse the return of the gift on condition[62] that he will pay the donor the amount required for the maintenance of the donor or the persons dependent thereon.[63]

The donor is not entitled to claim the return of donated thing if he artificially created grounds for such a claim; specifically, if his indigence is conditioned by his willful action or gross negligence. The gravity of the situation, which may in various cases change the essence of the legal relationship

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53 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi, 2010, 254 (in Georgian).

54 Weidankaff in Palandt BGB Komm.67.Aufl. §529, Rn.1.ff.

55 Ruling of the Civil Chamber of the Supreme Court of Georgia of September 22, 2015 on Case: №AS-710-676-2015.

56 *Krauss,* Der Ruckforderungsanspruch wegen Verarmung des Schenkers im Kontext des Sozialhilferechts, ZEV 2001, 417.

57 *Koch* in MüKo BGB, Band 3., 5.Aufl. §528, Rn.3.

58 *Seyfarth,* Schenkungsruckforderung wegen Notbedarfs, 1998, 31ff.

59 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi, 2010, 254 (in Georgian).

60 Ruling of the Civil Chamber of the Supreme Court of Georgia of June 14, 2010 on Case: №AS-385-358-2010.

61 *Schippers,* Ruckforderungsanshpruch des verarmten Schenkers (§§ 528,529 BGB), RNotZ 2006, 42.

62 *Saenger* in HK-BGB, 7.Aufl., 753.

63 *Rundel,* Ruckforderung wegen Verarmung des Schenkers bai mehreeren Beschenkten, Mitt-BayNot, 2003, 177.

associated with donation,[64] should necessarily be determined with due consideration of factual circumstances of the case.[65]

According to the ruling of the Cassation Court "The cassator undoubtedly turned indigent, he was deprived of the possibility to dispose of his property at his own discretion, e.g. to lease it (Article 531 of the CCG) and get benefit from or assign title to a real estate to an acceptable for him person (bread-winner) on condition of life-lime subsistence (Articles 941-942), etc."[66]

Based on the first paragraph of Section of 529 of BGB the account should be taken of the fact that the claim to return the gift is excluded if the donor has caused his indigence by intent or gross negligence[67] or if at the time of onset of his indigence[68] ten years have passed since the donated object was provided.[69]

In one of the cases the Cassation Chamber interpreted, that "If as a result of donation of the only dwelling place, the donor remains homeless, he is entitled to demand the revocation of the contract on the basis of Article 530 of the CCG as he became indigent after the donation of his property. Article 526 of the CCG concerns the case, when the donor is deprived of income after the donation of property. [70]

6. Interrelation between Articles 530 I and 398 of the CCG

Article 530 of the CCG sets the preconditions for the origin of the right to claim the revindication of donated thing (donor's indigence) and respective legal consequences (to claim the restitution of donated thing from the donee), as well as the exemptions, when the right to claim the revindication of donated thing does not originate. No doubt, the discussed provision is the independent grounds for claim.[71] Furthermore, Article 530 I can be regarded as an independent ground for the revindication of a thing only when the thing exists physically and the donee has not lost the title thereto.

The precondition of the claim under Article 530 of the CCG is the essential change of such circumstances, accounting for which would have excluded the execution of the contract. Respectively in certain[72] cases[73] the interrelation between Articles 398[74] and 530 of the CCG may be disputed. In

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64 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi, 2010, 258 (in Georgian).

65 Ruling of the Civil Chamber of the Supreme Court of Georgia of November 20, 2015 on Case: №AS-471-450-2015.

66 Ruling of the Civil Chamber of the Supreme Court of Georgia of September 22, 2015 on Case: №AS-710-676-2015.

67 *Weidankaff* in Palandt BGB Komm., 67.Aufl. §529, Rn.1.f.

68 *Koch* in MüKo BGB Band 3., 5.Aufl. §529, Rn.3.

69 *Saenger* in HK-BGB, 7.Aufl., 752.

70 Ruling of the Civil Chamber of the Supreme Court of Georgia of July 10, 2013 on Case: №AS-257-247-2013.

71 *Chachava S., Competition of Claim and Grounds for Claim in Private Law,* Thesis Research, TSU, Tbilisi, 2010, 87, <http://press.tsu.ge/data/image_db_innova/Disertaciebi/sofio_chachava.pdf> (in Georigan).

72 *Collins H.,* The Law of Contract, Cambridge University Press, New York, 2003, 216-217.

general, Article 530 of the CCG, which provides for exhaustive regulation of the grounds for cancellation of a contract, is exclusively challenging Article 398 as the circumstances, the change of which may become grounds for the cancellation of a deed of gift are regulated by special rules and they constitute preferentially applicable grounds for a claim with regard to Article 398 of the CCG. Respectively, the scope of application of Article 398[75] does not extend[76] to a deed of gift. The purpose of Article 530, as exclusive regulation, is the protection of the property right of the donee on the one part and on the other - protection of the interests of the donor in the case of existence of specific circumstances strictly prescribed by law. [77]

Application of Article 398 of the CCG with regard to a deed of gift jeopardizes the provision for the purpose of special regulations; specifically, the balance of party interests. Hence, Article 298 of the CCG can be applied with regard to a deed of gift only with due consideration of the purposes of Article 530 of the CCG, in close connection with it, what excludes its application as an independent provision, giving rise to a right.[78] The German legislation[79] and judicial practice[80] provide for similar regulation of this issue.

7. Prescription Period for the Revindication of Donated Property by Donor

7.1. Prescription Period for a Claim for the Revocation of Donation due to Ingratitude of the Donee

As stipulated by Article 529 III of the CCG, the donation can be revoked within a period of one year when donor finds out about the circumstances granting him the right to claim the revocation of donation.

"The prescription period of a claim means the period when a person may demand the restitution of a breached right."[81] By way of imposition of a prescription period the legislator aims at the exclusion of

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73 *Ciematniece I.,* Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 5.

74 For details see *Chitashvili N.,* Impact of Changed Circumsances on the Performance of Obligations and Potential Secondary Claims of the Parties, "Bona Causa", Tbilisi, 2015 (in Georgian).

75 *Frick J.G.,* Arbitration and Complex International Contracts, Kluwer Law International, Schulthess, 2001, 36.

76 *Unberath, Bamberger, Roth (Hrsg.),* Beck'scher Online-Kommentar zum BGB, 15. Aufl., 2009, §313, BGB.

77 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi, 2010, 255 (in Georgian).

78 *Chachava S.,* Competition of Claim and Grounds for Claim in Private Law, Thesis Research, TSU, Tbilisi, 2010, 93, <http://press.tsu.ge/data/image_db_innova/Disertaciebi/sofio_chachava.pdf> (in Georgian).

79 *Kropholler I.*, Educational Commentary to German Civil Code, Tbilisi., 2014, 394 (in Georgian).

80 OLG Karlsruhe Urteil vom 09.09.1988- 10 U 32/38, NJW 1989, 2136.

81 Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, Tbilisi, 2007, 63 (in Georgian).

the jeopardy of disproportionate exercise or abuse of creditor's right.[82] Furthermore, the limitation period: a) simplifies the process of establishment and scrutiny of facts for the court of law and thus promotes the delivery of duly justified decisions; b) promotes the stabilization of civil circulation; c) enhances mutual control of the subjects of civil law relationships and stimulates the immediate restitution of breached right.[83]

Overall prescription period makes ten years, which period is envisaged for all those relationships, for which the legislation not provide for some special prescription period.[84] Special prescription period can be prescribed by law. Furthermore, the court does not take account of prescription periods at its own discretion, but rather only in the case of reference thereto by a party.[85]

A reduced prescription period is applied with regard to revocation of donation due to ingratitude of the donee. Although Article 129 I of the CCG sets three years for prescription period for contractual claims, and six years for real-estate-related contractual claims, Article 129 III prescribes, that in certain cases the law may provide for other prescription period as well. Just the other prescription periods, prescribed by law, apply with regard to Article 529 of the CCG - revocation of donation in the case of ingratitude of the donee; specifically, under Article 529 III donation may be revoked within a period of one year. The similar provision is prescribed[86] by the first sentence of section 532 of the BGB.[87]

The moment when one-year prescription period starts to run for a claim for the revocation of donation is important for practical purposes. In general, under Article 130 of the CCG the prescription period starts to run from the moment of origin of the claim.[88] The moment of origin of the claim is the period when the person found out or should have found out about the breach of a right; i.e. if it is objectively impossible to establish the moment of origin of the prescription period, the attention should be paid to subjective moment, furthermore, it is implied, that objective and subjective moments of origin of a prescription period coincide, and when the plaintiff does not agree to the coincidence of objective and subjective moments of origin of prescription period he bears the burden of proof to identify the moment the running of prescription period should be counted from.[89]

The special moment of calculation of prescription period is the case with the revocation of donation due to ingratitude of the donee,[90], specifically, one-year prescription period is calculated not from the day following the donation of a thing, but rather from the day, following the one, when the donor comes to

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82 *Larenz, Wolf,* Allgemainer Teil des Burgerlichen Rechts, 9.Aufl., 2004, §17, Rn.2.

83 Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, Tbilisi, 2007, 63 (in Georgian).

84 *Dzlierishvili Z.,* Impact of Prescription Periods on an Action, Tbilisi, 1997, 5 (in Georgian).

85 Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, Tbilisi, 2007, 64 (in Georgian).

86 *Tonner,* Schuldrecht, 3.Aufl.,2013, §14, 133. Koch, in MüKo BGB. Band 3. 5.Aufl. §532.Rn.2.

87 *Saenger* in HK-BGB, 7.Aufl., 2013, 754.

88 Ruling of the Civil Chamber of the Supreme Court of Georgia of October 10, 2011 on Case: №AS-1124-1151-2011.

89 Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, Tbilisi, 2007, 64 (in Georgian).

90 Decision of Civil Chamber of the Tbilisi Appeals Court of May 11, 2011 on Case: №2B-2002-2011.

know about circumstances, which allow him to revoke the donation.[91]. In the case of expiry of prescription period the legal consequences, prescribed by Article 144 I of the CCG, occur.

"The Chamber considered, that the reference of defendant's representative to prescription period is does not constitute sufficient grounds for the assessment of the prescription period of the claim for the revocation of donation."[92]

It should be mentioned, that under Section 532 of the BGB, revocation of donation is excluded not only in the case, when one-year period is expired from the day when the person entitled to revoke the donation came to know about the occurrence of preconditions for the exercise of his right,[93] but also when donor pardons the donee demonstrated thereby ingratitude.[94]

7.2 Prescription Period for a Claim for Revocation of Donation due to Indigence of the Donee

Unlike BGB (Revindication of a gift is excluded when ten years have expired since the transfer of donated thing)[95] the CCG does not provide for the maximum period within which the donated thing can be revindicated in the case of existence of the grounds envisaged by Article 530 of the CCG. Despite such wording, it is apparent, that the intention of the legislator cannot be interpreted in a manner that, as if the claim for the revindication of a donated thing originated in the case of indigence of the donor is not limited in time. Such interpretation is groundless and unjustified in the light of sustainability of private law relationship and protection of property right.[96]

Apart from the preconditions, prescribed by Article 530 of the CCG a claim for the revindication of a thing should be subject to additional restriction and should be enforceable only within a certain period.[97]

Furthermore, subject to thorough consideration is whether the general prescription period, prescribed by Article 128, should extend to the case, envisaged by Article 530 of the CCG, or prescription periods prescribed by Article 129 of the CCG (3 or 6 years). In one of its cases, the court of law considered that "No special prescription period is prescribed by Civil Code for the revindication of a donated thing, hence in this case the general prescription periods, prescribed by Article 129 of the same Code should apply."[98]

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91 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi., 2010, 243 (in Georgian).

92 Ruling of the Civil Chamber of the Supreme Court of Georgia of January 12, 2012 on Case: №AS-1509-1517-2011.

93 *Saenger* in HK-BGB, 7.Aufl., 2013, 756.

94 *Tonner,* Schuldrecht, 3.Aufl., 2013, §14, 133. Koch, in MüKo BGB. Band 3., 5.Aufl. §532. Rn.4.

95 *Tonner,* Schuldrecht, 3.Aufl., 2013, §14, 133.

96 *Chachava S.,* Competition of Claim and Grounds for Claim in Private Law, Thesis Research, TSU, Tbilisi, 2010, 162 (in Georgian).

97 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi, 2010, 258 (in Georgian).

98 Ruling of the Chamber of Civil, Company and Bankruptcy Cases of the Supreme Court of Georgia of October 6, 2008 on Case: №AS-581-808-08.

However, there is no explicit answer to this question as the claim under Article 530 of the CCG is not a classic type of contractual claims. As per Article 130 of the CCG the prescription period runs from the moment when the person came to know or should have come to know about the breach of right. In the case envisaged by Article 530 of the CCG the moment, when the prescription period starts to run is less distinct and it is somewhat problematic to determine it.[99]

In cases, regulated by Article 530 of the CCG, the precondition for the restitution of donated property is only the actual existence of donated thing and non-placement of the donee in indigent condition. These preconditions cannot be presumed as sufficient protection in the context of the other purposes of prescription period e.g. the sustainability of private law relationship. Respectively, this issue should be regulated by judge-made law. Specifically, Article 128 III of the CCG should be interpreted in a manner for the claim under Article 530 of the CCG to be considered expired if 10 years have elapsed since the transfer of donated thing.

8. Procedure Law Problems Associated with the Revocation of Donation

With regard to revocation of donation it is important whether who is entitled to claim the revocation of donation. This matter is of major importance not only in the context of substantive, but of procedure law as well. With this regard, the mention should be made of the institute of procedure law: correct party.[100] Whether the person filing a claim is a correct claimant is determined on the basis of the provisions of substantive law.[101] It is reasonable to compare this moment with Section 530 of the BGB, which consists of two parts: a) A donation may be revoked if the donee is guilty of gross ingratitude by doing serious wrong to the donor or a close relative of the donor[102] b) The heir of the donor only has the right of revocation[103] if the donee has intentionally and unlawfully killed the donor or prevented him from revoking.[104]

Whether who is authorized to claim the revocation of donation is clearly demonstrated both by rules, envisaged by law and the established practice of the Supreme Court of Georgia. The Georgian legislation empowers only the donor to claim the revocation of a deed of gift. With regard to the aforementioned aspects of a deed of gift, the Cassation Court explained, that legal successors of the donor are not entitled to claim the revocation of donation on the grounds, envisaged by Article 529.[105]

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99 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi, 2010, 258 (in Georgian).

100 Ruling of the Civil Chamber of the Supreme Court of Georgia of October 24, 2011 on Case: №AS-1411-1426-2011.

101 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi., 2010, 257 (in Georgian).

102 *Tonner,* Schuldrecht, 3.Aufl., 2013, §14, 130. Koch, in MüKo BGB. Band 3., 5.Aufl. §530. Rn.1.

103 *Saenger* in HK-BGB, 7.Aufl., 2013, 754.

104 *Gehrlein* in *Bamberger, Roth* (Hrsg.), BGB Komm. 3. Aufl. §530, Rn.8. Hoppenz in Prutting/Wegen/ Weinreich (Hrsg.), BGB Komm. 2006, §530, Rn.9.

105 Recommendations of the Supreme Court of Georgia on Problematic Issues of Civil Law Judicial Practice, Tbilisi, 2007, 85.

Unfortunately, the CCG does not provide for a respective provision about the rights of the legal successors of the donor with regard to revocation of donation. Worth mentioning is the example from practice: "A" and "B" are business partners. "A" donated an expensive car to "B" as a birthday gift. Later the business relations between "A" and "B" became tense and the donee "B" inflicted corporal injury upon the donor "A" in one case and in the other - caused "A"'s death.

In the first case "A" filed a action with the court of law and demanded the revocation of the deed of gift executed with "B" and restitution of donated car, which was still under the ownership of the donee during the trial of the action. However, the donor - Plaintiff "A" died before the final court decision was made. "A" had a heir apparent - a son "D". Is "D" entitled to get involved in case proceedings as a legal successor of the deceased donor?

In the second case the deceased donor "A" had a heir - a son "D". Is "D" entitled to file an action with the court of law instead of the deceased parent-donor and claim the revocation of the deed of gift executed by the deceased donor (the Principal) with "B" and the restitution of donated car, which is still under the ownership of the donee "B" for the moment of filing an action? (in the case concerned it is not important in this context, whether what criminal liability will be imposed upon "B").

With regard to first issue problematic is the eligibility of procedural legal succession. Article 92 of the Code of Civil Procedure of Georgia (CCPG) provides for the possibility of procedural legal succession, what can be exercised at any stage of case proceedings.[106] The grounds for legal succession is not the withdrawal from some business by one of the parties, but rather the withdrawal from legal relationship by one of the parties.[107] One of the grounds of procedural legal succession is the death of a citizen. Procedural legal succession is fully dependent on substantive civil law. [108] If legal succession is inadmissible under substantive law, procedural legal succession is inadmissible either.[109]

Based on Article 92 III and Article 279 (a) of the CCPG the court of law is required to suspend the case proceedings in the case of death of a citizen if disputed legal relationship allows for legal succession, while under Article 272 (e) the court of law has to terminate legal proceedings if legal succession is inadmissible after the death of a citizen - one of the parties to proceedings owing to disputed legal relationship.[110]

"In one of its cases the Cassation Court paid attention to the situation, that under Article 529 of the CCG the right to claim the revocation of a contract is enjoyed by the donor and not his heirs, hence the court terminated case proceedings due to the death of the donor."[111]

As regards the second case, when guilty behavior of the donee resulted in the death of the donor, is the heir of the donor entitled to file an action with the court of law and demand the revocation of a deed

106 *Kurdadze Sh., Khunashvili N.,* Civil Procedure Law of Georgia, 2nd ed., Tbilisi, 2015, 168 (in Georgian).
107 *Liluashvili T.,* Civil Procedure Law, Tbilisi, 2005, 137 (in Georgian).
108 *Dzlierishvili Z.,* Some Aspects of Civil Procedure Law, Tbilisi, 2007, 6 (in Georgian).
109 *Dzlierishvili Z.,* Fulfillment of Obligations, Tbilisi, 2006, 5 (in Georgian).
110 *Kurdadze Sh., Khunashvili N.,* Civil Procedure Law of Georgia, 2nd ed., Tbilisi, 2015, 169 (in Georgian).
111 Ruling of the Civil Chamber of the Supreme Court of Georgia of December 8, 2014 on Case: №AS-482-456-2014.

of gift executed between the deceased donor and the donee? Whether or not the person filing an action (heir of the donor) is a correct plaintiff is determined on the basis of the provisions of substantive law.[112]

Based on the analysis of Article 529 of the CCG it can be concluded, that the right to claim the revocation of donation is enjoyed only by the donor and this right cannot be inherited and does not constitute the part of the estate under Article 1330 of the CCG.[113]

The possible solution of this problem can be the adding a provision to Article 529 II of the CCG, similar to the one, envisaged by Section 530 (2) of the BGB,[114] specifically "The heirs of the donor may enjoy the right to revoke the donation and claim the restitution of donated property only when the donee's unlawful and intentional action resulted in the death of the donor or prevented him from revoking."

Based on the analysis of Article 530 of the CCG it can be concluded, that in the case of death of the donor before the end of case trial, no procedural legal succession can be allowed and the court should terminate the case proceedings. In one of its cases the Cassation Court offered the following interpretation: "The right to claim the revocation of a deed of gift due to indigence of the donor is of personal nature and can be enjoyed only by the donor. The purpose of revocation of a deed of gift under these grounds is the improvement of financial standing of the donor, for the latter to be able to maintain himself or the persons dependent on him. It is apparent that this goal cannot be attained in the case of death of the donor. Hence, the Cassation Chamber is of the opinion, that the above property right does not constitute a part of the donor's estate and, respectively, cannot be extended to his heirs. Insofar as in this case no legal succession is allowed in material law, procedural legal succession is not admissible either, what constitutes grounds for the termination of case proceedings.[115]

As regards the case when the donor decided to apply to the court due to indigence and claim the restitution of donated thing from the donee, but the donor deceased before filing a claim. Is the donor or the persons dependent on him (a heir) entitled to apply to the court of law and claim the restitution of the thing from the donee?

Based on the analysis of Article 530 of the CCG it can be said, that the right to claim the revocation of donation is enjoyed only by the donor and this right is not subject to inheritance, as under Article 1330 this right does not constitute the part of the estate.[116]

9. Admissibility of Revocation of Donation in the Case of Death of the Donee

Rather problematic for judicial practice is the question whether or not it is admissible to revoke donation under the grounds envisaged by Article 529 and 530 of the CCG and claim back the donated

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112 *Dzlierishvili Z.,* Legal Nature of Contract on Transfer of Property under Ownership, Tbilisi, 2010, 257 (in Georgian).

113 *Shengelia R., Shengelia E.,* Law of Inheritance, Tbilisi, 2011, 29 (in Georgian).

114 *Szudik M.,* Reich durch Erbschaft und Schenkung? In: Reichtum und Vermogen, Wisbaden, 2009, 135.

115 Ruling of the Civil Chamber of the Supreme Court of Georgia of April 30, 2015 on Case: №AS-482-456-2014.

116 *Shengelia R., Shengelia E.,* Law of Inheritance, Tbilisi, 2011, 29 (in Georgian).

thing after the death of the donee? In my opinion it is not admissible. The grounds for making such a conclusion is provided for by the analysis of Articles 453, 529, 1306, 1328 and 1330 of the CCG. However, for explicit regulation of this problem it will be reasonable to add the provision to the CCG, similar to the last paragraph of Section 532 of the BGB,[117] specifically: "Revocation of donation[118] is no longer permissible in the case of death of the donee[119]".[120]

10. Conclusion

Revocation of donation is not caused by any insult and ingratitude, what, itself is already an unethical behavior, but rather the action of the donee, that seriously jeopardizes the ethical grounds of existence of the society. Based on the interrelation between the parties, their opinions, the assessment of the behavior itself, as well as the established customs, habits and opinions of the society concerned the court should determine that, according to Article 529 of the CCG, not all the condemnable acts of a donee provides grounds for the revocation of the donation, but rather only gross ingratitude or grievous insult. Gross ingratitude and grievous insult constitute judgmental category. When these preconditions are present, the account should be taken of the comprehension of the circumstances by the donor - the so-called subjective vision, as well as the judgment of the judge how the other person in the same conditions would have comprehended these circumstances.

Furthermore, the account should as well be taken of the gratuitous nation of this type of agreement, what is conditioned by specific relationship between the parties, what is regarded as the motive of donation. Grievous insult and demonstration of gross ingratitude on the part of the donee towards the donor or a close relative thereof dissolves the grounds that gave origin to donation. Hence the assertion, that Article 529 of the CCG breaches the interests of the donee, as the owner, should not be sustained.

Sometimes revocation of donation is conditioned not by ingratitude of the donee, but rather the indigence of the donor himself. The guilt of the donee in this case is excluded. Hence, Article 530 of the CCG should, in general, be regarded as one of the demonstrations of termination of title originated on the basis of gratuitousness.

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118 *Koch* in MüKo BGB. Band 3., 5.Aufl. §530. Rn.4.
119 *Tonner,* Schuldrecht, 3.Aufl., 2013, §14, 132.
120 *Gehrlein in Bamberger/Roth(Hrsg.)* BGB Komm. 15. Aufl. §532, Rn.7.

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Gross Breach of Obligation as Grounds for Termination of Employment Contract

One of the most problematic issues in employment relationships is the termination of employment contract. The Labour Code of Georgia provides for exhaustive list of grounds for termination of an employment contract. This article focuses on one of the grounds of termination of an employment contract, which provides for termination of an employment contract due to gross breach of obligation by an employee imposed thereon by an individual employment contract or collective agreement or/and internal labour regulations. Despite the statutory possibility of termination of an employment contract under the grounds concerned, the practical application of this normative stipulation is associated with certain difficulties. The article offers the overview of circumstances, which should be taken into account and evaluated upon termination of an employment contract on the grounds of breach of obligation.

Key words: *gross breach, contract termination, Labour Code*

1. Introduction

The fundamental reform of the Labour Code of Georgia was implemented in 2006. As a result of legislative amendments a new principle was introduced, according to which principles nobody is required to maintain employment relationships when he is not willing to. Almost the similar principle is employed in the USA and common law countries, known as the so-called "employment at will" principle, meaning higher degree of freedom of an employer to chose with whom to enter into employment relationships and also, to decide when to terminate these relations at his sole discretion.[1] This is the fundamental difference between the US and European laws regulating employment relationships: the US law support minimal intervention into employment relationships, thus granting greater freedom to subjects, whereas the EU law makes its citizens feel, that the state will create legal safeguards to protect their right to maximum practicable extent.[2]

The latest reform of the Labour Code of Georgia was accomplished in 2013. The improvement of legal status of the employees became the milestone of this reform. Specifically, a set of amendments were introduced into the Code which more or less balanced the rights of an employer and an employee. The legislative amendments also concerned the grounds for termination of an employment contract.

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1 *Borroni A.(ed.),* Commentary on the Labour Code of Georgia, Tbilisi, 2014, XVII.

2 *Wallach Sh.,* The Medusa Stare: Surveillance and Monitoring of Employees and the Right to Privacy, The International Journal of Comparative Labour Law and Industrial Relations, *Neal A.(founding ed.),* 2011, 192, <http://heinonline.org>.

2. Termination of a Agreement under the Labour Code of Georgia (General Overview)

Termination of an employment contract is the manifestation of the principle of party equality and means the termination of an employment contract under various grounds, envisaged by law. For the parties to exercise this power in employment relationships, there should necessarily exist the legal grounds for the enjoyment of this right.[3]

Paragraph 1 of Article 37 of the Labour Code of Georgia (LCG) provides for grounds of termination of an agreement at or without discretion of the parties. These grounds automatically result in the termination of an employment contract, upon their occurrence. Specifically, the grounds for termination of a employment contract irrespective of the will of the parties are as follows: expiry of the contract term, fulfilment of the task envisaged by contract and the death of either an employer or an employee.[4]

As regards the termination of a contract at the initiative of an employer, these grounds are of wider scope and include the following under Paragraph 1 of Article 37 of the LCG[5]:

1. Economic circumstances, technological, or organisational changes requiring redundancy;
2. Incompatibility of an employee's qualifications or professional skills with the position held/work to be performed thereby;
3. Gross or repeated breach of his/her obligations by an employee, envisaged by an individual employment contract or a collective agreement and/or of internal labour regulations, if some disciplinary action has already been administered against the employee concerned during the past year;
4. "long-term disability" - if a disability period exceeds 40 consecutive calendar days or total disability period exceeds 60 calendar days for a period of six months;
5. Entry into force of a court judgement or decision excluding the possibility to perform the work;
6. Participation in a strike found illegal by the court of law;
7. Initiation of liquidation proceedings for the employer legal entity;
8. Other objective circumstances, justifying the termination of an employment contract.

Under the amendments of 2013 the LCG also provided for the obligation of an employer to abide by relevant rules and procedures set forth for the termination of an employment Contract thereby, specifically Article 38 of the LCG provided for the obligation to give advance notice and also to pay compensation, what was envisaged by the earlier version of the GLC even in a more restricted manner.

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3 *Kavtaradze L.(ed),* Practical Guidelines in the Field of Right to Work and Environmental Protection, Tbilisi, 2015, 45 (in Georgian).

4 *Chachava S.,* Termination of Employment Contract at or without Discretion of the Parties–New Qualification, Introduced by Amendments of 12 June 2013, Legal Aspects of Recent Changes to Labour Law, *Chachava S.(ed),* Tbilisi, 2014, 85 (in Georgian).

5 Labour Code of Georgia, Article 37, Paragraph 1, №4113-RS, Sakartvelos Sakanonmdeblo Matsne (Legislative Herald of Georgia), as of 09.01.2017 (in Georgian).

3. Termination of Employment Contract according to the EU legislation (General Overview)

The stability of an employment contract is the basic principle of employment relationships, recognized by the European Union. According to Article 30 of the Charter of Fundamental Rights of the European Union[6] every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.[7]

Article 24 of the European Social Charter (ESC)[8] sets basic rules of protection against dismissal, specifically, the right of all workers not to have their employment terminated without valid reasons; the right of any worker to be informed about the reasons of his dismissal, to be able to evaluate the lawfulness of dismissal and appeal the decision with an impartial body; entitlement of workers, whose employment is terminated without a valid reason, to adequate compensation or other appropriate reliefs, etc.[9]

The basic principles of protection against dismissal are also reinforced by the International Labour Organization (ILO) [10] in its C158 - Termination of Employment Convention.[11][12] Although this Convention is not ratified by many European countries and Georgia amongst them, its basic principles are still implemented in labour laws of many states. The milestone of the ILO Convention N158 is the justification principle: according to the Convention dismissal should be based on one of the following reasons: skills of a worker; behaviour of a worker and business interests.[13] The Convention also provides for the obligation of existence of the so-called 'reasonable grounds' upon termination of an employment contract. The principle of existence of reasonable grounds upon termination of employment relationships at the initiative of the employer, as embodied in the Convention N158, is binding and of minimal standard category. This document binds the states rather strictly and does not allow them to drop the principle of 'reasonable grounds' out of the scope of regulation of domestic legislation or ignore it in any other manner. Furthermore, Convention N158 obliges the states to implement this principle at the level of domestic legislation in the meaning and according to interpretations, provided by Convention.[14]

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6 Charter of Fundamental Rights of The European Union (2000/C364/01), Article 30, <http://www.europarl.europa.eu/charter/%20pdf/text_en.pdf>, [20.12.2016].

7 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* translated by: *Berikelashvili T*., *Zaalishvili V.(ed.),* Tbilisi, Tbilisi, 2016, 344 (in Georgian).

8 Georgia signed the European Social Charter (ESC), as a Council of Europe Member State, in 2005.

9 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* translated by: *Berikelashvili T*., *Zaalishvili V.(ed.),* Tbilisi, 2016, 346 (in Georgian).

10 Georgia is a member of the International Labour Organization since 1993.

11 Termination of Employment Convention, 158 (adopted on 22 June, 1982, entered into force on 23 November, 1985) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100 INSTRUMENT_ID:312303:NO>, [20.12.2016].

12 For the list of Convention Georgia is a party to see *Tarasashvili M.,* Labour Law in South Caucasus, Collection of Articles on Labour Law III, *Zaalishvili V.(ed.),* Tbilisi, 2015, 145 (in Georgian).

13 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Tbilisi, 2014, 400.

14 *Kasradze L.,* Minimal Obligation of the State and Principle of 'Reasonable Grounds' with regard to Termination of Employment Relations: Standard of International Labour Organization, International

Overall, the constitutive essence and function of employment relationships and rights to work is the necessity of existence of reasonable grounds upon dismissal of an employee. Otherwise, the right to work would have been inflexible and would have existed without real essence.[15] Inadmissibility of termination of employment relationships by the employer without a valid reason and the principle of 'reasonable ground' of Convention 158 are also incorporated in the right to work guaranteed by Article 6 of the International Covenant on Economic, Social and Cultural Rights.[16]

ILO Recommendation 166 is also an important document with regard to ILO Convention N158.[17][18] It is not binding for the signatory countries and the states may provide for its implementation at domestic level at their own discretion. The text of this recommendation often repeats the stipulations of the Convention N158, however is also provides for additional protection criteria, which are not guaranteed for by the Convention. For instance, unlike the Convention the Recommendation prohibits the reduction of work force under the following grounds: age and absence from work due to compulsory military service or other civic obligations.[19]

The Convention sets procedural requirements which should be abided by the employers before and in the course of termination of employment relationships (a worker should be given an opportunity to be informed about the reasons of his dismissal and also to express his opinion); it also provides for appeal procedure and the involvement of a worker in the termination of contract. The Recommendation adds that an employer should provide a worker, on request thereof, a written statement of the reason or reasons for the termination. (Paragraph 9).[20]

As a result of amendments of 2013, the Labour Code of Georgia, and, specifically, the articles regulating the termination of employment contract, incorporated the principles introduced by the above mentioned international acts, and ILO Convention N158 amongst them.

As regards the examples of experience of some European countries with regard to termination of employment contract:

Standards of Human Rights Protection and Georgia, Collection of articles, *Korkelia K.(ed.),* Tbilisi, 2011, 87 (in Georgian).

15 Ibid, 82.

16 International Covenant on Economic, Social and Cultural Rights (adopted on 16 December, 1966, entered into force on 3 January, 1976), <http://www.ohchr.org/EN/Professional Interest/Pages/CESCR.aspx>, [20.12.2016].

17 Termination of Employment Recommendation, 166 (adopted on 22 June 1982), <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312457:NO>, [20.12.2016].

18 The Recommendation N166 of the International Labour Organization substituted Termination of Employment Recommendation, 119 (adopted on 26 June 1963), <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312457:NO>, [20.12.2016].

19 *Kasradze L.,* Minimal Obligation of the State and Principle of 'Reasonable Grounds' with Regard to Termination of Employment Relations: Standard of International Labour Organization, International Standards of Human Rights Protection and Georgia, Collection of articles, *Korkelia K.(ed.),* Tbilisi, 2011, 87 (in Georgian).

20 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Translated by: *Berikelashvili T., Zaalishvili V.(ed.),* Tbilisi, 2016, 348 (in Georgian).

The employment relationships and dismissal problem in particular are regulated in Germany by individual contracts or collective bargaining agreements, agreements between the works council and the employer, labour laws and the Constitution, as well as European law.[21] According to general rule, it is prohibited to directly dismiss an employee in Germany. The employee should first be warned and requested to refrain from violating his obligations and only after missing this warning the right of dismissal originates. A dismissal without warning can be considered unjustified by the court.[22]

In Italy the employment relationships, including the termination of employment contract, are regulated by the Constitution, the Civil Code and specific laws, regulating employment relationships.[23]

Both in Germany and Italy, like in the majority of countries, the cases, when employment relationship may be terminated, are predetermined.[24]

In Germany the Termination Protection Act identifies three grounds. Termination is socially unjustified when its justification is based on the employee's person, employee's behaviour and reduction of work force. In Italy they do not differentiate between the dismissal for the employee's conduct and business circumstances. For the requirements of law to be met the grounds should be related to the behaviour of the employee (material breach of contractual obligations) or the production and/or organization of a business entity. There does not exist a concept like 'reasons related to employee's person'.[25]

Article 2118 of the Civil Code of Italy provided for the right of an employer to make a decision on the termination of employment contract at any time (*ad nutum*), meaning that the latter was free from any restriction and was bound only by the obligation to abide by the notice timelines; now this rule applies only to a small category of employees, like home workers, domestic workers, persons employed for a probation period, managers and retired persons; the employees of other category enjoy the higher standard of protection. The size of a company is very important for the identification of the scope of application of the Termination Protection Law.[26]

There is a rule in Italy, under which rule dismissal can be applied as *ultima ratio*. However, this principle plays an important role as is intensively applied by courts, at least, in the case of termination under economic grounds. Dominating is the opinion, that an employer is obliged to assist an employee, whose position is worsened, to offer him some reasonable alternative job or other employment. In the case of individual termination on economic grounds, neither the law nor collective bargaining agreements provide for the obligation to arrange trainings.[27]

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21 Baker & McKenzie, The Global Employer: Focus on Termination, Employment Discrimination and Workplace Harassment Law, 2012, 193, <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1068&context =lawfirms>, [20.12.2016].

22 Termination of Employment Relationships, Legal situation in the Member States of the European Union, European Commission, 2006, 61.

23 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Translated by: *Berikelashvili T.*, *Zaalishvili V.(ed.),* Tbilisi, 2016, 289 (in Georgian).

24 *Ibid*, 358.

25 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Translated by: *Berikelashvili T.*, *Zaalishvili V.(ed.),* Tbilisi, 2016, 2016, 358 (in Georgian).

26 Ibid, 356.

27 Ibid, 362.

As regards criteria, the employers in Germany are required to select employees with due consideration of social aspects. And in Italy, the selection criteria is employed only in the case of mass redundancies.[28]

Like any other Member State, the first limitation on dismissal both in Germany and Italy, is the observance of notice timelines, the application of which, as mentioned above, aims at granting an employee an opportunity to find an alternative job and respectively, an alternative source of income. An employer is exempted from the obligation to abide by notice timelines only in the case of gross breach or other urgent necessity, which make the continuation of employment relationship until the expiry of notice period unreasonable.[29]

4. Termination of Employment Contract on the Basis of Gross Breach of Obligation by an Employee

Under Paragraph 1(g) of Article 37 of the LCG,[30] the grounds for termination of an employment contract is gross breach of obligation by an employee imposed thereon by an individual employment contract or collective bargaining agreement or/and internal labour regulations.

The analysis of this provision demonstrates that breach of an obligation, prescribed by an individual or collective agreement or/and internal regulations may become grounds for termination of an employment contract. Firstly, the essence and purpose of each of them should be defined.

A collective agreement is a multilateral arrangement. It is an outcome of efficient social dialogue, when negotiated agreement encourages the normalization of the solution of the problem existing within the organization and on the other hand, enables the employees to enter into relationship with socially more sustainable legal levers.[31] As per Article 41 of the LCG[32] a collective bargaining agreement defines working conditions; regulates relationship between en employer and an employee; regulates relationship between one or more employer or one or more employers' associations and one or more employees' associations. Collective agreement is the focus of ILO Recommendation N91, which defines, that collective agreements mean all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers, on the other.[33]

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28 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Translated by: *Berikelashvili T*., *Zaalishvili V.(ed.),* Tbilisi, 2016, 2016, 358 (in Georgian).

29 Ibid, 357.

30 Paragraph 1(g) of Article 37 of the Labour Code of Georgia, №4113-RS, "Sakartvelos Sakanonmdeblo Matsne" (Legislative Herald of Georgia), as of 09.01.2017.

31 *Zeinashvili A.,* Commentary on Labour code of Georgia, Tbilisi, 2015, 104 (in Georgian).

32 Labour Code of Georgia, Article 41, №4113-RS, Sakartvelos Sakanonmdeblo Matsne" (Legislative Herald of Georgia), as of 09.01.2017.

33 Collective Agreements Recommendation, 91 (adopted on 29 June 1951), <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312429:NO>, [20.12.2016].

An individual agreement regulates individual employment relationships. This agreement is executed directly between an employer and an employee.[34] As per Paragraph 9 of Article 6 of the LCG the essential terms of an employment agreement are: the date of commencement of work and the duration of employment relationships; working time and rest time; the workplace; the position and type of work to be performed; the amount of remuneration and the payment procedure; the procedure of compensating for overtime work; and the duration of paid and unpaid leaves of absence and the procedure for granting thereof.[35] An important stipulation is contained in Paragraph 10 of Article 6 of the LCG as well, under which Paragraph a term or condition of an individual employment contract is void when it contradicts the Labour Code or a collective agreement executed with the same employee, except when the individual employment contract improves the condition of the employee.

According to general principle of law an agreement is valid when executed on the basis of party equality principle, through the declaration of free will of the parties. In employment relationships a collective and individual agreements can be presumed as such, whilst the determination of internal labour regulations is the right of an employer. This is an apparent example of subordination in employment relationship.[36] It should be mentioned that, owing to its nature, internal labour regulations is very much alike the standard terms and conditions, as both standard terms and conditions and internal regulations are set forth by one party for another.[37] An important stipulation about internal regulations is also provided contained in Paragraph 4 of Article 3 of the LCG - that any provision of internal labour regulations that contradicts the individual employment agreement, or collective bargaining agreement or Labour Code, is void.

Under Paragraph 1 of Article 13 of the LCG,[38] an employer is obliged to communicate internal regulations to an employee. The Law does not stipulate whether the familiarization with the regulations should be conformed in writing or orally, however it should be presumed that in the case of a dispute, the burden of communication of internal regulations to the employee would be borne by the employer.[39]

Communication of internal labour regulations is of major practical importance, specifically, according to Paragraph 2 of Article 37 of the LCG,[40] gross breach of internal labour regulations may become grounds for termination of employment contract when it is a part thereof. As per Paragraph 5 of

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34 *Dzamukashvili D.,* Labour Law, Tbilisi, 2013, 41 (in Georgian).

35 For further details about essential terms and conditions of an employment agreement see: *Khazhomia T.,* Form and Essential Terms and Conditions of an Employment Agreement, Legal Aspects of Recent Changes to Labour Law, *Chachava S.(ed.),* Tbilisi, 2014 (in Georgian).

36 *Shvelidze Z.,* Characteristics of Legal Status of an Employee under the Labour Code of Georgia, Collection of Articles on Labour Law I, *Zaalishvili V.(ed.),* Tbilisi, 2011, 94 (in Georgian).

37 *Inasaridze T.,* Purpose of Reform of 12 July, 2013 with Regard to Essential Terms and Conditions of Employment Agreement, Collection of Articles on Labour Law III, *Zaalishvili V.(ed.),* Tbilisi, 2014, 228 (in Georgian).

38 Paragraph 1 of Article 13 of the Labour Code of Georgia, №4113-RS, "Sakartvelos Sakanonmdeblo Matsne", (Legislative Herald of Georgia), as of 09.01.2017.

39 *Zenaishvili A.,* Commentary on Labour Code of Georgia, Tbilisi, 2015, 41.

40 Paragraph 2 of Article 37 of the Labour Code of Georgia, №4113-RS, "Sakartvelos Sakanonmdeblo Matsne" (Legislative Herald of Georgia), as of 09.01.2017.

Article 6 of the same Code,[41] it can be provided by an employment contract that internal labour regulations is a part thereof. In this case an employer is required to communicate internal labour regulations (if there is such) to an individual before the execution of employment contract, and later, any amendments made thereto. Hence the analysis of the above articles demonstrates that gross breach of obligation prescribed by internal labour regulations may become grounds for termination of an employment contract, when internal labour regulations constitute a part of the employment contract and the employer has communicated the internal regulations to the employee.

Correct determination of the essence of individual or collective employment agreement or/and internal labour regulations and the obligations assumed by the parties on the basis thereof is of major practical importance as the lawfulness of dismissal of an employee can be examined based on their content.

5. Gross Breach of Obligation

Under Paragraph 1(g) of Article 37 of the LCG, the ground for termination of an employment contract is gross breach of obligation by an employee, imposed thereon by an individual employment contract or collective agreement or/and internal labour regulations.

This Article provides for the possibility of cessation of an agreement in employment relationship by an employer in the case of gross breach of obligations by an employee. The preconditions to the foregoing under the Article concerned are as follows: the existence of a valid bilateral agreement, gross breach of obligation and the fact, that violated obligation was prescribed by collective or/and individual agreement or internal labour regulations. However, for correct interpretation of the Article and for the protection of parties against its abuse the account should necessarily be taken of general rule, prescribed by the Civil Code of Georgia, on cessation of an agreement in the case of breach of an obligation.[42]

Pursuant to Part 1 of Article 405 of the Civil Code of Georgia (CCG),[43] if either of the parties to an agreement breaches an obligation arising from a bilateral agreement, the other party may repudiate the contract after unavailing lapse of an additional period of time set by him for the performance of the obligation. If no additional period is applied owing to the nature of the breach of obligation, the warning is equalised to setting an additional period of time. If the obligation has been breached only partially, the creditor may repudiate the agreement only if he is no more interested in the performance of the remaining part of obligation.

This Article states that breach of obligation by either party to long-term contractual relationship empowers the other party to cancel the agreement. The Article concerned sets forth the preconditions for the cessation of the agreement: setting additional period and losing interest in the remaining part of

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41 Paragraph 5 of Article 6 of the Labour Code of Georgia, №4113-RS, "Sakartvelos Sakanonmdeblo Matsne" (Legislative Herald of Georgia), as of 09.01.2017.

42 *Sturua N.,* Cancelation of an Employment Contract, Law Journal of the TSU, №1, 2015, 232 (in Georgian).

43 Civil Code of Georgia, Article 405, №786-RS, "Sakartvelos Sakanonmdeblo Matsne" (Legislative Herald of Georgia), as of 09.01.2017.

obligation.[44] However, setting additional period is not necessary if it is apparent that this will be futile in a priori and it is reasonable to terminate the agreement on extraordinary grounds, with due consideration of bilateral interests.[45]

The foregoing stems from *pacta sunt servanda*[46] principle, which prevails in contractual relationships, hence in the case of termination of an agreement, the Law sets forth certain preconditions for the purposes of recognition of the reasonability of termination, specifically - the agreement should be valid, the other party should be in breach of obligation envisaged by the agreement and the creditor of the claim should give the opportunity to the counteragent to fulfil the obligation through granting him the additional period or giving a warning. Normatively, these preconditions are embodied in Article 352-405 of the CCG. The priority of fulfilment of an agreement is absent when a party has lost interest in the fulfilment of the agreement or when it is clear and apparent, that the continuation of contractual relationships will be complicated or even become impossible. These circumstances are mainly characteristic of long-term legal relationships and are considered as valid reasons for the termination (cessation) of these relationships.[47][48]

Although the Labour Code provides for the breach of obligation as one of the grounds for termination of an employment contract, warning and granting of additional period, as stipulated by the Civil code of Georgia, is an important right of an employee and should be applied in employment relationships as well, though with certain specificities.

For better interpretation of gross breach of obligation it will be interesting to analyse the procedure of cancellation of agreement for the breach of obligation in the light of ILO Convention N158, according to Article 11 of which Convention an employer is empowered to cancel the agreement, if misconduct is of such a nature that it would be impossible to continue employment.[49]

Based on LCG, it was interpreted by Georgian case law, that any misconduct of an employee should be evaluated according to frequency of its commitment, gravity and, what is most important, according to its consequences. Respectively, in labour law the *ultima ratio* principle requires for an employer to evaluate employee's behaviour prior to his dismissal from consequential point of view, accounting for striking a reasonable balance between the breach (misconduct) and dismissal.

The *ultima ratio* principle has long-standing history and it had always been important both in social or political and legal context. In order to take a closer look at this principle, it would, at first, be

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44 *Chanturia L., Zoidze B., Shengelia R., Khetsuriani J.,* Commentary on the Civil Code of Georgia, Book III, 2001, 439 (in Georgian).

45 *Sturua N.,* Cancellation of an Employment Contract, Law Journal of the TSU, №1, 2015, 232 (in Georgian).

46 *Pacta Sunt Servanda* - Agreement should be Fulfilled – Means the Principle of Commitment to an Agreement in Civil Law and International Law – see *Kapanadze N., Kvachadze N., Kvachadze M.,* Latin-Georgian Law dictionary (ed.: *Chanturia, L., Tabidze M.),* Tbilisi, 2008, 86.

47 Decision №2B/7207-14 of Civil Chamber of the Tbilisi Appeals Court of 30 June 201.

48 For details with regard to this issue, see Decision №2B/62-14 of Civil Chamber of the Tbilisi Appeals Court of 21 October 2014.

49 Termination of Employment Convention, 158 (was adopted on 22 June 1982, entered into force on 23 November 1985), Article 11.

appropriate to consider the term itself, which comes from Latin "*ultimus*", meaning the last one, the most far or most remote, and "ratio", reasoning, is commonly understood as the last or final resort to achieve an aim pursued. Here, it is not to be understood as the chronologically last resort but as the most interfering last resort with the most far-reaching effect.[50]

In legal matters the idea of *ultima ratio* is a basic concept of many fields of law.[51] For example, in labour law the extraordinary termination of a contract by the employer is *ultima ratio*.[52]

In many aspects *ultima ratio* principle is very much like the principle of proportionality. The principle of proportionality (*Grundsatz der Verhältnismäßigkeit*)[53] in a broader sense or rather the prohibition of excessiveness is understood as a generic term for the rules of suitability, necessity and proportionality in the narrow sense.[54]

Principle of proportionality has important implication in German labour law. For example, the major right of the employees, like right to strike is also influenced by the principle of proportionality, meaning that a strike is allowed only in cases, when all the other solutions of the problem are exhausted and it is the last resort (*ultima ratio*) for the protection of right. According to case-law of German Federal Labour Court, the so-called token strike is prohibited owing to *ultima ratio* principle if the negotiations are still ongoing and are not yet accomplished.[55]

The *ultima ratio* principle is important for Georgian labour law as well, although under Paragraph 1(g) of Article 37 of the LCG, the grounds for termination of an employment contract is gross breach of obligation by an employee, imposed thereon by an individual labour contract or collective agreement or/and internal labour regulations, worth mentioning is the principle of protection of labour rights of the employees, under which principle every misconduct committed by an employee should be evaluated according to the regularity of its commitment, gravity and, what is most important, according to its consequences.

Prohibition of the abuse of a right in private law relationships acquires particular importance upon evaluation of the proportionality of the exercise of preferential right by an employer in employment relationships, granted thereto by law. In this respect the *ultima ratio* principle means that dismissal of an employee should be applied only in cases, when application of a relatively minor sanction is inconsequential for the employer owing to the nature and gravity of committed misconduct (breach).[56]

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50 *Wendt R.,* The Principle of 'Ultima Ratio' and/or the Principle of Proportionality, <Oñati Socio-Legal Series, Vol. 3, No. 1, 2013, 84 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200873>, [20.12.2016].

51 For details see *Michalski, Funke* 2010, §13 marginal №280, Gomille 2011, marginal №3, Streinz, Hammerl 2008, marginal №297 – see citation, ibid.

52 Ibid, 85.

53 This term is used by German Federal Constitutional Court, see BVerfGE 30, 292 (316); 27, 211 (219) – see citation, ibid.

54 Ibid, 86.

55 *Kirchner J., Kremp R.P., Magostch M.,* Key aspects of German Employment and Labour Law, 2010, 201, <https://books.google.ge/books?id=2gbE2lDPY2YC&printsec=frontcover#v=onepage&q&f=true>, [20.12.2016].

56 Ruling №AS-164-154-2015 of the Civil Chamber of the Supreme Court of Georgia of 27 April 2015.

In labour law the *ultima ratio* principle requires for the employer to assess the behaviour of an employee before his dismissal in the light of consequentiality accounting for striking a reasonable balance between the misconduct (breach) and dismissal. It is noteworthy that according to the same principle, in the case of a misconduct (breach) an employer should apply sanctions, which will make good the existing situation, make the employee better, improve his qualification, make him act prudently and with due diligence. Respectively, for reasonability purposes, a proportional punishment should be selected in the case of a misconduct, what, ultimately, apart from the punishment of the wrongdoer, will motivate him and the other employees to work more efficiently. Hence, for the dismissal of an employee to be regarded as an adequate, necessary and proportional measure it is necessary for the breach to be grave, what makes the application of some other, lighter sanction unreasonable.[57]

As regards the legislation of other countries, the regulation of the aspects related to termination of an agreement due to some behaviour of an employee, are different in Germany and Italy. In both jurisdictions the ordinary reasons, related to the behaviour of a dismissed differ from extraordinary ones considering the importance and scope of breach committed by the employee.[58]

According to German Protection Against Dismissal Act,[59] upon termination due to breach of obligations by an employee, the employer should take account of four preconditions: objective situation, that the employee has definitely violated a contractual obligation, high risk of future breach, the employer's interest should be overweighting the employee's interests and finally, the termination should be the only solution for the situation concerned. For example, there should not exist the possibility of transferring the employee to some other position.[60]

In German law wilful and repeated absence of an employee from work without an excusable reason is sufficient grounds for dismissal, as well as failure to duly notify the employer in writing in the case of existence of an excusable reason;[61] absence from work under the pretext of illness and wilful misleading of the employer;[62] being concurrently employed with a competitor establishment without a prior consent of the employer, also the otherwise breach of "loyalty obligation", if it is prohibited by the agreement;[63] also, the neglect of safety rules, when such behaviour is related to objectively serious threats.[64]

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57 Ruling №AS-776-733-2015 of the Civil Chamber of the Supreme Court of Georgia of 2 December 2015.

58 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed),* Tbilisi, Translated by: *Berikelashvili T.*, *Zaalishvili V.(ed.),* 2016, 363.

59 The Protection Against Dismissal Act (Kündigungsschutzgesetz), <http://www.eurofound.europa.eu/efemiredictionary/protection-against-dismissal-1>, [20.12.2016].

60 *Kirchner J., Kremp P.R., Magotsh M.,* Key Aspects of German Employment and Labour Law, Heidelberg, Germany, 2010, 141, in: *Sturua N.,* Cancellation of an Employment Contract, Law Journal of the TSU, №1, 2015, 232 (in Georgian), 228.

61 Preis, Staudinger OK, 626, Rn. 176, 177, see citation in: *Chachava S.,* Termination of an Employment Contract under or without the Will of the Parties – New Qualification, Introduced by Amendments of 12 June 2013, Legal Aspects of Recent Changes to Labour Law, *Chachava S.(ed.),* Tbilisi. 2014, 105.

62 Ibid, Rn. 154, see citation, ibid, 105.

63 Ibid, Rn. 21, also Preis, Staudinger OK, 626, Rn. 169 and others, see citation, ibid, 106.

64 Ibid , Rn. 136, see citation, ibid, 107.

In Italy an employee may be dismissed on the basis of a sound ground, like *giusta causa,* without warning or justified subjective grounds. *Giusta causa* is defined in Article 2119 of the Civil Code and covers cases, when the breach of obligation is so serious that continuation of employment relationships is not reasonable for the employer. However, the meaning of this formulae is still open and subject to debates.[65]

The analysis of Georgian case law demonstrates, that, for example, in one case the court of law did not find reasonable the application of the strictest measure for gross breach of obligations - dismissal of the employee together with his immediate supervisor,[66] however, in the other case gross breach of obligation by an subordinate also became the justified grounds for dismissal of the immediate supervisor thereof, as it was established that immediate supervisor was wilfully hiding the fact of gross breach of internal regulations by his subordinate.[67]

Based on the foregoing, it is necessary to thoroughly investigate the gravity of breach in the case of termination of employment contract on the grounds of gross breach of obligation, also the regularity of its commitment, inflicted damage, also to take account of the probability of the commitment of breach in future, as it is provided for by German legislation.

6. Conclusion

In conclusion it can be said, that termination of employment relationships on the grounds of gross breach of obligation is one of the most problematic aspects in employment relationships. The following circumstances are to be examined in the case of termination of employment relationships under these grounds:

- Whether or not the collective or individual agreement or internal labour regulations were definitely breached:
- Whether what kind of breach was committed, specifically, subject to evaluation is the gravity of breach, whether or not it was gross, was it the first case or of regular nature, what damage was inflicted, etc.;
- Whether the applied sanction was proportionate to the gravity of breach, could any other disciplinary measure have been applied instead of dismissal;
- Whether or not the dismissed person was given opportunity to present some arguments and explain himself before his dismissal.

The Labour Code does not provide for detailed examination of the above circumstances, what should be regarded as its shortcoming. Owing to the foregoing, during the court proceeding it becomes necessary to refer to grounds for termination of an agreement, prescribed by Civil Code, where the

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65 *Santagata R.,* Articles 36-40, Commentary on the Labour Code of Georgia, *Borroni A.(ed.),* Translated by: *Berikelashvili T.*, *Zaalishvili V.(ed.),* Tbilisi, 2016, 363.

66 Ruling №AS-1276-1216-2014 of the Civil Chamber of the Supreme Court of Georgia of 18 March 2015.

67 Ruling №2b/4864-14 of the Civil Chamber of the Tbilisi Appeals Court of 7 July 2015.

preconditions and procedures of termination of an agreement are provided for in a detailed manner. Due to this very reason the termination of an employment agreement for the breach of obligation is examined in the light of the respective provisions of the Civil Code.

The overview of the EU law and the labour law of Germany and Italy, as well as the analysis of the case-law demonstrated that despite the implemented changes the institute of termination of an agreement on the basis of gross breach of obligation, envisaged by Labour Code of Georgia, is not exhaustively regulated and still requires further improvement.

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For the Issue of Personal Liability of Directors/Managers and Partners'/Shareholders' in a Business Entity

The article examines the grounds for the personal liability imposition mainly under Georgian law, but also includes a brief comparative analysis of the issue. The general emphasis was made on personal responsibility grounds adaptation in practice and for that purposes here is examined supreme court decisions, on these bases reader will be capable to find a difference between the dogmatic and practical grounds for personal liability imposition.

The first chapter presents the general information about discussed issue and notion of personal liability. The second chapter is devoted to explanation the concept - "the head of the corporation" to make it clear who is the subject of responsibility in the article and not to remain beyond the attention persons who do not hold the position of director but are participating in government activities and, therefore, have fiduciury duties.

After short comparative analysis of personal responsibility, the Georgian Entepreneur not business law reality is further discussed. Here, the problem of determining personal libility is a problematic issue, thus a separate chapter with its sub-chapters are devoted to the issue, which explains the grounds of liability imposition in details .

The real place for the approaches that is developed in science is the practice, court. The fifth chapter provides the analysis of judicial practice, where it's outlined the grounds, that were enough to held managers personaly liable.

Key words: *Corporate Law, piercing the corporate veil, good faith, duty of care, ethical principles, abusing rights.*

1. Introduction

Business activity is one of the most important areas in Georgia that is stipulated by its direct connection to countries economic development, forasmuch the business subjects strength is the guarantee for stable economic development. Accordingly, to insure the states' economical sustainability it is important to maintain just and stable civil business transactions between business entities, which at the same time requires determining the principles of liability. The Georgian statute about business entities, which is in force, consists regulations envisaging liability for different forms of legal entities. However, the most sensible part in the frame of determining the liability issues is the personal liability of managers.

Here is discussed business (capital) organizations in the personal liability frame. According to the statute these organizations, can be held liable in outline of its own assets. Their liability to third parties is

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limited by its capital[1]. However, there are cases, when creditor can address his/her demand towards shareholders and directors. This doctrine is labeled as "piercing the corporate veil" or "piercing liability"[2] i.e. piercing the corporate shield, when courts, under the existence of proper terms, allow the possibility for creditors to penetrate in corporate web, which means, shareholders/directors[3] are held personally liable for the debts of corporation.[4]

The Georgian statute "of business entities" is very modest covering this issue. The norms are obviously characterized as optional rules and give court a broad discretion. On the one hand, the statute consolidates the institute of "limited liability" and aims to ensure the private ownership and stability of civil-judicial relations,[5] by separating the assets of shareholders and corporation from each other. On the other hand, it (the Georgian Law Entrepreneurs) imposes the personal liability on corporate rulers for acting without good faith or duty of care, in order to make not only directors, but shareholders as well (who in many cases may not be involved in corporations managerial and functioning process) participants in controlling and managing process of a corporation that will ensure the vital capacity of business entity.[6]

It is obvious that "personal liability" in itself considers "obligation of execution" through particular persons' own assets. This does not concern to corporations' personal assets. Accordingly, the criticism about why one particular person should be held personally liable is absolutely natural and feasible, fortiori when law gives opportunity to incorporate a business entity by ensuring incorporators' personal assets, whose liability is limited. Hence a person an individual is liable for the corporate debts through his/her own assets.

Generally, the danger of imposing personal liability is a protective mechanism, to ensure that corporation would not act unconscientiously and at the same time corporation would not be used merely for others personal benefits, because the purpose of business entity, as the statute stipulates in its 1st articles 2nd paragraphs, is to make profit, in lawfulness confine, through repeated, independent and organized way. Here for, I declare, that the profit should not be understood as ruler person's private gain, but as the overall outcome of corporations' activities that should be consumed by and for corporation purposes. Profit differs from dividend, which shareholders receive as pure income by summing up the obligations and assets. When the cost of corporations' exact asset exceeds the minimum statutory capital,[7] only then it is possible to share profit among the shareholders.[8] Consequently, one of the criteria for liability determination is the legitimate aim and managers motive.

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1 In the context of "capital" it is considered not only nominal capital (which is not a mandatory criteria anymore in Georgian corporate law), but also whole assets of enterprise, which is on its balance.

2 *Bainbridge S.M.,* Abolishing LLC Veil Piercing, 2005, 79-80.

3 It differs against whom the demand is addressed to and on what grounds.

4 *Burduli I.,* Nominal Capital and its Functions, in a book: Theoretical and Practical Issues of Modern Corporate Law, 2009, 236-247.

5 Constitutional courts' decision №1/1/543, 4, №15.

6 Ibid, 4.

7 The Georgian Law of Enrepreneurs in article 69.6 defines the notion of "nominal capital": "In the Georgian legislation the term" nominal capital" can be used during the incorporation as its capital (sum of contributions), the enterprises' personal capital, the nominal value of the shares multiplied on the number of

However, the basis for imposing personal liability, that law directly foresees is abusing "limited liability", abolishing the principles of good faith and duty of loyalty. Designated basis are mentioned in the 3.6 and 9.6 articles of the Georgian Law of Entrepreneurs. The disposal character of these articles is clear, because term good faiths, as well as duty of loyalty, are abstract notions and law, of course, does not recognize the legal definitions of these notions. There-fore, affirmation about particular behavior whether it was committed with loyalty, in a good faith or not, is up to court, which should determine it by allowing parties establish their own positions, pleading. In many cases these can lead us to dissimilar and controversial consequences.

In the framework of foregoing article, author examines case law concerning of personal liability. Will be assessed factual conditions, and basis for imposing or reliving personal liability. Each will give us a possibility to assess the situation from the distance, how the implementation of justice proceeds towards the discussed issue, what gaps exist and how to fill them up.

2. General Definition of Company's Head Individuals

American corporate law is characterized by a delegated management model where only the director does not occupy managerial positions. Among the directors there are other individuals who participate in leadership, such as managers and officers, the president, commissioner etc. However, they do not have equal authority. For example, a manager is in charge of something: resources, people, projects, programs, account; a manager might also be a part-time individual contributor. As for the Director's authority, they have a wider scale of responsibilities and authority, since they take care of company's management and represents of third parties.

As to a corporate officer, he/she is a person employed by a corporation who holds an office such as president, vice-president, secretary or treasurer. Officers are appointed to their position by a corporation's board of directors. Officers' responsibilities vary depending on what powers the corporation has specifically given them. Officers are agents of the corporation, and, therefore, they have fiduciary duties to the corporation called the duty of loyalty and the duty of care. That is why the article is aimed not only towards the director, but also to other persons who hold managerial positions and considers them as leader individuals.

3. Basis of Personal Liability (Short Comparative-Legal Analysis)

In comparison to Georgian corporate law, which starts its development from 1994, when Georgian parliament has enacted the bill about business entities, Its German and American colleague are far more

shares, number of votes of the partners of the enterprise." Herewith, it is important that "the minimum statutory capital," the first thing that was necessary for the establishment of corporation, Georgian Company Law does not envisage anymore. However, the act of incorporation may provide statutory capital.

8 *Burduli I.,* Ground of Stock Law, 2010, Vol. 1, 152.

developed and accomplished, which is reflected in deep legislative improvement of some particular issues. Despite the fact, that the Georgian corporate law mostly represents the tandem of German corporations law and trade law, it reflects the influence of American corporate law as well, which was derived from the striving to Americanize and by the affluent interest toward American corporate law.[9] However, before Georgian statute will become the highly appreciated document, like are its mixture components, the statute needs improvement, and for improvement it is absolutely necessary to study and research the case law and experience of different developed countries legal system and adequately adapt in appreciation of objective reality.

US corporate law is very modest in imposing personal liability[10]. Besides legal basis for personal liability, this in details will be discussed in later part of this article, reticence is conditioned through *Business Judgment Rule.* Its main point consists in the following: BJR represents a legal syllogism[11] which is derived from five fundamental prerequisites and the context of these prerequisites are: the decision from board of directors, where directors have no direct or indirect personal interest, which is derived on the grounds of all essential and adequate information and after careful examination of all alternative possibilities. If it is confirmed that decision was made in a good faith, in the sense that this decision rationally corresponds to corporate purposes, court will not interfere, wont restrict someway or impose personal liability on directors for the harm, even in the case if director's decision will be turned out to be unreasonable and will cause a lost for corporation or shareholders.[12] This doctrine is defensive mechanism for directors, that come in to action when litigation proceeds' in a court. If directors action, despite of legal conscious of this action, which provoked harm and corporation (shareholder, partner) imposes liability on director, he or she should deafened his/her self by affirmation the fact that he/she acted on behalf of corporations best interest and here by his/her motive was to benefit corporation through acting in a good faith, duty of care and duty of loyalty. In this case, court decides proceeding at a term till specialists[13] will be able to investigate whether or not the director actions fit to BJR- principles. The court does not investigate the content idea of decision, but only its compliance with the law – checks legitimacy.[14] After receiving expert's official opinion, court proceeding will be resumed, and if director's actions are confirmed as decision which another sensible director in the same conditions have made in compliance with all up mentioned principles, then personal liability will be excluded. It should be noted that the rule applies only to the Directors' business decision in the case of the dispute and does not apply

9 *Burduli I.,* Ground of Stock Law, 2010, Vol. 1, 94.

10 For the details, see *Gerding E.,* Directors Personal Liability for Corporate faults in the United States, 2009.

11 Syllogism - deductive inference, from which two of the discussion (assumptions) comes third (Conclusion), <http://www.nplg.gov.ge/gwdict/index.php?a=term&d=3&t=36786>, foreign words dictionary, [23.01.2017].

12 *Drexler D.A., Black L.S., Sparks G.A.,* Delaware Corporation Law and Practice, New–York, 2010, 8-15.

13 "Specialists" in this context can be interpreted in many senses. The main thing is to determine what kind of facts are under consideration and who has special knowledge of the subject. This may be a financier, audit, the commission whose members within the functioning has direct knowledge on the proper business planning and implementation issues, as well as risk-factor determining individual.

14 *Chanturia L.,* Corporate Governance and Leader Responsibility in Corporate Law, 2006, 219.

to the director, as the ruling parties of the corporation connected to control function relations. In the latter case, the violation of the duties of directors is completely subject to judicial review.[15]

Therefore, the American model of corporate law ultimately protects directors and with them shareholders/partners from imposing personal liability. The scarcity of case law in US courts proves that imposing personal liability is ultimate measure. That is why it is known as the rare exception[16], because of importance of limited liability institution and corporation form of business entity, and that is something that disrupts the first purpose of the idea of corporation unity.[17] As commentators explain the essence of limited liability situates in the "gross social benefits",[18] in spite of this, law will not recognize the existence of a separate legal entity from its partners, when it leads to injustice.[19] Dan Wormser in his work, where there is summarized early twentieth century approach to limited liability institution, he says: "When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons."[20]

Thus, despite the protection and preservation of the corporate form, the legislator considers the corporate veil piercing (personal responsibility) bases, which is also the prevention mechanism, but in this case, it protects the corporate entity from unscrupulous corporate leadership. There are circumstances in which the Court looks beyond the legitimate form of corporation and pierce the veil. For example, the American Corporate Law is familiar with the term "alter ego"[21], which in itself means the use of enterprise as an instrument or as a helping hand only for benefit personal interests. It is assumed that "Alter ego" exists when in enterprise we face the common interest and government, which withholds the existence of a corporation as a separate entity. For the developing alter ego theory, which can cause the legal base for imposing personal liability, it is necessary to have following prerequisites: a) unity of control over enterprise, and b) the fact, that defending corporate form will encourage the fraud and injustice[22].[23] At it is explained in Arizona State courts decision on 27th of February, 2012 (Pimal Property, Inc. v. Capital Ins. Group, Inc.), these prerequisites represents the fact-based explanation,

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15 *Chanturia L.,* Corporate Governance and Leader Responsibility in Corporate Law, 2006, 220.

16 Translation into Georgian.

17 In sum, courts will not easily disregard the corporate form because this would defeat one of the primary purposes of incorporation. See Dietel v. Day, Ariz. Appeal court, (1972) 492 P. 2d 455.

18 Translation into Georgian.

19 *Morrissey D.J.,* Piercing All the Veils: Applying an Established Doctrine to a New Business Order, 2007, 541.

20 Translation into Georgian.

21 When a person or entity "so dominates and controls another as to make that other simply instrumentality or adjunct to it, the courts will look beyond the legal fiction of distinct corporate existence." Gatecliff v. Great Republic Life Ins. Co., 170 Ariz. Supreme Court, 34, 37, 821 P.2d 725, 728 (1991) Quoting: Walker v. Southwest Mines Dev. Co., 52 Ariz. 403, 414-415, 81 P.2d 90, 95 (1938).

22 Translation into Georgian.

23 Pimal Property, Inc. v. Capital Ins. Group, Inc., 2012 U.S. Dist. LEXIS 24172, Ariz. district court (February 27, 2012).

which in first place insists investigation of particular factors connected to case. Thus, as it was mentioned in introduction part, it is difficult to determine concrete prerequisites to impose personal liability, which will fit each case identically. Exactly this approach is approved in up mentioned case from Arizona State Court and partially court agitates that each lawyer should assume the personal liability issue only after and under proper investigation of actual factors.[24]

Similarly, to Georgian Corporate law, US corporate law does not recognize legislative regulation of piercing veil doctrine, especially on such a level as it is regulated developed in practice. Moreover, The Model Business Corporation Act[25] affirms that shareholders are not personally liable for the debts of corporation, if act of incorporation does not provide any different terms concerning this issue or shareholders would not be help personally liable because of their lawful actions.[26] Despite of this, courts take decisions to pierce the corporate veil under appropriate circumstances like capitalization, disregarding formalities, unfaithful behavior, violation of fiduciary duties, comingling assets and others. Besides mentioned personal liability bases, which are also known for Georgian corporate law, the most crucial one is abuse of corporate form, i.e. if leader tries to avoid obligations using corporation and fraudulently harm third party.[27, 28] The Georgian Law of Entrepreneurs in its 3.6 article imposes personal liability on managers for abusing the legal form of limited liability. It should be noted that in the term of managers it is considered not only managers itself or people who are stated in incorporation act, in extraction of enterprise, but others who actually deals with corporations' managerial issues, or intruded in such issues and had actual influence over decisions.

In Germany, the dogmatic bases for piercing the corporate veil (*Durchgriff*[29]) is considered the violation of director's fiduciary duties,[30] also inadequate capitalization and commingling assets from shareholders/partners, as well as influence over the enterprise management (AktG §117), duty of silence

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24 cf.: *Morrissey D.J.,* Piercing All the Veils: Applying an Established Doctrine to a New Business Order, 2007, 542.

25 As you know, American law is more state than the federal law, so there are many differences between the states' regulations. Differences are also in Corporate law and this is why, since World War II in 1950 Committee on Corporate Laws of the ABA's Business Law Section (the Committee) established the Model Business Corporation Act - MBCA, the purpose of which was to reduce widespread misunderstandings and lawsuits due to the differences in corporate-law bills. MBCA today operates in 24 states. However, after 20 years in 1969, the committee approved the proposal to revise the act and completely renovated it in 1984, what was then called the Revised Model Business Corporation Act - RMBCA. See <http://www.lexisnexis.com/documents/pdf/20080618091347_large.pdf>.

26 *Thompson R.B.,* Piercing the corporate veil: an empirical study, 1991, 1041.

27 *Thompson R.B.,* Piercing the corporate veil: an empirical study, 1991, 1042-43.

28 *Magradze G.,* Master Thesis - Dogmatic Grounds of "Subsidiary Liability" In Georgian Corporate Liability: Existing Practice for Theoretical Analysis (manuscript), 2016, 12.

29 *Farat A., Michon D.,* Lifting the corporate veil: limited liability of the company decision-makers undermined? Analysis of English, U.S., German, Czech and Polish approach, 2006, 24.

30 Ibid, *Farat A., Michon D.,* Lifting the Corporate Veil: Limited Liability of the Company Decision-Makers Undermined? Analysis of English, U.S., German, Czech and Polish Approach, <http://www.commonlawreview.cz/lifting-the-corporate-veil-limited-liability-of-the-company-decision-makers-undermined-analysis-of-englishus-german-czech-and-polish-approach>, [22.01.2017].

and etc. Violation of these duties by active on inactive behavior which wreaked the harm to corporation or to third parties on behalf of corporation is ground for imposing personal liability on violator.[31] There is one exception from this rule, which is covered under German Joint-stock law that is obviously under the influence of Business Judgment Rules: violation of duties does not exists, when a member of directors board, had enough information and recourses to assume wisely that he/she was acted for the best interests of a company.[32] Nonetheless, piercing veil doctrine in German law and not only, maintains inexact and interspersed. Thus, courts use this kind of form of personal liability as an ultimate measure under proper circumstances.

The Georgian corporate law act covers following bases for imposing personal liability: a) abusing a legal form of limited liability (article 3.6)[33], b) abusing dominant position by dominant shareholder (article 3.8)[34], c) leading corporate business unfaithfully (article 9.6)[35], d) abusing the duty of protection of internal information related to enterprise (9.6)[36], e) violating rules of interest conflict (9.5)[37], and f) violating duty of care (56.4)[38]. In the framework of this article, there will be discussed couple of them.

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31 *Magradze G.,* Master Thesis - Dogmatic Grounds of "Subsidiary Liability" In Georgian Corporate Liability: to Theoretically Analyze Existing Practice (manuscript), 2016, 19.

32 *Chanturia L.,* Corporate Governance and leader responsibility in Corporate Law, 2006, 199.

33 Georgian Corporate Law bill article 3, paragraph 6: "a partnership, limited partnership, limited liability companies, joint stock companies and cooperative partners shall be held personally liable for the corporate debts if they abuse the legal form of limited liability".

34 Ibid, Article 3, paragraph 8, the first sentence: "If the company's partner has used its dominant position only to harm the company, he shall compensate the loss to other partners."

35 Ibid, Article 9 Section 6: heads of a company and "members of the supervisory board should conduct enterprise business in good faith; In particular, should take care in the way it takes care as reasonably prudent person under the same capacity and similar conditions, and act in the belief that their action is in the best interests of the enterprise. If they do not fulfill that obligation, they shall be jointly liable for damages incurred by all their assets, directly and immediately."

At the same time, the issue of a limited partnerships' limited partner with respect to the legal status in a framework of personal responsibility is worth to attention, because as usual limited partners do not participate in activities carried out by the company and accordingly they have nothing to do with some kinds of action done on behalf of a company. They are responsible for the obligations of the enterprise within the guarantee fee (Article 34). The exception to this rule is Article 37, second paragraph: "If one limited partner according to act of incorporation has the authority to carry out legal actions that are beyond the normal scope of the mandate, it is responsible under the Article 9th, section 6th paragraph."

36 Ibid, Article 9, section 6, the second paragraph: heads and "members of the supervisory board, if any, without the prior consent of the partners' meeting shall not be entitled to use information related to enterprise activities which become known during executing their duties or because of official capacity."

37 Ibid. Article 9.5 last paragraphs' first sentence: If the authorities harm the company by "violation of the rules of conflict of interest they shall ... compensate the damage."

38 Ibid, Article 54, paragraph 4, first sentence: "The directors must perform their tasks diligently and in good faith. If the director does not fulfill his duties, he is obliged to compensate to the enterprise for damage." However, according to the same paragraph, second sentence, the compensation should be made directly from the assets of director, and" if there is an actual fact of damage, the directors must prove that they have managed enterprise business under the Article 9 Article 6 of the Georgian Law of Entnepreneurs."

4. Bases for Imposing personal Liability in Georgian Corporate Law context

4.1. Abusing a Legal Form of Limited Liability

Generally, abusing the rights, first of all, is restricted by Civil Code article 115[39] which consoledates the use of rights through legitimacy. From the interpretation of norm, it is obvious what can be measured as abusing the right. It is about form of realization rights, which aims only to harm others. Therefore, natural of fictional individual should use his/her/its rights in such a way not to cause harm to others, they should be in conscious that as a legally capable and "sui juris" subjects they have rights but at the same time have obligations towards other, which first and foremost implicate the respect and special duty of care towards others legal rights.

Corporate law of Georgia provides right for legal entities to incorporate with the privilege of having limited liability, however this does not mean that they can act arbitrarily and only for the purpose of personal interest. Moreover, if this actions are directly addressed to harm the company. The law of corporations of Georgia article 3.6 imposes personal liability on shareholders in case if they consciously abuse the legal form of limited liability. Limited liability in itself is directed to business development, encourage investors, so that they have motivation invest financial resources in particular activity and under the possible unprofitable business conduct they are secured from personal liability. However, it is known to all, that business and generally economic relations are developing and becoming more complicated, in this condition shareholder may assume that the best way to secure his/her personal assets or personal investment in corporation, is to abuse legal form of limited liability. To avoid such actions from shareholders, to maintain equitable business environment and economic relations and balance between subjects of these relations, to protect faithful creditors' rights Law restricts abusing the legal rights.

To assume some kind of action as abusing legal form of limited liability there should be following factors: a) the fact that partner directly used the privilege of limited liability – thus, hi/she acted under the "privileged" circumstances and if not the privilege he/she would not act like, b) the fact of harming the enterprise and c) cause-effect connection – that exactly the partners action caused the damage to enterprise. It is clear that damage should be obvious, as "abusing the legal form" in it implicates negative effect, and the cause of this damage should be derived directly from shareholders' action, which he/she committed only because he/she had such a privilege like "limited liability".

As for existence of damage, the Supreme Court of Georgia in its decision explains the concept of damage and importance of its (damage) existence for imposing personal liability[40]. As it was mentioned before, the damage should be obvious and the court considers, under the provision of Civil Code of Georgia, four necessary factors existence: a) self-harm, b) an unlawful act, which has caused the damage,

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[39] Civil Code Article 115: "Civil rights must be exercised lawfully. Exercise of a right with the intention to harm somebody is unallowable."

[40] The Supreme Court Judgment on March 26, 2010, on the case of № ას-899-1185-09, 4.

c) fault and d) a causal link between the unlawful act and the result. From these four conditions, the lack of one of them excludes imposing responsibility.

4.2. Abusing of a Partners' Dominant Position by the Partner

Abusing rights from partners does not confine only by the abusing a legal form of limited liability. But law also provides, abusing of a partners' or group of partners dominant position by them.

Partners' dominant position is connected to his/her right of vote, which should be obviously influential over the shareholders general meeting. Thus, majority of partner(s), who will use their vote only to harm corporation, and in the context of imposing personal liability, it does not matter they did it purposely or negligently, important is the fact of damage. At the same time, abusing rights is actually in a direct connection to duty of loyalty in the respect of enterprise and co-partners. Here the discussion is about an action, which harms enterprise and its partners that cannot be done by loyal and faithful shareholder. German stock law paragraph 117 regarding of this issue constitutes that if a partner in such a way effects on the administrative bodies that will cause damage to the public, then the rest of the partners have the right to demand compensation of damages[41]. The starting point in this case is the fact that the partner's actions, as a rule, intended to be a personal benefit to recruit, thus damaging the community.[42]

It is difficult to talk about piercing the corporate veil on ground of up mentioned base, because it is about third parties demand against partner, who harmed corporation, although indirectly it harmed third parties as well. Corporate Law of Georgia does not provide an opportunity for third parties to demand fulfillment of obligation from partners in cases like that, but the source for executing obligations shall be his/her personal assets under the rule of regression. Thus, under the common interpretation of provisions to constitute justice it is absolutely feasible that court might use the veil piercing doctrine[43] in such litigation.

4.3. Duty of Faith

The most common base for piercing the corporate veil is violation of duty of faith. Generally, all jurisdictions are based on honesty, conscientiousness and faith. It is the fundamental principle of modern law, philosophy and business. The institute of faithfulness in mostly important to civil law and it is first and foremost principle for entire privet law[44]. Article 5.2 of Georgian Civil Code explains that each relationship, even in the absence of specific provision, should be regulated under the general principles, as well as according equity, good faith and moral norms. Generally, participants of legal relation must

41 *Burduli I.,* Nominal Capital and its Functions, in a book: Theoretical and Practical Issues of Modern Corporate Law, 2009, 266-267.

42 Ibid, 268-269.

43 Ibid, 254.

44 The Supreme Courts' Important Definitions on the Case №ას-1338-1376-2014, 1.

realize their rights and execute their duties in a good faith (Civil Code of Georgia article 8, paragraph 3). Good faith is also underlined in many provisions from Civil Code such as article 361 paragraph 2nd which constitutes that each obligation should be executed properly and in a good faith. Too many other articles contain the duty of acting in a good faith: articles 609, 610, 731, 765, 781, 935, 969, and etc. Majority of legal terms in Civil Code may not directly indicate, but still is based on honesty and faithfulness[45]. However, the most important thing is to find out, develop the driving principle of legal relation – "good faith" contents sense: what is "faith"?

You may agree that good faith somehow is abstract notion. It is impossible to make everyone act faithfully with the same quality and extent, because everyone has his/her own view and opinion about the definition of good faith and what kind of behavior should be considered as faithful?! Thus, the terms abstract character outlines in its inexact context. However, the law does not and cannot accommodate with incomprehensible and dispositional records in law bill. That is why it is preferable to find a way to determine whole, acceptable interpretation of the term.

Generally speaking, the principle of good faith, same as "bona fides" takes its beginning from the Roman Law and it had distinct place in "ius civiles" and roman legal thinking. The terms definition of those days demanded from the parties to priori abide personal conditions and given word, otherwise a contracting party could claim against.

In a modern legal system the principle of good faith in developed countries legislation and doctrine is connected to moral standards and it is described as sincerity, equity, honesty towards obligations.[46] The good faith in itself implicates ethical behavior, where ethic this is aggregation of values and principles and the use of this values and principles[47], that means the use and functioning of these values and principles in the process of execution of obligations.[48] These values and principles may be traditions, customs, moral standards, ideals, which is considered as valuable not only for individuals but for general society. Commonly, good faith principle may be comprehended as standard of professionalism and the aim of this principle is to encourage professionalism and on these grounds, create equitable, qualitative business environment.

The Georgian Law of Entrepreneurs in its 9.6 article, explains definition of good faith and implicates that directors and enterprise committee members should conduct business in good faith, in particular, they should take care in a way like other manager in a same position and same circumstances cares about enterprise and believes that his/her actions are derived from the best interests of the company. Hence, this definition of good faith in itself implicates duty of care, as well as duty of loyalty. Delaware corporate law constitutes the presumption about good faith and explains, that violation of this duty is arguable when directors' actions are not derived from the company's best interests[49]. Herewith it

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45 Ibid, Judgment №ას-1338-1376-2014, 23.

46 The Supreme Court Judgment on June 29, 2015, case №ას-1338-1376-2014, 23.

47 *Chapman R.A.,* Ethics in Public Service for the New Millennium, in: *Richard A. Chapman (ed.),* Ethics in Public Service for the New Millennium, 2000, 217, 218.

48 Ibid, 2018.

49 *Tsertsvadze L.,* Duties of Directors, According US (State Delaware) Corporate Law and Corporate Law of Georgia. (Comparative Analysis), 2011, 31-32.

is important, that article 56.4 contains duty of care and according to it "directors must execute their duties in a good faith and carefully"[50]. But this case will be discussed in a later part of this article.

Luckily, the supreme court of Georgia in one of its decision[51] explains the notion of good faith. The decision is about relationship between creditor ad debtor, but to come up with an approach that each law and order is based on an integrity of the subjects of law and this principle must be reviewed as normative conception[52], up mentioned decision cannot be irrelevant, fortiori because, good faith is described as duty between subjects of law. Hence, the good faith does not implicate obligations proper execution derived from law, treaty or other obliged-legal relation, but also in a good faith, in another words by taking into consideration other parties legitimate interests and security.

4.4. Duty of Silence

Duty of silence i.e. security of corporations' business information for the purpose of personal benefit, which become known because of their position or through execution their managerial duties. This provision is covered in the Georgian Law of Entrepreneurs in article concerning managers and representatives (article 9), which is not co-accident, because secret or business information can become known to individuals who actually take part in managing and conducting business. Herewith, it worth attention, that duty of silence is covered in the article 9.6 second indention and in the same article here is given the legal definition of good faith, which in its content represents one of the components of duty of loyalty. The information about enterprise activities is known to trustees and abusing this trust is considered as violation of good faith, when revealing this kind of information harms the interests of the enterprise, tangible or intangible property. Therefore, the duty to remain silent in the first place associates with the abuse of the right to having inside information.[53]

4.5. Conflict of Interests

A conflict of interests implicates carried out activities somewhere else by authorized persons in a similar way as this particular enterprise does, or to participate as a personally liable partner or as a director in another similar company, if the statute is not otherwise identified. This provision is covered in article 3.5 and bans activities like this. Otherwise imposes personal liability on individuals who abuses this rule. But this case is not about third parties demand. Demand liked that can be imposed by shareholder – in a stock corporation by shareholder or group of shareholders, who own 5% of shares, in all other cases each partner.

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50 *Maisuradze D.,* Business Judgment Rule in Corporate Law (under the example of US and Georgian Law), In the book: Corporate Law Collection, *Burduli I.(ed.),* 2011, 116.

51 The Supreme Court Judgment on June 29, 2015, case №ას-1338-1376-2014.

52 The supreme courts' important definitions on the case №ას-1338-1376-2014, 1.

53 Ibid, 2.

4.6. Duty of Care

The definition of the term "duty of care" is not known to Georgian corporate law, however this term is used in couple of provisions. Hence, for the determining its definition, the approach of developed countries is worth to try. For example, US corporate law, where this term is defined in two bills[54], gives the most sophisticated explanation of this term. Specifically, in the first bill law imposes duties on directors and managers to conduct their duties in good faith, in way that he/she reasonably believes that they act in the best interests of the corporation and in such a care that is anticipated from ordinary prudent person in the same position and in the same circumstances[55]. The second definition of good faith obliges lead individuals to conduct their duties in good faith and in a way that director reasonably believes that he/she is acting in the best interests of the corporation. Thus, the starting point here again is good faith, also, like in Georgian corporate law, there is no clear difference between terms[56]. In up mentioned provisions directors' duties include good faith, as well as duty of care, while the Georgian law the good faith in itself contains duty of care[57], because it is impossible to act according to duty of care and at the same time be unfaithful. Careful managers' actions must be in accordance to actions taken by reasonable person, who in the same circumstances could have made same decision. It is obvious, that decision maker should act in the best interests of the corporation and there-fore he/she must have loyal intensions towards enterprise. Good faith in itself contains both of them (duty of care and faithfulness).

According to German corporate law, the board members must exercise leadership in the use of a decent and honest carefulness. And in a second provision the honest businessman's care. Therefore, the duty of diligence means acting in accordance of good faith.

Thus, for determination of duty of care it is possible to use the principles of good faith, because if a person acts faithfully and similarly executes his/her obligations, thus he/she acts according duty of care.

5. Analyzing Case Law

Given the fact that the case law is very poor in Georgia's Private Enterprise Law concerning to imposition personal liability, nor have they a large variety of ground for such a liability. More often[58] court is using violation of duty of good faith to impose personal liability. However, like it was discussed in upper part of the article, each ground that law or legal science covers, is somehow directly or indirectly connected to good faith. Thus, here is important to ascertain the connection between action done by leader individual and violation of good faith and in that way, the understanding of the principle of good faith by courts.

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54 Model Business Corporation Act (M.B.C.A.).

55 *Chanturia L.,* Corporate Governance, 2006, 202.

56 Meaning the article 56.4 of the Georgian Law of Entrepreneurs.

57 Ibid, article 9.6.

58 If we can say that, because of lack of judgments.

By one of the decisions taken by the Supreme Court of Georgia,[59] where the decision of Appeal court was canceled and case has been returned for re-examination in the same court, a violation of the principles of good faith has become a base for personal liability. Through examining the actual facts, it has been established that the director of the enterprise as a representative to third parties, did not appear at the trial where held a dispute over the enterprise. According to a default judgment enterprize was held liabile and a certain amount of the levy was imposed on the enterprise for unfaithfull and negligent actions. Thus, the director has breached the duty of loyalty and, in particular, he has not fulfilled its duties[60] and compensation of damages was imposed ecxactly on him. Director, as the administrative body is a very important and responsible person towards the corporations' activities, his actions must be inspired to be the best interests of the company, because it has the ability to exert a negative or positive impact on enterprise.

As it was discussed in the previous chapter, duty of care and duty of loyalty is reviewed in the context of the integrity and faith, and above-mentioned court decision is its proove, in which the duty of good faith has been violated due to the fact that authorities have not received a decision on a specific issue, which could be made by the reasonable person, in the same position in similar circumstances, negligently in the dispute against his bad attitude that underlines his unfaithfulness and caused damage to the industry. There is a connection, that must be between unfaithfull managers action and obvious damage, when it comes to personal liability.

One more important explanation was made by Supreme Court of Georgia in its authoritative decision[61], which refers to directors and shareholders personal liability for the company's tax obligations. While the decision is manly based on article 3.6 (abuse of the legal form of limited liability) that concerns shareholders personal liability, we can make a parallel to principle of good faith, forasmuch as it was discussed in previous chapter, abusing limited liability is in direct connection to violation of duty acting in good faith, because faithful authority[62] wont abuse the possibilities only to harm others or enterprise. It is clear from the context of decision that talks about imposing personal liability and principles of good faith, is possible after establishing the fact that contesting parties were actually in charge of the company. The necessity to underline this fact (actually in charge of the company) is derived from the fact, that the case concerns not only directors liability issue, who obviously is in charge, but also the demand to impose personal liability on shareholders. However, as it was discussed previously, this is not only condition for imposing liability on shareholders. Corporate law bill gives shareholder authority to control the business of the enterprise, for this purpose receives all the

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59 The Supreme Court Judgment on March 26, 2010, case №ას-899-1185-09;

60 The Supreme Court Judgment on March 26, 2010, case №ას-899-1185-09, quoting: ""Fully protect company's interests, should have been appeared at the session or should have ensured the participation of the company's representative."

61 The Supreme Court Judgment on May 6, 2015, case №ას-1307-1245-2014.

62 In this case it includes not only director, but also a partner, which is directly managing the company. Accordingly, on such partner will be extended the requirement of Article 9.6 of the Georgian Law of Entrepreneurs - duty of good faith, as on the partner which have executive authority. Anyway, the partner is obliged to carry out his/her duties and responsibilities in good faith, which he has toward the enterprise.

information, annual and mid-term accounts and etc. Hence, this provision[63] gives partner real possibility not to turned out defrauded. And as in SCG decision case number #ას-899-1185-09 is explained, partners above mentioned rights transform into his/her duty toward enterprise to be informed about all important insider matters. According to this, the fact that partner does not actually takes part in managing process, it does not mean that his/her liability is excluded and moreover they can be faced to solidary liability with directors.

Thus, according to up mentioned supreme court judgments[64], it is constituted, that abusing legal form of limited liability from partner reveals, when there is actual management over the company from the partner and from his/her side such a management that aims evading taxes. In this case, creditor is the state, which can be presented as non-treaty, involuntary creditor, since the state had no intention to enter in a legal relationship with the enterprise, however appeared trespassed due to the fact that company did not execute its legal obligations[65] towards the state.

As for the issue concerning imposition a personal liability on directors , here the Court refers to the corporate Law article 9.6 good faith (fiduciary duties) violation, which had been expressed in minimization effort of tax liabilities of the company, which directly connects tax evasion and affluent obligations caused bu such action, that can be reason for catastrophic consequences for the company. Even though the director has to take care of the profitability of the enterprise, however, this has to be done within the statutory rules of behaviour.[66]

The discussed judgments are distinguished because of one more reason this is the first decision in which the court imposes a personal liability towards the company on the partner and the director subsidiary and jointly with each other. According to the decision discussed above, personal responsibility was imposed on the Director in appellate court. Subsidiary liability for the first time was announced in practice in a third instance, however, the Supreme Court has not defined the essence of the subsidiary responsibility and, considers as a veil piercing doctrine. It should not be considered as a mistake, from the fact that "the subsidiary responsibility" is a "secondary liability" form: the basic source of the liability, as has been discussed is directly enterprise asset, capital, while under the guilty action done by director or partner auxiliary liability source becomes directly the director's or partners' personal assets. Thus, personal responsibility in this context is considered as a "secondary liability" form to meet the upcoming demands.

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63 In accordance to the Georgian Law of Entrepreneurs Article 46.4, "the directors are obliged on the ground of a partner request immediately provide he/she with the information on the activities of the company and allow them to become familiar with the books and records"; Article 53.32: "Shareholders who hold 5% of the shares have the right to request an assessment of special balance of economic activities and the annual check, if they believe that there are irregularities"; Article 3.10: "Each partner has the right to receive the annual report and all publications. In addition, he/she has the right to verify the accuracy of the annual report and in order to do so, he/she can review the documents personally or through an auditor and request from governing bodies clarifications after submitting the annual report ... ".

64 №ას-1307-1245-2014; №ას-1158-1104-2014.

65 Profit tax.

66 The Supreme Court Judgment case №ას-1307-1245-2014, 22.

6. Conclusion

For the purposes of this article it would be better if we summarize the basics of the case law imposing personal responsibility. The Supreme Court's judgment analys revealed the results that is consequences of disposal provisions in legal proceedings. However, this does not mean that the law should explain the concepts, which leads to confusion. This is competence of practice and should be determined on the analys bases of the court judgmens, and which may become an imperative. Of course it is difficult to establish general criteria that will fit to widely different cases, as different factual circumstances of the case requires a different approach, but this is the goal of science: to explore, examine, interpret, explain and then implement in practice.

Therefore, according to the practice the limited liability abuse occurs when a partner or director uses company as the " undeclared income generating source", as for unfaithfulness it occures when the director unbalancely executes duty of care[67], and also, when the authorized officials have negligent and careless attitute towards the corporation's daily activities.[68]

Clearly, the above-mentioned principles which is used in Georgian practice, is not complete, and within the framework of the article more variation was discussed concerning personal responsibility imposition. However, since the article is devoted to the analysis of the practice, the lack in variety of personal liability grounds is stipulated because of lack of case law.

Both American and German commentators agree that, the discussed Institute is the most unpredictable and tumultuous doctrine of Corporate Law. In this regard, the Georgian corporate law is not exception, especially because that this institute is new to the Georgian Corporate Law and is in need of improvement in the context of dogmatic, as well as in case law. From this point of view a very important role to play is on practitioners as well as on scientists who will work around this issue. However, this is not a credible prerequisite, that in this way it will be possible to define the doctrine of liability through the use of indisputable grounds. American and European experience clearly shows that in spite of a lot of literature around "piercing the corporate veil" institute, still it is considered to be the most confusing corporate law doctrine.

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5. *Bainbridge S.M.,* Abolishing LLC Veil Piercing, University of Illinois Law Review, University press, Illinois, 2005, 79-80.

[67] According to the court explanation part, the duty of care lies on directors towards the enterprise, that includs an attempt to increase profits and minimize liabilities, although this should be done within the established rules of law.

[68] Such as, for example, the absence of (inactivity) representatives in the dispute against the company, that caused harm to the enterprise.

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Irma Nozadze[*]

Duty to Inform as a Specificity of Demonstration of Good Faith Principle in Voluntary and Compulsory Insurance

Insurance contract executed within the framework of either voluntary or compulsory insurance is based on the bona fides of the parties thereto. Due fulfilment of the duty to inform is of paramount importance as it is one of specific features of the demonstration of the good faith principle. The duty to inform should be duly fulfilled both during pre-contractual and contract period and upon occurrence of an insured event. Fulfilment of the duty to inform in voluntary and compulsory insurance is associated with certain specificities. This paper is focused on the analyses of these differences, it exposes the boundary between voluntary and compulsory insurance, reveals its essence and importance within the legal framework, in judicial practice and, in general, in civic relationship.

Key words: *insurance forms, voluntary insurance, compulsory insurance, specificity of demonstration of good faith principle, duty to inform, legal consequences of the breach of the duty to inform.*

1. Introduction

The article investigates the duty to inform as one of the means of display of good faith principle in voluntary and compulsory insurance. This research aims at: revealing the specificities of performance of the duty to inform in voluntary and compulsory insurance; also at analysing the differences associated with performance and non-performance of the duty to inform in voluntary and compulsory insurance relationships and, in this context, the paper clearly demonstrates the existence of a boundary between voluntary and compulsory insurance relationships, discloses its essence and importance within legal framework, judicial practice. Furthermore, this research aims at providing the respective conclusion.

"Good faith doctrine (*Treu und Glauben*) is the key issue in German Contract Law."[1] "It is self-evident for continental lawyers that the principle of good faith (*bonna foi, true und Glauben, redelikheid en billijkheid*) has a central role to play in a contract. The Civil Code has assimilated the provision on this rule. It was chronologically enforced in French, German and Dutch Codes."[2]

In insurance relationships the content of the principle of good faith is broad and comprehensive.[3]

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1 *Beatson T., Friedmann D.,* Good Faith and Fault in Contract Law, Oxford, New York, 2002, 171.

2 *Smits J., M.,* Contract Law, A Comparative Introduction, Great Britain, 2015, 136.

3 Commentary on Civil Code of Georgia, Article 799, 2016, 14-15, <www.gccc.ge>, [14.03.16.] (in Georgian).

It is impossible to appropriately investigate all the means of demonstration of good faith principle within a single article. Hence, this article with examine only the duty to inform, as a specific feature of demonstration of good faith principle in voluntary and compulsory insurance.

2. Manifestation of Good Faith Principle in Insurance Contract

An insurance contract is based on four fundamental legal principles: principle of indemnity, principle of insurable interest, principle of subrogation and principle of utmost good faith.[4]

In its turn, the insurable interest is the mean to reduce moral hazard,[5] develop good faith relationship between the parties and protect public order.[6] "The Appeals court hereby explains, that the Civil Code obliges the subjects of Private Law to act in good faith. As per Part 3 of Article 8 of the Civil Code the parties to legal relationship are required to perform their rights and responsibilities in good faith.

The starting point of the provisions regulating civil law relationships is the restoration of natural equity; respectively, the main attribute of behavioural standard in civil circulation is equity, good faith and morality. The duty to conduct civic relationships in good faith is sometimes directly provided for by a number of provisions of the Civil Code, whilst the majority of provisions relies on it, although they do not directly refer to it. The main duty of the principle of good faith is the occurrence of fair legal consequences and, at the same time, prevention of unfair ones, what is directly linked with stability and sustainability of civic relationships."[7]

"An insurance contract is based on the principle of utmost good faith - that is, a higher degree of honesty is imposed on both parties to an insurance contract then is imposed on parties to other contracts. This principle has its historical roots in ocean marine insurance. As ocean marine underwriter had to place great faith in statements made by the applicant for insurance concerning the cargo to shipped. The property to be insured may not have been visually inspected, and the contract may have been formed in a location far removed from the cargo and ship."[8]

2.1 Elements of the Principle of Good Faith

According to established opinion, in insurance contract the principle of good faith was limited only to proper performance of the duty to inform. However, this opinion is not correct, as the principle of good faith is much broader and is not limited only to performance of the duty to inform.[9] Comp.:[10] "An

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4 *Rejda G.E.,* Principles of Risk Management and Insurance*,* 10th ed., United States of America, 2008, 174.

5 Ibid, 178.

6 Commentary on Civil Code of Georgia, Article 799, 2016, 16, <www.gccc.ge>, [14.03.16.], (in Georgian).

7 Electronic Law Library (ELL), <www.library.court.ge>, Tbilisi Appeals Court, Civil Chamber, 21 November, 2012. Case №2b/3080-12 (in Georgian).

8 *Rejda G.E.,* Principles of Risk Management and Insurance, 10th ed., United States of America, 2008, 181.

9 Commentary on Civil Code of Georgia, Article 799, 2016, 14-15, <www.gccc.ge>, [14.03.16.] (in Georgian).

insurance contract is mutually binding, consensual and indemnity contract."[11] The performance of the principle of "*bona fides*"[12] - good faith depends on proper performance of the duty - "*obligare*"[13]. Hence, for abidance by the principle of good faith it is necessary to duly perform the duty to inform. A policyholder should be scrupulous about the execution of an insurance contract, double insurance should not be used for gaining unlawful revenues. To minimize loss in insurance the policyholder should dully follow the directions of the insurer, demonstrate adequate care toward insured property, pay insurance premium in good faith; the contract should be executed and interpreted in full compliance with the principle of good faith and, in general, the parties to a contract should perform the obligations imposed thereon and exercise their rights in good faith.

2.2. General Criteria of Correlation of the Principle of Good Faith in Compulsory and Voluntary Insurance

An insurance contract can be of both voluntary and compulsory format. In both cases a contract should be interpreted in full observance of the principle of good faith. Owing to just to the principle of good faith the parties to a contract have reciprocal obligation to be responsive towards the interests of each other.[14]

Voluntary insurance relationship originates on the basis of the autonomy of parties' will, what cannot be said about the compulsory insurance contract, as in this case the essential terms and conditions of the contract are determined by a special law and they fall within the scope of aspects regulated by public law.[15] A voluntary insurance contract is explicitly a civil law contract, whilst the legal nature of a compulsory insurance contract should be verified on the example of classic theories of delimitation between public and private laws. In view of the theory of interests, compulsory insurance explicitly protects the public interest. Unlike voluntary insurance contract the scope of interests covered by compulsory insurance is broader. It should be mentioned with regard to subordination theory, that the relationship under compulsory insurance does not originate on the basis of a contract, but rather on the basis of law.

Accounting for the theory of subjects may turn insufficient in the case concerned. For example, both parties to a contract may happen to be the subjects of private law, but the relationship may still be construed as public law relationship. In this case the purpose of execution of contract will be of decisive

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10 *Rejda G.E,* Principles of Risk Management and Insurance, 10th ed., United States of America, 2008, 181. In the Opinion of this Scholar, Owing to Pecific Nature of Insurance Contract, The principle of Utmost Good Faith is Supported by three Important Legal Doctrines: Representations, Concealment and Warranty.

11 Commentary on Civil Code of Georgia, Article 799, 2016, 4 , <www.gccc.ge>, [14.03.16.] (in Georgian).

12 *Zimmerman R., Whittaker s.,* Good Faith in Law, European Contract Law, Cambridge University Press, 2004 , 66.

13 *Zimmermann R.,* The Law of Obligations Roman Foundations of the Civilian Tradition, Oxford University Press, 1996, 1.

14 Commentary on Civil Code of Georgia, Article 799, 2016, 14 , <www.gccc.ge>, [14.03.16.] (in Georgian).

15 Commentary on Civil Code of Georgia, Article 801, 2016, 1, <www.gccc.ge>, [15.03.16.] (in Georgian).

importance. "Unlike voluntary insurance, compulsory insurance contract is of public law nature and originates on the basis of law."[16]

Hence, the basis of observance of the principle of good faith in voluntary insurance relationships is honest behaviour of the parties during pre-contractual and contract validity period as essential terms and conditions of a contract are determined on the basis of the "autonomy of parties' will",[17] and the negotiation of a compulsory insurance contract, determination of its terms and conditions is not dependent on the will of the parties. In compulsory insurance the object of insurance, type of insurance and performance procedure are prescribed by special law. Respectively, inclusion of the principle of good faith in relevant law mainly depends on the common sense of the legislator.

Although the legislator is entitled to provide for different from Civil Code regulation in special law on compulsory insurance, it is essential for specific legislative regulation not to contradict the principle of good faith.

At the same time, when speaking about the principle of good faith it is important to take account of its purposes according to the form of insurance contract, appropriate application of the principle of good faith for the attainment of the purpose of specific insurance contract. Furthermore, the main goal of insurance relationships should as well be guaranteed - the policyholder should correctly manage financial loss through insurance.[18]

"From the very outset the goals of insurable interest doctrine was said to be the development of good faith contractual relationships and protection of public order."[19] The purpose of compulsory insurance contract is the promotion of the development of stable and regulated civic relationship.[20] The principle of good faith should be enforced in compulsory insurance contract in a manner as to take account of the wide circle of individuals to maximum practicable extent, as the protection of public interests is the main purpose of compulsory insurance contract.[21] E.g. The already revoked Law of Georgia on Third Party Liability of the Motor Vehicles Owners aimed at caring about the compensation of damages inflicted by the owners motor-vehicles - the sources of increased hazard - to persons, whose life and health would have been injured during the movement of motor-vehicles.[22]

In march 2010 the President of the United States Barak Obama signed Patient Protection and Affordable Care Act, which act set essential terms and conditions for the performance of this type of

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16 *Gogiashvili* , Public Law , Private Law and Judicial Practice, Georgian Law Review, 6/2003-4, 486. 7; *Ibid*, 488. 8 (in Georgian). Ruling № AS-4-381-05 of the Supreme Court of Georgia of 21 April, 2005, Commentary on Civil Code of Georgia, Article 801, 2016, 2- 3, <www.gccc.ge>, [15.03.16.] (in Georgian).

17 Commentary on Civil Code of Georgia, Article 801, 2016, 1, <www.gccc.ge>, [15.03.16.] (in Georgian).

18 *Thorburn C.,* On the Measurement of Solvency of Insurers, Resent Developments that will Alter Methods Adopted in Emerging Markets, The World Bank ,Washington, 2004 February, 2.

19 *Iremashvili K.,* Irmashv Doctrine and Analysis of its Criticism, Law Journal №2, 2013, 58 (in Georgian).

20 Official Electronic Source, <http://www.constcourt.ge>, First Chamber of the Supreme Court of Georiga, Decision №1/2/106, Tbilisi, 31 October, 2001 (in Georgian).

21 Commentary on Civil Code of Georgia, Article 801, 2016, 2, <www.gccc.ge>, [15.03.16.].

22 Law of Georgia on Third Party Liability of the Owners of Motor Vehicles, "Parlamentis Utskebebi" ("Parliamentary Reports"), 33, 31/07/1997 (in Georgian).

insurance.[23] This insurance aims at the protection of public interests, for the patients to have access to affordable treatment.

Insurance was found to be the major instrument for the protection of public interests to prevent negative consequences of political economy,[24] like, for example, a crisis of the banking sector.[25] Age insurance is the mechanism of social protection,[26] etc.

3. Specificities of Performance of the Duty to Inform According to Types of Insurance

Experienced, strong party in insurance relationship is the insurer.[27] Policyholders mainly have to sign standard insurance contracts elaborated by insurance companies in advance and adjusted to their own interests. Ambiguous and veiled stipulations in the contract may materially impair the interests of a person. However, the policyholder may not even notice this. Hence, it is important for both the policyholder and the insured to make representations before the execution of a contract. Insuring company is required to demonstrate due diligence towards the policyholder; being the person experienced in insurance relationship, it should explain the terminology, used in the contract, to the policyholder, the meaning of these terms, because an ordinary citizen my find specific legal and insurance terms less comprehensible or even absolutely understandable. Good faith requires for standard contract terms to be formulated in a manner, as the contract not to be focused on the protection of the interests of only its maker, the dominant person.[28] An insurance contract is drawn up by an insurer.[29] According to EU Contract Law a standard term developed to the detriment of the interest of a consumer is a mala fides one.[30]

Based on the analysis of the material information received during the pre-contractual period, the insurer make a decision on the terms and conditions of the contract to be entered with the policyholder and even whether or not to execute a specific insurance contract at all.[31] Owing to specific nature of compulsory insurance contract, the insurer does not conduct risk analysis upon the execution of each compulsory insurance contract, as it is essential for the execution of this type of contract for the insurer

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23 *Jerry H.R., Richmond d.R.,* Understanding Insurance Law, 5th ed., LexisNexis, Sanfrancisco, 2012, 51, <www.Lexisnexis.com>.

24 *Leaven L*., The Political Economy of Deposit Insurance, The World Bank, Washington, 2004, March, 1-5.

25 *Demirguc-Kunt A., Kane E.J., Laeven L.,* Deposit Insurance Design and Implementation, Police Lessons from Research and Practice, The World Bank, Washington, July 2006, 1-5.

26 *Valdivia V.H.,* The Insurance Role of Social Security: Theory and Lessons for Police Reform, USA, 1997 September, 5-6.

27 Ruling of the Supreme Court of Georgia № AS-1643-1540-2012 of June 28, 2013, <http://prg.supremecourt.ge/DetailViewCivil.aspx> (in Georgian).

28 *Markensinis B*., *Unberath H., Johnston A.,* The German Law of Contract, 2nd ed., Oxford and Portland, Oregon 2006, 165.

29 *Campbell D*., International Insurance Law and Regulations, Vol 1, Austria, Salzburg, 2015 March, 732.

30 Project Group, Principles of European Insurance Contrast Law (PEICL), 2009, 44.

31 *Tsiskadze M.,* Legal Regulation of Voluntary Insurance, Meridiani Publishing House, 2001, 28 (in Georgian).

to obtain such information from the policyholder, which identifies the object of insurance according the special law on compulsory insurance. All the foregoing is conditioned by the fact, that basis for the execution of insurance contract by insurer is not requesting detailed information by insurer and provision of this information by the policyholder, but rather the establishment, whether or not the object to be insured meets criteria, set by law. Despite the foregoing, both in voluntary and compulsory insurance the parties have the obligation of 'the most perfect frankness'[32] towards each other.

Insurer has the legitimate right to get answers from the policyholder to all questions, that are necessary to obtain material information about the object of insurance, be it the information about health status, genetic underlying risk, value of the assets, criminal records, etc.

For the policyholder to enter into contractual relationship with insurer, he makes a choice at his own discretion, whether or not to disclose information,[33] which frequently constitutes personal data of special category.

Hence, the insurer can continuously provide the policyholder with information during both pre-contractual and contract period and remind the latter of his duty to inform about the status of insured wealth, be it human life, health, property or third party liability. As a result, insurer becomes the holder of the most valuable information about the insured. Owing to the very principle of good faith he is obliged to treat obtained information with particular care and guarantee its confidentiality.

The scope of information requested by insurer should not be limitless to prevent gross intrusion into human rights. Any such action will constitute mala-fides behaviour in itself. Hence, the word 'essential' used in Article 808 of the Civil Code of Georgia should not be broadly interpreted and the insurer should have the right to request only the information that is necessary for the assessment of insurance risks and prediction of negative consequences.[34]

Owing to its specific nature compulsory insurance contact grants more freedom to policyholder upon the execution of a contract not to allow excessive access of the insurer to his personal data.

During the insurance period the insurer is required to warn the policyholder against legal consequences of non-payment of insurance premium,[35] to give him directions in the case of occurrence of an insured event with a view to minimization of loss.[36]

Insurer will be entitled to freely enjoy the substantive law instruments only in the case of observance of the duty to inform (meaning the obligation to inform the policyholder about the representations to be made and actions to be performed thereby). Otherwise the reliance on these rules by insurer may be regarded as mala-fides behaviour in the light of factual circumstance of a specific insured event.

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32 *Rogan P.,* The Insurance and Reinsurance Law Review, United Kingdom, 2013, 92.

33 *Motsonelidze N.,* Role of Contemporary Biomedicine in Insurance Law. Law Journal №2, 2013, 122 (in Georgian).

34 Ibid, 122-123.

35 Official Electronic Source: <prg.supremecourt.ge>, Decision of the Supreme Court of Georgia of 21, February, 2013, Case №AS-85-81-2013 (in Georgian).

36 Commentary on Civil Code of Georgia, Article 830, 2016, 1-2, <www.gccc.ge>, [16.03.16.] (in Georgian).

3.1. Correlation Between the Means of Performance of the Duty to Inform in Compulsory and Voluntary Insurance

"Unlike other commercial contracts, insurance contracts are contracts of utmost good faith, which imposes an obligation of 'the most perfect frankness' on the parties,"[37] no matter the form of its performance and type.

During the insurance period the insurer is required to the provide the policyholder without undue delay with information concerning circumstances that are relevant for policyholder to freely exercise his rights and have changed after the execution of the contract, be it the data about the address, name or legal form, etc. of the insurer.[38]

As per Part 1 and 2 of Article 808 of the Civil Code of Georgia, for the execution of a contract an insurer is required to request a policyholder to provide all the known thereto material information. For the information to be regarded material, the insurer should ask the policyholder a question about it in writing, clearly and unambiguously. The forgoing is conditioned by the fact that "In insurance relationship the legislator grants the insurer, as the strong party to insurance contract, with an active role, what is manifested in defining certain rights for it. Respectively, an insurance company should exercise the rights, granted thereto in good faith and should not place the policyholder in worse conditions within the framework of insurance relationship."[39] Hence, it is important for the insurer to ask all the questions, relevant to insurance contract concerned before the execution of such insurance contract, in order to obtain all the material information. Insurer makes a decision on the basis of representations of the policyholder. The questions that are not related either to the hazard o occurrence of the event covered by insurance, will not be regarded material. Material are the circumstances, which may influence the insurer's decision, to denounce the contract or execute is with amended content.[40] When asking questions the insurer is required to abide by the principle of good faith. The questions should be posed in writing, clearly and unambiguously, as ambiguous or unclear question may mislead the policyholder and make him answer the question incorrectly, what later may become grounds for a mala fides behaviour on the part of the insurer.

Provision of information by insurer to policyholder is important not only during pre-contractual period, but also during the contract term. In the case of non-payment of premium, the insurer is required to timely notify the material information to policyholder that non-payment of the premium may result in the cancellation of the contract after futile expiry of the timelines set by the insurer. The Supreme Court of Georgia explained, that "Articles 817 and 818 are not binding, but the principle of good faith obliges the insurer to eightfully exercise the right, granted thereto and in the case of non-payment of the

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37 *Rogan P.,*The Insurance and Reinsurance Law Review, United Kingdom, 2013, 92.

38 Project Group, Restatement of European Insurance Contract Law, Principles Of European InsuranceContractLaw (PEICL), Article 2:702, 2015, 1 November, 23.

39 Official Electronic Law Library (ELL), <www.library.court.ge>, Tbilisi Appeals Court, Civil Chamber, 21 November, 2012, Case №2b/3080-12 (in Georgian).

40 *Emmett J.,Vaughan T.,* Fundamentals of Risk and Insurance, 10th ed., 2007,176.

insurance premium, warn the policyholder about the cancellation of the contract, not to wait until the expiry of the contract term and then demand the payment of the insurance premium."[41]

The insurer is entitled to request any certificate, that is required for the establishment of the scope of insured invent or liability after the occurrence of the insured event.

Hence, the insurer has the right to inform the policyholder, request information from the policyholder and the duty to warn him about consequences of his failure to abide by the principle of good faith.

For the exercise of the principle of good faith in property insurance contract it is important to take account of two fundamental purposes of the principle of indemnity. "The first purpose is to prevent the insured from profiting from a loss. For example, if Kristin's home is insured for 200.000 USD and a partial loss of 50,000 occurs, the principle of indemnity would be violated if 200.000 USD were paid to her. She would be profiting from insurance .

The second purpose is to reduce moral hazard. If dishonest insureds could profit from a loss, they might deliberately cause losses with the intention of collecting the insurance. If the loss payment does not exceed the actual amount of the loss, the temptation to be dishonest is reduced."[42] „Moral hazard ... related to human behaviour (in French "*les moeurs*" means the customs of a society)."[43] In economy the theory of moral hazard is based on the prevention of hazard, that may be conditioned by a contract executed in violation of market rules.

In general, the interest in the insurance of property, and particularly of real estate has considerably increased together with the rise in the number of natural disasters.[44] The employment of agricultural insurance is considered to be one of the most important and efficient means for combating poverty.[45]

Although the policyholder has his property insured, he is still required to take care of insured property. The duty of the insurer and policyholder to mutually cooperate with regard to taking case of insured property is regulated on the legislative level. The policyholder's interest should mainly be manifested in the desire to keep the insured object safe.[46]

The insurer is entitled to give directions to policyholder to prevent or mitigate loss as far as possible upon occurrence of an insured event.

According to Paragraph 1 of Article 5 of the Law of Georgia on Compulsory Fire Insurance (was invalidated on 18.07.2005), an insured event was the damage inflicted upon insured property as a result of fire, also the measures carried out for its extinguishment.[47] Hence, the damages resulting from

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41 Official Electronic Law Library (ELL), <prg.supremecourt.ge>, Decision of the Supreme Court of Georgia of 21 February, 2013, Case №AS-85-81-2013 (in Georgian).

42 *Rejda G.E.,* Principles of Risk Management and Insurance, 10th ed., United States of America, 2008, 175.

43 *Zweifel P., Roland E.,* Insurance Economics, Berlin, Heidelberg, 2012, 268.

44 *Cummins J.D., Mahul O.,* Catastrophe Risk Financing in Developing Countries, The World Bank, Washington, 2009 ,0-3.

45 *Gurenko E., Mahul O.,* Enabling Productive but Asset-Poor Farmers to Succeed, A Risk Financing Framework, The World Bank, Washington, 2004 February, 1.

46 Commentary on Civil Code of Georgia, Article 830, 2016, 1-2, <www.gccc.ge>, [16.03.16.] (in Georgian).

47 Law of Georgia on Compulsory Fire Insurance, SSM, 3(10), 19/02/1999 (in Georgian).

measures undertaken with a view to extinguishing the fire according to directions of the insurer, were subject to coverage by the insurer.

Thus, the directions of the insurer should be followed to minimise loss if the policyholder is objectively capable of undertaking them.

According to Article 839 of the Civil Code of Georgia, under a third party liability contract an insurer is required to exempt a policyholder from duty imposed thereon as a result of his liability to a third person arising during the period of insurance.

Insurance of third party liability against property loss mainly aims at the protection of third persons - victims.

It its turn, there can be two grounds for third party liability insurance - contractual and tort. The consequences of unlawful behaviour may vary according to the form of insurance contract. In a voluntary insurance contract mala fides behaviour of policyholder may become grounds for the exemption of the insurer from liability. Specifically, according to Article 842 of the Civil Code of Georgia an insurer is exempted from the liability if policyholder wilfully caused the occurrence of the circumstance, for which he is liable to a third person. As per Part 1 of Article 843 if an insurer is fully or partially exempted from liability to policyholder in a compulsory insurance contract, its liability to a third person is valid in cases envisaged by law on compulsory insurance. Hence, the interest in the protection of a third person is prevalent in a compulsory insurance contract and is performed irrespective of unlawful behaviour of the insured person.

The Constitutional Court of Georgia explained with regard to the Law of Georgia on Third Party Liability of Motor Vehicles Owners,[48] that compulsory insurance contract "is based on the principle of universality and extends to every owner of motor-vehicle. Unlike voluntary insurance it promotes the development of stable and regulated civic relationship.[49] In fact, this decision demonstrated the purposes and importance of influence of a compulsory insurance contract on civic relationship.

Liability insurance is widely applied in the EU Member States. For example, motor vehicle liability insurance, construction insurance, professional liability insurance and insurance for midwives. When going to other countries, the citizens of Member States, professionals of various fields conclude local insurance contracts to receive insurance services.[50]

As per Article 840 of the Civil Code of Georgia, in third party liability insurance contract the insurer enjoys the right to request information not only with regard to policyholder, but also the persons, who suffered damages, provided that the victim addresses insurer with a claim. Owing to the specific nature of its activities, an insurer cannot be regarded as a simple economic unit, focused only on economic purposes. Unlike other economic units it is required to demonstrate particular sympathy

48 Law of Georgia on Third Party Liability of the Owners of Motor Vehicles, Parlamentis Utskebani (Parliamentary Reports) 33, 31/07/1997 (in Georgian).

49 Official Electronic Law Library (ELL), <http://www.constcourt.ge>, Decision of the First Chamber of the Constitutional Court of Georgia №1/2/106, Tbilisi, 31 October, 2001 (in Georgian).

50 European Commission - Directorate-General for Justice, Final Report of the Commission Expert Group on European Insurance Contract Law, European Union, 2014, 29.

towards the interests of the insured and give preference to the interest of the policyholder and good faith expectation for insurance payment. For example, if the economic standing of the insurer has deteriorated that much that there is a risk that is will not be able to make insurance payments upon occurrence of an insured event, "it can be doubted whether or not the insurer is obliged to provide such information to policyholder. Taking account of business interests, it is not reasonable to impose such an obligation on the company. However, in certain cases, it is possible for a judge to impose such obligation upon insurer on the basis of interpretation of the principle of good faith."[51]

In the event of life insurance for the benefit of a third person an insurer should request the consent of the insured person or a legal representative thereof. In this case the consent of the insured person or a legal representative thereof is a kind of authorization for the insurer concerned to insure a person. In the case of absence of such a consent the risk of dishonest behaviour of the insurer would have increased greatly. According to the USA doctrine there are two different cases: [52] a) when the policyholder insures own life and nominates a third person as a beneficiary, and 2) when policyholder insures some other person's life and pays insurance premium himself.

In the first case the risk of dishonest behaviour (of the policyholder or beneficiary intention to take life of the policyholder) is minimal. It is less probable that policyholder will plan the "enrichment" of third persons at the expense of taking his own life. Also it is also less probable that the person nominated by the policyholder as a beneficiary would turn out to be potential "murderer." However such a risk cannot be excluded.

In the second case the risk of taking life of the insured is rather big. Respectively, the existence of insurance interest within strong family or economic union is very important.[53] Hence the existence of insurance interest is necessary for the reduction of moral risk, what constitutes grounds of bona fides behaviour.[54]

Bona fides behaviour is particularly important in life insurance, as in this case subject to protection against mala fides behaviour is human life.

The basis of insurable interest may vary. For example: "Close family ties or marriage will satisfy the insurable interest requirement in life insurance. For example, a husband can purchase a life insurance policy on his wife and be named as beneficiary. Likewise, a wife can insure her husband and be named as a beneficiary. A grandparent can purchase a life insurance policy on the life of a grandchild. However, remote gamily relationships will not support an insurable interest. For example cousins cannot insure each other unless a pecuniary relationship is present. In life insurance the existence of relationship by blood or marriage is not mandatory. If there is a pecuniary interest the insurable interest in life insurance cab ne met."[55]

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51 Commentary on Civil Code of Georgia, Article 819, 2016, 1, <www.gccc.ge>, [15.03.16.] (in Georgian).
52 *Iremashvili K.,* Irmashv Doctrine and Analysis of its Criticism, Law Journal №2, 2013, 60 (in Georgian).
53 *Iremashvili K.,* Irmashv Doctrine and Analysis of its Criticism, Law Journal №2, 2013, 60 (in Georgian).
54 *Rejda G.E.,* Principles of Risk Management and Insurance, 10th ed., United States of America, 2008, 178.
55 *Rejda G.E.,* Principles of Risk Management and Insurance, 10th ed., United States of America, 2008, 17.

In life insurance contract concluded in the form of a compulsory insurance, it does not depend on the consent of potential insured whether or not the insurance policy will be purposed for his/her life. Respectively, neither the insurer has the duty to request his/her consent. The law directly provides, that his/her life should be insured on a compulsory basis, who should be the insurer and who should be the beneficiary of insurance payment (after occurrence of an insured event). For example. according to Article 8 of the Law of Georgia on Compulsory Insurance of the Life and Health of a Member of Parliament, an insured risk is the death of a Member of Parliament, in which case the insurance amount is received by a legitimate heir of the Member of Parliament.[56]

Every law on compulsory insurance serves the purposes of protection of public interests. For example, social insurance, the so-called "SHI" is widely applied throughout the world. It was established in Germany more than one century ago - in 1883. It aimed at the protection of the society against diseases treatment of which could not have been afforded by population or, at best, the family would manage to get treatment at the expense of bankruptcy.[57]

Fundamental human rights and freedoms are guaranteed by the Constitution of Georgia. However certain circumstances cast doubt on the protection of the wealth guaranteed by the supreme law of the county - the Constitution of Georgia and other laws. Specifically, according to Part 1 of Article 37 of the Constitution of Georgia everyone has the right to enjoy health insurance as a means of accessible medical aid. However, for the execution of health insurance contract the requirement of the insurer should be met at pre-contractual phase and it should be informed about health status of the person. According to Paragraph "b" of Article 2 of the Law of Georgia on Personal Data this information constitutes personal data of special category. Hence "Granting insurer with the right to obtain personal data about the health of an individual and providing for the duty of an insured to inform, the legislator restricts general personal right. In the case of pre-contractual duty the case concerns one of the most important datum, which is naturally, and quite legitimately, regarded by the insured as a part of his/her intimate field. In this situation the insured is induced to chose between two types of wealth - to enter into insurance relationship and provide the insurer with personal data, or deny the issuance of personal data and, respectively, insurance relationships, as a result of what he/she will lose the right granted thereto by the Constitution."[58]

In accident insurance contract making of insurance payment may depend on wilful inflicting injury to health. According to Article 855 of the Civil Code of Georgia ia insurer's duty depends on wilful inflicting damage (injury) to health, then the absence of intent is presumed until the opposite is proved. Hence, in similar situations, insurer is entitled to demand the provision of valuable information about

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56 Law of Georgia on Compulsory Insurance of the Life and Health of a Member of Parliament, SSM, 30(37), 13/07/1999 (in Georgian).

57 *William Hsiao C., Paul Shaw R.,* Social Health Insurance for Developing Nations, Washington , 2007, 11-14.

58 *Motsonelidze N.,* Role of Contemporary Biomedicine in Insurance Law, Law Journal N2, 2013, 122 (in Georgian).

circumstances, that caused insured event. If accident insurance contract is concluded for the benefit of a third person, then the provisions regulating life insurance apply.

3.2. Consequences of Breach of Duty to Inform by Insurer According to Types of Insurance

If insurer does not properly request the provision of essential information from policyholder during the pre-contractual phase, it will not be able to refuse insurance payment upon compensation of loss in insurance on the basis of non-provision of material information or avoidance of notification. Also a contract cannot be terminated due to failure to notify circumstances, the insurer was aware from the very outset or policyholder cannot be blamed for non-notification of which. Insurer may enjoy the right to refuse the compensation of damages due to non-notification of information only to the extent that it requested information from policyholder and despite the foregoing the policyholder failed or avoided to provided material information or provided false data. After the occurrence of insured event, the insurer is not entitled to refuse policyholder from the compensation of damages if the circumstance with regard to which the duty to inform was breached, has not influenced the occurrence of insured event.

The existence of insurable interest is a necessary precondition for the conclusion of an insurance contract. "When discussing problems related to the application of insurable interest, the account should be taken of honesty of the insurer. It is possible for the insurer to be aware of the absence of insurable interest upon negotiation of the contract and/or improperly warn a policyholder about the importance thereof and then, after the occurrence of insured event, refuse the compensation of damages upon on the basis of the absence of insurable interest. The doctrine of insurable interest should not become an instrument for the insurer to gain unlawfully. Such application of the doctrine contradicts the idea of public order and protection of good faith contractual relationships from the very outset."[59]

It the insurer fails to warn the policyholder in the case of non-payment of insurance premium thereby and set a period for the payment of the premium, it will not be entitled to exercise the right to break the contract.[60]

The foregoing does not concern a lump-sum or the first insurance premium, because if a policyholder does not pay the first or lump-sum insurance premium, the insurer's obligations will not originate even if the contract is signed by both parties.[61]

In compulsory insurance, the insurer will not be able to enjoy the right to break contract if policyholder does not pay the insurance premium. Payment of the premiums should be claimed through judicial procedure. Non-payment of the premium will not exempt the insurer from the indemnification of occurred damages.

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59 Commentary on Civil Code of Georgia, Article 799, 2016, 18, <www.gccc.ge>, [14.03.16.] (in Georgian), Jerry/Richmond , Understanding Insurance Law, 2007, 311.

60 Official Electronic Law Library (ELL), <prg.supremecourt.ge>, Decision of the Supreme Court of Georgia on 21 February, 2013, Case №AS-85-81-2013 (in Georgian).

61 *Hodgin R.,* Text and Materials, 2nd ed., Great Britain, 2002, 121-122.

It is true, that the law does not say anything about potential consequences of failure to abide by the directions of the insurer to reduce or avoid loss in property insurance contract, but if the directions, given by the insurer to policyholder were not followed and there is a causal link between occurred consequence and non-abidance by the directions, the insurer will have the right to refuse the policyholder to compensate damages.[62] Respectively, if the insurer fails to give directions to policyholder to reduce loss, at the phase of compensation of damages it will not be able to complain about this issue and refuse the compensation of damages.

If upon insurance of the life of a third person the policyholder failed to perform the duty to inform irrespective of the warning of the insurer, the insurer will be entitled to refuse the execution of the contract. It would have been reasonable for the legislator to explicitly provide for insurer's obligation before the policyholder for the latter to request the consent of the third person and, failing that, to refuse the execution of the contract. (Article 845 of the Civil Code of Georgia deals with the case, when policyholder fails to abide by the duty to inform, but the contract is still executed).

If insurer fails to properly inform the policyholder about contract terms, the information to be provided by policyholder, the actions to be undertaken thereby both in voluntary and compulsory insurance relationships, this will be regarded as a mala fides behaviour on the part of the insurer and the latter will not be entitled to refuse a bona fides policyholder from the execution of the contract at pre-contractual phase due to non-performance of the above actions by policyholder, from compensation of damages during the insurance period and upon occurrence of an insured event or enjoy the right to break contract.

In compulsory insurance relationships "The state declares its will through the provisions of insurance law, how to conduct insurance activities and also determines the behaviour of the subject of legal relationship by these provisions. The state protects insurance relationships regulated by these provisions through guaranteeing the fulfilment of the provisions of insurance law."[63] Hence, in compulsory insurance contract a policyholder does not depend only on the bona fides of the insurer. If insurer acted untruthfully in the course of execution of a compulsory insurance contract and made representations to policyholder through obscure, veiled stipulations in a manner that the policyholder failed to understand that the execution of the contract would have worsened his position as compared with the one, prescribed by law, the policyholder is protected by law in this case. According to Part 2 of Article 6 of the Law of Georgia on Insurance, if s policyholder has not executed an insurance contract, or executed is under such terms and conditions, that deteriorate the standing of the insured as compared with the conditions, prescribed by law, the insurer is required to compensate damages to the insured in the case of occurrence of an insured event in amount, that the latter would have received in the case of existence of the insurance policy concerned. The policyholder is entitled to claim the insurance from the insurer through judicial proceedings.

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62 Commentary on Civil Code of Georgia, Article 830, 2016, 1-2, <www.gccc.ge>, [16.03.16.] (in Georgian).

63 *Ketsbaia E.,* Subject and Obsejct of Legal Relationship, Journal Justice and Law, №4(43)'14, 2014, 86 (in Georgian).

4. Specificities of the Performance of Policyholder's Duty to Inform According to Types of Insurance

A policyholder, who wants to buy an insurance policy from the insurer is required to provide the insurer with relevant representation. Naturally, unlike policyholder, the insurer cannot hold sufficient information about the object to be insured. This informational privilege[64] in legal literature is called "informational asymmetry"[65]. The policyholder is required to provide inform to the insurer before the execution of the insurance contract (during pre-contractual relationships) and at every stage of its operation. The performance of this duty is directly related to the exercise of legal rights.

In compulsory insurance contract the concurrent desire of a policyholder and an insurer to enter into contract does not constitute grounds for the execution of a contract. On the contrary, irrespective of policyholder's desire, he/she is required to enter into insurance relationship with the insurer pursuant to the provisions of special law. And failure to perform the duties, prescribe by law, is subject to relevant sanctions.

"For the interpretation of an insurance contract, it is important to take account of the legal status of the policyholder. In this respect insurance practice differentiated between commercial insurance contracts and adhesion contracts. Owing to difference in legal nature they are subject to different types of legal regulation. It is not reasonable for a judge to apply the same approach in two different cases, when: in the one case the policyholder is an economic unit and in the other - an "inexperienced" consumer. In the first case the contract terms are negotiated between the parties in details, while mainly the standard contracts are applied with regard to non-legal entity policyholders, correct understanding of the content of which terms is often problematic for a consumer. Hence, it will not be reasonable to consider a non-legal entity policyholder as an informed counterparty, capable of protection of his/her own interests. Sometimes such unequal position of counterparties has impact on the determination of burden of proof, causal link and other important circumstances."[66]

4.1. Correlation between the Means of Performance of the Duty to Inform by Policyholder in Voluntary and Compulsory Insurance

"Everyone, who is willing to enter into insurance contract, is required to inform the insurer in advance about circumstances, which are related to insurable risk.

In the world of law the above duties are called pre-contractual duties and they are accorded particular attention just in insurance law. Pro-contractual duties are the rules set by contract or law with

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64 Commentary on Civil Code of Georgia, Article 808, 2016, 2, <www.gccc.ge>, [15.03.16.] (in Georgian).

65 *Loshin J.,* Insurance Law's Hapless Busybody: A Case Against the Irmashv Requirement, The Yale Law Journal, 2007, 294.

66 *Squires*, Recent Development: Autopsy of a Plain English Insurance Contract: Can Plain English Survive Proximate Cause? 1984, 6. Commentary on Civil Code of Georgia, Article 799, 2016, 13, <www.gccc.ge>, [14.03.16.] (in Georgian).

regard to a parties to a contract, which rules create the precondition for the origin of a subjective, i.e. real right. And real right means the right to claim insurance payment upon occurrence of an insured event."[67]

"Insurance is based on mutual trust of the parties and goof faith. Due to this very reasons, according to foreign legislation, a policy holder is required to voluntarily notify all those material circumstances to the insurer, which may influence the terms and conditions of the contract executed between them. Quite often the representations, made by policyholder determine the basic terms of the contract and even the fate of execution of this contract."[68] The information can be provided not only about the counterparties, but also the third person, who is not an equal party to this contractual relationship, but rather a beneficiary (contract made for the benefit of a third party). [69]

As per Part 1 of Article 808 of the Civil Code of Georgia a policyholder is required to inform the insurer about all known to him/her circumstances of essential importance for the occurrence of hazard or an event, covered by insurance. "Representations are statements made by the applicant for insurance. For example, if you apply for life insurance, you may be asked questions concerning your age, weight, height, occupation, state of health, family history, and other relevant questions."[70]

A person, who hides or misrepresents facts - lies - with the intent to negotiate a contract, is acting against the principle of good faith. The insurer relies on data provided thereby.[71] Hence, "If the insurer knew the true facts, the policy would not have been issued, or it would have been issued on different terms. False means that the statement is not true or is misleading. Reliance means that the insurer relies on the misrepresentation in issuing the policy at a specified premium.[72]

The factual circumstances existing for the moment of execution of a contract may change, as events are developing dynamically. However, "Part 1 of Article 813 of the Civil Code of Georgia obliges a policyholder to immediately inform the insurance company about increased risk of occurrence of insured event only when this will have material influence on the execution of insurance contract. Hence, the following situation should be taken into account in every single case - would the insurance company have executed contract had the later increased hazard existed from the very outset."[73]

Policyholder is required to immediately notify the insurer of occurrence of an insured event.

In compulsory insurance it does not matter whether or not the insurer is notified, the object envisaged by law will still be on the list of persons, subject to insurance, and the policyholder will automatically become liable to pay insurance premium. However, a good faith policyholder should be responsive to the interests of the insurer in compulsory insurance as well, cooperate with the latter and duly inform it.

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67 *Motsonelidze N.,* Role of Contemporary Biomedicine in Insurance Law, Law Journal №2,2013, 120 (in Georgian).

68 *Tsiskadze M.,* Legal Regulation of Voluntary Insurance, Meridiani Publishing House, 2001, 28 (in Georgian).

69 *Martin A., Hurley P.,* Introduction to the Law of Contracts, 4th ed., USA 2008, 521 .

70 *Rejda G.E.,* Principles of Risk Management and Insurance, 10th ed., United States of America, 2008, 181.

71 *Emmett j., Vaughan T.*, Fundamentals of Risk and Insurance, 10th ed., 2007, 176.

72 *Rejda G.E.,* Principles of Risk Management and Insurance, 10th ed., United States of America, 2008, 181.

73 *Tsiskadze M.,* Legal Regulation of Voluntary Insurance, Meridiani Publishing House, 2001, 31 (in Georgian).

In the case of double insurance in voluntary insurance contract policyholder is required to notify the insurer that policyholder has insured one and the same interest with two different insurers. "Article 827 III of the Civil Code of Georgia contains more elaborated stipulation. For instance, a dwelling house was damaged as a result of fire. Two insurers took provided for two different risk-factors in their policies - death of fire-fighting system and death of power system. In this case, despite the fact that insured is one and the same interest, the loss will not be covered by both insurers due to existence of different terms and conditions in the policy. The insurer, responsible for loss will be determined on the basis of establishment whether the realization of which risk-factor caused fire. If in the above example the probability of occurrence of one and the same event would have been identified as a risk-factor, the loss would have fallen within the scope of insurance coverage of both insurers. In this very case the necessity of prevention of unjust enrichment - prescribed by Article 827 III - arises."[74]

One and the same insurable interest can be covered by both voluntary and compulsory insurance, but in this case as well the regulation envisaged by Part 3 of Article 827 should be taken into account. Specifically, the policyholder should not receive indemnification, that is more, than suffered damage.[75]

The policyholder also has the duty to inform the insurer in the case of alienation of insured property. This duty should be accounted for together with Article 813 of the Civil Code of Georgia (Duty to inform insurer about increased hazard). "The principle of good faith obliges the alienator to be responsive to purchaser's interest in insurance contract and not to obstruct the performance of insurer's duty to compensate damages to his."[76] Alienation of property may result in the cancellation of insurance contract if the insurer and the new purchaser lack the desire to continue insurance relationship.

In the case of compulsory insurance, insurance contract is not terminated as a result of alienation of property. The new purchaser automatically acquires the duty to get involved in insurance relationship and pay insurance premium.

If life insurance contract or voluntary accident insurance contract is executed for the benefit of some other person, the policyholder is required to provide the insurer with a written consent of the person concerned or a representative thereof. In compulsory insurance relationships policyholder is required to insure the person, falling within the scope of application of special law, irrespective of his/her consent.

4.2. Correlation Between Legal Consequences of the Breach of Duty to Inform by Policyholder According Types of Insurance

An insurer may denounce the contract if policyholder failed to provide material information, or wilfully avoided the notification of essential circumstances or concealed them. If the policyholder had to answer a written question about the hazard, the insurer is entitled to break contract due to failure to

74 Commentary on Civil Code of Georgia, Article 827, 2016, 2, <www.gccc.ge>, [16.03.16.].
75 Ibid, Article 801, 2016, 2, <www.gccc.ge>.
76 Ibid, Article 834, 2016, 1-2, <www.gccc.ge>, [16.03.16.] (in Georgian).

notify circumstances about which the policyholder intentionally withheld information, even though no questions were asked about them. A contract cannot be terminated if the insurer was aware of concealed circumstances or the policyholder is not faulty of non-notification. "To deny a claim based on concealment, an insurer must prove two things: 1. the concealed fact was known by the insured to be material and 2. the insured intended to defraud the insurer. For example, Joseph DeBellis applied for a life insurance policy on his life. Five months after the policy was issued, he was murdered. The death certificate named the deceased as Josep3 DeLuca, his true name. The insurer denied payment on the grounds that Joseph had concealed a material fact by not revealing his true identity and that he had an extensive criminal record. In finding for the insurer, the court held that intentional concealment of his true identity was material and breached the obligation of good faith".[77]

Hence , "the insurance contract is voidable if the representation is 1.material, 2. false and 3. relied on by the insurer."[78] Worth mentioning with this regard is US judicial practice. "Auto insurer denied coverage Because of material misrepresentation. Legal facts - The insured misrepresented that she had no traffic violation convictions in the prior three-year period. After an accident, a check of her record revealed that she had two seeping tickets in that period. The insured denied coverage.

Court decision - State law regarding the voiding of insurance required that the misrepresentation must be material and made with the intent to deceive. The insured claimed that she had forgotten about the two tickets, and therefore had no intent to deceive. The court ruled that it is unlikely she would forget both events. Decision is for the insurer."[79] Hence for some behaviour of a person to be regarded as mala fides, he/she should be aware from the very outset, that the representation made thereby is not correct or he/she is concealing the actual data. Furthermore, the case should concern the issue, the latter was to take care of and the fact of breach of this duty thereby should be evident.[80]

Despite mala fides behaviour, the insurance law still protects a policyholder and refers to causal link between suffered loss and non-provision of information. In the case of absence of such causal link the insurer must cover the loss and then enjoy the tight to terminate contract.

If the interests of the insurer were not materially breached as a result of non-notification of occurrence of insured event, the insurer is not exempted from the duty to cover the loss.

Non-representation or misrepresentation in compulsory insurance contract may not entail the same consequences as in voluntary insurance contract as compulsory insurance contract is focused on the protection of public interest.[81] Hence, after the assessment of an insured event the insurer should make a decision on coverage or denial the coverage of loss with due consideration of public interests. Its decision should be focused on the creation of stable civil environment.[82] For example: According to the

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77 *Rejda G.E.,* Principles of Risk Management and Insurance, 10th ed., United States of America, 2008, 182-183.

78 Ibid, 181.

79 Ibid, 182.

80 *Cook J.,* Law of Tort, 5th ed., Great Britain, 2001, 23.

81 Commentary on Civil Code of Georgia, Article 801, 2016, 2, <www.gccc.ge>, [15.03.16.] (in Georgian).

82 Official Electronic Source, <http://www.constcourt.ge>, First Chamber of the Supreme Court of Georiga, Decision №1/2/106, Tbilisi, 31 October, 2001 (in Georgian).

Law of Georgia on Third Party Liability of the Motor Vehicles Owners an owner of a motor-vehicle - any person, who owned a motor-vehicle or was lawfully disposing it, was required to buy third party liability insurance policy in accordance within this law.[83] If after purchasing third party liability insurance policy and occurrence of an insured event it would have turned out that policyholder was not lawfully disposing the car (the car was stolen), the insurer would have been entitled to deny the coverage as the person, who bought third party liability insurance policy, was using dishonestly acquired property. The making of insurance payments should not have served as an incentive for mala fides persons, what would have been detrimental for general public. But if a person misrepresented the year of manufacturing the car, but used the car in good faith and after the occurrence of an insured event it is revealed, that according to representations of the policyholder the car was manufactured in 2002 while actually it was manufactured in 1999 (in the case of technical damage and car accident an old car bears higher risk that the relatively new one) and human health was injured as a result of this car accident, the insurer should make a decision for the benefit of the victim despite the fact, that policyholder misrepresented to the insurer, because in this case of prior importance is the protection of public interests than the punishment of a mala fides policyholder - denial of coverage.

Legislator provided for voidance of double insurance as a protection against unlawful profiting. If a policyholder purchased double insurance policy with an intent to profit unlawfully, each agreement concluded to this end will be regarded null and void. Such a contract violates the principle of good faith from the very outset. The purpose of its conclusion is mala fides and any contract executed against the principle of good faith is void. Unlike this Article, the content of Article 826 of the Civil Code of Georgia is ambiguous. Under this Article an insurer is not require to pay more to the policyholder than the amount of loss even when the insurance payment exceeds the insurance value for the moment of occurrence of an insured event. The phrase "is not obliged" is worded in such a manner that is allows the insurer to pay more money to the policyholder than the amount of suffered loss. The purpose of employment of the principle of indemnity principle is to prevent the mala fides behaviour and to exercise the principle of good faith.[84] "Historically, the purpose of insurance has been set to be the restitution of *status quo* after the occurrence of loss".[85] To pay more than actual amount of loss is contrary to the principle of indemnity. It also contradicts the principle of insurable interest. Insurance contract should be based on the doctrine of insurable interest as it serves the purpose of reducing moral hazard. Respectively, it reduces the risk of mala fides behaviour. If insurance payment exceeds insurable interest of a dishonest person, he may cause loss intentionally.[86] Hence, it should be stated in Article 826 of the Civil Code of Georgia, that insurer should pay no more that the actual amount of loss even if the insurance payment exceeds the insurance value for the moment of occurrence of an insured event.

In compulsory insurance contract the above regulations apply to compulsory property insurance as well if this is not contrary to special law on compulsory insurance.

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83 Law of Georgia on Third Party Liability of the Owners of Motor Vehicles. Parliamentis Ustkebebi (Parliamentary Reports), 33, [3107.1997] (in Georgian).

84 *Rejda G.E.,* Principles of Risk Management and Insurance, 10th ed., United States of America, 2008, 175.

85 *Iremashvili K.,* Irmashv Doctrine and Analysis of its Criticism, Law Journal №2, 2013, 57 (in Georgian).

86 *Rejda G.E.,* Principles of Risk Management and Insurance, 10th ed., United States of America, 2008, 178.

In voluntary insurance contract the obligations of the parties originate on the basis of mutual promises.[87] Despite the foregoing, upon interpretation of dubious texts developed by insurer the policyholder is less protected than in the case of compulsory insurance. According to Paragraph 5 of Article 5 of the Law of Georgia on Insurance, in compulsory insurance the insurer is required to enter into contract with the policyholder under certain terms and conditions.

In life insurance or accident insurance contract, made for the benefit of a third person, on the case of failure of the policyholder to provide the insurer with a consent of the third person concerned or a representative thereof, the insurer may denounce the contract if the duty to inform was not abided by intentionally.

5.Conclusion

The milestone of insurance contract is the abidance by the principle of good faith both in voluntary and compulsory insurance during pre-contractual,[88] as well as contract validity period.

Due fulfilment of the duty to inform both by the insurer and the policyholder is one the instruments for the exercise of the principle of good faith, grounds for origin of "real right"[89].

The failure to provide information of due quality and in relevant format in insurance relationship between the parties is considered as a mala fides behaviour that will deprive one party of and equip the other party with grounds for the application a substantive law remedy. In the case exercise of the principle of good faith the account should firstly be take of the purposes of relevant insurance contract - the policyholder should correctly manage financial loss through insurance,[90] the interest of wide circle of people should be accounted for to maximum practicable extent as the main goal of a compulsory insurance contract is the protection of public interests,[91] promotion of stable and regulated civic relationship.[92] In insurance relationships a bona fides insurer should be focused on the protection of public interest[93] and should not constantly appeal to unjustified grounds to deny the coverage of loss. Insurance contract should enable a bona fides insurer to correctly manage financial loss through

87 *Kuniz C.L., Chomsky C.L.,* Interactive Case Book Series Contracts , A Contemporary Approach, West's Law School Advisory Board, USA, 2010, 14.

88 Acquis Group, Pre-Contractual Obligations, Conclusion of Contract, Unfair Terms, Germany, Munchen, 2007, 62.

89 *Motsonelidze N.,* Role of Contemporary Biomedicine in Insurance Law, Law Journal №2, 2013, 120 (in Georgian).

90 *Thorburn C.,* On the Measurement of Solvency of Insurers, Resent Developments that will Alter Methods Adopted in Emerging Markets, The World Bank, Washington, 2004 February, 2.

91 Commentary on Civil Code of Georgia, Article 801, 2016, 2, <www.gccc.ge>, [15.03.16.].

92 Official Electronic Source, <http://www.constcourt.ge>, First Chamber of the Supreme Court of Georiga, Decision №1/2/106, Tbilisi, 31 October, 2001 (in Georgian).

93 Commentary on Civil Code of Georgia, Article 801, 2016, 2, <www.gccc.ge>, [15.03.16.] (in Georgian).

insurance.[94] Bona fides attitude of insurers towards policyholders will increase trust in insurance companies, what ultimately will successfully develop the insurance market.

Legislator's right - to provide for different form Civil Code regulation in a special law of insurance - is not limitless. It is important for relevant normative act not to contradict the principle of good faith.

Although the Civil Code of Georgia does not speak about the principle of good faith in its insurance part, owing to is content and specific features the exercise of the right to insure and, in general, the future of insurance contract, depends on abidance by the principle of good faith. And to abide by the principle of good faith the parties should make appropriate representations.

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9. 15.*Tsiskadze M.,* Legal Regulation of Voluntary Insurance, Meridiani Publishing House, 2001, 28, 31 (in Georgian).
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Levan Zhorzholiani*

Advantages of Resolution of Civil Disputes through Judicial Mediation over Litigation

Dispute resolution of civil cases is compelling matter as for society as legal scholars and judiciary. Existing conditions and statistics analysis reveals that commonly the judges of Tbilisi City Court consider more than thousand cases. Every doubt which is connected to quality of the decisions taken by trial jurisdiction in legit. Accordingly, this paper represents the opinion that the reasonable mean to solve the abovementioned problem is to pass the disputes to the judicial mediation, which includes, shares the most of the advantages and disadvantages of mediation, including its own specifications. The Paper characterizes the institutional parts of mediation and it is compared to the provisions of Civil Procedural Code of Georgia, regulating the terms, expenses and other issues. The object of the paper is launching scholarly dispute about how the resolution of civil disputes through judicial mediation is preferential and what are the disadvantages of current judicial system. Also, the target of the article is to represent the judicial mediation as one of the best ways for the parties to resolve a dispute, maintain relations or terminated it a civilized manner with lesser costs, in a comfortable, informal environment, by their own efforts, quickly, excluding publicity, avoiding the creation of judicial precedents, judicial approval of mediated agreement.

Key words: *Mediation, judicial mediation, court, confidentiality, expenses, time, informality, Code, legal, mediator, agreement.*

1. Introduction

This paper investigates the advantages of resolution of civil disputes through judicial mediationover litigation. The paper aims at demonstration of institutional advantages and disadvantages of mediation, their examination in the light of court-based (court-sponsored) mediation, launching scholarly dispute about the above issues and identification of the problem: resolution of civil disputes through judicial mediationwithin Georgian judicial system;mediation as annex to justice; presence of institutional signs of classic mediation in judicial mediation process; specific aspects of judicial mediation is dispute resolution.

The efficiency of justice in the field of civil law cannot be improved without the introduction of new methods and implementation of respective projects. It should be admitted, that without judiciary the application of mediation and alternative dispute resolution (ADR)is doomed to be unsuccessful. The essence, meaning and purpose of respective forms and should first be well-comprehended by the corpse of judges, for them to ensure the awareness of the parties and promotion of mediation.[1]

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1 *Tsertsvadze G.*, Mediation, "Meridiani", Tbilisi, 2010, 216.

Court-based ADR is often called *Court-ordered.*[2]This demonstrates the essential distinctive feature of judicial mediation. Judicial mediation became an integral part of judicial proceedings and thus acquired certain public-law shading; however, in the event of mediation the court is not entitled to compel the parties to agree to some condition. Hence mediation still remains to be mediation, however in this case public administration supports mediation in the person of judiciary.[3]

The part of Association Agenda between the European Union and Georgia concerning the reformation of judiciary directly provides for the development of ADR mechanisms, and mediation amongst them.[4] Respectively, encouragement of mediation and its forms is not only a necessity, but also the international commitment of the country subject to fulfillment within specified timelines.

The Tbilisi City Court has been implementing the pilot mediation program since 2014[5] under the participation of 16mediators.[6]

The problem investigated in this paper may be compelling for practicing or theoretician lawyer, also for any person whose area of interests covers: ADR mechanisms, advantages and disadvantages of mediation, disadvantages of dispute resolution judicially. The discussed issues may be relevant for any citizen interested in judicial reform and administration, who wants for the court to guarantee the interest in expedient and efficientjustice.

The paper is based on the method of comparative, critical and historical analysis.The article containsstatistic data. The paper will be summarizedby the conclusion, that judicial mediation is one of the best ways for the parties to resolve their dispute with less expense, in a comfortable, informal environment, with their own efforts, quickly, excluding publicity, avoiding the creation of judicial precedent, by approving of their agreement by court, maintaining relationship or terminating it in a civilized manner.

2. Advantages and Disadvantages of Mediation

2.1. General Overview

The use of mediation is appropriate in so many different and varied contexts; attempting to describe all of them would be nearly impossible. At one time there were certain types of experts who stated that there were some disputes which are inappropriate for mediation. Over the last several years, however, mediation has been used effectively in nearly all types of cases and matters. This widespread acceptance of mediation is due in large part to the numerous advantages of the process. As information

2 *Berger K.P.,* Private Dispute Resolution in International Business, Negotiation, Mediation, Arbitration, Vol. 1, Case Study, Kluwer Law International, Alphen aan den Rijn, 2006, 161 in: *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 165.

3 *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 165.

4 Association Agenda between the European Union and Georgia, Judiciary, 2014, 5.

5 <http://tcc.gov.ge/index.php?m=587>.

6 <http://tcc.gov.ge/index.php?m=586>.

about mediation is disseminated and the general public becomes more familiar with the process, knowledge of fundamental advantages can be beneficial to expanded use.[7]

The advantages ofmediation, first of all, imply the high probability to come to an agreement, relatively lesser expenses as compared with arbitration and judicial proceedings, ability to act quickly, confidentiality, specialization of mediators in specific fields, promoting the resolution of a dispute amicably, possibility for the results to be controlled by the parties, etc.[8]Mediation may prove useful even before the origin of a dispute. When both parties understand that the situation tends to be complicated, they mayfind the reasons of complications together through the initiation of mediation and undertake joint efforts to remove these reasons. Such an approach fully excludes the origin of a dispute.[9]Mediation is an annex of justice and not its alternative, it can only promote the settlement of disputes, but cannot take a full lead on it.[10] It is noteworthy, that mediation is regarded as time and money saving mechanism not only for the parties, by for the rule-of-law state as well,[11] which is induced to allocated rather large resources for long proceedings to settle a dispute.[12] Not all the disputes can be resolved through mediation. ADR is not a panacea and universal mechanism for the solution of all types of conflicts. Based on the foregoing it is logical to ask, whether what kind of disputes can be "subject" to mediation and in which cases the application of this mechanism of dispute resolution may turn successful. As stated in the doctrine, three main characteristics can be identified: a) the dispute between disputing parties is not yet finally resolved; b) In principle, the parties are ready and well aware that they can better resolve the problems by themselves; 3) For the moment, the parties are not able to fully restore the communication without assistance of a third party. Overall, none of the parties should be willing to maintain the conflict. Then it comes to the situation, when they want to settle the dispute amicable, but are not able to do so independently due to some reasons.[13]

In order to have a fully picture, it will be reasonable to speak about the disadvantages of mediation as well.

There is an opinion in German legal literature, that mediation process is not so cheap as it is often stated. For instance, in principle, it is not cheaper than arbitration proceedings.[14]

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7 *Kovach K.K.*, Mediation in a Nutshell, Thomson West, University of Texas, 2003, 34.

8 *Schiffer K.J. (Hrsg).,* MandatspraxisSciedsverfahrenunda Mediation 2. Neubearbeitete und erweiterte Auflage, "Carl Heymann," Koln, Berlin, Munchen, 2005, 257-262 in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 54.

9 *Guillemin J.F.*, Reasons for Choosing Alternative Dispute Resolution, in *Goldsmith J.C., Ingen-Housz A., Pointon G.H.(eds.),* ADR in Business, Practice and Issues across Countries and Cultures, "Kluwer Law International", New-York, 2006, 37, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 54.

10 *Von Schlieffen K.,* Perspektiven der Mediation, in *Haft F., von Schlieffen K.*(Hrsg), Handbuch Mediation, 2. Auflage, "Beck", Munchen, 2009, 209, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 56.

11 *Falk G., Koren G., Gernot., Zivisrechts-Mediations-Gesetz., Kommentar., zum Zivmediat G.,* "Osterreich", Wien, 2005, s.35 in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 55.

12 *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 55.

13 *Ferz S.,Lison A., WolfartE.M. (Hrsg),* Zivilgerichte und Mediation, Widerspruch, Erganzung, Symbiose? "WUV Universitatsverlad, Wien, 2004, 182, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 57.

14 *Alexander M.,* Gerisctsstand und Schiedsvereinbarungenim E-Commerce sowie aussergerichtliche Streitbeileging "Dr. Kovac," Hamburg, 2006, 9-10, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 58.

The major disadvantage of mediation is its limited scope of coverage and lack of public awareness. As skeptics would say, the number of mediators is greater for now than the cases of mediation itself.[15] This opinion definitely has the right to exist in Georgian reality. As private associations of mediators do not maintain the database of reviewed cases, we should rely on statistic data retrieved from the Tbilisi City Court[16], which reinforces the presumption of skeptics. According to data of the Civil Chamber of the Tbilisi City Court, total 53 disputes were reviewed by mediators with the framework of judicial mediation and 17 disputes ended up with an agreement. Although 16 acting mediators are working at the Tbilisi City Court,[17] according to official data of the official web page of the court, it is evident that they are not "loaded with cases".

2.2 Time and Expenses in Mediation Process

The legal system can be an appropriate and effective method of dispute resolution, but it is also time and cost consuming. This focus, the cost and delay of litigation, has stimulated court reform, at least in civil cases. In most instances, mediation may provide a more timely resolution. Because mediation is informal and flexible, strict procedures which draw out litigation matters are avoided. Where time is of the essence, particularly in cases where a lawsuit has not been filed, a mediation court take place in a matter of days or even hours. In most instances, a speedy resolution also results in a monetary savings. Parties save the expense for extensive litigation, including costs for experts, depositions, and attorneys' fees. By reaching a prompt resolution, much of the emotional drain from engagement in continual conflict is also avoided.[18]It should be mentioned that there are arguments against the above opinion. There is an opinion in German legal literature, that mediation is not as cheap as it is often said to be. For instance, in principle it is not cheaper than arbitration proceedings.[19]Discernible cost benefits for parties may vary wildly of course depending on context. Mediation fees may deviated hugely from in-court services provided on a *gratis* basis to the extravagant hourly rates charged at the higher echelons of the commercial market. Add to such outlays, the costs of attendance and preparation of lawyers (perhaps including Counsel) and potentially, the fees of other experts. Mediation thus does not always represent a cheap option for disputing parties. One particular difficulty in proving the cost-effectiveness of mediation in many contexts is the issue of what to compare the costs of mediation to. While it may be tempting to compare costs in mediation to parties' potential costs at trial, very often in the course of on-going litigation cases will settle anyway absent mediation. When parties mediate, it may be very difficult

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15 *Einfuhrung G., Reinhard U., H.*(*Hrsg.),* Die Zukunft der Mediation in Deutschland, “Beck” Munchen, 2008, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 59.

16 Tbilisi City Court Letter №1-180, 22.12.2016.

17 <http://tcc.gov.ge/index.php?m=586>.

18 *Kovach K.K.,* Mediation in a Nutshell, Thomson West, University of Texas, 2003, 35.

19 *Alexander M.,* Gerisctsstand und Schiedsvereinbarungenim E-Commerce sowie aussergerichtliche Streitbeileging “Dr. Kovac,” Hamburg, 2006, 9-10, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 58.

to ascertain at what point such settlement might taken place. Nevertheless, evidence that mediation generally leads to earlier settlement than non-mediation settlement suggests that costs saving may occur as a result.[20]

2.3 Mediation as a Controlled Process

The dispute resolution mechanisms can be decided into two groups: formal and informal. The formal ways include the court and arbitrage and informal - negotiation, mediation, avoidance, etc.[21]When parties participate in an adjudicative procedure such as trial, arbitration, or administrative hearing, a third party takes the decision for them. A ruling is issued with which they must comply. In mediation, on the other hand, the parties are the final decision makers, which is a core feature of mediation including whether they wish to ultimately resolve the matter, as well as the terms of any resolution. This is part of the empowerment ethic inherent in mediation, and it is emphasized in several applications of the process. Because off personal involvement in the process and the resolution, the parties possess a psychological ownership, making it more likely that they will comply with any agreement reached. Most definitions of mediation carefully state that the mediator should not substitute his judgment for that of the parties. Mediator standards, such as ethics, want against coercion from the mediator and emphasize the need and importance of party self-determination.[22]

When individuals engage in conflict, whether it be personal or professional, frequently strong emotions and feelings surface. Legal proceedings do not focus on emotion, but instead look at most conflicts through the prism of relevance, admissibility and procedure. Mediation, however values the expression, understanding and release of emotions. Mediation also values basic human expressions, such as an apology or act of forgiveness.[23]

2.4 Informal Nature of the Process

Mediation, by design, is flexible. Relatively few rules guide the actions of the mediator with regard to how the process might unfold. As such, mediation is a more informal process. In mediation, parties are encouraged to discuss any issue and to express themselves freely. Few rules direct the specific conduct of the mediator, particularly with regard to tasks, responsibilities and actions.[24]

Unlike judicial and arbitration proceedings mediation has no general or mandatory rules or procedures. Some mediators ask the parties to present short written description of their positions about

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20 Wissler R (2204b) "Barriers to attorneys' discussions and use of ADR". Ohio State J Dispute Resolut. 19:459-508 in *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 59.

21 *Chaladze G.,* Training and Lecture Course: Alternative Resolution of Disputes and Conflicts, Ivane Javakhishvili Tbilisi State University, 2012-2013 Academic Year.

22 *Kovach K.K.*, Mediation in a Nutshell, Thomson West, University of Texas, 2003, 36-37.

23 Ibid, 37.

24 Ibid, 39.

the subject matter of the dispute, some are against the foregoing and are of the opinion, that it is not necessary to know about the positions of the parties about the subject matter of the dispute in advance, as the creativity of the mediator is restricted in this case.[25] It should not be presumed that informal nature of various ADR mechanisms mean that they operate without any rules.[26]Mediation is an informal medium of dispute resolution. Hence there is no uniform, strictly defined procedure, according to which the mediation should be conducted, nut this does not mean that mediation does not consist of certain stages and it is only a chaotic process, when mediator tries to resolve a dispute between the parties based on just his/her own impartiality and authority.[27]The mediation is divided into stages. Division of mediation in stages (phases) and raising awareness of the parties thereof increases the efficiency of this process.[28] Mediation should follow this scheme; however, it will be irrational to strictly abide by it. For instance, if some new information becomes available with regard to dispute, a mediator should not refuse the familiarization with its details and their discussion with the parties just because the "information phase"has already been passed and it is not correct to hear the new information upon presenting arguments. Such exaggerated "procedure-law" approach will only be detrimental for the proceedings. A party, who knows that he can say everything, whatever he/she wants to say and that mediation is his/her process and not that of the mediator, it will be impossible to explain, why he/she should abide by the theory of phases and stages, when he/she believes, that information is important for the clarification of the essence of the conflict.[29]

One of the advantages of the process is the option of the parties to avoid court judgmentin certain disputes, and respectively, the creation of a precedent for a similar case.

In some cases, lawsuits are brought to change the law or right a wrong. In those types of lawsuits, it is essential that the court make a ruling and set a precedent. In the majority of lawsuits, however, precedent is not the primary focus. As a resultmediation is often appropriate. In fact, parties may desire to settle a particular dispute in order to avoid setting what may be a negative precedent. The desire for precedent should not be confused with a "matter of principle."A party may be involved in a conflict because his or her specific principles are involved. A mediator may deal effectively with those personal principles, which are different than a desire to change a body of law or public policy.[30]

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25 *Berger K.P.,* Private Dispute Resolution in International Business, Negotiation, Mediation, Arbitration, Vol. 2, Case Study, Kluwer Law International, Alphen aan den Rijn, 2006, 145, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 334-335.

26 *Jarrosson Ch.,* Legal Issues Raised by ADR, in *Goldsmith J.C./Ingen-Housz., Arnold,/,Pointon., Gerald H. (eds.),* ADR in Business, Practice and Issues across Countries and Cultures, Kluwer Law International, New-York, 2006, 111, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 335.

27 *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 336.

28 *Berger K.P.,* Private Dispute Resolution in International Business, Negotiation, Mediation, Arbitration, Vol. 2, Case Study, Kluwer Law International, Alphen aan den Rijn, 2006, 161, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 337.

29 Ibid, 339.

30 *Kovach K.K.,* Mediation in a Nutshell, Thomson West, University of Texas, 2003, 40.

2.5 Confidentiality Principle in Mediation Process

Confidentiality is the essential and one of the most crucial principles of mediation,[31]that's why it should be discussed separately. The obligation of a mediator to keep silent about mediation stems from contractual relations existing between the parties and the mediators. This obligation will seize to exist only if both parties exempt a mediator from this obligation. Such exemption does not require some special form and can be accomplished through an implicative action.[32]

Over the last twenty-five years, a basic assumption of mediation practice has been that everything occurring within the mediation room was absolutely confidential. In most instances, mediators and participants both viewed the entire proceedings as one cloaked in secrecy. Yet, as experience with the process has expanded, and in particular, as mediation has merged with the litigation system a number of difficult issues relating to confidentiality have surfaced. Some of the more critical matters concern the duty to disclose and the court's need for evidence or additional information.[33]

When opting for mediationthe parties rely on confidentiality and participate in this process only because that disclosed facts will not become public. It is not the victory that is of particular focus here - a party may win a court,however the disclosure of the fact that some individual or company had dealings with the court, participated in a dispute, may "dishonor" him. Disclosure of some information may become particularly detrimental for a well-know or growth company.[34]

When confidentiality is guaranteed, the parties and the attorneys are more willing to discuss all the matters and propose alternatives. Confidentiality is the privilege to waiver the disclosure of a fact and is created for the "maintenance of the purity" of the relations, which is based on trust and requires protection.[35]

Disclosure of important matters and personal interests is more acceptable for the parties to a mediation process when they trust the mediator. The foregoing is conditioned by the nature of the dispute. The parties to mediation process may not trust each other and may not be willing to disclose some information. The only way to create confidence in mediation and convenient environment for the parties is to assure them of the confidentiality of the mediation process. In the course of mediation a mediator holds negotiations as an independent, impartial third person. As a generally, confidentiality protects the parties to mediation process, however the principle of confidentiality protects the mediator

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31 *Sanders P.,* The Work of UNCITRAL on Arbitration and Conciliation, 2nd d and expanded ed., Kluwer Law International, The Hague, 2004, 220, *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 48.

32 *Hiber M.,* Die sicherung der Vertraurlichkeit des Medationsverfahrens, "Dr. Kovac." Hamburg. 2006, 193, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 48.

33 *Kovach K.K.,* „Mediation in a Nutshell", Thomson West, University of Texas, 2003, 173.

34 *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 25.

35 *Kimberlee K.K.,* Mediation Principles and Practice, 3rd ed., "Thompson West", 2004, 263-264. In *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 24.

as well. The mediators work not for obstructing parties from coming to an agreement, but rather to assist them in that. Most of the mediators do not want during the court to examine their impartiality, and thus, they support the principle of confidentiality and impartiality (and to a certain extent they are obliged to do so).[36]

There are different types of confidentiality: a) Prejudice Privilege - in Anglo-American law the court of law guarantees the right of the parties to waiver various mechanisms of dispute resolution and to opt for mediation. It is necessary to guarantee confidentiality both when referring to mediation and after its successful or unsuccessful accomplishment; b) Legal Professional Privilege - means the protection of confidentiality stemming from the relationship between an attorney and a client; c) Statutory Confidentiality - is established by the Parliament and protects both "private" and "public" (court-supported) mediation; and finally d) Contractual Confidentiality - the content and scope of which can be determined by an agreement executed between the mediators and the parties.[37]

Most of the practitioners agree that confidentiality is one of the essential and important principles for mediation process. As defined by Uniform Mediation Act (UMA)this frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.[38]

The Georgian law contains stipulations regarding the protection of confidentiality. For instance, as per Parts 1 and 2 of Article $187^{8}$of the Code of Civil Procedure of Georgia (CCPG) the process of judicial mediation is confidential. A mediator is not entitled to disclose the information that became known to him/her when discharging the duties of a mediator, unless otherwise prescribed by the agreement of the parties. A party (representative) is not entitled to disclose the information that became known to him/her in the course of mediation on confidentiality condition, unless otherwise prescribed by the agreement of the parties.[39] According to Paragraph 9 of Article $48^{1}$of the Organic Law of Georgia - Labor Code, a dispute mediator is required not to disclose the information or document, that became known to him/her.[40] The principle of mediation confidentiality is further guaranteed by Paragraph "d" of Article 141 of the Code of Civil Procedure of Georgia, according to which Paragraph not in all cases can be a mediator summoned and questioned as a witness with regard to circumstances, which became known to him/her while discharging the duties of a mediator.

For instance, in Austria Article 18 of the Mediation Act establishes the registered mediator's absolute duty of confidentiality. A registered mediator must keep confidential all facts revealed by the

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36 *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 26.

37 *Spencer D., Brogan M.,* Mediation Law and Practice, Cambridge University Press, New York, 2006, 313, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 52-53.

38 *Casandra F.,* Mediation Confidentiality Controversy, <http://www. Dailyjournal.com/cle/cfm? show= C:EDisplayArticle&VersionID=80&eid=872569&evid=1>, *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 24.

39 CCPG, adopted by the Parliament of Georgia on 14.11. 1997, published in Sakartvelos Parlamentis Utskebani (Georgian Parliament Reports), date of publication: 31.12.1997.

40 Organic Law of Georgia - Labour Code, adopted by the Parliament of Georgia on 17.12.2010. published in Sakartvelos Parlamentis Utskebani (Georgian Parliament Reports), date of publication: 27.12.2010.

parties, and may be subject to prosecution if this duty is breached.The EU Mediation Act also adopted Article 7 of the Directive to establish that mediators cannot be compelled to give evidence regarding information arising out of or in connection with a mediation process in either civil and commercial judicialproceedings or in arbitrations.[41]

Worth mentioning is the regulation of German legislator regarding the confidentiality of mediation. Mediator maintenance of confidentiality is required by Section 4 of the Mediation Act, but the requirement is subject to a few exceptions. For example, it may be necessary for the mediator to disclose the content of the mediation proceeding to enable the implementation or enforcement of the settlement agreement, or due to overriding considerations of public policy, such as ensuring the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person. Also, if the disclosure contains obvious information, then it is not necessary for it to remain confidential. In contrast, the legislation does not require the parties or others involved in the mediation proceeding to maintain confidentiality. Such confidentiality must be discussed and agreed to by the parties prior to the mediation in order to have effect. The consequences of disclosure of confidential information by these individuals depend on the confidentiality provisions in their agreement. In addition, all mediators are exempt from the obligation to give evidence in court proceedings or in arbitration. The parties, however, can release the mediator from this exemption for civil cases, allowing the mediator to testify.[42]

3. Judicial Mediation

3.1 General Overview

"Judicial mediation" is a conventional name of ADR mechanism, which is applied under the consent and active participation of the court. The quality and intensity of interference of judicial authorities in the conduct of mediation process is different in various jurisdictions.[43]

It should be mentioned, that judicial mediation includes, shares and is characterized with most of the advantages and disadvantages of mediation, discussed in the first chapter of this paper;of course, with due consideration of specific features typical for judicial mediation.

Disagreements arising from a legal relationship between the parties may be the subject-matter of court mediation. The disagreement must be by nature such that it could be dealt with as a civil dispute in regular adjudicative proceedings. Thus, mediation is possible in all types of civil cases, including family law cases. That being said, mediation cannot be used in all situations. Mediation can be declined e.g.

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41 *De Palo G., D' Uros L., Trevor M., Branon B., Canessa R.., Cawyer B., Florence R.,* European Parliament, Brussels, "Rebooting" The Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in The EU, 2014, 17.

42 *De Palo G., D' Uros L., Trevor M., Branon B., Canessa R.., Cawyer B., Florence R.,* European Parliament, Brussels, "Rebooting" The Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in The EU, 2014, 32.

43 *Tsertsvadze G.*, Mediation, "Meridiani", Tbilisi, 2010, 163.

when the parties are not equal, as this could lead to a situation where a party is incapable of pursuing his or her interests in an appropriate manner.[44]This approach of Finnish legislators gives rise to a question whether what is meant under inequality- this is economic, procedural or any other type of inequality, which may be discovered by judge in the course of the proceedings.

The court decides whether mediation is to be undertaken. If the case is pending also as a regular adjudicative matter, the court proceedings are interrupted for the duration of the mediation.[45]This opinion has the right to exist, however, is any case, no matter how clear is a court decision, one should not forget that there exist the appellate and cassation courts, a loser party may apply to just to protract time or to postpone the enforcement of court decision for the opponent party to maximum practicable extent. In certain cases the manipulation with time factor may turn particularly detrimental for entrepreneurial activities and not only for that.

The history of judicial mediation (court-annexed mediation) in the USA dates back to 1970s. This was the time, when federal courts first started to support mediation and implement the projects related thereto.[46]

There is no universal approach for supporting mediation by judiciary. A member of German Federal Constitutional Court *Winfried Hassemer* wrote, that traditional judicial institutions should not be maintained only just because they are traditional. If it is necessary, the justice should not avoid experiments.[47] Participation of judges in mediation processes is necessary for the promotion and raising of awareness of general society. But this is a "transitional task" of judges, as owing to its legal nature and essence, mediation is not the duty of sitting judges, respectively it cannot become an integral part of their routine activities.[48]

Sitting judges can commonly be found acting as mediators in different contexts. They perhaps remain most prominent in civil law jurisdictions in which judges have traditionally enjoyed a 'settlements-master' role, within an inquisitorial system of civil justice. It may thus seem a natural progression from this starting point, that on the development of modern mediation schemes within their courts, judges may covet the mediation role.[49] Indeed court-connected mediation in civil law countries often follows what can termed a "justice model"[50] in which the court provides litigants with a judge to

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44 *Ervasti K.,* Conflicts Before the Courts and Court - Annexed Mediation in Finland, Scandinavian Studies in Law, 2012, 196.

45 Ibid, 196.

46 *Hiber M.,* Die Sicherung der Vertraurlichkeit des Medationsverfahrens, "Dr. Kovac," Hamburg, 2006, 154, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 163.

47 *Gootwals W.,* Gerichtsnahe Mediation- erfahrung und lehrenausdemModellprojekt in Niedersachsen, in *Haft F von Schlieffen., Katherina.(Hrsg.),* Handbuch Mediation, 2. Auflage, "Beck", Munchen, 2009, 964, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 163.

48 *Von Barge J.,* Der Richter als Mediator, in *Haft F., von SchlieffenK.(Hrsg.),* Handbuch Mediation, 2. Auf.,, "Beck", Munchen, 2009, 945, in *Tsertsvadze G.,* Mediation, "Meridiani", Tbilisi, 2010, 164.

49 *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 128.

50 *Alexander N.(ed),* Global Trends in Mediation, 2nd ed., Kluwer International, Alphen aan den Rijn, 2006, 23, in *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 128.

mediate in-court at no cost. The common law world of court-connected mediation has by contract been traditionally frames as a 'market model'[51] in which courts refer parties to mediation (with or without their consent), and direct them to an external mediator, perhaps drawn from a list of accredited professionals approved by the court or simply from the market, often at the parties' own cost. In more recent rimes, however, sitting judges have taken on the mediation role in the common law world too, particularly as initiatives in mediation within the central domain of their courtroom have begun to take root.[52]

Making mandatory the organization of mediation process (it is called a mediation paradox as the main principle of application of ADR mechanisms is arbitrariness) provides for different consequences in different jurisdictions. If, for instance, the projects organized in Great Britain in this field where not particularly successful, the mandatory mediationbrings about the best consequences in the USA, as a general rule.[53]

While mediation is touted as a flexible, non-legal process, unfettered by rigid procedures and rules, it is perhaps inevitable that we would witness a burgeoning case law on the mediation process as mediation has become more "institutionalized." With the widespread establishment of state and federal courts-sponsored mediation programs, and mediation's more frequent use by legal professionals generally, the mediation process increasingly has been subjected to the searching inquiry of trial and appellate courts. This burgeoning case law is due, in no small measure, to the fact that litigated cases are being sent to mediation in ever increasing numbers, particularly in states with well established mandatory mediation programs.[54]

Prior to the advent of institutionalized, court-sponsored mediation programs, mediation process issues that came before courts generally centered on the confidentiality of mediationcommunications. While confidentiality issues are also present in mediations conducted "in the shadow" of the courts,[55] other mediation process issues have begun to arise with great frequency. Two of the most frequently litigated issues have to do with "mediation in good faith" requirements and the enforceability of mediated agreements.[56]

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51 *Alexander N.(ed),* Global Trends in Mediation, 2nd ed., Kluwer International, Alphen aan den Rijn, 2006, 23, in *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 128.

52 *Alexander N.(ed),* Global trends in mediation, 2nd ed., Kluwer International, Alphen aan den Rijn, chap 3. fn 13 in *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 128.

53 *Hopt K.J., Steffek F.,* Mediation: Rechtsvergleich, Regelungsmodele, Grundsatzprobleme in *Hopt.*, *Klaus., J., Steffek F.,* Mediation, Rechtstatsachen, Rechtsvergleich, Regelungen, "Mohr Siebeck", Tubingen, 2008, 88, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 165.

54 *Alfini J.J., Mccabe G., Catherina G.,* Mediating in the Shadow of the Courts: A survey of Emerging Case Law, Arkansas Law Review and Bar Association Journal, USA, 2001-2002, 171-172.

55 Nat' l Labor Relation Board v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980); Fenton v. Howard, 575 P. 2d 318 (Ariz. 1978); People v. Snyder, 492 N.Y.S. 2d 890 (N.Y. Sup. Ct. 1985.), in *Alfini J.J., Mccabe G., Catherina G.,* Mediating in the Shadow of the Courts: A survey of Emerging Case Law, Arkansas Law Review and Bar Association Journal, USA, 2001-2002, 172.

56 *Mnookin R.H., Kornhauser L.,* Bargaining in the Shadow of the Law: The Case for Divorce, 88 YALE L.J. 950 (1979), in *Alfini J., James, Mccabe, Catherina G*., Mediating in the Shadow of the Courts: A survey of Emerging Case Law, Arkansas Law Review and Bar Association Journal, USA, 2001-2002, 172.

Legal commentators have worried that mediation's core principles will be compromised as this consensual, flexible and informal process is integrated into the legal system.[57]Professor Nancy Welsh is concerned that trends in court-sponsored mediation seem to be eroding the traditional model of mediation that requires a firm commitment to party self-determination.[58]

Court-sponsored mandatory mediation programs generally are promoted and established, however, for reasons of judicial economy, with little attention given to mediation's core values.[59]

It has become rather a hackneyed comparison but it still holds true that court produces a win-lose result, mediation a win-win outcome.[60]

Mediation offers the consumer another alternative — more freedom of choice. It will not remove the court from the dispute scene, nor will it make lawyers redundant. Some cases cannot be settled or mediated. It has not been put forward as a cure-all, but as a worthwhile idea that can save people time and money and a portion of the emotional turmoil that often accompanies adversarial proceedings. The spread of mediation could do much to improve the quality of life in our society, not only because of the savings it brings but because it fosters interaction among people, and empowers them to control their own lives.[61]

3.2. Judicial Mediation in National and Foreign Legislations

Under the legislative amendments of December 20, 2011 the new ChapterXXI[1] was added to the CCPG containing the provisions regulating judicial mediation. Georgia's aspiration to join the EU can be presumed as a reason of these amendments, due to which reason the country tries to approximate domestic legislation with the standard set by the EU for its Members-States.

ADR methods have been a topic of discourse in many nations for over thirty years, at least in the field of civil and commercial disputes. In the EU, the increasing focus on mediation was a consequence of years of mounting concern about court costs and congestion, and other obstacles to cross-border dispute resolution in the single market. During this period, the use of alternatives to litigating civil and commercial disputes was almost entirely voluntary, and subject only to limited legislative encouragement throughout the Member States. Consequently, very few litigants used mediation to resolve these disputes.[62]

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57 *Alfini J.J., Mccabe G., Catherina G.,* Mediating in the Shadow of the Courts: A survey of Emerging Case Law, Arkansas Law Review and Bar Association Journal, USA, 2001-2002, 173.

58 Ibid.

59 Ibid.

60 *Clarke G., Davies R., Iyla T.,* ADR- Argument for and Against Use of Mediation Process Particularly in Family and Neighborhood Disputes, QLD. University of Technology Law Journal, 1991, 81, <https://lr.law.qut.edu.au/article/viewFile/343/335>.

61 *Clarke G., Davies R., Iyla T.,* ADR- Argument for and Against Use of Mediation Process Particularly in Family and Neighborhood Disputes, QLD. University of Technology Law Journal, 1991, 95, <https://lr.law.qut.edu.au/article/viewFile/343/335>.

62 *De Palo G.,* European Parliament, Brussels, "Rebooting" The mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in the EU, 2014, 12.

The EU efforts spanned nearly a decade and resulted in the adoption of the Mediation Directive.[63] The aforementioned Directive was adopted in 2008. No wonder that in 2011 Georgia decided to fill up its legal space with the regulation of court-based and medical mediation[64].

The quality of regulation of Chapter XXI[1] of the CCPG may not be ideal, but it still sets minimal standard in the context of legislative institutionalism for a judge to extend judicial mediation to a dispute.

According to Chapter XXI[1] of the Code of Civil Procedure of Georgia, once a lawsuit is filed with the court, a case subject to judicial mediation may be referred to a mediator by a court ruling and this ruling is final and is not subject to appeal. Judicial mediation may apply to family disputes, except for adoption, annulment of adoption, restriction and deprivation of parental rights; inheritance disputes; neighborhood disputes; any dispute - under the consent of the parties. The Law contains a stipulation onbroad application of judicial mediation - that a case may be referred to a mediator at any stage of trial when there is a consent of the parties. The Georgian legislation also provides for grounds for challenging a mediator, for which Part 1 of Article 31 of the Code of Civil Procedure isapplied. The period of judicial mediationcovers 45 day, but at least 2 meetings, this period can be extended for the same period of time. The legislator provides for the consequences of non-appearance of the parties for participation in the mediation process - for a fine, meaning full covering the litigation expenses and fine in amount of 150 GEL. If a dispute is resolved amicably a ruling on amicable settlement between the parties is delivered, which is final and not subject to appeal. Failure to amicably settle a dispute does not deprive the party of the Constitution right to bring a lawsuit before the court of law according to general procedure. The process of judicial mediation is confidential both for the parties and the mediator, unless otherwise prescribed by the agreement.[65]

As already mentioned, according to Part 1 of Article 187[1] of the CCPG after filing a lawsuit with the court the case subject to mediation may be referred to a mediator for its amicable settlement and according to Part 2 of the same Article the ruling on referral of the dispute to a mediator is not subject to appeal[66]. The content of the provision make it obvious that the CCPG offers the so-called mandatory mediation model. The very first article clearly demonstrates that a case is referred to a mediator on the basis of the sole discretion of a judge. This approach encourages a judge to refer as much disputes to mediation, as possible, in order to develop the institute in the first place and then to relieve the disputes from court judgments.

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63 *De Palo G.,* European Parliament, Brussels, "Rebooting" The mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in the EU, 2014, 12.

64 Legal Entity of Public Law - Medical Mediation Service was subordinated to the Ministry of Health, Labor and Social Affairs of Georgia. The process of liquidation of the LEPL has been accomplished by now and its legal successor with regard to certain matters is the Ministry of Health, Labor and Social Affairs of Georgia by virtue of Resolution №316 of the Government of Georgia of 6 July, 2015.

65 Code of Civil Procedure of Georgia, adopted by the Parliament of Georgia on 14.11.1997, published in Sakartvelos Parlamentis Utskebani (Georgian Parliament Reports), date of publication: 31.12.1997.

66 Ibid, Article 187[1] .

The regulations of Italy and the State of California (USA) also follow the above approach. In Italy Pursuant to Law Decree 69, mediations are mandatory for those subject matters listed therein[67], and Paragraph 15.4 of Article 16 Local Rules – Central District of California, United States Court District of California offers three alternative dispute resolution mechanisms: 1) settlement proceedings under the participation of a district judge or magistrate judge, assigned to the case; 2) mediation under the participation of a neutral mediator, selected from the Court's Mediation Panel; 3) Private mediation[68] without involvement of the judge assigned to the case, the parties are required to participate in any of these three procedure on every civil case.[69]

In France judicial mediation procedures have existed since the law of 8 February 1995. But while various legal instruments have been available for mediation, the last 15 years or so have shown that mediation is not a particularly popular dispute resolution mechanism, especially in commercial matters.[70] Despite the limited success of judicial mediation, it has nevertheless been in the spotlight in France over the last few years.On 16 November 2011 the French Government enacted a Decree (Ordinance No. 2011 – 1540, 2011), whichimplemented the provisions of the Directive. The 2011 Decree followed years of consultations and studies carried out by public entities, courts and legal practitioners. The provisions of the 2011 Decree were partially codified in the Code of Civil Procedure through another Decree dated 20 January 2012. The 2011 Decree furthered the French Government's objectives to facilitate and encourage mediation use for domestic civil and commercial disputes as well as cross-border ones.[71]

Magendie Report[72] included various recommendations to facilitate recourse to mediation in civil and commercial courts.[73]It concluded that four preparatory steps are necessary: (I) inform professionals and potential mediation users; II) develop protocols with local professionals; (III) formalize the principles for intervention by mediators; (IV) integrate mediation into the court routine. Finally, the Report ser out protocol, which provides a useful guideline for courts.[74]

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67 *De Palo G.,* European Parliament, Brussels, "Rebooting" The Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in the EU, 2014, 41.

68 Local Rules – Central District of California, United States District Court Central District of California Pretrial Conferences, scheduling, Management, L.R. 16-15, Policy Resettlement & ADR.

69 Ibid.

70 *De Palo G.,Trevor M.B.,* EU Mediation Law and Practice, Oxford University Press, 2012,113.

71 *De Palo G.,* European Parliament, Brussels, "Rebooting" The Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediation in The EU, 2014, 26.

72 Report of the working group on mediation, led by former first president of the Paris Court of Appeal, Mr. Magendie, Report "Speed and Quality of Justice System – Mediation: another way", October 2008, Annex II in *De Palo G.,Trevor M.B.,* EU Mediation Law and Practice, Oxford University Press, 2012, 128.

73 Report of the Working Group on Mediation, October 2008, 77-78, in *De Palo G.,Trevor M.B.,* EU Mediation Law and Practice, Oxford University Press, 2012, 128.

74 Ibid.

Mediation in France is currently in a transitional phase. Various measures have been taken to bring some uniformity between judicial and conventional mediation, to simplify the procedures which apply to the enforcement of mediation agreements and clarify the mediator duties.[75]

There is no court-annexed schemes available in Germany, because Germany has developed a specific type of court-based mediation, where the mediation is conducted by a judge who does not have jurisdiction over the case.[76]

Like Germany Finnish Law on Mediation provides for court-sponsored mediation. It enabled judges to be directly involved in mediation procedures, or instruct the parties to engage in mediation under the assistance of a mediator or some other organization, also this Law regulates the procedural rules of holding mediation at courts of law.[77]

Like Germany and Finland, Hungarian courts are entitled to invite parties to mediation and personally lead the process.[78]

The official web-page of the Supreme Court of New South Wales gives the following definition of court-based mediation: There are numerous benefits that can arise from mediation, including: early resolution, less costs to parties, greater flexibility in resolving the dispute, finality, privacy.[79]

4. Specific Aspects of Settlement of a Civil DisputeJudicially

When the most heated and emotional stage of a dispute/conflict is already passed, the parties begin to think how to resolve the dispute/conflict. A lawyer, the principals (clients) apply to, should be able to offer several ways of dispute/conflict resolution to the parties. These ways can be: negotiations, arbitration, judicial proceedings and even surrender, if it is apparent according to factual circumstances of the case. Judicial proceedings and arbitration are formal ways and it is characteristic of them that they cannot be controlled, unlike negotiations and mediation.[80] Apart from controlled nature of the process, many other things are typical of judicial review of a case that makes it an inefficient mechanism in Georgian and not only Georgian reality.

As per Part 1 of Article 1 of the CCPG, the Georgian courts review civil cases in accordance with the rules, prescribed by this Code. Even a brief overview of the route a person has to take for the resolution of a dispute only within first instance court and then for the enforcement of the decision, it will become apparent that institutional advantages of judicial mediationare far greater than traditional way of dispute resolution. E.g. according to the CCPG for a person to initiate a dispute against an

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75 *De Palo G.,Trevor M.B.,* EU Mediation Law and Practice, Oxford University Press, 2012, 129.

76 Ibid, 146.

77 Ibid, 111.

78 Ibid,170.

79 <http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_ mediatio nin thesc/ sco2_mediationinthesc.aspx#mediation_costs> .

80 *Chaladze G.,* Training and Lecture Course: Alternative Resolution of Disputes and Conflicts, Ivane Javakhishvili Tbilisi State University, 2012-2013 Academic Year.

opponent party it is necessary for the former to file a with the court (Article 177). Upondrafting alawsuit the following should be defined: jurisdiction (Article 11), competent court (Chapter 3), subject matter of the dispute (Article 178), factual circumstances, accompanying evidences (sometimes the provision of evidences (Chapter 14) or an expert opinion (Chapter 20) may become necessary), testimonies of witnesses(Chapter 18), question of provisional remedy (Chapter 23), legal grounds of the claim (Article 178), value of the claim (Articles 40-41), amount of state duty (Articles 38-39). Also the party often requires the assistance of a professional lawyer as the CCPG provides for the grounds for dismissal of an action (Article 186), the parties present their motions at the preparatory session, and at the main session they have to listen to the explanations, ask questions, examine the evidences, engage in pleadings,[81] what is not an easy thing to do and respectively requires the involvement of professionals, what is also associated with costs and expenses.

UnderCCPG within a period of 5 days after filing a lawsuit the judge decides upon the admissibility of an action, forwards the lawsuitto the defendant together with accompanying documents and sets a period of time (which should not exceed 14 days and for hard cases - 21 days) for the latter to file a defense.[82]According to Article 59 of the CCPG the court shall review the case not later than 2 months following the admission of the application, in the case of particularly hard cases these timeline may be extended to maximum 5 months by decision of the reviewing court, except for claims for charging alimonies, compensation of damages inflicted through maiming or other injury or death of a bread-winner, claims stemming from employment relations, Law of Georgia on Relations Originating from Using Dwelling Places and cases on claiming the revindication of a thing from illegal possession, which should be reviewed within a period of maximum 1 month. In cases, envisaged by Article 184 of the CCPG the civil cases are reviewed within maximum 45 days following the submission of the document certifying the serving of the documents, sent to the defendant or providing a public notice to the dependant, and in the case of particularly hard cases this period can be extended up to maximum 60 days.[83]

In reality it deems impossible for the courts of first instance to try cases even within timelines set by law for hard cases, not to mention 2 months period, even of cases, which should be tried within a period of 1 months through expedited court procedure. The foregoing can be asserted on the basis of the latter of 15 December, 2016 of the Tbilisi City Court officer, responsible for the issuance of public information, according to which letter the court does not maintain statistic data about the average number of disputes reviewed by a judge of Civil Chamber, also about the average period of time it takes a judge to review a case. However the officer concerned confirms that as of 9 December 2016 total 37628 civil cases were addressed to the Civil Chamber[84]. Based only on this data it is easy to image what amount of work is to be done by judges of the Civil Chamber of the Tbilisi City Court, who are 33 in all.[85] It should

81 CCPG Chapter 25.
82 Ibid, Articles 184 and 186.
83 Ibid, Article 59.
84 Tbilisi City Court Letter №2-04236/69, 15.12.2016,
85 See <http://tcc.gov.ge/index.php?m=502>.

as well be mentioned, that retrieved information evidences the necessity of reformation of judicial administration, and improvement of procession of statistic data amongst them.

Furthermore, in addition to the foregoing the decisions of the courts of first instance are appealed with the appeals court. The latter also reviews private complaints, which should be tried within a period of 2 months. According to CCPG, once a party is served the duly-justified decision within timelines set by law, the latter becomes entitled to draft an appeal, and the court examines the admissibility of the appeal within a period of 10 days following its filing (Article 374). Further to the above said, the account should be taken of the timelines, necessary for the appeals court to made a decision, and one should not forget the period of trial of a case within cassation court, which takes up to 6 months.[86]

Respectively it is easy to presume that based on statutory and actual statistic , it takes a party and judiciary, at least, 18 months to review a single case at all instances.And fee of the representative and other costs automaticallyincases according to the number of involved instances. Here a question arises - is it possible for the interest of either party to be satisfied in this situation? moreover if one takes account of the fact, that the CCPG allows for filing a counter action[87] and also the enforcement of a court judgment requires certain period of time. It can easily be presumed, that almost probably a party will lose interest in the outcome of the dispute owing to never-ending "dashing" to courts, and also will lose the chance to amicably negotiate with the opponent party, save expenses and time because ofgoing from one instancecourt to another.

After the description of negative aspects of judicial system, discussed in this Chapter, it would have been reasonable to offer the arguments against judicial mediation as well.

Models of mediation in its institutional setting have developed in ways that diverge significantly from the grassroots origins of the process. Evidence suggest that court-connected mediation is particular has become infiltrated to a significant extent by the dominant culture of litigation, leading to a settlement focus and narrow, lawyerly approach to dispute resolution. It will be recalled that many aspects of typical mediation models in the court-connected setting have been caused by the increasing role of judges and lawyers in the process, and more specifically, by such rules as mandating that mediators be lawyers, lawyer preferences for evaluative mediators, lawyer 'shopping' for lawyer-mediators, lawyer attendance as party representatives in mediation with at times clients excluded from participation, and systems requiring the *ex post* approval by the courts of the any mediated settlements reached.[88]

Quite a number of Lawyers believe, that judicial mediation is conducted in informal environment, what is characteristic of mediation in general, however it is still influenced by judiciary and, respective procedural formalism.[89]

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86 CCPG Article 391.

87 Ibid, Chapter 22.

88 *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 164.

89 *McEwen C.,* Examining Mediation in Context: Toward Understanding Variations in Mediation Programs, in *Herrmann, M.S.,* The Blackwell Handbook of Mediation, Bridging Theory, Research and Practice, "Blackwell Publishing", Oxford, 2006, 90, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 166.

Domination of lawyers, what is unequivocally connected with the purpose of dispute resolution - what is almost inevitable in judicial context, driven by efficiency and which may shelter time-restricted mediation sessions and the purpose of trial of the case - may result in the experience of discontent party in mediation.[90]

Based on the example of family disputes, some would argue that, in the family law area, there is no need for separate mediator services because Registrars, Court Counsellors, lawyers, psychologists and community health workers already provide sufficient assistance to separating and divorcing couples to negotiate agreements.[91] No-one is saying that mediation is the only answer in the dispute resolution spectrum. It is not meant to be a cure-all.[92]

The courts will never be removed from the divorce process. It is accepted that some cases cannot be settled or mediated.[93]

As has already been observed, it is quite an irony that often the advantages of mediation also contribute to the disadvantages.[94]

Arguably, the most serious criticism of mediation relates to the fairness of the process. Critics say that mediation represents secondary justice – that only the courts provide first class justice..[95]

Owen Fiss[96]for example, said that the thrust of mediation is towards a surrender of legal rights. "I do not believe that settlement as a generic practice is preferable to judgment.. . justice may not be done . . . settlement is capitulation to the conditions of mass society and should be neither encouraged nor praised.97

Requiring parties to mediate in good faith and enforcing mediated agreements are intertwined with a critical concept in the law of mediation-confidentiality. Although confidentiality is considered essential to the mediation process, the requirement of good faith participation and the ability of the courts to enforce mediated agreements may infringe on the confidentiality of mediation communications. A good faith participation requirement

becomes pointless if a party's conduct in a mediation is deemedbeyond the investigation of the court because of confidentialityconcerns. Similarly, a court may not be able to determinewhether an

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90 *McEwen C.,* Examining Mediation in Context: Toward Understanding Variations in Mediation Programs, in *Herrmann, M.S.,* The Blackwell Handbook of Mediation, Bridging Theory, Research and Practice, "Blackwell Publishing", Oxford, 2006, 90, in *Tsertsvadze G*., Mediation, "Meridiani", Tbilisi, 2010, 128.

91 *Clarke G., Davies R., Iyla T*., ADR- Argument for and Against Use of Mediation Process Particularly in Family and Neighborhood Disputes, QLD. University of Technology Law Journal, 1991, 84, <https://lr.law.qut.edu.au/article/viewFile/343/335>.

92 Ibid.

93 Ibid.

94 Ibid, 88.

95 Ibid, 89.

96 *Owen M.,* Fiss is a Sterling Professor at Yale Law School.

97 *Fiss O.M.,* Against Settlement, (1984) Yale Law Journal at 1073, in *Clarke G., Davies R., Iyla T.,* ADR Argument for and against Use of Mediation Process Particularly in Family and Neighborhood Disputes, QLD, University of Technology Law Journal, 1991, 89, <https://lr.law.qut.edu.au/article/viewFile/343/335>.

agreement was reached in mediation, or what itsterms were, if all evidence of what occurred in the mediation isconfidential and thus outside the court's purview.[98]

It is also mentioned in legal literature, that endorsement and enforcement of mediated agreements by judiciary is contrary to mediation principles. Generally, the enforceability of a mediated agreement usually raises a number of legal and policy issues. In some states, the judiciary or the legislature has decided that mediated agreements should be enforced in the same manner as a contract or as a non-mediated settlement agreement.[99]In these jurisdictions, ordinary contract law defenses will normally apply to mediated agreements.[100]Regardless of the overall approach to enforcement, however, the enforceability issue is complicated by the fact that there may be other relevant laws that contradict the mediation enforcement provisions. Enforceability may also implicate confidentiality concerns. If the parties are fighting over whether an agreement was reached or over the interpretation of certain terms in the mediation agreement, relevant evidence over whether the parties reached an agreement or what the parties intended may be excluded because of confidentiality requirements.[101]

5. Conclusion

Based on the above discussion, critical analysis, and comparative law and statistic research it can be said that judicial mediation, as an institute, has major advantage over the settlement of civil disputes through judicial proceedings.

As already mentioned, judicial mediation is one of the models of mediations, having all the advantages and disadvantages described in this paper; of course, one should not forget the specificity of judicial mediation which acquired public law (civil procedure law)nature in certain aspects through practice and approaches established in various jurisdictions.

Judicial mediation allows for saving the time and costs. The concomitant result of the fotrgoing is the saving of human resources and energy, also the emotional connection with the dispute is associated with less time. A party is also enabled to less formalize the dispute. As said in the paper, it is very difficult to say, whether when would have the parties come to an agreement in the court when the parties are engaged in mediation. Despite the foregoing, it is a fact that resolution of mediation takes less time in the case of mediation than in the case of non-mediation process, and this may result in cost-saving.[102]

In judicial mediation it is the partywho decides the faith of his dispute, he relies on his own potential and negotiation skills. No one else determines the outcome of the dispute, the result of the

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98 *Alfini J.J., Mccabe G., Catherina G.,* Mediating in the Shadow of the Courts: A survey of Emerging Case Law, Arkansas Law Review and Bar Association Journal, USA, 2001-2002, 174.

99 Ibid, 196.

100 Ibid.

101 Ibid.

102 *Wissler R.,* (2204b) Barriers to attorneys' discussions and use of ADR, Ohio State J Dispute Resolut., 19:459-508 in *Clark B.,* Lawyers and Mediation, Springer, University of Strathclyde, Law School, Glasgow, United Kingdom, 2012, 59.

dispute does not depend on eloquent, oratorical speeches and tens of volumes of evidences. This is a part of the empowerment ethic inherent in mediation and it is emphasized in several applications of the process. Because of personal involvement in the process and the resolution, the parties possess a psychological ownership, making it more likely that they will comply with any agreement reached.[103]

The party is empowered to define rules and laws, which will regulate the process. The party is given the possibility to enjoy informal, comfortable and free environment. The party is also entitled to terminate the process at any stage of mediation. One of the advantages of the informality of the process is the ability of the parties to avoid court rulings in various disputes and respectively, not to create a precedent for a similar case.

When opting for mediation the parties rely on confidentiality and participate in this process only because that disclosed facts will not become public. It is not the victory that is of particular focus here - a party may win a process, however the disclosure of the fact that some individual or company had dealings with the court of law, participated in a dispute, may "dishonor" him.[104]

Despite the observations, offered in this paper about the shortcomings of judicial mediation and advantages of dispute resolution through judicial proceedings, like: expensiveness of mediation as compared with arbitration; limited scope of application of mediation; integration of essential principles of mediation, like consensus, flexibility and informal process, into judicial system; confidentiality as possible discomfiture for the parties to mediation; negative influence of lawyers upon mediation process and monopoly of legal professions in mediation; the question of enforcement of mediated agreement and intersection with confidentiality principle, judicial mediation is one of the best ways for the parties to resolve a dispute, maintain relations or terminated it a civilizedmanger with lesser costs, in a comfortable, informal environment, by their own efforts, quickly, excluding publicity, avoiding the creation of judicial precedents, judicial approval of mediated agreement (judicial approval of a mediated agreement excludes a) such agreement, which is explicitly contrary to law as in Georgian legal system the rules of judicial agreement extend to mediated agreement; 2) polemics about the presumption that the absence of the mechanism of enforcement of mediated agreement is a shortcoming of mediation).

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103 *Kovach K.K.,* Mediation in a Nutshell, Thomson West, University of Texas, 2003, 36-37.

104 *Tsertsvadze G.(ed.),* Perspectives of Legal Regulation of Mediation in Georgia, National Centre for Alternative Dispute Resolution, Tbilisi, 2013, 25.

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Ekaterine Kardava*

Proportionality Principle as a Response Instrument to Challenges of Modern Labour Law

Proportionality Principle is the fundamental principle of public and private laws and the basic regulatory instrument of modern relations measuring the use of power. Integration of the principle into the labour law in the form of systematized test (three-stage test) - is the subject of recent debates. The issue is actual caused by contradiction between the traditional approaches of the labour law and modern labour market challenges. The proportionality principle and the application of its structured test to labour relations' debates is considered as one of the responsive mechanism to the challenging process. It is addressed in labour cases not only for the analyzing of employers but employees (mostly trade unions) actions, as well for final assessment and decision-making.

The practice still is developing. It echoes the modern process within of which there are discussion on possibilities of modification of labour law doctrinal objectives. It implies changes of selective nature of the labour low towards the universal.

The study on the practice of application of proportionality and its development within the national labour law of Georgia is the subject of utmost interest with regard to the fulfillment of the Association Agreement and transposition of European standards into the national legislations. Georgia should conduct the legal approximation activities in labour law field, which requires the complex and systemized vision: not only setting of compliance with EU directives, but cognition of the principles, which are the bases for interpretation of the AA norms and their use in practice.

Key words*: proportionality principle, Oakes Proportionality test, three-stage proportionality test, just cause, privacy cases, picketing, discrimination, AA.*

I. introduction

In 2014 - 18 years after the signing of the first agreement between Georgia and the European Union - the Partnership and Cooperation Agreement (PCA)[1], Georgia and the EU signed a second agreement: the EU-Georgia Association Agreement (AA), which replaced the PCA) and established an association between the parties.[2] As a consequence of about twenty years of integration processes Georgia was acknowledged as a country with the European aspiration and European choice.[3] To gain the rightful

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1 **"**Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part**",** 22.04.96, entered into force 01.07.99, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31999D0515>.

2 First Paragraph of the first article, Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part", 27.06.14, <https://eeas.europa.eu/sites/eeas/files/association_agreement.pdf>.

3 Ibid, preamble,2nd indention.

place within the family of the European values it is necessary to achieve political, economic and social goals of the AA. This can be attained through legal approximation - integration of the European standards into national legislation of Georgia and their strengthening in the practice. Hence, Georgia is facing the commitment to implement abundant and voluminous legislative actions, and in the field of labour law, amongst them.

The labour law doctrine is still strictly advancing the fundamental principle of labour law, by virtue of which principle it delimited itself from civil law and developed into a separate branch: labour legislation is to guarantee the weaker party and protect the basic rights of the employee with regard to working conditions and salary.[4] This goal is hotly opposed by some scholars and the specialists and practitioners of various fields. Some believe, that labour relations should be considered and settled within the frame of civil law. However, the researches, legal data, juridical records which have come down to us in the form of legal opinions care the product of social and economic environmental influence in the process of selection through ideas and concepts,[5] without the consideration of which the importance of labour law as a separate branch oriented on the protection of weak party and social standards, cannot be duly understood. Respectively, the matter related to labour relations are still settled within the framework of labour law with due consideration of general principles and approaches of private law. Despite doctrinal strength, the straggle between the concepts, the dynamics of interrelation between labour and capital, mutual links between social and economic aspects and the development indices of a state, provide for the changing nature of labour law. Hence, some processes are permanently ongoing within labour law, requiring the discussion and scrutiny in the context of modern realities.

When interpreting labour legislation it is important to unite and highlight the goals of labour law. These goals can be classified on a continuum between selective and universal.[6] Selective goals imply the

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4 Labour Law: Its Role, Trends and Potential, Labour Education 2006/2-3, No. 143-144, V, <http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_111442.pdf>.

5 *Deakin S.,* The Contract of Employment, A Study in Legal Evolution, University of Cambridge, ESRC Center form Business Research, Working Paper № 203, 2001, 4-5, <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp203.pdf>.

6 Universalism generally means that benefits are given to all. Selectivity, on the other hand, is a model that prefers the targeting of benefits to specific groups (or people) that really need them. Most democratic countries have both universal and selective programs. But the combination varies. It is common to classify welfare states into three models: liberal, conservative and social-democratic. The liberal model, exemplified by the US, relies mostly on the market. For the most part people are expected to achieve income and security through the market, so intervention by the State is minimal. The conservative model, exemplified by Continental European countries, relies to a large extent on the family. People are expected (more than in other models) to rely on their family members for support, so again intervention by the State is relatively limited. In contrast, the social-democratic model, exemplified by Scandinavian countries, relies much less on both market and family. The State assumes a central role in creating broad societal reciprocal insurance – most risks are transformed from private to public through massive redistribution programs. Obviously the social-democratic model is based on higher taxes alongside a higher level of public services, *Davidov G.,* The Goals of Regulating Work: Between Universalism and Selectivity, Labour Law Research

intention to help a specific subject of labour relations – employees and the universal goal advance the interests of the society at large and employers as well. The past years are marked with increasing interest in articulating goals from selective to universal. The identification and elucidation of challenges associated with this trend is the very basis of labour law related disputes in the recent history. All this is associated with the goals of labour law - what are and what should be? The topicality of the issue was stressed by some labour law scholars, who demanded the rethinking of the basic principles of labour law. Unlike them, the others believe that it is not the goals and principles that require revision, but rather the results from a mismatch between the goals of the labour law and actual application of labour laws. The debates are necessary as this process investigates legislative gaps, evaluates the proposed reforms and examines the constitutionally of labour law, when they are being challenged.[7]

Based on the foregoing the labour law of Georgia is being formed and developed in the light of interception of three major segments: 1. Political and legal, within the framework of which the process of European integration should be successful, and the legal framework of Georgia should be approximated with the European standards in this process; 2. Doctrinal, within the framework of which the national labour law should maintain fundamental principles stemming from traditional goals and general scientific achievements in a manner, as for the foregoing not to contradict the global political, legal and practical trends. 3. Trade and economical, within the framework of which the labour law should efficiently respond to the duty of the state to advance economically, promote employment and improve the welfare of the employees. Based on the foregoing, Georgia, being the country of new democracy and transitional economy and, at the same time, the subject associated with the European Union, is facing many challenges in the field of labour law conditioned by many international and domestic factors, requiring analysis.

With due consideration of all the above said, when speaking about the aspects of well-balanced protection of the parties to labour relations and "modernization" of the goals of labour law, the possibility and scope of application of ***proportionality principle*** becomes one of the pressing issues.[8] Proportionality is the basic principle of law and is designed to limit the abuse of power. It has become a fundamental and binding legal principle in the jurisprudence of many countries.[9] Apart from being applied in every fields of law (international law, criminal law, administrative law), it is an ethical

Network, 2012, 5, <http://www.labourlawresearch.net/sites/default/files/papers/Regulating%20Work%20--%20Between%20Universality%20and%20Selectivity%20final.pdf>.

7 *Davidov G.*, The Goals of Regulating Work: Between Universalism and Selectivity, introduction, Labour Law Research Network, 1-2, 2012, <http://www.labourlawresearch.net/sites/default/files/papers/Regulating%20Work%20--%20Between%20Universality%20and%20Selectivity%20final.pdf>.

8 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal / Revue de droit de McGill, Vol. 59, № 2, 2013, 375-379, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

9 Ibid, 375.

principle as well. [10] Throughout the years, the principle of proportionality became a central and binding public law principle of the member-states of the European Union.[11] However, gradually, it became applicable in private law as well for the prevention of the excessive and unjustified use of power by contracting parties.

The legal science faced the question: is it possible to apply the standard of proportionality principle in relation with the use of power by employers and can such a standard be integrated in labour law as a responsibility?[12] Is it possible to apply the standard of proportionality principle in relation with the use of power by trade unions as well?[13] With regard to which aspects of labour law will the implementation of the proportionality principle be relevant and useful at this stage of the Georgia's European integration?

Introduction of the proportionality principle and its structured tests into domestic labour law of Georgia and their practical integration into the settlement of labour disputes may efficiently resolve the labour law related problems caused by radically bipolarised ideologies to, what, as a general rule, has an impact on the pace and quality of the implementation of European standards into domestic legislation.

The research aims at providing the overview of recent scholarly disputes and opinions within labour law, and specifically - of proportionality principle.

The objectives of the research are: to study the scholarly and practical visions of proportionality principle within labour law; to advance the possibility of integration of proportionality principle into labour law of Georgia; to establish and develop the practice of reference to proportionality principle in the decisions of the employers and the employees, within the framework of employment relations, as well as court decisions; to study the practical tests of proportionality principle and develop the potential of their application.

The subject of the research is the proportionality principle as a mechanism to respond to modern challenges in the field of employment relations.

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10 *Davidov G.,* the Principle of Proportionality in Labor Law and its Impact on Precarious Workers, 10/11/2012, 63, <http://law.huji.ac.il/upload/Davidov34-1FINAL.pdf>.

11 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal / Revue de droit de McGill, Vol. 59, № 2, 2013, 377, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

12 *Davidov G.,* the Principle of Proportionality in Labor Law and its Impact on Precarious Workers, 10/11/2012, 64, <http://law.huji.ac.il/upload/Davidov34-1FINAL.pdf >.

13 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal /Revue de droit de McGill, Vol. 59, № 2, 2013, 419, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

II. Scope of Application of Proportionality Principle in Labour Law

2.1. The Essence of Proportionality Principle and the Basis for Integration into Private Law Relations

Before answering the questions, posed above, it is important and necessary to review the practice of application of proportionality principle in labour law. Without understanding the essence of proportionality principle the explanation of the goals of the Association Agreement will not be efficient and effective where the labour law is analysed in the light of trade-economic, social and environmental policies (AA, Title IV and VI). Fulfilment of the AA requires not only the compatibility of Georgian labour law with the European Union Directives, comparative law activities, identification of discrepancies and transposition of the European standards into national legislation, but also the discussion of those principles, on the basis of what the AA rules should be interpreted, impact of their practical implementation preliminary should be evaluated, tasks of contemporary labour law should be fulfilled, labour disputes should be efficiently settled, interests of the employers and the employees should be balanced and, at the same time, labour law should be developed.

In the era of neo-liberal capitalism the employers often exert as much control over the life of an individual as the governmental/public authorities do. I.e. it became feasible to develop the idea that proportionally principle can be extended to in private sphere- in the relations of private persons to impose limitations on employers' actions, like public authorities.[14] Not long ago some scholars started to investigate this potential within the framework of labour law, through the advocacy of proportionality principle in some contexts of labour relations and employment. Their opinion was based on the following three basic motives:

1. Higher standard of behaviour is required in employment relations as opposed to other private contractual relations;

2. The application of proportionality principle stresses its legal and analytical merits;

3. The application of proportionality principle fits within contemporary legal doctrine and advances legal coherence.[15]

After all the labour law already imposes limitations on the abuse of power by the employers. Hence it is natural to discuss the necessity of application of proportionality principle. First and foremost it should be said, that the proportionality principle is not a preventive mechanism and does not create additional limitations. The employers are legally entitled to dismiss employees subject to various statutory limitations. The trade unions are also legally entitled to organize picketing. In such cases the judges are left with broad room for discretion when applying and evaluating laws. Just then the proportionality principle stages in as an instrument to measure, evaluate and balance the power.[16] It should as well be mentioned that the private law is quite familiar with proportionality principle, however

[14] Ibid, 379.
[15] Ibid, 380.
[16] Ibid, 408-409.

the manner and method of its application in labour field is very specific as it places a disputed or discussed matter under specially structured test of proportionality principle, what simplifies the analysis and decision-making. The mention should as well be made of the other aspect as well - why proportionality and not some other standard? The employment relations are dynamic, demanding changes over time. The legal framework and agreements between the parties and official rules are changing. For ex: a statute or a specific regulation provides when, in what cases and how to dismiss an employee. However, in the case of a dispute, the courts of law have some degree of discretion to assess the legality of dismissal. The judges apply various standards for evaluation. The employer's actions are often measured in the light of ***reasonableness standard***. E.g. Canadian courts have recognized implied contractual duties to treat employees with civility, decency, respect, and dignity and in good faith and abide by the reasonableness standard. The court discusses and sets certain rules about the reasonableness standard. However, these standards and rules are subject to amendments as it should be defined on a case-by-case basis whether what will be reasonable. Unlike the foregoing the proportionality principle is based on concrete three-stage proportionality test. The application of the test is not associated with some specific situation, but rather offers a principled way to analyse the problem.[17]

The EU applies the proportionality principle in various fields, amongst them, in the legal framework regulating discrimination. In 2000 the EU adopted Directive N2000/78[18] establishing a general framework for equal treatment in employment and occupation.[19] This Directive, is referred to in Annex XXX of the AA (Employment, Social Polity and Equal Opportunities) as one of the commitments to be fulfilled by Georgia and the AA provides for a period of 3 years, starting from 2014, for the integration thereof into domestic legislation and further implementation. The Directive prohibits any direct and indirect discrimination, however there are case, when indirect discrimination can be justified, if it serves a legitimate aim and the means of achievement this aim are objectively necessary and proportionate.[20] Based on the Directive the European Court of Justice (ECJ) started to intensively apply the principle in employment relations. *Mutatis mutandis*, it even extended the proportionality principle to the activities of trade unions. E.g. In *Laval* Case the right to strike, which is one of the fundamental rights, became subject of restriction. In constitutional and administrative law proportionality imposes limitations on the exercise of public authority not to allow for the breach of the rights of citizens/private persons. In the case concerned proportionality imposes limitations on the application of the freedom of a private person by a private person. In *Laval* Case a Latvian company, having won a contract from Swedish Government, posted Latvian workers to Sweden to work on the site. These workers earned much less than comparable Swedish workers. The Swedish trade union asked *Laval* to sign its collective

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17 Ibid, 410.

18 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, 0016 – 0022, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1474273510720&uri=CELEX:02000L0078-20001202>.

19 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal /Revue de droit de McGill, Vol. 59, № 2, 2013, 413, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

20 Ibid, 413.

agreement with a view to improvement of the conditions of these workers. *Laval* refused to sign the collective agreement. The Swedish trade union called a strike to blockage the business territory of *Laval*. When *Laval* failed to fulfil the contract it filed a suit with the court of law. The Swedish court referred the matter to ECJ for interpretation. The latter applied the proportionality principle, what resulted in final assessment of the action and limitation of the freedom of the trade union. Of course, owing to their consequences, this and similar cases, were roundly condemned based on the argument, that economic interests were preferred to social ones. Various comments were made with regard to this case, within the framework of which comments various standards of application of proportionality test were offered. According to *Brian Bercusson* proportionality should not be applied in the context of strikes as this is the process of collective bargaining and it is difficult to apply proportionality with regard to the requirements of trade unions, which change or originated during the negotiations. Also, the application of proportionality may have a negative impact on the impartiality of the state in the economic sector. Despite the difference in opinions, the controversy of the outcomes of these cases does mean that the application of proportionality should be eliminated altogether. What is more, the matter was analysed in the following light: the justification for using this standard as a limitation of strikes becomes stronger when employers also have to conform to the same standard the obligation of the employer, that its action should be compatible with the same standard.[21]

In the UK the more structured principle of proportionality has replaced the *reasonableness* standard in various employment contexts. Especially the principle of proportionality is well-established in discrimination law. Dynamics of such developments influenced on the jurisprudence of ECJ applying EU Directives concerning equal treatment. Gradually these directives led to the amendment of the existing measures and adoption of new measures prohibiting employment discrimination on various grounds. Furthermore, these Directives also required the application of a proportionality as a part of defence in indirect cases of discrimination. In this contexts the most cases dealt with the employers, who discriminated against their employees. It should be said, that English courts often apply a test integrating proportionality and reasonability. This is the test, that requires an objective balance between the discriminatory effects of the measure and the reasonable needs of the discriminator, but avoids subjecting employers to the stricter ECJ standard, which demands that indirect discrimination be necessary to meet a real need of the business.[22]

As already mentioned the proportionality principle is most often and widely used with regard to law regulating various aspects of discrimination. The aspects of discrimination are particularly relevant for private law relations, like employment relations. E.g. In France, there is a general rule grounded in the Labour Code that prohibits any infringement of workers' rights that is not in line with the principle of proportionality.[23] Ever since in one of its judgements (*Seminal R. v. Oakes*) the Supreme court of Canada interpreted section 1 of the Canadian Charter of Fundamental Rights using the three-stage proportionality test, proportionality has become an important pillar of Canadian law.[24] In Israel, labour courts have been

21 Ibid, 413-414.
22 Ibid, 415.
23 Ibid, 416.
24 Ibid, 375.

using proportionality tests for many years.[25] Professor *Bernd Waas* stated at Barcelona Conference of 2013 on Labour Law, that German Federal Court has been applying the principle of proportionality for decades in labour disputes, especially in dismissal-related matters.[26]

It is reasonable to believe, that in the nearest future this trend will be further expanded and will be applicable by greater number of countries. The expansion of the proportionality principle to other areas of law and especially to contract law could be explained through the changing role of the law in establishing an Economic public order that, traditionally, has been realised via the imperative law, aiming at combating inequalities in the name of social justice.[27] Employment relations are typical example of the theory called relational contract,[28] by *Macneil,* where the parties cannot predict all possible circumstances in advance and due to this reason it is necessary to apply an external criteria, regulating non-predictable circumstances. Insofar as employment relationship is characterised by a different distribution of contractual powers, one of the most important functions of the labour law is precisely to re-balance this unequal power distribution. This labour law function can be implemented through a variety of instruments: first of all using imperative norms that the parties of the contract of employment can't derogate, with a range of different sanctions.[29] Proportionality should be applied as a technique to fill the regulatory gap in the context of employment. It should be applied in private law identically to administrative and public law - should not go beyond the legitimate aims recognised by general principles of law.[30]

2.2. Some Judicial Practice of Application of Proportionality Principle

There are some aspects in Labour law where the principle of proportionality is applied both explicitly and implicitly. The foregoing is proved by some judicial practice which revealed the aspects of labour law, with regard to which the application of the proportionality proved to be effective.[31]

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25 Ibid, 416.

26 *Waas B.,* The Principle of Proportionality in German Labour Law, Goethe Universität, LLRN Barcelona Conference, June 2013.

27 *Piera L.,* The Reasonableness and Proportionality Principle in Labour, Labour Law Research Network, Inaugural Conference, Pompeu Fabra University, Barcelona, June 13-15, 2013, 3, <https://portal.upf.edu/documents/3298481/3410076/2013-LLRNConf_Loi.pdf/a1992ca6-3376-4e87-a40f-bc3a8250d189>.

28 *Macneil I.R.,* Relational Contract, Wisconsin Law Review, 1985, 483-526, <http://www.cisr.ru/files/publ/lib_pravo/Macneil%201985%20Relational%20contract.pdf>.

29 *Piera L.,* The Reasonableness and Proportionality Principle in Labour, Labour Law Research Network, Inaugural Conference, Pompeu Fabra University, Barcelona, June 13-15, 2013, 3, <https://portal.upf.edu/documents/3298481/3410076/2013-LLRNConf_Loi.pdf/a1992ca6-3376-4e87-a40f-bc3a8250d189>.

30 Ibid, 4.

31 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal / Revue de droit de McGill, Vol. 59, № 2, 2013, 419, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

When making decision on *R.v.Oakes Case* the Supreme Court of Canada, like other jurisdictions, applied three-stage proportionality test, which examines the interrelation between the legitimate measures used for reach of a legitimate objective and legitimate objective:

1. The applied measure should be ***rationally connected*** with the objective that is to be attained;

2. The measure should be selected in a manner as it to be less damaging or ***minimally impairing*** the right to free action, but, at the time, attain the objective;

3. In narrow meaning, there should be ***proportionality*** between the damage caused as a result of applied measures and the benefit gained through the attainment of the objective. I.e. Graver is the effect of negative impact of application of a measures, greater should be the objective.[32]

Proportionally test structured according to such three-stage system is the useful and effective instrument for assessment and decision-making. It ensures: a) that decisions are both rational and considerate; b) prevention of the abuse of power by both employers and unions.[33]

2.1.1. Some contexts of explicit application of proportionality test have been identified:

a) Disciplinary procedures and *just cause:*

The most obvious example of an explicit use of proportionality are ***just cause*** cases. In this case the context is being assessed and analysed in the light of proportionality test - whether an employee's misconduct was so serious that it did not give rise to use just cause (e.g. summary dismissal). In case of a dispute an employer is required to show that the sanction imposed upon an employee was proportional to his or her misconduct. The following is being verified within the scope of the principle of proportionality: even if the misconduct is very serious - a theft, misappropriation or serious fraud was committed - would an employer have a *just cause* to summarily dismiss the employee without an advance notice? In just-cause cases the courts mainly apply two-stage proportionality test: 1. whether the evidence establishes the employee's misconduct; and 2. if so, whether the nature and degree of the misconduct warrants dismissal.[34] E.g. the two-stage proportionality test was applied in *McKinley v. B.B. Tel* Case. However there is some similarity to the ***Oakes proportionality test***: one might argue that when employers make a decision to either discipline or dismiss an employee, the decision infringes the employee's right or interest to have job security or at least to receive advance notice. How does the employers balance such decisions? Of course, the employer's objective is to ensure that the workplace is composed of the most competent and cooperative workers. In the course of dispute settlement, employers are required to show that the measure chosen to achieve this objective was proportional. In this very contexts the test developed in *McKinley* Case resembles the first two stages of the *Oakes* proportionality test. Let's discuss it in details: First and foremost the McKinley test requires a proof of

[32] Ibid, 378-379.
[33] Ibid, 379.
[34] Ibid, 382.

incompetence or misconduct of an employee. This is necessary, as disciplining or dismissing of employees without notice should be rationally related to the aforementioned objective of the employer. Such decisions deter or conclusively prevent future misconduct or incompetence from the other employees.[35] I.e. the objective of the employers - for the workplace to be composed of the most competent workers - is attained through a measure like a decision on disciplining or dismissal. If an employee's action is trivial, minor error, dismissal without notice does not seem to advance the objective of the employer. I.e. there will be no rational relationship between the measure and the objective (the first stage of *Oakes proportionality test*).[36] On the other hand the *McKinley* test examines whether a less severe response is possible while still achieving the objective. E.g. summary dismissal is a severe punishment. A less severe response is a warning, which may prove to be an efficient measure to achieve the objective when official misconduct is not very serious. However, when the employee's actions are serious, intentional, or numerous, the employer may argue that there is no less intrusive way to achieve its legitimate business objective. I.e. there may exist the less damaging measure, still guaranteeing the achievement of the objective (the second stage of *Oakes* proportionality test).[37] The *McKinley* test was further developed in subsequent cases and now contains elements of all three stages of the *Oakes* three-stage proportionality test, balancing the benefits gained against harms.

The use of proportionality principle in disciplinary or dismissal case is even more established in collective bargaining settings as collective agreements generally require employers to establish *just cause* prior to the imposition of any form of discipline (written or oral warning, suspension, discharge, etc.). Furthermore, legislation provides arbitrators with the power to substitute their authority for that of the employer and to reduce the penalty imposed by an employer to one that is "just and reasonable" in the circumstances.[38] Employment relations arbitrators mainly consider two questions in *just cause* cases:

1. Does the conduct in question amounts to *just cause* (proof of reason/sound justification) for the imposition of some form of discipline? This part resembles rational connection stage of the *Oakes proportionality test*: dismissing or disciplining only those employees who misbehaved or performed poorly is *rationally connected* to the employer's objective of having the most competent body of employees?

2. Is the method/form of discipline selected by the employer appropriate in the circumstances? Various mitigating factors are discussed as potentially justifying the substitution of a lesser penalty in the place of discharge, including: whether the employee was confused or mistaken or the act was impulsive (non-premeditated); whether the harm to the employer was trivial; whether the employee sincerely acknowledged the misconduct; whether the penalty imposes severe hardship upon the employee given his or her age and personal circumstances; the past record of the employee, the length of service. This part combines both the second and third stages of the *Oakes proportionality test*. It requires the employer

35 Ibid, 382-383.
36 Ibid, 383.
37 Ibid, 383.
38 Ibid, 384-385.

to choose the least intrusive punishment while still achieving its objective. It also balances between the benefits of achieving the employer's objective and the harms imposed upon the employee.[39]

b) Inviolability of privacy at workplaces/privacy cases:

Obvious example of explicit use of proportionality principle is the case of privacy violation at workplaces: employers requires the employees to take alcohol test or uses surveillance cameras or monitors the use of mails and computers. E.g. in Canada this matter is subject to regulation of PIPEDA-ს ,[40] namely, it says that organizations can collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.[41] This stipulation was interpreted by Privacy Commissioner, arbitrators and federal courts within the proportionality test.[42] The Confidentiality Commissioner developed *four-stage test* to determine, whether it is possible to collect personal data for purposes that a reasonable person would consider appropriate in the circumstances. The Commissioner held that, it is essential to consider the appropriateness of the organization's objective for collecting personal information, as well as the circumstances surrounding that objective. Once the objective is identified, in order to determine whether the collection, use, or disclosure was reasonable in the circumstances, the following questions should be tabled:

1. Is the measure demonstrably necessary to meet a specific need?
2. Is it likely to be effective in meeting that need?
3. Is the loss of privacy proportional to the benefit gained?
4. Is there a less privacy-invasive way of achieving the same end?[43]

The same approach was developed by Federal Court and the arbitrators. The above structure of the test is identical to *Oakes proportionality test*. The first inquiry corresponds to the *minimal impairment* stage of the *Oakes test* because it examines whether the measure is necessary to meet the objective - that is, whether there are less intrusive ways of achieving the same objective. The second inquiry is akin to the first stage of the *Oakes proportionality test* because it examines whether the measure chosen for the collection of information is effective in achieving the objective - that is, whether it is *rationally connected* to it. The third inquiry resembles the third stage of the *Oakes proportionality test* because it weighs the proportional benefits of collecting information against the harm to the employee's privacy (In this case the benefit from collecting data against impairing employee's confidentiality by the employer).

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39 Ibid, 385-386.

40 Personal Information Protection and Electronic Documents Act, <http://laws-lois.justice.gc.ca/PDF/P-8.6.pdf>.

41 Ibid, part 1, division 1, paragraph 5(3).

42 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal / Revue de droit de McGill, Vol. 59, № 2, 2013, 386, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

43 Ibid, 386-387.

The fourth inquiry, which asks whether the employer explored other less privacy-invasive ways of achieving the objective, is also similar to the *minimal impairment* stage of the *Oakes test*.[44]

In *Eastmond v. Canadian Pacific Railway* Case, the video recording surveillance cameras were installed in the work space, what was the least intrusive mean available to employer to accomplish a reasonable objective. In this case the court found that the measure to accomplish the objective was appropriate in these circumstances caused by numerous past incidents, which encouraged the employer to use this measure as a preventive instrument. The cameras were important for deterrence of theft and vandalism as well as for the increased security of individuals and goods. Furthermore, the court found the loss of privacy to be minimal. Also, the collection of information was neither surreptitious. Another argument was that the surveillance was not limited to employees only, but captured every person who walked in the work space. As well, the employer explored other alternatives, such as security guards and fencing, but they were too expensive or unfeasible. Finally, after passing all the stages of the test, the court found the loss of privacy proportional to the benefit gained from the collection of information. [45]

In *Parkland Regional Library* Case an employer installed software to monitor the usage of computers by employees. This action was hidden from employees. When the employee found out about the surveillance, he filed a complaint with the Privacy Commissioner. After reviewing the case the Commissioner held that employer's action was violating the legislation. In the case concerned there was no legitimate reason of the employer that would have considered surveillance of the employee without his knowledge as a legitimate measure to the accomplishment of the objective. Neither was there sufficient evidence to support the employer's suspicions about employee's control. i.e. there was no *rational connection* according to the first stage of the *Oakes proportionality test*. Moreover, the measure chosen by the employer was not necessary for managing the employee. Furthermore there could be other computer-based methods which would assess employees more productivity and specifically. In this case chosen measure was not the least intrusive way of collecting information about the employee. Again, the Commissioner was in fact using the second stage of the *Oakes proportionality test* - *minimal impairment*.[46]

Based on the above examples **proportionality is a tool to assist in the assessment of facts. It calibrates the intrusion to the interest protected. The operating principle is that the more serious the intrusion, the heavier the burden will be, and vice versa.**[47]

The situation differs according to the existence of trade unions at the workplace. In a unionized environment, relations between the parties are regulated by law as well as the rules, established between them. In this case the employers are required to exercise their managerial rights and discretion reasonably. In privacy cases, this reasonableness standard has evolved into a "balancing of interests" test:

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44 Ibid, 387.
45 Ibid, 387-388.
46 Ibid, 390-391.
47 Ibid, 391.

weighing the employer's interest in running its business effectively and safely against the privacy interests of employees. In such cases the arbitrators often assess:

- the reasonableness of the employer's action or policy;
- the nature of the employer's interests in advancing this action or policy;
- whether there are less intrusive means available to address these interests;
- the impact of the employer's action or policy on the employees.

Actually, the above structure represents the first and the second stages of the *Oakes* proportionality test, however the elements of the third stage can as well be identified.[48] E.g. with regard to surveillance cameras, if they are placed in workplace washrooms, some argue, that this is a necessary and efficient measure, reasonably needed to prevent thefts. There is no less intrusive way of controlling washrooms. However, some agree that this measure is still unreasonable, due to the severity of privacy infringement, which cannot be offset by the benefits of preventing thefts. The assessment of this very aspect is the part of the reasonableness where balancing issue is being assessed, what is identical to the third stage of the *Oakes proportionality test*. In non-unionized workplaces and the employers are free in their actions, they collect and use information about their employees in the absence of specific legislation or common law rules. In this case the rights of the employees are brutally violated.[49]

As already mentioned, at least two contexts of explicit application of proportionality principle and its test in employment relations are established in practice (*just cause* and privacy). In some cases the different variations of proportionality test are used, but each of them is based on proportionality three-stage test system. Hence, it is reasonable to fully apply *Oakes proportionality test* in the case of explicit referral to it.

2.2.2. Several contexts of implicit use of proportionality test in employment relations are identified:

- restrictive covenants;
- workplace discrimination;
- picketing.

In cases regarding these issues the courts have developed the practice of legal tests that are very similar to the proportionality test yet lack any direct reference to proportionality.[50] These tests are rather well structured, what brings about a question: why using proportionality in an explicit manner will be beneficial in these cases? The answer is as follows:

1. Once the tests used in above contexts are very similar to proportionality, it could prove beneficial to start using all three stages of the test directly and in a systematized manner, the good practice of which would add additional relevant considerations into the analysis.

48 Ibid, 391-392.
49 Ibid, 392-393.
50 Ibid, 394.

2. Even if no change is made to the jurisprudence and the same tests prevail without referring to proportionality, by showing that courts are de-facto using the proportionality tests, that is, it is an efficient mechanism for assessment. Hence, it is better for it to be used directly and not implicitly. [51]

In picketing cases proportionality may be relevant in two different contexts. The first context is constitutional and examines whether picketing should be permitted or restricted by legislation. In this case is it clear, that picketing is a form of expression, and as such is protected by the constitution. The second context focuses on the relationship between the union and the employer and assesses whether the use of picketing is appropriate. In this context the proportionality of union's action with regard of the employer is not clear without establishing and analysis of specific circumstances. Insofar as freedom of expression is not unlimited, it is subject to reasonable limits. Imposing limitations on picketing may therefore be justifiable only to the extent that it is reasonable and markedly necessary for free and democratic society. E.g. picketing outside the homes of management personnel may be tortious and the court may issue an injunction order, whilst picketing according to the places of production may be found admissible. However, even in the latter case it is very difficult to delimit between the form of expression and a tortious action. In such cases the court makes recourse to a balancing act. It argues, that picketing is economically damaging not only for the employers, but the third persons as well. At the same time it is possible for even the most problematic picketing not to become grounds for setting limits. Hence it is necessary to analyse picketing cases according to proportionality test. In *Ledcor* case the workplace was under substantial renovations and, as a result of picketing at the entrance that included delays of vehicles, construction had to be shut down. The court allowed the picketing, but ensured that construction workers were let in. At the same time the court limited the maximum number of picketers to twenty. This result corresponded to the minimal impairment stage of the test. Furthermore, the court concluded that there were less intrusive ways to achieve the objective and since the union had not chosen them, the court had to impose some limitations with regard to picketing.[52]

In above cases the logic and assessment system of *Oakes* (three-stage) *proportionality test* is applied implicitly, without direct reference to proportionality principle. This practice demonstrated the importance of proportionality principle and the necessity of its advancement and explicit use.

III. Conclusion

Although the proportionality is the fundamental principle of public and private law and the main tool for the regulation of modern relations through measuring the use of power, the question of its integration into labour law field in a way of systematized tests, is subject of recent debates. The actualization of the question was conditioned by some contradiction between traditional understanding of labour law and modern challenges. Application of proportionality principle and its tests in employment

[51] Ibid, 394-395.
[52] Ibid, 399, 403.

relations is regarded as one of the mechanisms to react to this process. It was applied in labour disputes as a preventive measure against the abuse of power for analysis of the actions of not only the employers, but the employees (mainly unions) as well and for making final decisions. The case law is not so rich so far, however it is developing. The advancement of proportionality principle is the reaction to modern processes, within which the aspects of possibility to modify doctrinal tasks of labour law are discussed, meaning the change of selective nature of labour law by universal and taking good account of employer's interest in proportion to protection of the rights of the employees. Hence, proportionality principle is a kind of efficient balancing legal mean in response to modern challenges to solve both traditional and new tasks of labour law.

As a result of referral to proportionality principle when discussing a specific case, specific questions and assessment criteria were developed, which were then systematized in three-stage test - the so-called *Oakes* proportionality test. The courts and other dispute settlement authorities of course prefer case-by-case approach to the use of proportionality principle, however, over the time, the analysis of various cases has demonstrated, that all the assessment criteria resemble three-stage proportionality test. The latter combines all the different approaches, systematizes them in a more efficient manner, what is relevant (ready-made formula) for any case:

1. There should be rational connection between means/measures and objectives, as the means/measures used for the achievement of objects should really promote the advancement of results.

2. Intrusive measure should be selected, which is necessary for the attainment of the objective. Justification of violation of rights should be conditioned by strong necessity, owing to specific needs and should result in minimal impairment.

3. The damage, caused by the abuse of power and the benefit of this action should be mutually proportional.

As of to date the practice of application of proportionality principle and its structured test is notable only in several contexts of employment relations (*just cause*, privacy cases, discrimination cases, picketing). Furthermore, proportionality principle is not always used explicitly, but rather implicitly, without direct reference thereto. However, it is important, that the necessity, need and benefitiality of the use of proportionality test in decision making process is evident.

Study of the practice of proportionality principle and its advancement within the framework of national labour law of Georgia is of major importance in the light of fulfilment of the Association Agreement and integration of the European standards into Georgian legislation. The country is to accomplish legal approximation in labour field and this required multidimensional vision: not only the establishment of compatibility with the EU Directives and transposition of the European rules into Georgian legislation, but also the understanding of the principles, which constitutes grounds for the interpretation and then use of these rules.

Integration of intensive application of proportionality principle in court decisions and scrutiny of labour dispute in the context of three-stage test will promote not only the establishment of sound practice (new models of analysis), but also the advancement of labour law as well in general.

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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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17. *Kay R.S.,* The European Convention on Human Rights and the Control of Private Law, European Human Rights Law Review, Issue 5, 2005, 476.
18. *Koch J.,*Münchener Kommentar zum BGB, 5 Aufl. 2010, 196.
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30. *Wilhelmsson T*., Contracts and Equality, Legal Theory, Stockholm, 2000, 146-147, 150-151, 155, 159, 161.
31. AZ: OLG Köln 24 U 51/09.
32. Das Urteil des Amtsgerichts Hannover vom 14.08.2013 (Az.: 462 C 10744/12).
33. Bull and Bull v Hall and Preddy, UK Supreme Court, B2/2011/0313 and B2/2011/0314 27.11.2013.
34. 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.
35. Constitutional Court of Georgia, Decision of 18th March 2011, №2/1/473, Citizen of Georgia Bichiko Chonkadze and others against the Minister of Energy of Georgia.
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Third Parties as the Subjects of Civil Justice

The paper considers the development of the third-party institute in civil proceedings and its value for implementation of the right of access to court. It includes comparative analysis of the third parties stipulated in the civil procedures of civil law countries - European Union, Germany, Italy, France and common law countries – UK, USA, Canada and Australia. The article also compares the third persons envisaged in the project "The International Rules of Civil Procedure" of the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) and in the Civil Code of Georgia.

The paper considers the issue about define the type and quality of influence to be exerted by judgment on persons' rights to involve them in trial in the Civil Procedures Code of Georgia.

The paper suggests introduction of the term „intervention" in the Civil Procedure Law of Georgia and differentiation of the kinds of intervention in accordance with the continental (civil) law reflecting the interference of a third party in the civil proceedings. For avoiding intervention of the persons, whose rights and obligations are not impacted by the judgement, the paper, at stipulation of international practice, recommends introduction of the "amicus curiae" procedural mechanism in Civil Procedure Law.

Key words: *Civil Procedure, third person, intervention, amicus curiae.*

1. Introduction

Civil disputes regularly originating between two parties might complicate[1] and become complex and multiparty. The primary objective of the civil justice is to achieve fair, complete and efficient solution of the dispute, which requires existence of flexible and appropriate legal regulations. In the civil procedures, it is very important properly to define the status, rights and obligations of the persons participating in the proceedings. The institute of a third party provided in the Civil Procedure Law reinforcing the right to fair trial defined by Article 6 of the European Convention on Human Rights is the merit of the national culture of civil procedure. According to the scope of the rights provided for third persons´, it is possible to judge how the legislator defends the rights of the citizens.[2] In addition, the efficient legal defence includes the issues concerning the scope of practice of a third party allowed.[3] Given these circumstances, intervention of a third party in civil proceedings has a special significance.

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1 *Liluashvili T., Khrustali V.,* The Comment to the Civil Procedure Code of Georgia, 2nd ed., Tbilisi, 2007, 168 (in Georgian).

2 *Gottwald P.,* Comparative Civil Procedure, Ritsumeikan Law Review, International Edition, № 22, March 2005, 25, <http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr22/rlr22idx.htm>.

3 *Luke W.*, Die beteiligung Dritter im Zivilprozess, Eine rechtsverglaichende Untersuchung zu Grundfragen der subiektiven Verfahrenskonzentration, Tübingen, 1993, 6.

It is difficult to agree with the opinion of some authors, according to which a third party is considered as surplus, harmful mechanism and is used for a process delay.[4] On the contrary, a third party institute in civil proceedings is one of the valuable resources and its objective performance greatly assures realization of human right - access to a court, guaranteed by Constitution and international acts.

The third party intervention in civil process helps for collection all neseccary materials in one case,[5] also provides full consideration of the case by court and eliminates risk of contradictory decisions. Participation of a third party provides not only to protect the rights quickly and correctly but also saves time of judicial authorities and helps for procedural economy.

The Civil Law of the Soviet period was mostly a part of the public law. The change of social and economic formation put the problem of the legislation optimization on the agenda. After the collapse of the Soviet Union, in Georgia the Civil Law was chosen as the best legal system for the country. The Civil Code of Georgia based on the principles of the Civil (Continental) Law was adopted in 1997. Although the material Law of Georgia relies on the Civil Law principles, in the Civil Procedure Code the existing legal norms for the institute of the third parties are mainly the same as those of the Soviet Union period and do not meet requirements of modern civil society. Against the background of global harmonization, the problem of optimization and harmonization of the Civil Procedure Law is on the agenda again. The more so, according to Article 13th of Association Agreement between the European Union and the European Atomic Energy Community and their Member States and Georgia while cooperating in security and justice, the parties shall focus on the further support to the rule of law including the independence of the Court, access to justice and the right to the fair trial.[6] Increasing pace of internationalization and globalization causes legal, economic, political and/or cultural integration of various parts of the world in larger entities[7]. The integration results in the world-scale harmonization and unification of law and in this rapid process of harmonization, it is important to develop such mechanisms in Georgian legislation, which can succesfully regulate the modern civil realtionship.

2. The Third Parties in the Harmonization and Unification Process

The researchers of the comparative civil procedures had several attempts to unify the existing civil procedural law. Harmonization of the civil law was preceded by adoption of the conventions[8],[9],[10]while

4 *Prikhodko I.A.,* Access to Justice in Arbitration and Civil Litigation. St. Petersburg .: Publishing House of S.-Petersburg state. University, 2005, 345 - 347; Ibid, Problems of Participation of Individuals in the Arbitration process // Arbitration practice, 2005, 29 (in Russian).

5 *Kurdadze S, Khunashvili N.,* Civil Procedure Law of Georgia, Meridiani, Tbilisi, 2012, 123 (in Georgian).

6 Association Agreement between the Aeuropean Union and European Atomic Energy Community and their Member State, of the one Part, and Georgia, of the other part 27.06.2014, ratified 18.07.2014, Effective 01.07.2016.

7 *Van Rhee C.H.,* Harmonisation of Civil Procedure: An Historical and Comparative Perspective, in: *Van Rhee C.H., Kramer X.E. (eds.),* Civil Litigation in a Globalising World, The Hague: T.M.C. Asser Press/Springer, 2012, 39-63.

8 1905 Convention on Civil Procedure, Hague Conference on Private International Law, 17.06.1905.

the first attempt of unification was the innovative project of Marcel Storme in Europe[11] in 1994, which implied visionary search for civil procedural principles combining civil and common law learning and experience.[12] The mentioned principles were adopted in 1988 in Rio de Janeiro.[13]

The next attempt of harmonization was in 1997 – the American Institute of Law (ALI) launched a project Principles and Rules of the Transnational Civil Procedure shared by the international institute for the Unification of Private Law (UNIDROIT) in 2000. The principales were introduced in 2004. The goal of the mentioned project was to unify the achievements of the common law and civil law and to create a "peaceful law" combining the common and civil laws. The model principles are created in case some specific norms are inapropriate for different cultures. Those principles have an important role in the science of civil procedure. It is important to follow these principles, otherwise it can be considered as an ignorance of the procedures".[14]

Intervention of a third party is regulated by the 12th principle – Multiple Claims and Parties. According to the second point, a person with a substantial interest in the subject matter of dispute may apply for intervening. The court itself or by motion of a party, may notice and invite a person with sufficient interest for intervention. Invitation for intervention is a favorable opportunity for a third party to intervene in the proceedings. Under the Article 5.3, the court itself or on motion of the parties may demand from the invited person to prove such an interest. Before invitation for intervention the court shall consult with the parties**.**[15] In Georgian Civil Procedures the court does not have the right of invitation.

Also**,** the impulse for spontaneous harmonization and unification of existing and future systems of civil procedure is the current legal, economic, political and cultural integration of the EU countries.[16] It is possible to create uniform principles of European Civil Procedure based upon Article 6 of the European Convention of Human Rights and the comparative studies. [17] European Union member states should maintain fundamental procedural guarantees of criminal and civil proceedings.[18] Article 6 of the

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9 1954 Convention on Civil Procedure, Hague Conference on Private International Law.

10 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Hague Conference on Private International Law.

11 *Storme M.,* Approximation of Judiciary Law in the European Union, Nij, Dortrecht, 1994, 67.

12 *Storme M.,* Towards a Justice with a Human Face, The First International Congress on the Law of Civil Procedure Faculty of Law – State University of Ghent, 1977. <https://books.google.ge>.

13 Abuse of Procedural Rights: Comparative Standards of Procedural fairness, International Association of Procedural Law International Colloquium, Tulane Law School New Orleans, Louisiana edited By Michele Taruffo, Kluwer Law International, 27-30 October 1998, 192.

14 *Andrews N.*, Fundamental Principles of Civil Procedure: Order Out of Chaos, University of Cambridge, UK, 2012, 21, <www.springer.com>.

15 *Joint ALI/UNIDROIT Working Group* on Principles and Rules of Transnational Civil Procedure, Principles of Transnational Civil Procedure Appendix: Rules of Transnational Civil Procedure (A Reporters' Study) UNIDROIT 2005 – Study LXXVI – Doc. 13, Rome, January 200, 37, <http://www.unidroit.org/>.

16 *Van Rhee C.H.,* Harmonisation of Civil Procedure of Civil Procedure: An Historical and Comparative Perspective, Maastricht University, School of Law, 2011, 9, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876329>.

17 *Gottwald P.*, Comparative Civil Procedure, Ritsumeikan Law Review, International Edition, № 22, March 2005, 33, <http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr22/rlr22idx.htm>.

18 *Kramer X.E., van Rhee C.H.,* Civil Litigation in a Globalising World, T.M.C.Asser press, The Hugue, The Netherland, 2012, 50, <www. Asserpress.nl>.

European Convention on Human Rights is the highest peak of the hierarchy of the norms of the Civil Procedure Law in European countries and not only there. It creates the basis for legal balance of human rights, which is granted to individuals intervening in the civil procedure and, in this case, to a third party intervened in accordance with the rules defined by European law as follows: According to Article 40 of the Statute of the European Court of Human Rights the member states can participate in the proceedings. The right is given to organizations, agencies, and other individuals who can show "an interest in the result of a case submitted to the Court."[19]

According to the Case law of the EU Courts, "an interest in the result of a case submitted to the Court" will exist if the intervener's legal position or an economic situation might actually be directly affected by ruling" , while a person's interest in one of the pleas raised by a party to the proceedings succeeding or failing is insufficient for intervention.[20] In Georgian law it is not underlined whether what kind of interest is sufficient for a person to interevene the proceedings. According to Article 89, all interested persons without an independent claim may apply to a court to allow him/her to intervene as a third party if the court decision may affect his/her rights and duties with respect to one of the parties. "All interested persons" is a very wide notion, the more so, there is no definition of whether how the decision can affect his/her rights. This ambiguty implies the probability of intervening an irrelevant person in the proceedings. Consequently, it would be reasonable to consider the existence of economic or legal interest as the precondition of intervention.

EU. Law does not directly differentiate the third parties with independent claims but recognizes a participant similar to a third party without independent claims. The Court defines the limits of participation in the proceedings allowing a third party to intervene in support of any party.[21] EU law provides intervention of associations as a third party. Under the EU case-law, as a rule, an association is allowed to intervene if the results of the proceedings affect the collective interests of the association. This means that unlike the physical persons, the associations do not need to show that the results of the court's decision directly affect their legal position or economic conditions or those of any member. On the contrary, it is considered that they are interested in intervention, if their interests coincides the interests of the majority of its members and if their intervention will allow the court to better assess the risks of the situation. It is considered that this approach is more flexible somehow compensating the strict view point concerning the intervention of physical persons.[22]

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19 *Eliantonio M., Backes Ch.W., van Rhee C.H., Spronken T.N.B.M., Berlee A.,* Standing up for your right(s) in Europe, A Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts, Directorate-General for Internal Policies, Policy Department, Citizen′s Rights and Constitutional Affairs, Legal Affairs, 2012.36. <www.europarl.europa.eu/.../IPOL-JURI_ET(2012)462478_EN.pdf>.

20 Ibid.

21 Statute of the court of Justice of the European Union (Consolidated version),< http://curia.europa.eu>.

22 *Eliantonio M., Backes Ch.W. van Rhee C.H., Spronken T.N.B.M., Berlee A.,* Standing up for your right(s) in Europe, A Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts, Directorate-General for Internal Policies, Policy Department, Citizen′s Rights and Constitutional Affairs, Legal Affairs, 2012, 36, <www.europarl.europa.eu/.../IPOL-JURI_ET(2012)462478_EN.pdf>.

3. The Third Parties in the Legal System of EU Member States

In continental (Civil Law) system of civil procedures, an independent procedural institute named "intervention principal" was developed in the period of canon law.[23] In the Civil Procedure Codes of every German-speaking countries the involvement procedure is referred to as "intervention" and provide almost similar regulations about intervention of a third party in the proceedings: a person claiming for better right on the subject of dispute, proceedings on which is already going on between other parties, has the right to prove his claim against both parties during current procedure (Hauptintervention - the principal intervention).[24] If a third person has a legal interest in support of one of the parties of the proceedings, he has the right to intervene in the dispute to help that party (Nebenintervention - auxiliary intervention)[25]. Also, the Regulation (Streitverkündung) recognizes the case, where a party intends to lay claim to a third party. Both German and Austrian Civil Procedures contain the regulations of the Der pratendententenstreit (claimants' dispute) or Urheberbenennung in the case, where the party claims for the property, or for enjoying the right on behalf of a third party.[26]

The Civil Procedures of Georgia does not specify the above-mentioned action with a special term, only the persons intervening the initiated proceeding are called the "third parties". The term "third party" is of technical character, because it is the third in order.[27] The degree of interest of the third parties and relation to the object of the proceedings – the subject matter of dispute can be different. Accordingly, the law specifies two different kinds of the intervention: the third parties with independent claims, which intervene the proceedings together with the original parties of the dispute and asserts an independent claim for the subject matter of the dispute, and the third parties without independent claims, which intervene the proceeding in support of a plaintiff or the defendant and do not assert an independent claim for the subject matter of the dispute. If considered separately, they are two completely different subjects under one term of the Civil Procedure Law both in terms of intervention and in terms of the scope of rights. The common thing for the both forms is that those parties intervene in the ongoing dispute between other persons. Therefore, they are united under a common term „third parties". In Georgian legislation the term „third party " comes from Civil Procedure Code of the Soviet time, which in its turn comes from the Russian legislation. In Russia, the legal status of the third parties was formed in 1863, in the period of the so-called „Discussion", for adoption of the Civil Procedure Charter in 1864. Articles 653-655 of the Charter were about intervening third parties in a civil cases.[28] Based on the foregoing, it

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23 *Gorelov M.V.,* Third parties in Civil Procedures from the View of Centuries, Arbitration and Civil Procedures. 2012, №2, 41-43 (in Russian).

24 *Oberhammer P., Domej T*., Germany, Switzerland, Austria (CA. 1800-2005), European Traditions in Civil Procedure, Interseria Antwerpen – Oxford, 2005,103-106.

25 *Baur f., Grunsky W.,* Zivilprozeßrecht, Zehnte, uberarbeitete Auflage, Luchterhand, 2000, 102-104.

26 *Oberhammer P., Domej T*., Germany, Qwitzerland, Austria (CA. 1800-2005), European Traditions in Civil Procedure, Interseria Antwerpen – Oxford, , 2005,103-106.

27 *Melnikov A.A.,* The Course of Civil Procedure Law of Soviet Union, Theoretical base of Civil Justice, Book 1, Publishing House „Science", 1981, 236 (in Russian).

28 Judicial Statutes of the Russian Empire , 1864. Influence on modern legislation of Lithuania. Poland. Russia. Ukraina, Finland (To the 150th Anniversary of the Judicial Reform 20,11, 2014), 50, <http:// civil.consultant.ru/reprint/books/115/3.html#img4>, (in Russian).

would be appropriate if the Georgian Civil Procedure Code establishes the term "intervention" denoting involvement in the proceeding.

In the legal system of every EU member states the third parties can intervene the civil proceedings, if they have a sufficient interest in that and satisfy the main requirements of the principal parties of the civil proceedings. In most legal systems, the intervention is possible at any stage of a proceeding before the arguments is ended the same way as it was in the original version of the Civil Procedure Code of Georgia allowing intervention before ruling. In most legal systems, a third party not intervening the proceedings, may file a third-party opposition against the ruling, which they consider to be critical for their legal position.[29]

In the Civil Procedure Code of the Federal Republic of Germany the instutute of the third parties has an important place. The rules and terms of intervention of the third parties in the civil proceedings is regulated by Chapter 3 of the Code. Intervention of a third party is admissible if the party is interested in the result of the case. The result of the dispute is also important for legal relations or can have an economic and ideological effect on the proceeding. The intervention is possible only in case they can prove the above said.[30]

Section 64 of the Civil Procedure Code of the Federal Republic of Germany specifies the form of intervention, which is similar to that of the third party with independent claim: "Anyone asserting a claim to the object or the right regarding, which a legal dispute is pending between other person, either as a whole or in part shall be entitled, until a final and binding judgement has been handed down on that dispute, to assert his claim by filing a complaint against both of the parties with the court before which the legal dispute became pending in the proceedings in the first instance."[31]

Unlike our legislation, German Civil Procedure determines the time of intervention of a third party before ruling. Besides, the mentioned Section provides another important difference: according to the German law the third party shall assert his claim against both parties, while the Georgian Civil Procedure Code provides to assert a claim against both or to one of the parties. This means that German legislators do not share the position of those scientists, who consider that during the proceeding of a dispute in the court a third party may assert an independent claim only against one party without any claim against the other .[32]

As for the second kind of intervention, which is called an auxilarry intervention (Die Nebenintervention) and which is similar to that of the third parties without an independent claim, it is defined by

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29 *Eliantonio M., Backes Ch.W., van Rhee C.H., Spronken T.N.B.M., Berlee A.,* Standing up for your right(s) in Europe, A Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts, Directorate-General for Internal Policies, Policy Department, Citizen′s Rights and Constitutional Affairs, Legal Affairs, 2012, 36, <www.europarl.europa.eu/.../IPOL-JURI_ET(2012)462478_EN.pdf> .

30 *Baur F., Grunsky W.,* Zivilprozeßrecht, Zehnte, uberarbeitete Auflage, Luchterhand, 2000, 102.

31 Гражданское процесуальное уложение Германии, от 30 января 1877 г, в редакции от 12 сентяьря 1950 г, с измменениями и дополненями, внесенными до 30 ноября 2005 г, Wolters Kluwer , Москва, 2006 (in Russian).

32 *Ильинская И.М.,* Участие Третьих Лиц в Советском Гражданском Процессе. Государственное издательство юридической литературы, Москва, 1962 (in Russian).

Section 66 of the Civil Procedure Code of the Federal Republic of Germany, under which: (1) Anyone who has a legitimate interest in one party prevailing over the other in a legal dispute pending between other parties may intervene in the proceedings in support of the party. The auxilarry intervener cannot become an independent party, neither friends of the main party of the dispute except the auxilarry party. He cannot change or withdraw the complaint, neither to file a counterclaim support or to end the proceeding with plea bargaining.[33] Pursuant to 70 article the auxilarry intervener needs to present to the court the written document with all requisits defined for claims, while Georgian legislation recognizes the oral application too.

Curent system of the French Civil Procedural Law originated from the French *Code de procédure civil* of 1806. According to the Code, the parties were considered to be free in deciding how they would conduct their case.[34] Today, the problem of intervention of persons in the procedure is regulated by Section II, French Code of Civil Procedure, 1975,[35] which defines the so-called interlocutory claims. According to Article 66 of the Civil Procedure Code the purpose of intervention is to allow a third party to join a lawsuit engaged between the originating parties. The same Article specifies the types of intervention: voluntary, where the claim emanates from a third party; a non-voluntary, when the third party is summoned by a party (to join the lawsuit). [36] Under the French Civil Procedural Law the interlocutory appeal for intervention shall contain the claims and arguments of a party, applying and presenting accessory documents. [37] In France, the procedure is pending upon intervention of a third party.[38]

In Italy, Articles 105 and 106 of the acting Civil Procedure Code regulate the types of intervention of the third parties, and Articles from 267 to 270 define the necessary procedures of intervention. The latter fact shows that for Italian lawmakers the intervention institute is of high importance. According to Italian court practice, each can intervene in a process voluntarily or involuntarily. [39] Voluntary intervention is divided into three categories: 1. intertvento principale – where the claim is against the legal dispute *causa petendi* or *petitum*;[40] 2. intervento litisconsortile – when the intervener asserts claim against one of the parties for a part of the subject matter of dispute; 3. Intervento adesivo dipendente – where a third party intervenes after demand one of the parties or for self defense. In such a case the intervener shall have his interest. According to Article 268 of the Italian Code of Civil Procedure,

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33 *Baur F., Grunsky W.,* Zivilprozeßrecht, Zehnte, uberarbeitete Auflage, Luchterhand, 2000, 103.

34 *Van Rhee C.H.,* Harmonisation of Civil Procedure of Civil Procedure: An Historical and Comparative Perspective, Maastricht University, School of Law, <https://papers.ssrn.com/sol3/papers. cfm? abstract_ id=1876329>, 2011, 13.

35 French Code of Civil Procedure, 1975, Mise A jour Legifrance Le 15 sept. 2003, <http://www.legifrance. gouv.fr/html/codes_traduits/ncpcatext.htm>.

36 Ibid.

37 *Wijffels A.,* French Civil Procedure (1806-1975), European Traditions in Civil Procedure, Interseria Antwerpen – Oxford, 2005, 25.

38 *Cadiet L.,* Introduction to French Civil Justice System and Civil Procedural Law, Ritsumeikan Law Review, №28, 2011, 358.

39 Codice di procedura civile, Libro I, Titolo IV, agg. al 11/03/2013, 105, <http://www.altalex.com/>.

40 *Cappelletti M., Perillo J.M.,* Civil Procedure in Italy. Springer-Science+Business Media B.V, 1965.

intervention is allowed before the parties draw conclusions.[41] However, it should be noted that according to Article 165 of the Italian Code of Civil Procedure, in case of the dispute on the author's rights the author may intervene at any stage of the proceeding in order to defend his rights.[42] According to Article 106 of the Italian Code of Civil Procedure, mandatory intervention can be under the order of any party or the Court.[43]

4. Institute of Intervention in the System of Common Law

The distinctions in Civil Procedural systems of today's world are explained in different historical approaches to Civil Procedure, which might be called the families of Common Law and Civil Law[44]. In addition to great difference between these two principal families there are also some distinguished features within the families, which can be identified if we compare, for example, the Procedure Laws of England, Wales and even USA. However, comparison of the present Procedure Law of England with the European Continental Procedure Law shows some similarities too. [45]

In the countries of the common law the intervention cycle consisists of three main steps: the first one is the thrashhold, when the Court makes decision whether to hear from a certain intervening person or not; at the second stage the judge is hearing from the intervened parties analyzing the hearing; at the final stage the Court's point of view concerning the intervened parties is reflected in the decision.[46] In the countries of the common system of law it is considered that there are at least three reasons for allowing the person to intervene: accuracy, affiliation and acceptebility. Accuracy implies hearing from the interveners of both parties even if they cannot provide any additional information. Provided with objectively useful information the Court will be able to make more accurate decision. Affiliation implies that the interveners can provide the Court with the best arguments for certain partisan interests. And acceptebility implies that the interveners, are allowed to have their voices heard by the Court.[47]

The statistical data show that intervention is highly important in England. Namely, in 2015, out of 79 cases of the Highest Court the intervention was allowed in 38 cases. And intervention for public interest is considered to be the greatest merit of the proceedings, because it allows the Court to learn

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41 *Grossi S., Pagni M.C.,* Commentary on the Italian Code of Civil Procedure, Oxford.2010, 247.

42 Copyright Litigation Jurisdictional comparisons, General Editors: Thierry Calame, Lenz & Staehelin & Massimo Sterpi, Studio Legale Jacobacci & Associati, Second edition, Thomson Reuters, 2015, 538. <http://tilleke.com/sites/default/files/2014_Dec_European_Lawyer_Copyright_Litigation_Vietnam.pdf.>.

43 Codice di Procedura Civile, Libro I, Titolo IV, agg. al 11/03/2013, 106, <http://www.altalex.com/>.

44 *Van Rhee C.H.,* Civil Procedure, Elgar Encyclopedia of Comparative Law, 2nd ed., <www.academia.edu >, 2012, 140-156, <www.academia.edu>

45 Joint ALI/UNIDROIT Working Group on Principles and Rules of Transnational Civil Procedure, Principles of Transnational Civil Procedure Appendix: Rules of Transnational Civil Procedure (A Reporters' Study) UNIDROIT 2005 – Study LXXVI – Doc. 13, Rome, January 200, 37, <http://www.unidroit.org/>.

46 *Alarie B.R.D., Green A.J.*, Interventions at the Supreme Court of Canada: Accuracy, Affiliation and Acceptance, Osgoode Hall Law Journal, vol. 48, num: 3/4(Fall, Winter), 2010, <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1086&context=ohlj>.

47 Ibid.

more arguments compared to those provided by the parties in a concrete case. [48] While it was 100 years ago when the Highest Court of the USA declared that intervention of the non-parties prevents "failure of justice".[49] In recent years, 85% of cases proceeds with intervention. [50]

Australia is also among the countries based on Anglo-Saxon common law, where intervention is rare for its Courts.[51] However, in the recent decade, changes in the approach of law proffesionals to the public interest caused the increase of the amicus curiae role.[52]

In Canada, there is an unprecedented rate of interventions. In 2000 - 2008 years there were 1583 interventions allowed, i.e. about 176 interventions per year, and for half of them the applications had been filed. Historically, the rules were unclear and any interested party was allowed to intervene. In 1980, the Supreme Court of Canada clearly defined existing rules and established a new practice. For intervention a party shall file an application that will be considered by a judge or the Court registrator depending on the circumstaces. The intervention application shall show the interest of the party, including the results and causes of nonintervention whether how intervention can help the court.

In the countries based on the common law system, a non-party may participate in proceedings in two different ways: as an intervener and as an amicus curiae. Intervention is interpreted as the proceeding, where the Court allows a third party, who was not the original party in the proceedings, to become the party by joining the plaintiff or the defendant.[53] As for the institute of the amicus curiae brief, it is also recognized by above-mentioned 13th principle of the model principles of ALI/ UNIDROIT, according to which a written submission concerning the important legal issues may be received from third persons with the consent of the Court, upon consultation with the parties. The Court may invite such a submission. The parties shall have the opportunity to submit written comment addressed to the matters contained in such a submission before it is considered by the Court.[54] The above mentioned institute is an important mechanism in the proceedings of the public issues.

It should be noted that the institute of amicus curiae was introduced in the Administrative Procedure Code of Georgia under the law of July 2015, which was added by Article 161 - amicus curiae brief. Introduction of such mechanisms as „amicus curiae brief" in the Civil Procedure Code would be

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48 Third Party Interventions in the Public Interest, Freshfields Bruckhaus Deringer LLP, May 2016, <https://justice.org.uk/events/assist-court-third-party-interventions-public-interest/>.

49 Cf Krippendorf v Hyde and another [1884] USSC 59; 110 US 276 at 285 (1883), January 28, 1884.

50 *Kearney J. D., Merrilli Th.W.,* "The Influence of Amicus Curiae Briefs on the Supreme Court", (2000), 148 U. Pa. L. Rev. 743.

51 *Willmott L., White B., Cooper D.*, Interveners or Interferers: Intervention in Decisions to Withhold and Withdraw Life-Sustaining Medical Treatment, Sydney Law Review, Vol. 27, 2005, 598, <https:// sydney.edu.au/law/slr/slr27_4/Willmott.pdf>.

52 *Kenny S.,* Justice, "Interveners and amici curiae in the High Court" (FCA), 1997, FedJSchol 1, 2. <www.fedcourt.gov.au>.

53 West's Encyclopedia of American Law, 2nd ed., Copyright 2008 The Gale Group, Inc. <http://legal-dictionary.thefreedictionary.com/intervention>.

54 Joint ALI/UNIDROIT Working Group on Principles and Rules of Transnational Civil Procedure, Principles of Transnational Civil Procedure Appendix: Rules of Transnational Civil Procedure (A Reporters' Study) UNIDROIT 2005 – Study LXXVI – Doc. 13, Rome, January 200, 37, <http://www.unidroit.org/>.

reasonable as it would reduce the number of the irrelevant third parties such as different organizations. Also, the legal reason and status of participation of the parties in the proceedings would be more accurate, and a third party with no material interest in the court decision would not be allowed to intervene as a party without independent claims.

5. Conclusion

Development of the institute of a nonparty intervention in the proceedings and transition to the model of the Continental (Civil) Law would be an important step towards harmonization of the Procedure Law with the European Law. During the work on legislative changes it is especially important to take into consideration the Georgian national character. Therefore, based on the synthesis of transnational principles and the national values, the legislators can be given the following recommendations to take into consideration in prospect:

- It would be reasonable to take into consideration the international practice approaches and in the Civil Procedure Code define the degree of interest of a party to be entitled as an intervener in the proceedings. Also, it would be a step towards harmonization to introduce the notion of „intervention" and to differentiate the types of intervention as follows:

a) Intervention for assertion of an independent claim (third party with an independent claim);

b) Auxiliary intervention in support of a party for further defense of his material interests (third party without an independent claim);

c) Intervention in support of the Court and/or for defending the public interests (in case the ruling can affect realization of the public interests).[55]

- Also, It would be reasonable to define terminologically the interveners according to their meaning:

a) Third party – a person asserting an independent claim against a party(s) in the Court during the proceedings;

b) Auxiliary intervener – a person intervening the proceedings in support of a party in order to defend his material interests and to prevent the prospective dispute;

c) Amicus curiae - a person intervening the proceedings in support of the Court and/or for defending the public interests. They are interested in prevention of infringement of public interests upon defending the private interests.

The above said differentiation would be useful for proper disposition of the participants in the proceedings and also would define the degree of interest of the third parties in the result of ruling. Excluding their confusion, the Court would be able to make a fair decision. In addition, in the global process of harmonization, it is very important for Georgian Civil Procedure Law to be in harmony with the international approaches.

[55] Freshfields Bruckhaus Deringer LLP , to Assist the Court: Third Party Interventions in the Public Interest, May 2016, <http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf>.

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46. Cf Krippendorf v Hyde and another [1884] USSC 59; 110 US 276 at 285 (1883), January 28, 1884.

Irine Bokhashvili*

A Preliminary Hearing in Criminal Proceedings

A preliminary hearing is an independent stage of the criminal proceedings, with its own aim, tasks and final documents.

Determination of a date of a preliminary hearing is an obligatory prerequisite for the conduct of a hearing, which falls within the powers of a magistrate judge.

According to amendments made to the Criminal Procedure Code, a judge of a preliminary hearing shall on his/her own initiative verify the issue of leaving the remand detention.

Resolution of essential issues of a preliminary hearing, such as: admissibility of evidence; referring a case for a main hearing falls within the competence of a judge of a preliminary hearing. When making a decision on these issues, a judge of a preliminary hearing will take into account the high probability standard.

The legislation provides for the rule of appealing a judgement on termination of criminal prosecution, as well as on appealing the judgement on evidence recognized as inadmissible in the superior body.

Along with all above-mentioned issues, the article deals with controversial issues, provides analysis of the legislation and court practice and offers the author's opinion and proposals.

Key words: *preliminary hearing, a stage of the proceedings, terms, determination the identity of the accused, detention, the right to remain silent, evidence, assessment, fruit of poisonous tree, high probability, a ruling, termination of criminal prosecution, appeal.*

1. Introduction

The present work deals with controversial issues of a preliminary hearing in criminal proceedings. The relevance of the research is due to recent legislative changes related to matters discussed within the framework of a preliminary hearing and essentially non-homogeneous approach in the practice.

2. Preliminary Hearing in the System of Stages of Criminal Proceedings

A preliminary hearing[1] is an independent stage of criminal proceedings.

The term "stage" is often used in the scientific literature. A stage in the criminal proceedings may be any subsequent action performed after one action (e.g. the stage of application of measures of restraint, the stage of examination of evidence, etc.). In this regard, criminal proceedings are not characterized by division into stages. Division into stages is characteristic of criminal proceedings, where the term "stage" is used with a particular meaning, has definition as a concept, the number of stages and their sequence are officially recognized in criminal proceedings.

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1 See Federal Rules of Criminal Procedure, Rule 5.1, <https://www.law.cornell.edu/rules/frcrmp/title_II>.

The features characteristic of the stage of criminal proceedings are: 1. independent period of time; 2. particular tasks[2]; 3. circle of participants; 4. procedural form; 5. final document/decision. A preliminary hearing contains all above-mentioned signs: 1. A preliminary hearing is the second stage, which will be implemented in the criminal proceedings after the first stage-the investigation. A preliminary hearing is followed by the third stage-main hearing of the criminal case in the court of the first instance. An independent time period is allocated for a preliminary hearing in the criminal proceedings and it is not implemented simultaneously with any other stage; 2. A preliminary hearing has its specific objectives and tasks. The main purpose of a preliminary hearing is to deliver a decision on the admissibility of evidence and refer the criminal case for the main hearing; 3. A preliminary hearing is held by a judge[3] of a preliminary hearing, with the participation of parties; 4. The rule of a preliminary hearing is regulated by the legislation (the Criminal Procedure Code of Georgia (hereinafter referred to as CPCG) Article 219); 5. At the end of a preliminary hearing a final decision is delivered, a decision of the judge on referring the criminal case for the main hearing or termination of the criminal prosecution (so-called record of judgment is a wide-spread practice, when the judge announces the judgement verbally, which is reflected in writing in the records of a court hearing).

The system of stages of the criminal proceedings is characterized by a strict sequence of stages. In addition, the mandatory prerequisite for the implementation of each subsequent stage is the implementation of the previous stage. A preliminary hearing for the criminal case will be held only after the investigation of the case has been completed. The criminal case cannot be heard on merits before a preliminary hearing. A preliminary hearing will be held for all criminal cases, except when the criminal prosecution/investigation on the criminal case is ceased or the plea bargain is approved at the investigation stage.

3. Determining a Date for a Preliminary Hearing

3.1. The Rule of Determining a Date

Article 208 of the CPCG regulates the issue of determining by a magistrate judge of a date for a preliminary hearing on a criminal case. For its part, Article 208 of the CPCG is included in Chapter XX, which is devoted to the initial appearance and measures of restraint. It is obvious, that the issue of determining a date of a preliminary hearing, by its significance, is optional and integrated with the issue of the initial appearance and measures of restraint. This is confirmed by the fact that the CPCG does not provide for initiation/conduct of a hearing with the aim of determining a date for a preliminary hearing. At the same time, determining a date of a preliminary hearing is inevitable, as a prerequisite for the holding of a preliminary hearing.

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2 *Gogshelidze R.(ed.),* General Section of Criminal Law Proceedings. Tbilisi, 2008, 65 (in Georgian).

3 A magistrate judge or a judge of a district (city) court shall hold a preliminary hearing. In Tbilisi City Court, due to intensity of cases, a narrow specialization of judges is established and there is an investigatory and a preliminary hearing board. See resolution №1/85 of the High Council of Justice of February 19, 2016, <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202016/85-2016.pdf>.

As regards the above-mentioned issue, the court practice has not always been homogeneous. At the first stage of enactment of the current CPCG, in practice it was explained that part one of Article 196 of the CPCG inevitably obliged the prosecutor to file a motion with the court on all criminal cases on applying measures of restraint against the accused. After the completion of the review of the mentioned motion, the magistrate judge determined a date of a preliminary hearing.

The practice of demanding application of measures of restraint has gradually changed and Article 198(2) and Article 206(5) of the CPCG define that the prosecutor is not obliged to file a motion with the court on applying measures of restraint on all criminal cases and against all accused. Though, the practice of determining a date of a preliminary hearing remained the same and it was considered, that unless it was the first proceeding before the court, the basis for which was only the motion on applying the measures of restraint against the accused, no other rule for determining a date of a preliminary hearing could be applied. In this sense, in practice there were cases, when the prosecutor filed a motion in all criminal cases on applying measures of restraint against the accused. During the first proceeding before the court he/she filed a motion with the court, not to review the motion on applying measures of restraint and for the judge to consider only determining a date of a preliminary hearing.

Nowadays, it is established in the court practice that if the prosecutor considers that there are no grounds for applying measures of restraint against the accused, he/she will file a motion with the court, request the court to determine a date of a preliminary hearing and the court hearing will be conducted with the aim of review of this issue. This does not violate the law directly, though the aim of the law is not complied with. Today the procedural legislation does not recognize an independent rule for determining a date of a preliminary hearing. The term of filing a motion, the form of its review (without an oral hearing or with the participation of the parties) is not defined. Taking into account the court practice the procedural legislation must be improved/clarified and the procedure for determining a date of a preliminary hearing must be developed for the occasion when in the opinion of the prosecutor there is no basis for applying measures of restraint against the accused. In all other cases it is reasonable to integrate the issue of determining a date of a preliminary hearing with the initial appearance. The initial appearance is conducted with the participation of the parties, where the judge has the opportunity to take into account the positions of the parties when determining a date of a preliminary hearing. Also, by its content, determining a date of a preliminary hearing does not require the establishment and review of any material circumstances and the review of this issue at the end of the first proceeding before the court (without an independent hearing) ensures avoiding additional costs and saving resources of the judge.

3.2. Procedural Term

According to Article 208(3) of the CPCG preliminary hearing shall be held not later than 60 days after a person has been arrested or indicted (if the person has not been detained)[4]. This norm is consistent with Article 205(3) of the CPCG, according to which the term of the remand detention of the accused before a preliminary hearing shall not exceed 60 days after he/she has been arrested. The date of a

[4] As regards terms, for comparison, see, for example, USA practice 18. U.S. Code №3161 – Time Limits and Exclusions, <https://www.law.cornell.edu/uscode/text/18/3161>.

preliminary hearing is determined by the magistrate judge, who takes into account the positions of the parties, the complexity and volume of the case and is guided by the adversarial principle. A preliminary hearing is a post-investigation, court stage, which excludes conduct of an investigation during a preliminary hearing or after it. Accordingly, by the date of a preliminary hearing, the parties should have completed obtaining of evidence and be ready for convincing presentation of their positions before the court. Therefore, the magistrate judge shall allow the parties sufficient time and means to prepare the accusation and the defence[5].

According to Article 169(8) of the CPCG, before a preliminary hearing, a person may be indicted as a defendant due to a single episode of crime for not longer than 9 months. Furthermore, according to Article 8(2) of the CPCG the accused shall have the right to the expediency of justice within the time limits prescribed by this Code. A person may relinquish this right if so required for the appropriate preparation of the defence. Proceeding from the above, by a motion of the party (parties), the term defined for a preliminary hearing may be extended. The law does not define how many times the party (parties) can file a motion for the extending of the term, though in total this term should not exceed 9 months defined by Article 169(8) of the CPCG.

If a party (parties) prepares the position prior to the date of a preliminary hearing determined by the magistrate judge, the law provides for the change (reduction) [6] of the set term of a preliminary hearing by way of filing a motion with the magistrate judge.

3.3. Competence for Determining a Date

According to part one of Article 208 of the CPCG, the magistrate judge shall, after hearing the opinions of the parties, determine a date for a preliminary hearing. For its part, according to Article 196(1) of the Criminal Procedure Code of Georgia, the first proceeding before the court is conducted by the magistrate judge according to the place of investigation. According to Article 208(3) of the CPCG, the decision of the magistrate judge on defining/extending/reducing the date of a preliminary hearing may not be appealed.

Despite the fact, that the main reason of the initial appearance is a motion on measures of restraint against the accused and it is followed by determining a date of a preliminary hearing, both issues shall be

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5 See Article 208(2) of the Criminal Procedure Code of Georgia, <https://matsne.gov.ge/ka/document/view/90034>, [14.03.2017].

6 As to determining a date of a preliminary hearing it is interesting, for example, how this issue is regulated by the federal rules of criminal proceedings of USA: according to subparagraph "c" of rule 5.1. The magistrate judge must hold a preliminary hearing within a reasonable timeframe, but no later than 14 days after the initial appearance if the defendant is in custody and no later than 21 days if not in custody. Subparagraph "d" of the same rule stipulates extending of this term, which means that the magistrate judge may extend the time limits one or more times with the defendant's consent, taking into account the public interest. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay. See Federal Rules of Criminal Procedure. < https://www.law.cornell.edu/rules/frcrmp/rule_5.1>.

resolved independently of each other. The rule of appealing the judgement on applying, change or termination of measures of restraint provided for by Article 207(1) of the CPCG, does not apply to the decision delivered on the date of a preliminary hearing. [7]

The magistrate judge is always obliged to determine a date of a preliminary hearing, except for the occasion when a plea bargain is entered into between parties (part one of Article 208 of the CPCG). If the decision of a plea bargain approved at the initial appearance, will be terminated according to Article 215 (5) of the CPCG, the case will be returned to the prosecutor and the investigation will continue. In this case, on the agenda there is determining a date of a preliminary hearing, which is again the competence of a magistrate judge according to the place of investigation and cannot be resolved by a higher instance court reviewing a claim on terminating a plea bargain.

4. Issues to be Considered at a Preliminary Hearing

4.1. Definition of the Essence of the Charge

One of the first actions of a judge of a preliminary hearing, is to inform the accused of the essence of the charges and the sentence stipulated for those charges. The legislator shall instruct a judge of a preliminary hearing to do so if, after the initial appearance, the charges have been altered (part one of Article 219 of the CPCG). Parts 2-5 of Article 169 of the CPCG defines the rule of indictment when the prosecutor, or upon his/her instructions, - an investigator, shall familiarise the accused and his/her defence lawyer with the indictment. The accused learns the essence of the charge for the first time at this stage. The prosecutor and the investigator represent the prosecution party in the criminal proceedings and in some cases the legislator imposes the judicial control of their actions. The opportunity of the first check by the court of proper understanding of the essence of the charge by the accused in the criminal proceedings arises on the initial appearance and is provided for by subparagraph "c" of part one of Article 197 of the CPCG. Receiving from the accused of an asserting answer by a judge of the initial appearance, as a "neutral arbitrator" in the adversarial process, that he/she understands the essence of the charge, serves and already fulfils the purpose of protecting the interests of the accused. After the initial appearance the investigation continues and the charge against the accused may be changed/specified. In this case, the need of the inspection of the issue arises again and the preliminary hearing is the first opportunity in case of change of the charge after the initial appearance, for the judge to find out proper definition/perception of the charge by the accused. The prerequisite defined by part one of Article 219 the CPCG and discussed above must be preconditioned by this. There is no doubt that if the charge has not changed and the judge of a preliminary hearing will still explain to the accused the essence of the charge, it cannot be considered violation of the law on his/her behalf, and in the opposite

[7] The court practice is interesting regarding this issue, for example, see decision of April 10, 2014 of the Investigatory Board of Tbilisi Court of Appeals, <http://library.court.ge/judgements/89862014-04-29.pdf> (in Georgian).

case, when the charge changes and the judge of a preliminary hearing will not explain the essence of the charge to the accused, the rights of the accused are violated and it is considered to be failure to define the rights and obligations to the accused. There is an opinion in the scientific literature that as the Law does not provide for any precondition in explaining the charge by the judge reviewing the case on merits, imposition of a precondition on the judge of the preliminary hearing is incorrect and vague.[8] The rule provided for by Article 230 of the CPCG, instructing the judge of the main hearing to explain to the accused the essence of the charge, must proceed from the significance of the main hearing for the criminal case, as the main stage of the criminal procedure. The main task of a hearing on merits is the delivery of a decision on the issues related to the charge and at this stage the legislator along with the essence of the charge will take into account the detailed explanation of all issues related to the charge on behalf of the judge-minimum and maximum of the sentence, mitigating and aggravating circumstances, etc.[9]

4.2. Clarification of the Possibility of Entering into a Plea Bargain

According to Article 219 (2) of the CPCG a judge at a preliminary hearing shall inquire whether the accused pleads guilty to the charges brought, and to what extent, and about the possibility of entering into a plea bargain. According to part one of Article 209 of the CPCG, the mandatory prerequisite of a plea bargain is the confession of guilt by the accused. Accordingly, if the accused does not pleads guilty at a preliminary hearing, the opportunity of a plea bargain will be excluded and it will no longer be reasonable on behalf of the judge to discuss a plea bargain. If the accused pleads guilty at least to a part of charge, the judge shall establish the possibility of a plea bargain. This should not be understood in a narrow sense and only within the framework, that the question related to the plea agreement put by the judge should concern only already achieved agreement, which the parties submit for approval at a preliminary hearing. There is a difference of opinions in this regard. For example, in the comments[10] to the CPCG there is an opinion, that establishing the opportunity for a plea bargain by the judge at a preliminary hearing should not mean the existence of the plea negotiations, it should concern already entered agreement. As an argument for this conclusion the comments indicate to the last sentence of Article 219 (2): "In that case, the provisions related to a plea bargain stipulated by this Code shall apply". In this case the legislator did not mention that only Articles 212-213 apply, which concern the review and resolution of a motion of the prosecutor on a plea agreement. Establishing the opportunity of a plea agreement by a judge of a preliminary hearing

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8 See *Giorgadze G.(Chief ed.)*, Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 653 (in Georgian).

9 The aim of the initial appearance and a preliminary hearing is not the determination of the guilt of the accused. Despite the fact that the law provides in both above instances the opportunity to approve a plea bargain, which will resolve the issue of the charge, the rule of approval of a plea bargain does not mean resolution of the issue of the charge through the main hearing. *I. Bokhashvili (hereinafter I.B.).*

10 See *Giorgadze G.(Chief ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi 2015, 654 (in Georgian).

facilitates, as a rule, defining the future perspective of the proceedings of the case. As a result of the mentioned procedure, at a preliminary hearing it may be established that the agreement has already been entered into, or it is still under negotiation or one of the parties expressed readiness for the plea negotiations, if the other party agreed. All the mentioned options are acceptable and admissible and don't contradict the law. One more argument spread among the lawyers, as to why a plea agreement should imply only already achieved agreement, is that if in clarification of the issue of a plea agreement, a judge of a preliminary hearing, will mean its future registration, he/she will express his/her attitude towards the case in advance and show to the parties, that he/she excludes the possibility of termination of the criminal prosecution from the beginning (in the court of the first instance-in determination of an acquittal). Once more, clarification of the possibility of a plea bargain facilitates only predicting the direction of the development of the process on this case, setting expectations. In case, if a judge of a preliminary hearing shows obvious actions related to the beginning of a plea agreement with the aim of persuasion of the defence or prosecution, the issue will be resolved easily by applying subparagraph "e" of part one of Article 59 of the CPCG.

4.3. Establishment of the Consent of the Accused to Have the Case Tried by the Jury

Article 219(3) of the CPCG stipulates the obligation of the judge, that if the accused is charged with the commission of a crime subject to a jury trial, the judge shall be obliged to explain to the accused the provisions of the jury trial and the related rights of the accused. Then the judge shall establish whether the accused agrees to have the case tried by the jury. The mentioned procedure requires active actions from the accused, by way of clearly stating the position. Based on the analysis of Article 219(3) and Article 226(2) of the CPCG a conclusion may be made that the accused's motion on waiver of jury trial must exist, otherwise a judge of a preliminary hearing will appoint a date of jury selection. For example, in case if the accused will exercise the right to silence and with relation to jury trial will not raise a demand to have his/her case tried without the participation of the jury, the case will be tried by the jury. Furthermore, the review of the issue at this stage should not be final. The right to waive jury trial may be used by the accused at the next stage of the process, despite the fact that he/she consented (did not refuse) while establishment of the issue at a preliminary hearing by the judge. The practice is accepted that the accused should have the right to waive jury trial at any time, until the jury swears an oath.

4.4. Reviewing the Necessity to Leave the Remand Detention

According to changes made on July 8, 2015, subparagraph "b" of Article 219(4) of the CPCG stipulates that if an accused person has been sentenced to remand detention, the judge shall, on his/her own initiative, review, at the first preliminary hearing, the necessity to leave the remand detention. The requirement of the Law to review the mentioned issue, if the accused is sentenced, should mean cases, when in relation to the accused/wanted the detention is applied in the form of a measure of restraint,

including, with the aim of securing the use of bail. The review of necessity of detention is obligatory for a judge of a preliminary hearing and he/she should review it on own initiative at the first preliminary hearing, notwithstanding the availability/non-availability of a motion of parties on a measure of restraint. According to the rule of continuous review of a motion on measures of restraint, after the opening of the first preliminary hearing its postponement for any reason cannot concern the issue of necessity of leaving the remand detention. An opinion cannot be shared that as the rule and standard of Article 206 of the CPCG are applied at the preliminary hearing while reviewing the issue of measures of restraint by the judge, the 24-hour term of review of a motion stipulated by parts 3 and 8 of this article must apply to a preliminary hearing. Article 206 of the CPCG regulates applying/altering/terminating measures of restraint, as an independent procedure, and the review of the issue of measures of restraint at the preliminary hearing must be considered one of current issues, which, as a rule (maybe for the moment of the first preliminary hearing a party will not file a motion about the measures of restraint and file it later (part one of Article 206 of the CPCG), will be reviewed at the first preliminary hearing taking into account the continuous character. In making a decision on a motion about measures of restraint raised at the preliminary hearing, part 5 of Article 93 of the CPCG should be taken into account, according to which, the motion should be reviewed and resolved immediately. As a result of the review of the issue, the judge shall make a decision within the powers envisaged by part 5 of Article 206 of the CPCG. In case if the judge no longer considers it to be necessary to leave the remand detention, he/she is authorized to apply less strict measures of restraint or refuse to apply them at all. As today in practice the problem (part 6, Article 200 of the CPCG) of detention with the aim of securing the application of bail is actively discussed, it should be noted in the form of definition, that with the aim of ensuring the application of bail against the accused in contrast to obligatory sentencing, as a result of the review of leaving the remand detention in force, the judge is authorized to replace detention by the bail so as not to apply its securing by detention, as by the moment of inspection of the necessity of detention, there may be no threats, which are assumed to exist in case of the arrested accused (accused will flee and so on). Taking into account the same argument, a judge of a preliminary hearing is authorized to terminate the detention of the accused, who was detained due to securing the bail, notwithstanding the condition of complete or partial deposition of the bail. According to subparagraph "b" of part 4 of Article 219 of the CPCG, after the first review of the issue, the court shall, on its own initiative, review, at least once in two months, the necessity to leave the remand detention in force. This obligation is imposed on a judge of a preliminary hearing only in case, if as a result of the first review of the issue the detention remains in force. In case of annulment of the detention, review by the court of the issue on its own initiative, will not result in more strict measures of restraint against the accused, especially the application of detention. If in 2 months the review of leaving the remand detention in force, is still on the agenda of a preliminary hearing (there is no particular term for a preliminary hearing and it can last longer than two months), its performance by the same judge shall not give rise to any imperfectness in the law. Re-inspection by the judge of a preliminary hearing of his/her decision shall not give rise to the threat of partiality on his/her behalf, as this procedure does not fall within the framework of appealing, it means repeated evaluation of

circumstances with a reasonable intervals and making a decision. A decision made as a result of necessity of leaving remand detention in force by a judge of a preliminary hearing cannot be appealed, this issue is reviewed according to Article 206 of the CPCG, but the rule for appealing established by Article 207 of the CPCG does not apply to it.

4.5. Admissibility of Evidence

Subparagraph "a" of part 4 of Article 219 of the CPCG stipulates one of the most important power of a judge of a preliminary hearing- review motions of the parties regarding the admissibility of evidence (*motions in limine*[11]*).* The mentioned procedure is the task and aim of a preliminary hearing. Establishing the issue of admissibility[12] of evidence at a preliminary hearing is a task for the achievement of the main aim-the resolution of the issue of referring the case for a main hearing. At the same time, the aim of resolution of the issue of admissibility of evidence is to avoid referring the case to the judge of the main hearing, which will result in making a decision about the guilt of a person by the trial judge only by assessing the admissible evidence. It is of particular significance, when the case is tried by the jury[13]. It is considered that checking the admissibility of evidence at a preliminary hearing in jury-triable case has preventive nature, in order not to mislead the jury. If the case is non jury-triable and the evidence is assessed by the trial judge, he/she has enough knowledge and skills not to take into account the evidence which has the signs of inadmissibility.

4.5.1. The Theory of Fruit of Poisonous Tree

Article 72 of the CPCG concerns inadmissible evidence, whose first part provides so-called "theory of poisonous tree". Its main essence is the protection of the accused, in order to base the judgement of conviction against him/her on incontrovertible evidence obtained lawfully. According to part one of Article 72 of the CPCG, "evidence obtained as a result of the substantial violation of this Code and any other evidence obtained based on such evidence, if it worsens the legal status of the accused, shall be considered inadmissible and shall have no legal effect". The following occasions are considered to be

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11 See for example, *Manela S.S.,* Motions in Limine: On the Threshold of Evidentiary Strategy, Arent Fox *Washington D.C.,* 2003, 1-10 , <http://apps.americanbar.org/labor/lel-aba-annual/papers/2003/ strategic. pdf>; *Montz C.L.,* Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials, 29 Pepp. L. Rev. Iss. 2 (2002), 13-15, <http://digitalcommons.pepperdine.edu/plr/vol29/iss2/1>.

12 Examination of evidence in terms of admissibility is the main approach, which the judge of a preliminary hearing uses, and not vice versa, inadmissibility of evidence. This is stipulated by the right of the parties in the adversarial process to obtain, submit and examine all relevant evidence (part 2 of Article 9 of the CPCG) and the role of the court, to create for the parties equal opportunities for this purpose (part one and pat two of Article 25 of the CPCG). The judge verifies the evidence in terms of its admissibility and if the evidence is not admissible, it is inadmissible. *I.B.*

13 See *Tumanishvili G.*, Review of General Section of Criminal Law Proceedings, Tbilisi, 2014, 241 (in Georgian).

exceptions from the theory of fruit of poisonous tree: 1. The existence of an independent source; 2. The circumstance of unavoidable discovery; 3. Mitigation[14]. The exceptions concern the evidence obtained on the basis of illegal evidence, except for the third occasion, which will be taken into account with both evidences. Despite the fact that the legislation of Georgia takes into account only the main theory of "the fruit of poisonous tree" and does not provide the above-mentioned exceptional cases, in practice, while deciding the admissibility of evidence the theory is taken into account, as well as its exceptions. One of the legal basis for the use of exceptional cases is the content of part one of Article 72 of the CPCG: "as a result of substantial violence…"

According to part one of Article 72 of the CPCG recognition of evidence as inadmissible by the judge requires establishment of several evaluative circumstances. One is that the judge must evaluate whether there is a substantial violation or it is a technical legal defect and the second is that the judge should determine whether the second evidence resulted from this evidence obtained in substantial violation. In determination of the substantial character of the violation the judge shall along with other circumstances evaluate the significance of the violation and take into account how the circumstance influenced the result. Therefore, in each particular case, the judge shall individually define the nature of the violation and establish whether the violation was substantial, except for the case, when according to the CPCG the nature of substantial violation will be assigned to the violation of the procedural requirement. For example, according to part 4 of Article 175 of the CPCG "Unless a person has been explained the rights stipulated by Article 174 of this Code and has been given a record of arrest,… the person deprived of liberty shall be immediately released". Here the legislator assigned the nature of substantial violation to non-fulfilment of the procedural requirement and imposed procedural sanction in the form of annulment of the result. Proceeding from the above considerations, violation of the same content may have the nature of a substantial violation in one case and be evaluated as a technical mistake of non-substantial nature in another case. Taking this into account, cases in the court practice are often paradoxical, if the circumstance to be evaluated will be considered independently from other circumstances of the case.

Several examples may be given: in one case O.P. was examined as a witness. Upon the examination he/she was detained as an accused and taken to verify the provided testimony as a witness on site. According to the protocol of verification of the testimony on site, prior to the investigative action O.P. was informed of his/her rights as a witness. The defence filed a motion on recognition of the protocol of examination of the testimony on site as inadmissible, as O.P. already had the status of an accused by the moment of verification of the testimony on site and his/her rights as an accused should have been explained to him/her. The motion was not satisfied, as this violation was evaluated as a technical mistake and not as a substantial violation. In the second case, there were protocols of examinations of witnesses in the case. The defence filed a motion about recognition as inadmissible of the protocols of examinations of two witnesses, as the time of beginning and completion of examinations indicated in the protocols intersected. Conditi-

[14] More information on the issue see *Chkheidze I.,* Issue of Evidence Admissibility at Criminal Law Proceedings, Tbilisi, 2010, 68-81 (in Georgian).

onally, according to one protocol of examination the examination started at 11:00AM and finished at 12:00PM, and according to the second protocol, the examination started at 11:30 AM and finished at 13:00 PM. In this case the judge evaluated the violation as a substantial violation and recognized the protocols of both examinations as inadmissible evidence.

In practice and literature they often misinterpret, that part one of Article 72 of the CPCG recognizes as admissible evidence obtained by the defence with substantial violation and evidence lawfully obtained on its basis. On behalf of the defence, even in considering the issue of admissibility of evidence obtained in substantial violation is inconsistent with part one of Article 72 of the CPCG, as this norm does not regulate the issue of evidence obtained in favour of the accused. It concerns only the evidence, which worsens the legal condition of the accused, that is, it is contrary to the position of the accused in this particular criminal case. Consequently, part one of Article 72 of the CPCG, concerns only evidence obtained by the prosecution, proving the charge. This norm does not determine the fate of the evidence of the defendant. This does not mean, that evidence obtained by defence in substantial violation is admissible.[15] According to part 3 of Article 72 of the CPCG, the burden of proving admissibility of evidence of the prosecution and of inadmissibility of evidence of the defence shall lie with the prosecutor. Also, according to part 7 of Article 42 of the Constitution of Georgia, "evidence obtained in contravention of law shall have no legal force". This record equally concerns the evidence of the prosecution, as well as of the defence.

4.5.2. Judicial Notice

Article 73 of the CPCG provides for circumstances, which can be accepted as evidence without any examination. Here one of the disputable issues of the judicial notice must be considered. In particular, according to subparagraph "d" of part one of Article 73 of the CPCG, „any other circumstance or fact on which the parties agree" can be introduced into evidence without any examination. This content is defined by scientist and practicing lawyers in different ways. Some lawyers consider that when deciding the issue of admissibility of evidence at a preliminary hearing, the judge is prohibited from examining at his/her own initiative the admissibility of the evidence accepted as undisputable by the parties and recognizing it as inadmissible.[16] Others believe that the judge is not bound by the position of the parties

[15] See for example, Decision of February 27, 2017 of the Investigatory Board of Tbilisi Appeal Court on inadmissibility of evidence of the defence and admissibility of evidence obtained on its basis, <http://library.court.ge/judgements/35582017-03-07.pdf> (in Georgian).

[16] In general, when it is disputed whether a judge of a preliminary hearing has the powers to consider on his/her own initiative the issue of admissibility of evidence if the party did not request it, the circumstance should be taken into account that based on part 4 of Article 83 of the CPCG, when sending the materials of the case to the court the parties attach a request to the court to consider and recognize as admissible the evidence submitted in the case. Accordingly, a motion on admissibility of evidence exists in certain form and it is not correct to define the consideration of admissibility by the court of any particular evidence, as consideration of the issue by the court on its own initiative contrary to the will of the party. *I.B.*

and is authorized to recognize as inadmissible the evidence obtained in substantial violation of the law, even the evidence considered as undisputable by the parties.[17]

A circumstance or a fact recognized as undisputable by the parties will be accepted as evidence without examination and may become the basis for the court decision only in case, if it passes the admissibility stage at a preliminary hearing. Article 73 of the CPCG stipulates the admissibility of a circumstance as evidence without examination at main hearing and not without examining its admissibility at a preliminary hearing. Thus, judicial notice does not protect one or another fact or circumstance from examining the admissibility at a preliminary hearing, on which the parties agree. To ensure procedural economy, by the agreement of the parties, the aim of the norm is to provide an opportunity to the trial judge, to take into account evidence while justifying the judgment, which was not examined at main hearing (exceptional case from part 3 of Article 259 of the CPCG). In wide notion of the adversarial principle, the aim of the norm is not granting rights to the parties to make a decision at their discretion on the issue of admissibility of the evidence obtained illegally. When granting to the parties the right to obtain/submit/examine evidence on equal basis, the adversarial principle itself, takes into account its implementation only according to the rule established by the legislation (part 2 of Article 9 of the CPCG). Rendering a judgement by the judge (delivery of a verdict by the jury) is a process of administration of justice, which occurs based on adversarial principle of parties, but relying on the principles of independence of the court, the rule of law and other principles. Admissibility of evidence and agreement on undisputed evidence shall be determined gradually. The admissibility of evidence submitted by the parties is discussed at a preliminary hearing and then, at the end of the session, at the stage of preparation for the main hearing of the case, the judge of a preliminary hearing, with the participation of the parties shall approve a list of evidence received form parties, which they do not contest (subparagraph "c" of Article 220 of the CPCG). It is logical, that this list may not contain evidence, which the judge of a preliminary hearing recognized as inadmissible (except for the case, if according to part 7 of Article 219, this evidence is recognized as admissible by the judge of investigatory board of the Court of Appeals).

With regard to judicial notice in practice several issues often become disputable. One of them concerns defining subparagraph "d" of part one of Article 73 of the CPCG. The court hearing the case on merits may consider that there is a circumstance or a fact, on which the parties agreed and accept this circumstance or fact without examination only when the evidence relevant to this circumstance or fact is included in the list of evidence approved by the judge of a preliminary hearing, which is not contested by the parties (subparagraph "c" of Article 220 of the CPCG. In all other cases, notwithstanding whether there has been active discussion with regard to this evidence at a preliminary hearing, while hearing the case on merits the party must examine (has the right to examine) according to the rule stipulated by the

[17] See for example, Decision of September 16, 2015 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/38692015-09-18.pdf> (in Georgian); Decision of April 22, 2016 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/68312016-10-27.pdf> (in Georgian).

CPCG any evidence included in the list of evidence to be submitted (except for the case, when the parties agree on this while hearing the case on merits), otherwise this evidence cannot become the basis for the judgement (part 3 of Article 259 of the CPCG). For example, any document introduced at a preliminary hearing, which is admissible for the main hearing, but at the same time, is not included in the list of undisputable evidence, for the main hearing of the case must be examined according to the requirements of part one of Article 78 of the CPCG and for this purpose the party must take relevant measures in advance (in the list of evidence indicate the relevant person/persons for examination as a witness/witnesses). The approach is incorrect when a case is compared to subparagraph "d" of part one of Article 73 of the CPCG, when the opposing party does not contest the evidence submitted by the party. The case, when there is a circumstance or a fact, on which the parties agreed and this circumstance or fact is accepted as confirmed (without examination), exists only when both parties agree on it. If the party submitting the evidence wishes to examine this evidence while hearing the case on merits, despite the fact that the opposing party does not contest this evidence, the party submitting evidence has the right to freely decide on the issue of examination of this evidence while hearing the case on merits. For example, if at a preliminary hearing a protocol of interview of the witness is submitted and the opposing party does not contest it, the submitting party shall choose whether the protocol of interview should be taken as a judicial notice or while hearing the case on merits based on this protocol, examine the interviewed person as a witness.[18]

4.5.3. Inadmissibility of Testimony (testimonies) in Substantial Discrepancy:

According to part 2 of Article 75 of the CPCG, if there is substantial discrepancy between the information provided by a person during the interview and his/her testimony or between the testimonies of a witness, a party may file a motion with the judge requesting recognition of the testimony (testimonies) as inadmissible". Prior to the review of the problem of inadmissibility of testimony/ testimonies, a brief explanation should be made for several issues. This rule applies only to the information submitted by one and the same person and concerns testimony/testimonies and does not regulate a case, when information submitted by two or more different persons or testimony/testimonies contradict each other, as it is often considered. Also, the belief that direct examination and cross-examination are the testimonies given by one person, is incorrect. The witness is initially examined by the party, who summoned the witness (direct examination), then by the opposing party (cross-examination) and this may be followed by re-direct examination and re-cross-examination. This whole process is one testimony of the witness and its division into testimonies is not correct. We can talk about testimonies, for example, when there is testimony given by one witness during investigation, the

[18] With regard to this issue there used to be inhomogeneous practice, which has recently established into a joint approach and today in most cases, the court shares the experience, that the party has the right to make an independent decision on the examination of evidence, notwithstanding whether the opposing party will contest the evidence to be examined or not. *I.B.*

testimony given by the same witness while hearing the case on merits, testimony given while reviewing the case according to the rule of appeal. We also cannot share the view that part 2 of Article 75 of the CPCG concerns mutually exclusive answers about one and the same circumstance within the framework of one testimony. For example, if during a free narration and answering questions, a witness gives testimony of substantially different content about one and the same circumstance, this is not the basis for demanding by the opposite party to recognize the testimony as inadmissible indicating to part 2 of Article 75 of the CPCG. As to the information and testimony or discrepancy between testimonies and recognition of testimony/testimonies as inadmissible on this basis, here the problematic issue is when the party should file the mentioned motion. According to subparagraph "a" of part 4 of Article 219 of the CPCG, the issue of admissibility of evidence will be resolved at the stage of a preliminary hearing, and while hearing the case on merits, the judge will resolve the issue of admissibility of evidence only within the framework of part 2 of Article 239 of the CPCG, if the party submits additional evidence. In practice, if while hearing the case on merits, after giving testimony by the examined witness, a party requests recognition as inadmissible due to substantial discrepancy between this testimony and information or testimony provided by the witness earlier, the judge of the main hearing based on subparagraph "a" of part 4 of Article 219 of the CPCG, shall refuse to satisfy the motion.[19] At the same time, filing the mentioned motion with the preliminary hearing is out of question, as there is no testimony given by the witness at the main hearing.[20] According to current legislation, the correct action of the party is to apply in such situation the rule of witness impeachment[21] and also draw the attention of the judge to discrepancy in the closing arguments and request the testimony/testimonies not to be taken into account when the judge renders the judgement. There are various opinions concerning this problematic issue. Some lawyers consider it possible, based on Article 93 of the CPCG, to discuss the issue of admissibility of evidence by the judge hearing the case on merits, because they misinterpret the indicated article, as if the party, at any stage has an unlimited right to file motions. Also, in 2013 recommendations were worked out as a result of research[22] conducted by "Article 42 of the Constitution", according to which the authors of the research offered the following amendments: "Part 1 of Article 93 of the CPCG shall be formulated as follows: "at any stage of criminal proceedings, the parties may file a motion". Subpa-

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19 On this topic and, in general, on the admissibility of evidence see *Chomakhashvili K., Tomashvili T., Dzebniauri G., Osepashvili S., Pataridze M.,* Evidences at Criminal Law Proceedings. Tbilisi, 2016, 28-41 (in Georgian).

20 There are cases in the court practice, when at a preliminary hearing the judge applies in advance the reservation stipulated by part 3 of Article 75 of the CPCG. For example, by the decision of Investigatory Board of Tbilisi Court of Appeals on case №1ბ/429, the judge fully shared justification of the judge of a preliminary hearing related to exclusion of the representative of the person affected from the list of witness of the prosecution on the basis of part 3 of Article 75 of the CPCG. See <http://library.court.ge/judgements/97162016-03-23.pdf>.

21 *Mamatsashvili M., Matiashvili M., Loria A., Chelidze T.,* Direct Examination, Cross Examination (Manual for Lawyers), Tbilisi, 2013, 145-150 (in Georgian).

22 The effectiveness of the right of defence in the criminal procedure: the right to file a motion on the recognition of evidence as inadmissible at any stage of the court hearing, "Article 42 of the Constitution", 2013 (in Georgian).

ragraph "a" of part 4 of Article 219 of the CPCG must be formulated as follows: "The judge of a preliminary hearing: a) shall consider the motions of the parties regarding admissibility of evidence. Such motions can be filed by the parties during hearing the case on merits". We cannot agree on it due to the following circumstances: the condition stipulated by part one of Article 93 of the CPCG, stating that at any stage of criminal proceedings, the parties may file a motion only in cases directly defined by this Code, and in the manner prescribed by this Code-is an essential condition and its annulment directly contradicts the established institute of the procedural form (part 3 of Article 12 of the CPCG); as to making amendments[23] to Article 219 of the CPCG, this Article concerns directly the preliminary hearing and it is not expedient to impose regulations of main hearing of the case within its framework. If the legislator wishes to grant to the parties the right to file a motion while hearing the case on merits about recognition of the testimony/testimonies as inadmissible due to discrepancy, its simple resolution is to make amendments to part 2 of Article 75 of the CPCG and specify, that a party is authorized to file a motion with the judge hearing the case on merits.

4.5.4. Appealing a Decision about Recognition of Evidence as Inadmissible[24]:

According to amendments made on February 19, 2015, the decision of the judge of the preliminary hearing on the recognition of evidence as inadmissible may be appealed only once to the investigatory board of the Court of Appeals. This amendment was preceded by long debates as to where and how to regulate the issue of appealing the decision. According to one of the opinions, it was possible to appeal according to the rules of appeal along with the judgement received as a result of hearing on merits. Regulation of this issue by the rule of appeal along with the judgement would have been inefficient in

[23] As of today, Constitutional claim №821 has been submitted to the Constitutional Court of Georgia with the demand to recognize Article 219 as unconstitutional, where the plaintiff uses as the main argument of the claim, the view that at the stage of the main hearing restriction of the rights of the parties to file a motion about the admissibility of evidence-undermines the adversarial principle in the criminal procedure, See Constitutional claim №821, <http://constcourt.ge/ge/court/sarchelebi> (in Georgian).

[24] It should be noted, that the practice of the European Court of Human Rights does not recognize directly review of the issue of inadmissibility of evidence, as its direct competence, though within the framework of the right recognized by Article 6 of European Convention on Human Rights-the right to fair trial, implies review/making a decision on the case on the basis of lawfully obtained evidence. See for example: *Shestakova L.A.*, Legal analysis of practice of European Court of Human Rights in criminal matters related with violation of principle of a fair trial, Journal "Basis of economics, management and law", 2012, № 1(1), 172-179, <http://cyberleninka.ru/article/n/pravovoy-analiz-praktiki-evropeyskogo-suda-po-pravam-cheloveka-po-ugolovnym-delam-svyazannym-s-narusheniem-printsipa-spravedlivogo#ixzz4cbuy4t5j> (in Russian); *Trubnikova T.V.,* Rules of evidence and decision-making in criminal procedure within the mechanism of granting every person the right to legal defense, Journal "Bulletin of the Tomsk State University", 2012, № 354, 143-149, <http://cyberleninka.ru/article/n/ pravila-dokazyvaniya-i-prinyatiya-resheniy-v-ugolovnom-protsesse-v-mehanizme-garantirovaniya-kazhdomu-prava-na-sudebnuyu-zaschitu#ixzz4cbyp3HoW> (in Russian). also, the research conducted in 2003, which concerns the experience of EU member states regarding the issue of the use of unlawfully obtained evidence in the criminal procedure: Opinion on the Status of Illegally Obtained Evidence in Criminal Procedures in the Member States of the European Union, <http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf _opinion3_2003_en.pdf>.

terms of procedural economy and the right to submit/examine the evidence of the parties. According to the results of the preliminary hearing, the parties would examine the evidence at the main hearing, and as a result of appealing according to the rule of appeal, the limit of evidence might change. Also, based on the sum of evidence remaining as a result of the issue of admissibility of evidence, the judge of a preliminary hearing would discuss referring the case for hearing on merits and if a decision was made regarding termination of criminal prosecution, the party lost the right to appeal the decision on the inadmissible evidence or it should have implemented along with the right to appeal the decision on termination of criminal prosecution, which would cause non-homogenous approach of appealing the decision on the recognition of evidence as inadmissible. One possible option of appealing the decision on the inadmissible evidence, could be at the initial stage of main hearing of the case, on the threshold of the trial, a motion of the party about review of the issue of admissibility of evidence recognized as inadmissible. Here we might receive duplication of the issue of admissibility at the main hearing. The party would always try to apply this right regardless of the substantiation of the motion, which would cause unjustified delay of the court hearing. Therefore, resolution of the issue of appealing the decision about inadmissibility of evidence should have taken place prior to main hearing of the case and the best opportunity for it was the appealing of the decision in the investigatory board of the Court of Appeals. Here the law already envisaged this way of appealing the decision on termination of criminal prosecution and these two issues are so closely linked to each other, that the unified rule of appealing is the most efficient means to ensure adversarial principles and interests of justice.

The prosecution, as well as the defence may exercise the right envisaged by part 7 of Article 219 of the CPCG. While reviewing the appeal, it is the competence of the investigatory board, to uphold or terminate the decision of the judge of the preliminary hearing about recognition of evidence as inadmissible. The ruling of the judge of a preliminary hearing may concern recognition as inadmissible of several evidences and while appealing the ruling, a party may request recognition of the inadmissible evidences (part of evidences) as admissible. The judge of the investigatory board, may as a result of review of the appeal, partly terminate the ruling in relation to separate evidence and leave unchanged in the remaining part. In case of terminating the ruling the judge of the investigatory board will accept himself/herself the admissibility of the evidence for examination at the main hearing.[25]

4.6. Final Decision of the Preliminary Hearing

The final decision of the preliminary hearing concerns the main task of the mentioned stage of criminal procedure-making a decision on referring the case for main hearing (subparagraph "e" of part 4 of Article 219 of the CPCG). The judge of the preliminary hearing will apply various standards of proof in order to make a decision on the issues falling within his/her competence. For example, while making a decision on the application, change or annulment of a measure of restraint, the judge will make a

[25] See for example, Decision of October 20, 2016 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/98182016-10-24.pdf> (in Georgian).

decision according to the standard of probable cause (part 11 of Article 3 of the CPCG); while approving the plea bargain the judge of a preliminary hearing will use evidence sufficient for delivering a judgement of conviction without hearing a case on the merits (part 11^1 of Article 3 of the CPCG). But the main guiding standard of a judge of a preliminary hearing, based on which he/she will make a final decision, is the standard of High Probability (part 12 of Article 3 of the CPCG). The signs determining the mentioned high probability standard are: the totality of evidence submitted at the preliminary hearing; the convincing character and mutual compatibility of this evidence; sufficiency of evidence. Today many people argue regarding the stage when the evidence is being assessed. Assessment of evidence in its classical sense takes place with the purpose of resolution of the main task of the criminal proceedings-the issue of guilt/innocence of the accused. This falls within the competence of the trial judge and the main and final assessment of evidence is performed by the judge (court) hearing the case on merits when rendering the judgement on the case (court deliberations). In case of jury trial, accordingly, based on the assessment of evidence, the jury will deliver a verdict. As to the preliminary assessment of evidence (where the assessment of evidence is not meant, as a final stage of the assertion), it is done, for example, by parties, with the aim of planning the strategy of their position. Of particular significance is the preliminary assessment of evidence (at the stage of investigation it bears the status of information, potential evidence) by the prosecutor, which enables him/her to determine correctly the initiation, waiver of initiate, termination, renewal, continuation, change of the framework of the charge of the criminal prosecution. As to the judge of the preliminary hearing, while making a decision on admissibility of evidence he/she shall verify[26] the lawfulness of the origin of evidence, including observation of rules provided for by Article 83 of the CPCG (part one of Article 72 of the CPCG), authenticity (part 2 of Article 72 of the CPCG; part one of Article 78) and make a decision on the issue of admissibility of this evidence for its further examination/assessment or suppress it. In other words, the judge of the preliminary hearing shall conduct the analysis of the evidence and decide whether the evidence is valid or not, in order to assess the fitness of evidence. As a rule, the judge will abstain from recognizing the evidence as inadmissible at a preliminary hearing due to irrelevance of evidence, which he/she will explain by the fact that evidence is not examined at this stage of the process, that is, its content-related review is not performed and entrust this issue to the judge of main hearing.[27] In general, the relevance, as the sign determining admissibility, really goes beyond determination of tangibility of the case by means of examination and undoubtedly contains determination of significance of this evidence for the criminal case by taking the circumstances into account, which is the issue of assessment

[26] See *Akubardia I.,* The Art of Defence, Tbilisi, 2011, 158-166 (in Georgian).

[27] There are cases in the court practice, when leaving in force the decision on recognition of evidence as inadmissible the investigatory board of the Court of Appeals discussed the relevance and other features of assessment of evidence, though in this particular case the basis for recognition of evidence as inadmissible is the substantial violation of law. See Decision of November 02, 2015 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/49452015-11-06.pdf> (in Georgian).

of evidence and the prerogative of the judge hearing the case on merits *(weight vs. admissibility of the evidence[28]).*[29]

While making a decision on referring the case for the main hearing the judge of the preliminary hearing will consider the admissible evidences in aggregate in terms of compatibility and sufficiency. It should be noted, that legislative regulation of the judge of preliminary hearing leaves an impression of deeper, evaluative process, than is required and is happening in fact. The majority of features envisaged by this standard (aggregate, convincing character, compliance, sufficiency) coincide with the criteria (admissibility, trustworthiness, a sum of agreed and required evidences) of assessment of evidence provided for by part 13 of Article 3 and Article 82 of the CPCG. This has a logic explanation. The standard of a judge of a preliminary hearing, as a component part of the process of proof, is directed towards the person's guilt, conviction (part 12 of Article 3 of the CPCG; part 5 of Article 219 of the CPCG), in the same way as a standard beyond reasonable doubt. The difference between them is that the judge of the preliminary hearing "predicts" with high degree of probability culpability of the person and a judgement of conviction. And the judge of the main hearing decides upon this issue beyond a reasonable doubt. As a result of the discussion it is obvious that the competence of the judge of the preliminary hearing in making a decision for the main hearing of the case, goes beyond examination and contains certain components of assessment, which constitutes preliminary assessment of evidence.

Now several words about compatibility and sufficiency: one of the signs of high degree of probability -compatibility should not be understood as scrupulous comparison of evidence and determination of its admissibility on this basis. When receiving the materials of the case, the judge of the preliminary hearing, of course, will familiarize himself/herself with them (the requirement of part 6 of Article 83 of the CPCG, that not later than five working days before the preliminary hearing, the parties shall submit to the court the complete information), though the content of this evidence is not examined at the hearing with the participation of the parties. For the case there may be different in content, contrary evidence about one and the same circumstance, but it can be admissible for examination. For example, the protocols of examination of witnesses, the experts opinions[30] given in the result of expertises conducted by the parties, etc. The competence of the trial judge while assessing evidence, is determining its compatibility, accepting one evidence and rejecting another (part 3 of Article 82 of the CPCG; part one of Article 273 of the CPCG). Thus, due to incompatibility of evidence at the preliminary hearing, the criminal prosecution should be terminated only in case if this feature is obviously expressed, which excludes the ability of the judge of the preliminary hearing to make sure with high degree of

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28 See US v. Nadeau (2010), <http://federalevidence.com/pdf/2010/03-Mar/US_v._Nadeau.pdf>.

29 For example, USA Federal rules on evidence impose general requirements of relevance while considering the admissibility prior to main hearing of the case, which most of states apply. See Federal Rules of Evidence, Rule 401. Test for Relevant Evidence, <https://www.law.cornell.edu/rules/fre/rule_401>; Massachusetts Guide to Evidence, 2017 Edition, Article IV, Section 401, <http://www. mass.gov/courts/docs/sjc/guide-to-evidence/massguidetoevidence.pdf>.

30 Modern approaches with relation to the expert opinion, see for example, *Beety V.,* Changing the Culture of Disclosure and Forensics, 73 Wash. & Lee L. Rev. Online 580, 2017, 580-594, <http://scholarly commons.law.wlu.edu/wlulr-online/vol73/iss2/3>.

probability[31], that a judgement of conviction shall be delivered for this case. As to the sufficiency, it is related to the subject of proof (framework). First of all, the framework of the process of proof at a preliminary hearing and at a main hearing of the case should be distinguished. When delivering a judgement by the judge who conducts the main hearing of the case, Article 260 of the CPCG shall define the list of issues, related to the guilt of a person (subparagraphs "a"-"c" of part one of the same article) and determine the punishment (accordingly subparagraphs "d"-"f"). The definition of evidence also contains the issues of guilt and punishment, when determining the aims of evidence for the court directly (part 23 of Article 3 of the CPCG). As to the preliminary hearing, at this stage the framework of proof should be understood more narrowly and determine only the circumstances, which are sufficient for making a conclusion about the guilt of a person with high degree of probability (delivery of a judgement of conviction). The judge of a preliminary hearing while making a decision about referring the case for the main hearing shall not consider the issue of qualification and determination of punishment.[32] Accordingly, the sufficient combination of evidence defined by part 12 of Article 3 of the CPCG and the required combination of evidence defined by part 13 of the same Article is of different volume.

4.6.1. The Ruling of a Judge of a Preliminary Hearing about Termination of Criminal Prosecution and the Rule of its Appealing

According to part 6 of Article 219 of the CPCG, "if the evidence provided by the prosecutor does not provide grounds to believe with high probability that the crime has been committed by that person, the judge of the preliminary hearing shall terminate the criminal prosecution by a ruling". It has already been mentioned above, that the guiding standard of the judge of the preliminary hearing is directed at the guilt of the person[33] and accordingly, the focus is made on the integrity of evidence submitted by the prosecuting party, which is preconditioned, generally, by the aims of process of proof, the prosecutor's burden of proof, etc. As it is made clear from the legislative regulation under review, the judge of the preliminary hearing delivers a ruling on the termination of criminal prosecution. The law does not stipulate the form of the ruling-written or oral. One of the norms of the general provisions on court hearing, Article 192 of the CPCG, concerns the rule of delivering a ruling at the hearing, which also does not mention written or oral ruling. Therefore, the ruling of the judge of the preliminary hearing regarding termination of criminal prosecution may be written or oral. In practice the so-called "protocol decision" is often used, when the ruling on the termination of the criminal prosecution is delivered by the judge of the preliminary hearing verbally, which is recorded in the protocol of the court hearing and if requested, an extract from this protocol is prepared-a protocol decision. This practice must be conditioned by the reason that besides procedural economy, which is achieved by recording oral decision directly in the

31 See Federal Rules of Criminal Procedure of USA. Rule 5.1.(f),(g), <https://www.law.cornell. edu/rules/ frcrmp/rule_5.1.>.

32 *Giorgadze G.(Chief ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 657-658 (in Georgian).

33 See Sub-Chapter 4.6.

protocol of the hearing instead of drawing up an independent written document, the judge of the preliminary hearing avoids the obligation of detailed justification of the decision made. While announcing oral ruling and its reflection in the protocol of the court hearing, the decision made by the ruling factually does not contain the consistent, full justification of the circumstances and is often limited to the indication of legal norms, based on which the decision has been made. This practice is not justified: a) the ruling of a judge of a preliminary hearing about the termination of the criminal prosecution is not a document of a particular stage, it is a final document of the whole process and by its significance, it requires to be drawn up in written; b) the rule for appealing the judgement delivered by the judge of the preliminary hearing is stipulated by part 6 of Article 219 of the CPCG and accordingly, the ruling must be substantially justified, which ensures the guarantees of realization of the right to appeal by the person: according to the justification the participant shall make a decision whether to exercise or not his/her right to appeal and in case of appealing, draw up an appeal according to the justification; c) for the court reviewing the appeal, while examining the appealed ruling it is important to know, what it is based on, what the judgement of a judge of a preliminary hearing is justified by[34]. The ruling of a judge of a preliminary hearing about termination of the criminal prosecution must be made in written and justified. Also according to subparagraph "e" of part 4 of Article 219 of the CPCG, a judge of a preliminary hearing by the ruling shall refer the case for the main hearing or refuse to refer the case for the main hearing. In the latter case, the process ends and accordingly, the criminal prosecution is terminated. Therefore, if there is no grounds stipulated by the legislation, that this person has committed the offence, the judge of the preliminary hearing shall by the ruling refuse to refer the case for the main hearing and terminate the criminal prosecution. As a summary, the proposal of part 6 of Article 219 of the CPCG is better to be formulated in the following form: "if the evidence submitted by the prosecution does not provide basis to assume with high degree of probability, that this person has committed an offence, the judge of the preliminary hearing by a written ruling shall refuse to refer the case of this person for the main hearing and terminate the criminal prosecution. The ruling must be justified. …".

The case where there are multiple accused has certain features. In this case the judge of the preliminary hearing shall consistently consider and make a decision on the issue of a particular accused on referring the case for the main hearing in the part of his/her accusation or refusal and on termination of criminal prosecution against the particular accused.[35] It is very important. The judge of the preliminary hearing may consider on multi-accused case that there is basis towards one accused to refer the case for the main hearing and there is no such basis for other accusation. In this case the case will be referred for the main hearing only within the indictment of one accused, and towards other accused a

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34 With regard to the mentioned see, for example, decisions of the investigatory board of Tbilisi Court of Appeals, where judges indicate the significance of justification of the ruling: Decision of February 27, 2017 of the Investigatory Board of Tbilisi Appeal Court (in Georgian), <http://library.court.ge/ judgements/35582017-03-07.pdf >, decision of May 07, 2015 of the Investigatory Board of Tbilisi Appeal Court (in Georgian), <http://library.court.ge/judgements/92312015-05-07.pdf>.

35 *Giorgadze G. (Chief ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 657-658 (in Georgian).

decision on termination of criminal prosecution will be made (separately for all accused). While appealing the mentioned ruling (see the procedure of appeal in the next paragraph) the prosecutor must indicate whose (accused) issue is appealed. Satisfaction of the appeal by the investigatory board of the Court of Appeals and termination of the ruling of the judge of the preliminary hearing will cause referring for the main hearing of the part of the case, which concerns the accused indicated in the appeal. In multi-accused case making various decisions on the accused does not require separation of one criminal case from another.

The ruling of the judge of the preliminary hearing about termination of the criminal prosecution may be appealed once to the investigatory board of the Court of Appeals. In this case the appellant is the prosecutor (part one of Article 107 of the CPCG). It is in the interests of the prosecutor to overcome the stage of the preliminary hearing, achieve substantial hearing of the case and as a result of examination of the evidence convince the court hearing the case on merits in the guilt of the accused (burden of proof). The decision contrary to this interest is the ruling of the judge of the preliminary hearing based on the assumption of high degree of probability about the termination of the criminal prosecution. With regard to the procedures of appeal, the competence of the investigatory board of the Court of Appeals is actively considered. According to part 6 of Article 219 of the CPCG: "If the investigatory board of the Court of Appeals annuls the ruling of the judge of the preliminary hearing, it shall return the case to the chairperson of the district (city) court that delivered the appealed decision. The chairperson shall ensure the holding of a preliminary hearing to solve the issues stipulated by Article 220 of this Code". In this case, the guiding standard of the investigatory board of the Court of Appeals should be high degree of probability stipulated by part 12 of Article 3 of the CPCG. In making a decision on overruling the appealed decision or its upholding, the judge of the investigatory board of the Court of Appeals must rely on the sum of evidence, which was recognized as admissible evidence as a result of a preliminary hearing and the evidence submitted at the preliminary hearing, but recognized as inadmissible by the judge of the preliminary hearing, should not be taken into account. A different case is when the court reviews by joint appeal(s) the issues regarding the recognition of evidence as inadmissible and termination of criminal prosecution. Here the court should judge consistently, first on admissibility of inadmissible evidence, and then on the basis of the sum of evidence recognized as admissible, make a decision on the issue of overruling or upholding the ruling about termination of criminal prosecution. A ruling delivered by the investigatory board of the Court of Appeals with respect to the appeal is final and may not be appealed (part 3 of Article 107 of the CPCG). The decision of the investigatory board of the Court of Appeals about annulment of appealed ruling of the preliminary hearing includes and means, that the case should be referred for the main hearing. Therefore, in case of annulment of the ruling of the district (city) court, when returning the case to the chairman of the court for resolving the issues envisaged by Article 220 of the CPCG, the judge of the renewed preliminary hearing shall resolve only the issue of preparation of the case for the main hearing, but does not envisage referring the case for the main hearing. Accordingly, there is no need, to refer the case for renewed preliminary hearing to another judge (for example, as it is regulated with regard to the prosecutor-part one of Article 108 of the CPCG).

A renewed preliminary hearing may be conducted by the same or other judge. Though to all judges (secretaries of the court session) who were even somehow involved in the case at the stage of the preliminary hearing (preliminary hearing, the review of the appeal of the ruling, renewed preliminary hearing) the rule envisaged by part 2 of Article 59 of the CPCG, which excludes further participation of the mentioned judge (secretary of the court session) in this case, must apply.

5. Conclusion

As a result of the analysis of problematic issues related to the preliminary hearing, it is obvious that legislation requires improvement of certain issues and the court practice should be generalized ensuring its homogeneous character. The opinions and proposals given in the work are intended to facilitate the improvement of the legislation and practice.

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Objective Imputation of the Result and the Liability for Negligent Keeping of Firearms According to Georgian Criminal Legislation

The present article examines the justification of the existence of art. 238 of the criminal code (negligent keeping of firearm, including hunting smoothbore gun). Its current formulation is in conflict with theory of objective imputation. As the result of analysis of views expressed in legal literature and the court caselaw, an alternative legislative formulation of art. 238 is provided.

Keyword: *negligent keeping of arms.*

1. Introduction

According to Georgian criminal law, a physical person may bear liability only for a guilty conduct. However, the conduct stipulated in par. 1 of art. 7 of Georgian criminal procedure code implies not only the act or omission, but also specific results. The doctrine of causality as well as the equality of conditions, or equivalency doctrine developed initially in criminal law could not deal with problematic cases. Namely, even if the result was brought about in accordance with natural regularity, from normative point of view, it was impossible to properly solve the issue of criminal liability of the person for results occurred (for example, factual causation of the harm as the result of two independent actors (so called, atypical causation), so called "concurrent causation")

In criminal law, some offences are deemed to be completed and entail criminal liability only when a certain harm is present. However, in some cases, despite the occurrence of certain result, it is impossible to impose criminal liability due to the principle of individual responsibility. Dating back from Soviet times, the liability for illegal storage of firearms is retained in the form of art. 238 of criminal code of Georgia. Study of the theory of objective imputation in legal literature and case-law evidences the necessity of radical changes in this article of criminal code.

2. Objective Imputation of the Result, as a Guarantor of the Principle of Individual Responsibility

A legal assessment of the occurred harm also implies the application of normative criteria in final stage. Therefore, in the chain of causation, it is indispensable to identify every ring which is not only causally linked to the outcome, but is normatively considered to be the work of the actor. Such understanding of the conduct is indispensable due to the principle of individual responsibility.

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"According to this principle, which has recently turned into an independent criteria of imputation, every person is principally responsible only for his own conduct. In application of this principle and based on objective imputation, it is possible to identify several layers of responsibility. In addition, above all, it is important to separate the risks which are created by the victim, namely for freely assumed self risk or self injury. In addition, this principle can also help us to solve the cases in which the third actor interferes negligently or intentionally"[1].

All the above factors, together with the other circumstances have contributed to the elaboration of doctrine of objective imputation in German and Austrian criminal law. This doctrine proposes two step system of imputation of result for problematic cases (causation + objective imputation).[2]

When we are assessing specific cases in the light of criminal law, it is sometimes necessary to introduce normative filter in the infinite chain of causation, which in the end enables the rational solution of the matter. It is interesting to analyze the art. 238 of the criminal code in the light of the principle of objective imputation of the result. According to this article "negligent storage of firearm, including smoothbore hunting weapon, which created a possibility of its use by other person, resulting in the death of a person or some other grave consequence."

3. Principle Offender of the Crime Stipulated by Art. 238 of the Criminal Code

In order to properly analyze the boundaries of the article of the crime stipulated by art 238 of the criminal code, it is interesting to find out who can be the subject of this crime.

A view has been expressed in the legal literature, according to which "the subject of the given crime can be anyone who is in lawful custody of the weapon. If an unlawful guardian of the weapon causes a grave consequence by its negligent storage, he/she must be liable for unlawful possession. However, the harm which have occurred should be taken into account while defining the sentence, because the unlawful storage of the weapon is punished more severely than its negligent storage"[3].

Similar comments are made to art. 234 of the Russian criminal code in force[4]. Analogous view is also expressed in Georgian criminal legal literature. "In art. 238 of Georgian there is no reference to the legality or illegality of the custody of the weapon. Therefore this question is interpreted differently by different authors in legal literature. It is more logical to punish only lawful custodian for negligent storage of the firearm. The latter is properly instructed on the rules of due care from competent

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1 *Wessels J., Beulke W., Satzger H.*, Strafrecht Allgemeiner Teil, 43. Auflage, 2013, 72.

2 In details see *Turava M.*, General Part of Criminal Law, Theory of Crime, Tbilisi, 2011, 215-259 (in Georgian).

3 *Ignatov V.N.,* Course of the Soviet Criminal Law. Team of Authors, Editorial Board *Piontkovsky A.A., Romashkin P.C., Chkhikvadze V.M.,* Vol.6, M., 1971, 388 *(*in Russian).

4 Compare *Komissapov V.C.,* Course of the Soviet Criminal Law. The Textbook for Higher Education Institutions. Team of Authors, Edited by *Borzenkov G.N., Komissapov V.C.,* In five Volumes, Vol.4, M.,2002, 340-34,1 *(*in Russian); *Kostareva T.A.,* in Commentaries: Commentary to the Criminal Code of the Russian Federation. Team of Authors. Under the General Edition of *Skuratov Yu. I., Lebedev V.M.*, M., 1996, 507 *(*in Russian).

authorities. If an illegal custodian, knowingly or without knowledge, violates safety rules of the storage of the weapon, this conduct shall be covered by unlawful possession of the firearm and no additional qualification of the case under art. 238 is required. Therefore, an unlawful possession of the weapon also covers the violation of safety rules of its storage. "[5].

Hereby, according to the proposed view, the subject of the given crime can only be the lawful custodian of the weapon, however, this conclusion does not necessarily flow from the text of the law. It is not proper to say that an illicit custodian of the weapon who is causing grave consequences by disregarding safety rules should be liable only for the unlawful possession of the firearm and the grave consequence of the conduct should be taken into account only in deciding the proper sentence, because the unlawful possession of the weapon is punished more severely than the negligent storage. Neither is it correct to say that unlawful storage of the weapon also covers grave consequences.

We are more in favor of the view, according to which the subject of art. 238 of the criminal code is the lawful as well as unlawful guardian of the gun. Ignatof unjustly criticizes Matishevski, according to whom the negligent keeper of the weapon should bear liability for multitude of crimes (negligent storage of the weapon as well as illegal possession[6]). Kudriavcev also thinks that in this case we have an ideal unity of crimes. "K was keeping a pistol illegally in his drawer. The children managed to get hold of the weapon and started to play, which has resulted in death of one child. We are having an ideal unity of two crimes, one of which is an unlawful possession of the weapon (art. 222.1. of Russian criminal code) and negligent keeping of the weapon (art. 224 of Russian criminal code[7]"

The crime stipulated by art. 236 of the criminal code may never include the crime stipulated by art. 238 of the criminal code, because none of the rules competition between norms shall apply (such as overlap, subsidiarity, etc)

We must also take into account the following situation. What will happen if law of amnesty absolves the crime covered art. 236 of the criminal code. Namely, if we say that the subject of art. 238 of the criminal code can only be a lawful owner and if an illegal owner of the gun also violates the safety rules resulting in any of the consequences described in art. 238, than he or she must bear liability only for unlawful possession of the weapon and the result must be taken into account only in sentencing phase. However, due to the amnesty law, the a person may never bear any criminal liability, because the defendant was not charged under art. 238 of the criminal code. Therefore, the given position is not justified neither for criminal policy considerations. Hence it is more appropriate to conclude that the subject of art. 238 can be any person and in given situation the conducts must be charged under art. 236 and art. 238 of the criminal code.

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5 *Todua N., Lekveishvili M., Todua N., Mamulashvili G.,* Team of Authors, Private Part of Criminal Law, Part I, Tbilisi, 2016, 675 (in Georgian).

6 *Ignatov V.N.,* Course of the Soviet Criminal Law. Team of Authors, Editorial Board *Piontkovsky A.A., Romashkin P.C., Chkhikvadze V.M.,* Vol. 6, M., 1971, 388 (in Russian). Unegligent Storage of firearm was by the Time Stipulated in Art. 219 of the Criminal Code of Russian Federation.

7 *KudriavtsevV.N.,* General Theory Qualification of Crimes, M. 2001, 245 (in Russian).

4. Who is the User of the Firearm?

In order to properly analyze the *corpus delicti* stipulated by art. 238 of the criminal code, of central important is the question of who is the user of the firearm. For this reason, first we should clarify what is meant by the term "use"

A firearm can be used only by its firing and in no case its application as a blunt object of physical assault can be considered as use. For example if a person gets hold of negligently stored pistol and hits it in the head of another person causing grave injury, this cannot be understood as a cause of any of the consequences described in art. 238, because we are normatively restricting the mechanic causation in the light to the purpose of the norm. The legislator criminalized the negligent storage of the firearm because its functional application creates an increased danger.

We must now turn our attention to a following question: does the corpus delicti of the given crime imply suicide as a consequence.

A particularly interested case related to justification of art. 238 is the case number 5 cited below, because provision of a weapon to a legally competent individual with the knowledge that it shall be used for homicide (which shall in fact be carried out), does not trigger criminal responsibility because the suicide is not punishable.

As it is often pointed out in academic literature, "the grave consequence implies different types of physical injury – murder, suicide, use of weapon for the commission of the crime and etc. Its up to the court to decide whether or not the grave consequence stipulated by article 238 is present[8]. Other scholars have also expressed similar view at times. [9]

There are different views expressed in Georgian legal literature related to the suicide. Namely, one of the authors argue that suicide can be considered as a grave consequence only if the weapon was discharged by a child or mentally incompetent person"[10]. We believe that this position is correct, because we are facing a ground excluding objective imputation – self endangerment created by the victim. As *Mr. Turava* correctly points out, the personal responsibility of the victim is excluded if the victim has no freedom of choice due to insanity or any other ground[11]. In addition if corpus delicti stipulated by art. 238 includes suicide committed by mentally competent person, than we shall have a logical contradiction, namely, it is widely accepted that a purposeful delivery of the weapon to another person for purpose for suicide does not trigger criminal liability, because based on derivative nature of

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8 *Komissapov V.C.* in the book: Course of the Soviet Criminal Law. The Textbook for Higher Education Institutions. Team of Authors, Edited by *G. N. Borzenkov, V.C. Komissapov.* In five volumes, Vol. 4, M., 2002, 341 (in Russian).

9 Compare *Kostareva T.A.* in commentaries: Commentary to the Criminal Code of the Russian Federation. Team of Authors. Under the General edition of *Yu. I. Skuratov, V.M. Lebedeva*, M., 1996 507 *(*In Russian); *Khomchik V.V.* in the Commentaries: Commentary to the Criminal Code of the Russian Federation. Team of Authors. Editor-in-Chief *Lebedev V. M.*, M., 2007. 527 *(*in Russian).

10 See *Todua N., Lekveishvili M., Todua N., Mamulashvili G.,* Team of Authors, Private Part of Criminal Law, Part I, Tbilisi, 2016, 676 (in Georgian).

11 See *Turava M.*, General Part of Criminal Law, Theory of Crime, Tbilisi, 2011, 236 (in Georgian).

complicity, an accomplice is not liable in the absence of liability of the principle offender. Therefore its logically impossible to impose liability for negligence.

In this situation, based on the principle of individual responsibility, no one can be liable for harming legal interest owned by the offender himself. When we talk about complicity in self inflicted danger or harm, we have several limitations for the imputation of the result. For example, when there is a suicide, or self infliction of the body harm, an accomplice is not as a rule liable if the result was known to the victim, it was also desired and executed through self endangerment or infliction of harm, while a third person participated in it only through the contribution or interference. The area of protection envisaged by the norm, for example in art. 222, 223, 229 of the criminal code, which is aiming at the protection of the legal interest from the interference of the third person ends at a point where the territory of the victims personal responsibility starts. Hence, in such cases, according to the general formula of objective imputation, no significant danger to the legal interest has been created[12]"

M. Turava is citing an example from the court case law: "A policemen recklessly left a gun lawfully possessed by him on the table. His girlfriend, which was not a minor and was mentally competent committed a suicide by using the weapon"[13]

"Because the principle of objective imputation has not yet been fully developed in Georgian criminal law, including the caselaw, the policeman was convicted for this crime under art. 238 of the criminal code. If we accept the doctrine of objective imputation, the result shall not be attributed to the policemen because the victim committed suicide by her free will. However, we shall have a different legal outcome, if mentally incompetent person (art. 33-34 of criminal code) commits suicide with that weapon. In such case, the outcome shall be objectively be attributed to the policemen in accordance with the general rule[*]."[14]

From the cited example, we can clearly see that self infliction of the harm by the victim at free will excludes the grounds of criminal liability of the defendant.

Similar approach is adopted in German legal literature "for example A has self injected the heroine delivered by B. Even though the drug had lethal effect, B cannot be punished under art. 222 of the criminal code"[15]

"The court also applies the same principles. In the past an accomplice could also be liable for negligent offences, however this is problematic taking into account the aspects of self endangerment[16]"

As a recommendation, we may say that the user of the weapon in art. 238 cannot be any person. This only implies a person, who is exempt of criminal responsibility due to insanity or other ground. Of

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12 *Wessels J., Beulke W.,Satzger H.*, Strafrecht Allgemeiner Teil, 43. Auflage, 2013, 72.

13 *Turava M.*, General Part of Criminal Law, Theory of Crime, Tbilisi, 2011, 236 (in Georgian).

* "Similar case is provided in German literature, in which the issue is solved in the same manner. See e.g. the book of *Rengier R.*: Strafrecht, AT, 2nd ed.,, 2010, 90. In the book it is pointed out that policeman should not be punished. Reference is made: Here it is implied deprivation of own life, both intentionally and recklessly." Reference cited: *Turava M.*, General Part of Criminal Law, Theory of Crime, Tbilisi, 2011, 237 (in Georgian).

14 *Turava M.*, General Part of Criminal Law, Theory of Crime, Tbilisi, 2011, 236-237 (in Georgian).

15 *Wessels J., Beulke W., Satzger H.*, Strafrecht Allgemeiner Teil, 43. Auflage, 2013, 72.

16 Ibid.

course the liability of the contributor exists when the awareness of the risk in some cases goes beyond the freedom of the victim (**increased awareness**). [17]

Example: A doctor has prescribed a substitute to heroin addict. However, due to the regular use of the substitute, the patient became addicted to both drugs. The patient did not know about the additional danger of addiction. Subsequently the doctor can be liable for the caused injury."[18]

If the legislator wants to punish the person who has brought some contribution in self infliction of the harm by the victim, then the legislator shall convert the factual aider or instigator into a principle by creating a special offence – delictum sui generis.

5. For Interpretation of the Storage of the Firearm

For proper interpretation of the negligent storage of the firearm we should apply the law on firearm adopted on May 8 2003. Based on art. 20 of this law, the Ministry of Interior issued several decrees setting down the rules for the storage, transportation and etc. of lawfully possessed firearms. Particularly interesting is the decree of Minister of Interior dated by February 28, 2014 (N. 164), the art. 18 of which reads as follows:

1. The firearms and explosives must be kept in the state and in the conditions which ensure their protection and safety, prevent unexpected discharge and the access of the third person to the weapon.

2. The weapons and explosives envisaged by art. 9 (2) "k", "l", m" of the law on Firerams of Georgia must be kept in fire resistant metal safe, excluding the access of the third person. For the withdrawal of the weapon, a special journal must be kept, which shall be bound and certified by relevant division / responsible person of the Ministry of Interior"

In order to properly interpret the word "storage" in the meaning of art. 238 of the criminal code, it is important to extend the precautionary measures conceived for the storage to the process transportation. Chapter 4 of the decree 164 of February 28, 2014 of the Minister of Interior, stipulates the standards for he safe transportation of the weapon. For example articles 21-23 of the decree read as follows:.

"Art. 21

1. Upon domestic transportation of the weapon and explosives by airplane, the weapons and explosives belonging to a physical person shall be temporarily handed to the member of the crew of the plane for custody during the flight and shall be returned to the owner in the airport upon completion of the flight. The crew member appointed by the plane captain as a person responsible for storage and transportation of the weapon during the flight shall receive weapons and explosives, register relevant documentation, ensure the transportation of the weapon and explosives on board of the plane and delivery.

2. The authorized officers of security service of civil aviation shall ensure the registration of the relevant documents, the delivery of the weapons and explosives on board of the plane and delivery in the airport.

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[17] See ibid, 68.

[18] Ibid.

Art. 22

1. Upon transportation by airplane, the weapons and explosives should be placed in packed, sealed and locked container in a baggage compartment of the airplane. In the airplanes, which do not have isolated baggage compartments, the weapons and explosives belonging to physical persons can be stored in the cabin of the crew in isolated and protected area".

Therefore, during transportation of the firearm by domestic flight where the relevant conditions exist, the subject of art. 238 can be a crew member of the airplane.

For the proper interpretation of art. 238 we should highlight the specific problem of causation between the negligent storage of the weapon and the grave consequence. In order to charge a person under art. 238 of the criminal code, its necessary to prove the existence of the risk of using the weapon by another weapon. If there is no such risk, the criminal liability under art. 238 of the criminal code shall be ruled out. For example, if a military serviceman keeps a weapon on the table in a space where no stranger can lawfully be admitted, however a stranger still manages to penetrate the area and uses the weapon entailing grave consequences, no liability under art. 238 can be imposed.

Before we talk about the justification of the existence of the art. 238, its interesting to find out whether we should stick to criminal liability under this article in the case, where the weapon was apparently was stored properly in the safe, though the key or the code of the safe was accessible to a third person. For example, A locked his weapon in the safe, however, he/she forgot the key of the safe in publicly accessible area and a mentally ill person got hold of the weapon and killed his neighbor. We can logically say that this case can be charged by art. 238 of the criminal code. Because safe storage of the weapon implies observance of all conditions which prevent the access of third parties to the weapon.

It is properly stressed in legal literature that " if the person was acting purposely with regard to the result, than he/she should be liable for graver intentional crime, (such as murder, complicity to murder, etc)[19]

6. The Experience of United States

The United States are known to be part of common law legal system, however they are not unfamiliar with statutory law. For thorough research of the given question, it is interesting to bring examples from several US state legislations.

Under Connecticut Penal Code "art. 53a 217 – Criminally negligent storage of a firearm: Class D felony:

(a) A person is guilty of criminally negligent storage of a firearm when such person violates the provisions of section 29-37i and a minor or, a resident of the premises who is ineligible to possess a firearm under state or federal law or who poses a risk of imminent personal injury to himself or herself or to other individuals, obtains the firearm and causes the injury or death of such minor, resident or any other person.[*] For the purposes of this section, "minor" means any person under the age of sixteen years.

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[19] *Ignatov V.N.,* Course of the Soviet Criminal Law. Team of Authors, Editorial board *Piontkovsky A.A., Romashkin P.C., Chkhikvadze V.M.,* Vol. 6. M., 1971, 388 *(*in Russian).

[*] Here it is meant as intention, carelessness (negligence).

(b) The provisions of this section shall not apply if the minor obtains the firearm as a result of an unlawful entry to any premises by any person.

New Hampshire state criminal legislation (650-c.1 Negligent storage of firarms) extensively outlines the crime of negligent storage of weapon:

II. As used in this section, "child," "juvenile" or "youth" shall mean any person under 16 years of age.

III. Any person who stores or leaves on premises under that person's control a loaded firearm, and who knows or reasonably should know that a child is likely to gain access to the firearm without the permission of the child's parent or guardian, is guilty of a violation if a child gains access to a firearm and:

- (a) The firearm is used in a reckless or threatening manner;
- (b) The firearm is used during the commission of any misdemeanor or felony; or
- (c) The firearm is negligently or recklessly discharged.

Part 5 of the same article outlines in detail circumstances, excluding criminal liability

" V. This section shall not apply whenever any of the following occurs:

(a) The child has completed firearm safety instructions by a certified firearms safety instructor or has successfully completed a certified hunter safety course.

(b) The firearm is kept secured in a locked box, gun safe, or other secure locked space, or in a location which a reasonable person would believe to be secure, or is secured with a trigger lock or similar device that prevents the firearm from discharging.

(c) The firearm is carried on the person or within such a close proximity thereto so that the individual can readily retrieve and use the firearm as if carried on the person.

(d) The child obtains or obtains and discharges the firearm in a lawful act of self-defense or defense of another person.

(e) The person who keeps a loaded firearm on any premises which are under such person's custody or control has no reasonable expectation, based on objective facts and circumstances, that a child is likely to be present on the premises.

(f) The child obtains the firearm as a result of an illegal entry of any premises by any person or an illegal taking of the firearm from the premises of the owner without permission of the owner.

VI. A parent or guardian of a child who is injured or who dies of an accidental shooting shall be prosecuted under this section only in those instances in which the parent or guardian behaved in a grossly negligent manner".

According to Cal. Penal Code § 12035 (West 1992). The provisions of the California statute include:

(b)(1) Except as provided in subdivision (c), a person commits the crime of "criminal storage of a firearm of the first degree" if he or she keeps any loaded firearm within any premise which is under his or her custody or control and he or she knows or reasonably should know that a child is likely to gain access to the firearm without the permission of the child's parent or legal guardian and the child obtains access to the firearm and thereby causes death or great bodily injury to himself, herself, or any other person.

(2) Except as provided in subdivision (c), a person commits the crime of "criminal storage of a firearm of the second degree" if he or she keeps any loaded firearm within any premise which is under his or her custody or control and he or she knows or reasonably should know that a child is likely to gain access to the firearm without the permission of the child's parent or legal guardian and the child obtains access to the firearm and thereby causes injury, other than great bodily injury, to himself, herself, or any other person, or exhibits the firearm either in a public place or in violation of Section 417.

Haw. Rev. Stat. Ann. § 134-10.5 (Michie Supp.1992). The statute provides:

No person shall store or keep any firearm on any premises under the person's control if the person knows or reasonably should know that a minor is likely to gain access to the firearm without the permission of the parent or guardian of the minor, unless the person:

(1) Keeps the firearm in a securely locked box or other container or in a location that a reasonable person would believe to be secure; or

(2) Carries the firearm on the person or within such close proximity thereto that the person readily can retrieve and use it as if it were carried on the person.

For purposes of this section, "minor" means any person under the age of sixteen years.

New Jersey (§ 2C:58-15),Florida (§ 790.174) Wisconsin (§ 948.55), have similar articles, though in Wisconsin a “child” implies a person under 14.

7. Solution of the Matter in the Light of Specific Cases

Its much better if we approach the issue ofjustification of the art. 238 of the criminal code in the light of the examination of specific cases: 1. A left a pistol on the shelf and entered the bathroom. His 14 year old sun grabbed the weapon and started to play. Accidentally the gun was discharged and killed his friend which was also 14 years old. 2. Case n. 2. A left a gun on the shelf and entered the bathroom. His 14 year old son grabbed the weapon and started to play, the gun was accidentally discharged and took the life of B. 3. A landed his gun to B, who committed the murder. A was not aware of B s intention. 4. A left a gun on the shelf and entered the bathroom. His 14 year old son grabbed the weapon and committed a suicide. 5. B asked A to lend his weapon to him in order to commit suicide. A handed his weapon to B and the latter committed suicide. 6. A left his gun on the shelf and entered the bathroom. His 14 year old son grabbed the weapon and killed his friend. 7. A left his gun hanging on the wall. The gun fell down and discharged and took the life of a person. 8. A left his gun on the shelf. B grabbed the gun and gravely injured A.

In the given cases, the legal assessment of the conduct committed by A from the viewpoint of Georgian or Russian criminal law doctrines shall be following: 1. A’s conduct shall be charged under art. 238 of the criminal code, however this qualification is against the principle of objective imputation. 2. A’s conduct shall be charged under art. 238 of the criminal code, which is against the principle of objective imputation 3. A’s conduct shall be charged under art. 236.4 of the criminal code (the sale of weapon). 4. A’s conduct shall be charged under art. 238 of the criminal code or A shall be exempt from

criminal liability (this opinion which is absolutely correct is expressed by Nona Todua[20]), 5. A shall be exempted from liability for murder based on derivative nature of complicity. However A shall be charged under art. 236.4 of the criminal code (sale of weapon). 6. A s conduct shall be charged under art. 238 of the criminal code, which is against the principle of objective imputation. 7. In this situation, A cannot be charged under art. 238 of the criminal code, because this article requires effective use of weapon by third person, which has not occurred in given situation, in other word, we don't have specific causation, however, we may charge this case under art. 116.1 of the criminal code (negligent homicide), because from the violation of the norms of the due care to the occurrence of the result, there has been no interference of any third person and therefore the results can entirely be attributed to the person who negligently stored the weapon. 8. No opinion has been expressed in legal literature on this case either, however, according to the dominating doctrine, we can quite legitimately use the art. 238 of the criminal code which again runs against the principle of objective imputation

8. For the Interpretation of Other Grave Consequences

One of the important issues, which concern the result described in art. 238 of the criminal code is its boundaries. Namely, is any grave consequence implied in art. 238 or should we have any limitation here.

First of all, we must find out what is meant by the words "have triggered". Namely, this implies only the negligence of the final user or the negligence, as well as intention. From the literature that we have analyzed it is clear that the causing the result implies the negligence as well as the intention. The court caselaw illustrates several examples:

I. According to the judgment of the court, A committed a murder, after which he left the revolver with bullets in the house of his friend's aunt. He was keeping the arm in a small plastic box, while the box was under the couch in the dormitory. While the box was locked, it could be opened by other person. The son of B knew the existence of the gun. He grabbed the gun and committed suicide[21].

II. If is evident from the court judgment that A acquired a pistol, which he could duly guard. Namely, he kept the weapon on the top of the bookshelf in dormitory. B seized the gun and committed a murder.[22]

III. A was negligently keeping a firearm in his dormitory together with the cartridges. On October 30, 2014, his grandson, juvenile B secretly took the weapon, with which he and his friend started shooting in the air. Later they gave the gun to their friend D. Who discharged it by accident while causing minor injury to A and grave injury to B.[23]

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20 *Todua N. in the book*: *Lekveishvili M., Todua N., Mamulashvili G.,* Team of Authors, Private Part of Criminal Law, Part I, Tbilisi, 2016, 669 (in Georgian).

21 See Criminal Case Chamber of Tbilisi City Court, Judgment of February 27, 2015, Case №1/894-15. The names of the participants have been coded, therefore we are using the initials.

22 See Criminal Case Chamber of Tbilisi City Court, Judgment of May 16, 2016, Case 1/4884-15.

23 See Criminal Case Chamber of Tbilisi City Court, Judgment of November 26, 2014, Case 1/6861-16.

Now, the question which arises is whether or not we can argue the application of art. 238, when the third person willfully interferes in the negligent storage of arms. The discussion of the two cases shall give us a much clearer view of the problem: 1. A husband which was acting violently towards family members kept the gun violation of due norms of safety. His wife decided to hide the weapon to some other place though also did it negligently. Their child used this opportunity and started to play with the weapon, though accidentally injured his own brother. What will be the legal evaluation of the conduct of the spouses? 2. A negligently stored the weapon, which was later stolen. The thief sold the weapon to a third person who committed a homicide with it. Shall A be punished under art. 238 of the criminal code? In the given case, in using the formula –*conditio sine qua non*, the chain of causation continues infinitely. In given situation, when legally blameable risk, which is created by one person is replaced by legally blameable risk created by another person, the responsibility of the initial actor must be excluded, because the willful interference of third person into the chain of causation transfers the objective imputation to this person.

Now we have to find out whether the attempted suicide committed by mentally insane person shall be considered as a legal outcome stipulated by art. 238[*].

First of all, must be noted that there are three ways of understanding the grave result described in art. 238. 1. This implies only material outcome, which means that the legal interest must be harmed. 2. This implies also the attempt to harm the legal interest, which did not result in the actual harm 3. This implies the attempt, which though could not harm the aimed legal interest, though harmed other legal interest. For example, the gun which was fired for the purpose murder caused bodily injury.

We believe that for proper interpretation of art. 238, the first and second ways are acceptable. Namely, it will not be correct to impose liability for the attempt, which did not cause harm to any legal interest. Any other understanding of the grave result would counter the will of the legislator. Sample list of grave results offered by legislator starts by death of the person, which implies materially harmed legal interest. We should view the other grave results in the same light.

If it is established with high degree of probability that the defendant could not avoid the result no matter if observed proper standards of due care, than the objective imputation is excluded namely by reason of absence of legal relationship between causes.

We must also note that, if negligently stored weapon is used to commit crime (murder, robbery, etc), than the end user should be charged with art. 236 (acquisition of firearm) or art. 237 (theft of firearm for wrongful misappropriation) together with relevant crime committed. Analogous view is encountered in Russian legal literature, which states that the user of the negligently kept weapon should be liable under art. 222 (illegal carriage, acquisition of arms) of criminal code of Russian Federation or art. 226 (illegal taking of arms for the purpose of misappropriation[24]). However, this later view requires

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[*] Here we do not examine the suicide attempt by mentally competent person: based on the arguments developed above, we share the position according to which the grave results triggered by the use of weapon by legally competent person should not entail the results described in art. 238 of criminal code.

[24] See *Komissapov V.C.,* Course of the Soviet Criminal Law. The Textbook for Higher Education Institutions. Team of Authors, Edited by *G.N. Borzenkov, V.C. Komissapov.* In five volumes, Vol. 4*,* M.,2002, 341 *(*in Russian).

clarification. If the weapon is used spontaneously, than there is no need of separate qualification of unity of crimes together with acquisition of arms or illegal taking for the purpose of misappropriation.

Finally, how should we decide the issue, if the negligently stored weapon is used for self defense. In this case we believe that the result described in art. 238 implies only the result of wrongful action.

9. Conclusion

As the result of this research, we may offer following conclusions as to art. 238 of the criminal code:

First: The grave result does not imply the suicide or crime committed by mentally competent person, because in this case the liability may be limited based on objective imputation. Therefore, the user of the weapon should be legally incompetent person.

Second: the principle offender of the crime can be any person and it does not matter whether he/she has lawful or unlawful custody of the weapon

Third: For the uniformity of the court case law, it is recommended to amend art. 238 so that it shall read as follows:

"Negligent storage of firearm or explosive in lawful or unlawful custody, which created risk of its use by legally incompetent person and its application has triggered intentional or negligent homicide, bodily injury or property damage, or by its use, a legally incompetent person has committed any unlawful conduct stipulated by this code.

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Constitutional Court of Georgia and *de facto* Real Control

Constitutional Court of Georgia is an organ, that implements constitutional control. The status of Constitutional Court of Georgia, as negative legislator, is ensured by the Constitution, however, by the decisions of last period, Constitutional Court increased the borders of constitutional control and established new practice of constitutional control. Namely, by ascertaining constitutionality of normative contents of norm, Constitutional Court lay the foundation of using de facto real control in Georgia.

The present article concerns judicial authority, made by the Constitutional Court of Georgia about the constitutionality of normative contents of norm. In my labour work, I took time to concentrate on status of Constitutional Court of Georgia, effectivity of the institute of individual constitutional complaint on the point of defending human rights in Georgia, essence constitutionality of normative contents of norm control and its influence on the Constitutional Court of Georgia, as a negative legislator's status. In this article, I discussed in detail the legal basis of constitutionality of normative contents of norm by the Constitutional Courts of Georgia and conformable rulings are provided because of the practice examples of the Constitutional Court of Georgia.

Key words*: Constitutional Court, constitutional control, Georgia, human rights, normative control, control of normative content of norm, de facto Real Control*

I. Introduction

In the reality of Georgian jurisprudence, quit often several thoughts was suggested, about the model of constitutional control of Georgia in the point of view of defending the human rights.[1] The fact that individual constitutional complaint is unimproved form of defending the human rights, was also noticed by the European Court,[2] However none of steps was taken in order to make the competence of Constitutional Court better. The *de facto* Real Control should fill the given gap for Constitutional Court; what is more, quite many thoughts was expressed about this issue,[3] but up to this date, Constitutional Court is not equipped throw this effective mechanism of defending the human rights.

For the last period decisions, the Constitutional Court in the intra vires of Constitution, article 89 followed the different practice of constitutional control and started the ascertainment constitutionality of normative acts, this direction on the point of protecting the human rights, might be estimated as a

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1 APOSTOL v. GEORGIA (2006), ECHR, art. 42.

2 *Erkvania T.,* Normative Constitutional Complaint, as Imperfect Form of Concrete Constitutional Control in Georgia, 2014, see <http://emc.org.ge/2014/10/27/tinatin-erkvania/>, [05.02.2017], (in Georgian).

3 Presentation of Public Defender of Georgia on increasing the authority of Constitutional Court of Georgia, Tbilisi, 2015, see <https://goo.gl/7mSohU>, [25.01.2017].

positive action. Throw this way the disputed norm and its normative content[4] was marked off from each other by the Constitutional Court, subsequently the new lead of the constitutional control was defined. Quite a lot questions raised about this issue, for example, what is the legal nature of this constitutional authority? How this authority corresponds the mandate, defined by the Constitution of the Constitutional Courts? How it reflects on the Constitutional Court, as the negative legislator status? What was the reason of legal controversy number growth? The aim of this article will be the answering of these questions on the base of using researches analytical, comparative and normative methods.

II. Constitutional Court of Georgia, as the Negative Legislator

Constitutional Court is the creator of constitutional democracy.[5] It is the state institution of higher category,[6] constitutional control that is set by the Constitutional Court is the main supervisory lever of the public authority. "By using its authority, Constitutional Court plays the important role in the separation of powers, actualizing the principles of supremacy of the Constitution and defending the human rights"[7].

Constitutional control influence on the legislative organ activity is very important to be designated. By the announcing unconstitutionality the norms, Constitutional Court enacts judicial standard, which predispose legislator for the legislative action. In certain countries, Constitutional Court has right to estimate the non-existence norms constitutionality and to make the legislative organ of showing the legislative will.[8] Because of this functional connection with the legislative branch, Constitutional Court is reported as the negative legislator.[9]

Constitutional Court of Georgia is the organ of constitutional control,[10] which has two main function. One of them is the constitutional control of normative acts and other one is protecting the human rights. In the effective maintenance of these rights is shown the constitutional tribunal's historical, political and legal nature, what is more their affective guarantee makes the Constitutional Court as the organ protecting the Constitution.

Besides the main competency, that is specified by the Constitution, article 89, in Georgia, the frame of constitutional control expanses more and more and goes farther only from the frame of negative

4 *Gegenava D.,* Constitutional Court of Georgian, As Positive Legislator, report for the conference "Sergo Jorbenadze 90", Tbilisi, 2017 (in Georgian).

5 *Shvartz H.,* The Struggle for Constitutional Justice in Post-Communist Europe*,* translation by *K. Aleqsidze,* Preface by *Patricia M.,* Vald, editor *K. KublaSvili,* Tbilisi, 2003, 45 (in Georgian).

6 *Kakhiani G.,* Constitutional Control in Georgia – Analyzing Theory and Legislation, Tbilisi, 2011, 59 (in Georgian).

7 *Khetsuriani J.,* The Authority of Constitutional Court of Georgia, Tbilisi, 2016, 8-9, 54 (in Georgian).

8 *Shvartz H.,* The Struggle for Constitutional Justice in Post-Communist Europe*,* translation by *K. Aleqsidze,* Preface by *Patricia M.,* Vald, editor *K. KublaSvili*, Tbilisi, 2003, 144 (in Georgian).

9 *Gegenava D.,* Constitutional Justice in Georgia: Main System Problems of Court Procedures, Tbilisi, 2012, 45 (in Georgian).

10 Constitution of Georgia, art. 83, paragraph 1.

legislation. Because the Constitutional Court does not have constitutional mandate of legislative work, it does not pass the law, however it helps improving the legislation,[11] and according to its own decisions, court creates solid legal material norms".[12] Even more, during the constitutional control, by forming the compulsory principles Constitutional Court not only announces norms unconstitutionally, but also creates positive norms of law.

Besides the fact, that Constitutional Courts action creates hard and reliable guarantees to protect the human rights in country, it is also the risk for Constitutional Court, namely "if it is perceptive with the second legislative chamber, it will be the object of attack on the "political" motive, no matter if tribunal will make the decision only on the judicial motive".[13] That is why increasing the competence of Constitutional Court lies on its bound of independence and legitimation.

III. The Control of Normative Content of Norms

1. The main Features of Normative Contents Control

1.1 Essence and Meaning

The constitutional control on normative content of norm implies establishing the using of disputing norms, by the constitutional law. In the borders of this authority, Georgian Constitutional Court, by using the norms different definition states its normative nature and grammatical meaning, it takes into consideration using the norms in practice and states its suitability with the human rights that is defined by the Constitution. In the borders of this authority, not only text is checked, but also content of norms and the constitutional usage is checked by the public authority.

The aim of the control of normative content by the public authority is a prevention the use norm of unconstitutional meaning. In other words, the Constitutional Court, by its own decision excludes the norms definition to such way, that violates and in future humiliates human rights and in future might be in contravention with the normative norms essence. At the same time, the result of the given acts is to forbid the use of unconstitutional norms and not declare the questionable norm as invalid. In case of complying the complaint, (Preliminary request) the norms legislative formulation retains its legal force, with agreement that it will not be used by the Constitutional Courts to its unconstitutionally defined content.

According to the Constitution of Georgia, article 89, first paragraph, "v" sub point, the Constitutional Courts primary dependence was equally formalized. During the realization of its competence, the Constitutional Court was directing throw the constitutional mandates formal and textual meaning and

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11 *Kverenchkhiladze G.,* Legal Protection of Constitution (General Theoretical Issues), "Human and Constitution", №3, 2006, 41 (in Georgian).

12 *Gegenava D.,* Constitutional Justice in Georgia: Main System Problems of Court Procedures, Tbilisi, 2012, 49 (in Georgian).

13 *Shvartz H.,* The Struggle for Constitutional Justice in Post-Communist Europe*,* translation by *K. Aleqsidze,* Preface by *Patricia M.,* Vald, editor *K. KublaSvili,* Tbilisi, 2003, 63 (in Georgian).

was strictly defending its literal borders. For example, 23rd of July in 2004 the court by its ruling declined the control of normative content of norm and did not get the complaint in charge. This was substantiated that the Constitutional Court could not discuss about the norms incorrect usage, because courts function was only discussing cases on a constitutionality of normative acts.[14] According to this consideration courts should be discussed by the legislative organ, which should have defined the norms content and eradicated the existed legislative gap.

The control of normative content of norm gains special meaning for the effectively maintaining the delay-balancing constitutional principle. By the defining the normative content of constitutionality, the Constitutional Court controls not only the statutes constitutionality, but also gives the legislator the distinct hint to define the legislative norms content and exclude the norms unconstitutional interpretation, that might be caused, by the norms dim formulation: "Because the legislator is limited by the Constitution, impliedly legislator is also limited by the decision of Constitutional Court".[15]

At the same time, the constitutional control addressee is the court authority, which is obliged to defend human rights constitutional standard. By using the normative content, Constitutional Court is getting similar to a federal constitutional court, which controls the decisions constitutionality that is received by the courts authority. However, the Constitutional Court has lack of possibility to estimate the constitutionality of decisions, made by the ordinary courts. By taking into consideration these circumstances, meaning the control of normative content and the role of defending the human rights is growing.

1.2 The Norms Defining Borders

The Constitutional Court while defining the normative content of norm, is free in making arguments and discussion, however binding force for court has only the constitutional norms and terms.[16] Constitutional Court should check not only the norms formal conformity with the constitutional exigency, but also should ascertain how the debated norm will ensure the essence of constitutional rights.[17] "While the normative acts verification, Constitutional Court takes into consideration the debated norms not only literal meaning, but also actual thought and the practice usage, also the essence of appropriate norm of the Constitution."[18]

Constitutional Court is limited by the confines of actional request, according to this the Constitutional Court, while ascertaining the normative contents, does not defines the uniform method, but excludes laws unconstitutional definition. In one of its decision, Constitutional Court remarked that the aim of debated unconstitutionality of norm was not the prohibition of 9-month pre imprisonment usage,

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14 *Zoidze B.,* Constitutional Control and Valuations Order in Georgia, Tbilisi, 2007, 64 (in Georgian).

15 *Zoidze B.,* Constitutional Control and Valuations Order in Georgia, Tbilisi, 2007, 63 (in Georgian).

16 Decision of Georgian Constitutional Court, Case of a "Georgian citizens – *kemoklidze I., kharadze D.,* v. The Parliament of Georgia", 8th October, 2014, №2/4/532,533, II-63.

17 See Decision of Georgian Constitutional Court, Case of a "Georgian citizen –*Ugulava G.,* v. The Parliament of Georgia", 15th September, 2015, №3/2/646, II-2, II-34, II-35.

18 The Law of Georgia on Constitutional Legal Proceedings, art. 26, paragraph 3.

but it considered impermissibly the manipulation of procedural date, in a result it would come against to the right protected by the constitutions conformable article.[19]

As the result of ascertainment constitutionality of normative content of norm, Constitutional Court might define the concrete cases, when debated norms definition will not be considered irrelevant with the constitutional norm. For example, "besides the norms normative contents unconstitutionality, which is defined by the code of criminal process, Constitutional Court did not exclude and considered constitutional - possibility of using 9 month, in case if the motive on crime, that is committed before the imprisonment, will be known for Commonwealth counsel only after the estimation of pre-imprisonment case.[20]

Relating to norms definition and power of constitutional frames, the Constitutional Court's 2012 ruling is symptomatic.[21] Constitutional Court actually denied of increasing its authority in the frame of constitutional mandate, when decided to stay in severe constitutional frames and did not discuss the constitutionality of constitutional change.

Because the decision of the Constitutional Court has immobilizing force for government authorities, Constitutional Court is plenipotentiary to expend the norms content and enact the legislator's authority boarders on the debated action. On the case "Citizen Beka Tsikarishvili v. the Parliament of Georgia", Constitutional Court not only reversal the sanction – suppression of freedom from seven to twelve years, for the using of 70 gramme narcotic means, but also reversal using the suppression of freedom in general for the given action.

1.3 Legal Results

The control of normative content of norm purports norms definition and its using practice accordance with the constitutional norm by the court. Differently to the process of ascertainment constitutionality of norms, ascertainment unconstitutionality normative content of norm, does not make laws concrete norm void, in this case unconstitutionally is declared the norms concrete content interpretation by the government authority organ. According to this decision, Constitutional Court excludes norms definition and its usage with constitutional norms irrelevant practice.

On the result of defining constitutionality of normative content of norm, decision made by the constitutional court is binding while the norm using process. "Constitutional Court descants on a concrete issues normative content and makes decision about the problems normative contents conformity with the Constitution that is conditioned by the contesting regulation.[22] In case of using the norm, which is known as unconstitutional the decision of Constitutional Court works directly and has straight judicial force, also it excludes unconstitutionally known normative norms content of using ability.

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19 Decision of Georgian Constitutional Court, Case of a "Georgian citizen –*Ugulava G.,* v. The Parliament of Georgia", 15th September, 2015, №3/2/646, II-2, II-34, II-35.

20 See the same case, II-2, II-34, II-34.

21 See Decision of Georgian Constitutional Court, Case of a "Georgian citizen *Ashordia G.,* v. The Parliament of Georgia", 24th October, 2012, №1/3/523.

22 Decision of Georgian Constitutional Court, Case of a "Georgian citizen *Mamagulashvili T.,* v. The Parliament of Georgia", 11th July, 2013, №1/3/534, II-34.

Constitutional Court of Georgia, while establishing constitutionality of normative content of norm, did not take into Consideration Courts several action and pointed on the previous excepted decision. The statute of Constitutional Court defines designated competence. According to this statute if the Constitutional Court finds out, that debated normative act or its part has the same norms that court already notified as unconstitutional, the court deduces ruling of denying the case discussion in essence and about the making normative content of norm void.[23]

However, two case should be marked off from each other:

a) If the problem that is raised in in preliminary request has the same content to the already discussed issue, but also extra circumstances should be estimated, Constitutional Court in this case discuss these issues. If new actual circumstance does not influence on a old decision of Constitutional Court, the court will not take suit in charge, but the court will announce the normative content as unconstitutional on the direction of an old decision.[24]

Constitutional Court in 2017 got back to freedom suppressing constitutionality for marihuana acquisition and preservation. This time district court of Bolnisi was demanding ascertainmenting the constitutionality of norm.[25] The difference between the case actual conditions appeared only in one detail. This time preliminary request was about the damp marihuana acquisition/preservation. Constitutional Court guided 2015th of 24 Octobers decision and noticed unconstitutional article 260 from the criminal code, namely it noticed unconstitutional the normative content that involved freedom prohibition sanction for the given action.

b) If Constitutional Court already has the previous decision on the contesting norm, in this case court does not discuss the case actual circumstances and by the direction of an old decision decline of taking case in essence.[26]

2. The Authority of Ascertainment Normative Content of Norm

2.1 Legal Basis

Constitution of Georgia equips Constitutional Court of Georgia with a very important authority. Normative, abstract and concrete constitutional control powers create the main basis for the Constitutional Court of Georgia. Constitutional control of normative content is contained in this area of authority, which accomplish not differently defined legal basis, but a legal basis of salutation is Constitution's 89 article, first paragraph, "v" sub point. Submitted actions indirect legal basis also creates

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23 The Organic Law of Georgia on Constitutional Court, art. 25, paragraph 41.

24 Decision of Georgian Constitutional Court, Case of a "Constitutional preliminary request of Bolnisi district court on constitutionality of normative content of article 260, Georgian Criminal Code, which foresee the punishment for purchasing and conserving the "damp marihuana" for a private use", 15th February, 2017, №3/1/855.

25 See the same case.

26 Decision of Georgian Constitutional Court, Case of a "Constitutional preliminary request of Supreme Court of Georgia on constitutionality of normative content of Georgian Criminal Procedure Code 20th February, 1998, article 546 and article 518", 24th December, 2014, №3/3/601, II-27.

Organic Law of Georgia on Constitutional Court, article 19, first paragraph "e" sub point, in case of constitutional preliminary request, works article 19, second paragraph from the same statute.

While controlling the normative content, it is important to pay attention to The Law of Georgia on Constitutional Legal Proceedings, namely paragraph 26, third point. According to this paragraph, "Constitutional Court, while controlling the normative act, takes into consideration not only debated norms literal meaning, but also the actual thought and its practice of usage, also constitutional norm conformable essence.[27]

During the implementation of constitutional control, constitutional preliminary request is the main power of Ordinary Courts, while controlling the concrete norms intra vires,[28] common courts have ability to inhibit consideration of concrete case and address to Constitutional Court about controlling the constitutionality of norms. On the base of these norms, court should make decision on a concrete case, if they believe that the given norm entirely or partially might be considered irrelevant with Constitution.[29]

The court that brings in constitutional preliminary request is obliged to indicate constitutional regulation that might be irrelevant or might violate normative act.[30] Against to this, according to a practice of Constitutional Court, constitutional preliminary request will not be submitted in ruling.[31] Besides this agreement, Constitutional Court made different ruling on one of the case.[32] Besides the fact, that Constitutional Court considered in preliminary request mentioned constitutional norm as inappropriate, the court anyway submitted it in ruling and checked its constitutionality with the conformable Constitution norm. This kind of approach was substantiated by the court in occasion of impediment the consideration of Constitution preliminary request, as the existence of using the unconstitutional norm by the common courts.

2.2 The Practice of the Constitutional Court

The first decision about the constitutionality of normative content of contesting acts, Constitutional Court made in 2011,[33] on the given case, Constitutional Court did not doubt the obligation of discharging the military reserves services. Constitutional Court considered unconstitutional statutes normative content, which ascertained any citizen's obligation on military reserves work and did not foresee the right of use the conscientious resistance. According to the given resolution, Constitutional Court made

27 The Law of Georgia on Constitutional Legal Proceedings, art. 26, paragraph 3.

28 *Khetsuriani J.,* The Authority of Constitutional Court of Georgia, Tbilisi, 2016, 54 (in Georgian).

29 The Organic Law of Georgia on Constitutional Court, art. 19, paragraph 2.

30 The Law of Georgia on Constitutional Legal Proceedings, art. 16, paragraph 5.

31 See Decision of Georgian Constitutional Court, Case of a "Constitutional preliminary request of khashuri district court" 22th September, 1999, №1/6/115.

32 Decision of Georgian Constitutional Court, Case of a "Constitutional preliminary request of Supreme Court of Georgia on constitutionality of normative content of Georgian Criminal Procedure Code article 306, article 297", 29th September, 2015, №3/1/608,609.

33 Decision of Georgian Constitutional Court, Case of a " Public Defender of Georgia v. The Parliament of Georgia", 22th December, 2011, №1/1/477.

the exception from the absolute obligations, defined by the law and underlined norms practical interpretation problem.

According to a decision of Constitutional Court, it is possible for norm to not only lose concrete normative content, but also ascertain new norm-principle and also it should diffused on inculpatory, concrete act, which is widespread in code of criminal process. In 2015, Constitutional Court considered one of the most important case "Georgian citizen Beka Tsikarishvili v. the Parliament of Georgia"[34]. In this case, the problem for plaintiff was not narcotic medicines in general, but suppression of freedom for 7 to 14 years for the sapped marihuana's purchase/preservation (and not for any action that is prohibited by a debated paragraph).[35] On the given case, Constitutional Court not only declined 70 gramme narcotic means – sapped marihuana's for purpose of private use, defined sanction form 7 to 14 years freedom suppression on purchasing and preservation the marihuana, but in general the court considered unconstitutional to use freedom suppression punishment for the given action.

The ascertainment constitutionality of normative content of norm should not be estimated as authorities, or some of its branches opposite action, by the Constitutional Court. Constitutional Court considered Georgian statute of "military commitment and military service", paragraph 11, first point, first sentence, conformable with Constitution of Georgia, paragraph 14. Georgian Law of "military commitment and military service", paragraph 11, first point, first sentence, imposed men, who did not have any military registration speciality, on a military registration in such circumstances, when women, who did not have any military registration speciality, were free from a military work.[36] On the given case, Constitutional Court considered country's defense and discharging the military commitment as one of the form of constitutional obligation and selecting the discharging of this obligations form as the countries discretion.[37]

Constitutional Court of Georgia ascertains constitutionality of normative content of norm, not only the bases of citizen, but also on a base of preliminary request of Ordinary Courts. Constitutional Court of Georgia in 2014-2016 considered several constitutional preliminary request, in which the court specially remarked specific disposition of a constitutional preliminary request, because constitutional preliminary request is connected with complex problems that exist in court practice because considering the constitutional preliminary request, it is connected with the indisputable ruling regulation.

While ascertaining constitutionality a normative contents of norms, Constitutional Court might go far from norms texts and might ascertain a new regulation. The court also might go far from normative statutes, literal meaning. Constitutional Court relative to first paragraph of Constitution, article 42,

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34 Decision of Georgian Constitutional Court, Case of a "Georgian citizen Giorgi Beka Tsikarishvili v. The Parliament of Georgia", 24th October, 2015, №1/4/592.

35 Decision of Georgian Constitutional Court, Case of a "Constitutional preliminary request of Supreme Court of Georgia on constitutionality of normative content of Georgian Criminal Code article 260, article 297", 26th February, 2016, №3/1/708,709,710.

36 Decision of Georgian Constitutional Court, Case of a "Georgian citizen Giorgi Kekenadze v. The Parliament of Georgia", 30th September, 2016, №1/7/580.

37 See the same case, II-29.

considered unconstitutional Georgian supreme courts N601 constitutional preliminary request, namely given debated norms normative content, which neglected the possibility for justified person to appeal via appellate order. According to a debated norm, state accuser, higher procurator, victim, sentenced, defender and victims legal representative had right to appellate the complaint in court. According to a court decision, it is possible that the persons, who were justified, had the interest of appealing the justified sentence.[38]

According to this decision, Constitutional Court used higher constitutional standard. Court used norm teleological definition method and spread norms protected legal welfare on those officials, who were not considered in norms literal meaning of this welfare-protecting object. The court go farther from negative legislators constitutional frames, created the positive legal norm and changed to a positive legislator.[39]

The same contents decision was made by Constitutional Court in 2005, when for the aim of protecting more legal welfare, it notified unconstitutional normative content of article 306, paragraph four from the code of criminal process. This article was depriving the reviewing court possibility of going farther from borders of appeal complaint and liberate from responsibility the person, when the statute that was derived after the commitment of some legal action abolished acts criminality.[40]

IV. Real Control: Between *de facto* and Formal

According to a Constitution, article 89, each person, who think that, their human rights, that is secured by Constitution, was abolished, has right to file a complaint in Constitutional Court about the ascertainment constitutionality of norm.[41] This possibility creates the main guarantee of protecting the human rights in Georgia, however the act of its area confine oneself to constitutionality of normative acts. It does not effect on decisions of ordinary courts, that comparative to normative acts might no less abolish someone's constitutional rights. According to this, normative control has formal character on someone's human rights. For considering the protecting of effectuality of human rights, the Court not only has to protect the rights guaranteed by Constitution in indirect way, but also provide straight and fast satisfaction for statement of claims.[42]

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38 Georgia on constitutionality of normative content of Georgian Criminal Procedure Code 20th February, 1998, article 546 and article 518", 24th December, 2014, №3/3/601, II-27.

39 *Gegenava D.,* Constitutional Court of Georgian, As Positive Legislator, report for The conference "Sergo Jorbenadze 90", Tbilisi, 2017 (in Georgian).

40 Decision of Georgian Constitutional Court, Case of a "Constitutional preliminary request of Supreme Court of Georgia on constitutionality of normative content of Georgian Criminal Procedure Code article 306, article 297", 29th September, 2015, №3/1/608,609.

41 Constitution of Georgia, art. 89, 1st par., "v" sub point.

42 Compere *Sharashidze M.,* Perspectives of Granting the Constitutional Court of Georgia the Authority to Discuss Real Constitutional Complaints; Collected works: Constitutional and International Mechanisms of the Protection of Human Rights, edited by *Korkelia K.,* see reference 6, Dever against Belgium, 1980, § 29, 59 (in Georgian).

On the base of ascertainment the constitutionality of normative contant of norm, Constitutional Court of Georgia created important institute to protect the human rights. However, this authority appertains to a courts subsidiary competency. This competence is empowered not by a legislator, but by a Constitutional Court, to its own decision. Accordingly, separate specified legal base ascertainment of this authority does not exists in legal system of Georgia.

Expanding the authority by the Constitutional Court, in the circumstances, when in early practice Constitutional Court on the one hand was against of its authority expansion[43] and on the other hand, abstained from consideration of constitutionality of normative content of norm[44], might be estimated as a "normative starvation" of Constitutional Courts competent arsenal.[45] What is about last practice of Constitutional Court, it might be estimated as attempt of eradication by this normative lacuna. although, it doesn't mean that increasing the new practice of the Constitutional Court is correct and without deffect.

Constitutional Court of Georgia, which is connected to European model of constitutional tribunal, shows many similarities to a German Federal Constitutional Court.[46] I consider that in case of conformable legislative decision and implementation of institutional measure, by empowering the real control, Georgian Constitutional Court might not need to define its authority borders and become a strong guarantee in protecting the human rights.

V. Conclusion

Constitutional Court to its last period practice, without creating additional legislative basis could increase its authority, transformation of own competence and formed as overseer of *de facto* real control organ. Constitutional Court via the right of estimation the constitutionality normative content of norm lay the foundation to a new way of constitutional control. Intra vires to the all cases considered in this authority, Constitutional Court not only made unconstitutional norms void, but also go farther from negative legislator's authority borders and re-acquired a new positive legislator's function, by creating new norms.[47]

By increasing the borders of Constitutional Court authority, it shows that comparing to existed model, much more powerful constitutional control is needed. Without proper legislative changes, the control of constitutionality of normative content of norm is an important instrument to protect the human

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43 Decision of Georgian Constitutional Court, Case of a "Georgian citizen *Ashordia G.,* v. The Parliament of Georgia", 24th October, 2012, № 1/3/523.

44 *Zoidze B.,* Constitutional Control and Valuations Order in Georgia, Tbilisi, 2007, 64 (in Georgian).

45 About the term see *Gegenava A., Gegenava D.,* Citizen of Denmark Heik Qronvist v. Parliament of Georgia and Normative Starvation of Legislation, Article in anniversary collection "Besarion Zoidze 60", 173, 2016 (in Georgian).

46 *Papier H.I.,* Individual Complaint in Federal Constitutional Court, "Human and Constitution", Tbilisi, 2003, №2, 16 (in Georgian).

47 *Gegenava D.,* Constitutional Court of Georgian, As Positive Legislator, report for The conference "Sergo Jorbenadze 90", Tbilisi, 2017 (in Georgian).

rights, however I consider it is important to institutionalize the de facto real constitutional control and to award the Constitutional Court the right of real control on the legislative level. This step will create much more improved guarantee for protecting the human rights by the Constitutional Court.

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25. Decision of Georgian Constitutional Court, Case of a "Georgian citizen *Kekenadze G.,* v. The Parliament of Georgia", 30th September, 2016, №1/7/580, II-29.
26. Decision of Georgian Constitutional Court, Case of a "Constitutional preliminary request of Supreme Court of Georgia on constitutionality of normative content of Georgian Criminal Code article 260, article 297", 26th February, 2016, №3/1/708-710.
27. Decision of Georgian Constitutional Court, Case of a "Constitutional preliminary request of Bolnisi district court on constitutionality of normative content of article 260, Georgian Criminal Code, which foresee the punishment for purchasing and conserving the "damp marihuana" for a private use", 15th February, 2017, N3/1/855.
28. Study on Individual Access to Constitutional Justice, European Commission For Democracy through Law (Venice Commission), №538/2009, Strasburg, 2011, 33-34, 41, 48, 59.
29. Annual Report of Activities 2011, European Commission For Democracy Through Law, Strasburg, 2012, 39.
30. CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the Constitutional Court) adopted by the Venice Commission at its 61st Plenary Session, 2.
31. <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.
32. Presentation of Public Defender of Georgia on increasing the authority of Constitutional Court of Georgia, Tbilisi, 2015, see <https://goo.gl/7mSohU>, [25.01.2017].

Nino Rukhadze[*]

Can Human Rights Violations Constitute Public Morals under the Article XX(a) of the GATT and Article XIV(a) of the GATS?[1]

The article considers the problem of interrelation between human rights and internationa trade law. The article studies whether human rights are banished from international trade law to such an extent that even fundamental human rights cannot be invoked by the Panel and the AB to challenge the public morals argument invoked by WTO members under the Article XX(a) of the General Agreement on Tariffs and Trade (hereinafter, GATT) and Article XIV(a) of the General Agreement of Trade in Services (hereinafter, GATS). The article maintains that international trade law doesn't enable effective protection of human rights, since human rights law is not applicable in the World Trade Organization; moreover, the legal construction of the Article XX(a) of the GATT and the Article XIV(a) of the GATS do not ban trade restrictive measure, which contradicts human rights.

Key words: *World Trade Organization, Human Rights, Public Morals, Necessity Test, Chapeaux of the Article XX of the GATT and Article XIV of the GATS.*

1. Introduction

Scarsity of judgements on public morals exception under Article XX(a) of the GATT and Article XIV(a) of the GATS, triggers increasing interest towards the issue of public morals. The public morals is much accommodating notion and it may cause significant jolting in operation of the WTO agreements.

There is an anticipation that the judicial practice of the WTO dispute settlement system will be developed regarding the public morals exception so that, it will be possible to strengthen role of human rights significantly within the framework of international trade law. Though, with regard to the issue of public morals exception, careful attitude is noticeable. It can be explained by existence of threat that moral values can be used for disguising protectionist purposes of member states. This risk plays somehow hindering role for preventing operation of conception of public morals with full normative potential, which may have negative impact on full-fledged integration of human rights in the WTO system under the auspices of public morals exception.

Considering the afore-said, attempt of human rights intervention in international law through the concept of public morals cannot be considered as an optimal way; moreover, in certain cases public morals may even contradict to human rights. In such case, public morals does not support protection of human rights in international trade system, but, on the contrary, directly contradicts to interests of protection of its even most basic principles.

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[1] The article is open for discussion.

The article is dedicated to the problem of interrelation of human rights and internstional trade law. Specifically, the article studies whether human rights are banished from international trade law to such an extent that even fundamental human rights cannot be invoked by the dispute settlement bodies of the WTO – the Panel and the AB to challenge the public morals argument invoked by WTO members under the Article XX(a) of the GATT and Article XIV(a) of the GATS.

For the above-mentioned purpose, two main issues are covered in the paper. The first issue concerns status of international human rights' law in the World Trade Organization. Specifically, it analyses whether human rights are applicable law within the WTO. Within the framework of the second issue it is analyzed whether public morals exception can accommodate human rights violations. The second issue involves three sub-issues, which are separately discussed in the paper: whether the concept of public morals is reconcilable with violations of human rights; whether public morals which contradicts to human rights meets the necessity test; and finally, whether public morals, conflicting with human rights complies with requirements of the chapeau of the Article XX(a) of the GATT and the Article XIV(a) of the GATS.

2. World Trade Organization and Human Rights – What Extent of Integration Is Allowed?

Complexity of the issue, whether international law of human rights has presence within the WTO, is that representatives of both pro and anti - human rights integration views have convincing arguments about the issue for supporting their positions. From the viewpoint of those, who adhere to an idea of inflow of international law of human rights into the WTO system, human rights form integral part of international trade law. On the contrary, from the perspective of those, who are not convinced that human rights are entrenched in international trade law, the two legal systems have high degree of autonomy and their influence on each other is insignificant.

The support of the view that human rights form part of international trade law can be found in the UN Charter (the Charter). In the international treaty, having the supreme legal force - the UN Charter human rights have central place.[2]

Considering the meaning, which was given to human rights by the Charter, it can be claimed without exaggeration that human rights gained the status of constitutional norms in modern international law,[3] creating necessity of "recognizing, promoting, protecting, and implementing human rights at all levels of national and *international relations*…"[4] (highlighted by me). On this backbone, any international system would be suicidal, if it doesn't take take due consideration of human rights[5] and,

2 Article 103 of the UN Charter, 1945.

3 *Petersmann E.U.*, Human Rights and International Economic Law in the 21st Century. The Need to Clarify their Interrelationships, Journal of International Economic Law, 4(1), 2001.

4 UN General Assembly "Declaration of the Right to Development, Resolution, Resolution 41/128, 4th of December, 1986 (Petersmann E.U., Human Rights and International Economic Law in the 21st Century. The Need to Clarify their Interrelationships, see. fn. 3)

5 *Yarwood L.*, Trade Law as a Form of Human Rights Protection?, NUJS Law Reviw, 3, 2010.

hence, it is less conceivable that human rights are neglected in any field of international law, including international trade law.

The view that human rights are inevitably mirrored in international trade law, is further reinforced by the fact that member states of the WTO are parties to universal or regional human rights' agreements. In the light of obligations undertaken under these instruments it seems that the state will not bind itself by such international agreements, which may be in conflict with human rights. [6]

Furthermore, even the WTO agreements themselves indicate that human rights are not irrelevant in the context of international trade law. For instance, the preamble of the Marrakesh Agreement maintains that raising standards of living, ensuring full employment, increasing global welfare, promoting sustainable development and protecting environment represents one of the central objects of concern in the world trade system[7] and "draw[s] striking similarity, both in language and essence, with human rights."[8] In addition, the fact that Article XX of the GATT and Article XIV of the GATS permits deviating from objective of global trade liberalization in favor of such humanities, which directly or indirectly boil down to the interests of protecting human rights, shows that international trade law doesn't foreclose human rights.

At the same time, the view that human rights should be *a priori* granted predominance over trade interests and hence, should be granted wide endorsement within the WTO system "would be somewhat simplistic".[9] Some Articles of the DSU[10] highlight that the WTO Panel and the AB have extremely limited jurisdiction, making it in view of some experts fairly "nonrealistic" to integrate human rights in international trade law disputes.[11]

Particularly, according to the Article 1(1) of the DSU, the Panel and the AB can consider only disputes under the covered agreements, which are exclusively international trade agreements.[12] At the same time, as the International Law Commision explained: "A limited jurisdiction does not ... imply a limitation on the scope of the law applicable in the interpretation and application of [WTO] treaties ... While the [DSU] limits the jurisdiction to claims which arise under the WTO covered agreements only, there is no explicit provision identifying the scope of applicable law."[13]

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6 *Zagel G.M.*, Human Rights Accountability of the WTO, *Human Rights and International Legal Discourse*, 1, 2007, 340-355.

7 *Powell S.J.*, The Place of Human Rights Law in World Trade Organization Rules, Florida Journal of Iternational Law, №16, 2004, 220-221.

8 *Yigzaw D.A*., Hierarchy of Norms, The Case for Primacy of Human Rights WTO Law, Suffolk Transnational Law Review, 2015, 40.

9 *Kanade M*., Human Rights and Multilateral Trade:A Pragmaic Approach to Understanding the Linkages, The Journal Jurisprudence, 2012, 396.

10 See Articles 1(1), 7(1) and 7(2), as well as Articles 3(2) and 19(2)of the Understanding on Rules and Procedures Governing the Settlement of Disputes (1994).

11 *Schultz J*., Ball R., Trade as a Weapon? The WTO and Human Rights-based Trade Measures, Deakin Law Review, №12, 2007, 43.

12 See the Appendix I of the DSU.

13 International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN GAOR, 5 81h sess, UN Doc A/CN.4/L.682 (13 April 2006) 28-9 [45] ('ILC Fragmentation Report'). The same view is shared by Joost Pauwelyn,

Besides, according to Articles 7(1) and 7(2) of the DSU member states can present complaints to the WTO dispute settlement bodies only with regard to the covered agreements.

DSU includes other Articles, which impugn competency of the WTO dispute settlement bodies to consider issues of human rights protection. Special mention should be made of Article 3(2). Specifically, according to the Article 3(2) "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. Consequently, as the AB maintained in *Mexico – Tax Measures on Soft Drinks and Other Beverages* WTO dispute settlement bodies may not "determine rights and obligations outside the covered agreements".[14]

Notwithstanding the above-mentioned Article of the DSU, the idea of integrating human rights in the WTO system does not lose the topicality and attempts are made to show that human rights are organic part of international trade law.

The opinion that, the applicable law of the WTO dispute settlement bodies can be broader concept than the covered agreements, can be somehow grounded in the text of the DSU, particularly in the Article 11. According to the Article 11 of the DSU a panel should make an "objective assessment of the matter before it, including … of applicability of and conformity with the relevant covered agreements, and ***make such other findings*** as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements" (highlighted by me). According to Thomas Schoenbaum, the Article 11 represents "implied power clause which should be interpreted broadly so that panels and Appellate Body can decide all aspects of a dispute",[15] among them, seemingly, the aspects concerning human rights.

Other attempt of injection of human rights within the scope of international trade law are made through the Article 31(3)(c) of the VCLT. [16] According to the Article 31(1) of the VCLT, when interpreting international agreements, we should consider appropriate context of relevant international agreements. On its term, when defining the context according to the Article 31(3)(c) of the VCLT "any relevant rules of international law applicable in the relations between the parties" should be considered. Those, who are

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who considers that we should distinguish: on one side, the jurisdiction of the WTO dispute settlement bodies and on the other side the applicable law by the Panel and AB. Accordingly, Pauwelyn concludes, that though the jurisdiction of the WTO dispute settlement bodies includes only the covered agreements, applicable law within the WTO dispute settlement system is more than simply covered agreements (See *Pauwelyn J.*, How to Win A WTO Dispute Based on Non-WTO Law? Journal of World Trade, №37, 2003 (see *Guzman A.T., Pauwelyn J.,* International Trade Law (New York: Wolters Kluwer Law & Business), 2012, 417-418).

14 Appellate Body Report, Mexico Tax Measures on Soft Drinks and Other Beverages, WTO Doc WT/DS308/AB/R, AB-2005-10 (6 March 2006) [56].

15 *Schoenbaum T.*, WTO Dispute Settlement: Praise and Suggestions for Reform, International and Comparative Law Quarterly, №47, 2000, 653 (see *Marceau G.*, WTO Dispute Settlement and Human Rights, European Journal of International Law, №13, 2002, 764).

16 Pursuant to the Article 3.2 of the DSU- covered agreements of the WTO are to be interpreted in accordance with customary rules of interpretation of public international law. The VCLT codifies rules of customary international law of treaties, *inter alia*, rules on treaty interpretation. (*Gabčíkovo-Nagymaros Project,* I.C.J., 1997, Paragraph 46).

persuaded that human rights should be read into international trade law, bring the argument that according to the Article 31(3)(c) of the VCLT, international trade law should be interpreted in the light of system of international law as a whole, including, international law of human rights. At the same time, we should keep in mind that the Article 31(3) of the VCLT is not opening the door of international trade law too wide for other fields of international law. As the WTO Panel stated in the case *EC-Biotech,* according to the Article 31(3)(c) of the VCLT covered agreements imply only those agreements parties of which all member states of the WTO are.[17] In other words, for the purposes of international trade law only those norms of international law of human rights can be applied, which are recognized by all members of the WTO. Such norms are not few in number, a whole bunch of universal international instruments exist in the field of international human rights law, which are acknowledged by most of the states and which are *per se* obligatory for states or legally binding by power of customary international law.

Acceptance of the described legal arguments for implementing human rights in international trade law is far from unanimous. Moreover, the mentioned arguments cause more skepticism, than support. However, it is a fact that there do not exist sound arguments which would unchallengedly deny possibility of incorporation of international law of human rights in international trade law.

Considering the above mentioned the conclusion may be drawn that interrelation of international law of human rights and international trade law, is quite vague. On the background of this vagueness, the most uncontroversial inference would be that international law of human rights does not have status of actual law within the system of the WTO. However, considering the practice of settling the disputes within the WTO, it is less likely that the WTO dispute settlement bodies will come into confrontation with international law of human rights. It is the fact that conflict situation between international trade law and international law of human rights has happened rarely up to now.[18] As it seems, the WTO Panel and AB try not to create problems to member states and interpret the covered agreements so that these agreements do not come into conflict with international law of human rights.

Besides the fact that the WTO Panel and the AB try not to create legal problems to states, the principle of good faith interpretation of international agreements require to avoid conflicts between different international agreements.[19] Considering this, presumption against conflict, which exist in international law, should be embedded within the scope of dispute settlement system of the WTO,[20] for providing "coordinated" co-existence between international trade law and international law of human rights.[21]

Coordinated co-existence of international trade law and international law of human rights is the most suitable interpretation of interrelation of these two systems of international law from the systemic point of view. International trade law represents part of international law and accordingly, it is not

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17 *EC — Approval and Marketing of Biotech Products*, Panel Report, WTO, 2006, Paragraph 7.68.

18 *Hilpold P.*, WTO Law and Human Rights: Bringing Together Two Autopoietic Order, Chinese Journal of International Law, №10, 2011, 355.

19 *Sinclair I.M.*, The Vienna Convention on the Law of Treaties, (Manchester University Press, Manchester 1973), at 75**,** referring to II ILCYB 1966**,** at 50 (see *Hilpold P.*, WTO Law and Human Rights: Bringing Together Two Autopoietic Order, 356, see fn. 17).

20 *Marceau G.*, WTO Dispute Settlement and Human Rights, 791-795, see fn. 14.

21 *Hilpold P.*, WTO Law and Human Rights: Bringing Together Two Autopoietic Order, 354-357, see fn. 17.

correct to isolate it from other fields of international law, *inter alia*, from international law of human rights, which would cause unjustified fragmentation of international law.[22]

To sum up, international trade law has high degree of autonomy, though at the same time it is not isolated field and does not exclude possibility of being subjected to normative influence of other fields, including international law of human rights. Though this influence is restrained and is limited so that human rights law simply adjust interpretation and application of international trade law in the sense that it prevents interpretation and application of international trade in a manner, which is inconsistent with the obligations of a state under human rights law.

At the same time, the idea of full-fledged integration of human rights in international trade law is groundless. Neither the text of the covered agreements, nor general international law, except for the law of human rights, suggest that international law of human rights is acting law within the WTO system and accordingly neither the Panel, nor the AB may rely on it to legally challenge trade-restrictive measures, which are introduced for the purpose of protecting public morals and which represent obvious abrogation from human rights law.

The issue of admissibility of public morals, which conflicts with human rights law, is not exhausted here. The next question is whether the content and design of the Articles XX(a) of the GATT and Article XIV(a) of the GATS makes the public morals exception conceptually reconcilable with violations of human rights. The next chapter of the paper is dedicated to consideration of this issue.

3. Three-stage Test

3.1 Preface

According to the practice of the WTO Panel and the AB, assessment of trade restrictive measure, which is justified by the member state based on the the Article XX(a) of the GATT and Artcle XIV(a) of the GATS, is made by using three-stage test: first stage is determining whether ground of restricting of trade is really demand of public moral considerations; on the second stage necessity of this measure is tested; third stage is about determining compliance with the requirements of the chapeau of the Article XX(a) of the GATT and Artcle XIV(a) of the GATS.

Considering this the issue to be studied within the scope of this work is discussed in three stages. First, it is examined what the concept "public morals" means according to the WTO agreements and whether violations of human rights can represent public morals according to this concept. Afterwards, the issue, whether trade restrictive measure, adopted on the basis of public morals, which at the same time may represent violation of human rights, can be considered as necessary measure according to the Article XX(a) of the GATT and Article XIV(a) of the GATS, is analyzed. Finally the brief overview of the issue of compliance of such measure with the requirements of the chapeau of the Article XX(a) of the GATT or Article XIV(a) of the GATS is provided.

[22] Ibid, 357.

3.2 Public Morals and Violations of Human Rights

First question to be discussed is – whether violations of human rights can represent public morals. The best possibility of answering the question - whether violation of human rights may represent public morals according to the Article XX(a) of the GATT, was the case *China — Publications and Audiovisual Products.* The case was about restrictions on import and distribution of audiovisual products, sound recordings and publications imposed by government of China. In response to these restrictions, US brought a claim against China at the WTO Panel, alleging that China has violated its trade obligations under the China's Protocol of Accession,[23] the GATT[24] and the GATS[25]. One of the central issues for consideration by the Panel was whether a content review for the importation of cultural goods, operated through a system of selected import entities, was consistent with Article XX(a) of the GATT. China appealed to the interest of protection of public morals in order to justify restrictions, imposed on importers, which practically represented censure of printed and audiovisual products, as well as sound recordings, since as China stated these "cultural goods may have a negative impact on public morals".[26] Unfortunately, U.S did not raise an issue about the fact that the mentioned restriction may contradict to freedom of speech. Hence, the Panel either did not consider the issue whether it is acceptable to qualify violations of human rights as public morals, according to the Article XX(a) of the GATT.[27] The AB neither discussed the mentioned issue and consequently, in this case the chance of discussing the issue under consideration by the dispute settlement bodies of the WTO was lost. As Pauwelyn writes, this lost chance cannot not be assessed in favor of freedom of speech.[28]

Considering the fact that neither the Panel, nor the AB have discussed the issue whether the concept of public morals can imply violations of human rights, it is reasonable to refer to original source – first decision of the WTO Panel on public morals exception. It was first time when the concept of public morals was determined within the scope of international trade law. The mentioned decision was made in the case *US — Gambling* with regard to public morals exception as envisaged in the Article XIV(a) of the GATS. Decision made in the case *US - Gambling* on the concept of public morals still remains as controlling case, since nothing substantially new was added to the issue of what can be considered as public morals even in the recent *EC — Seal Products* case.[29]

The position of the Panel in the *US-Gambling* regarding the concept of public morals gives possibility of double interpretation. On one hand, the wide discretion of defining the concept of public

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23 Paragraphs 1.2, 5.1-5.2 of the Part I of the Protocol of Accession.
24 Article XI(1) of the GATT.
25 Article XVI and XVII of the GATS.
26 China — Publications and Audiovisual Products, WTO Panel Report, 2009, Paragraph 4.276-4.279.
27 Ibid, Paragraph 7.763.
28 *Pauwelyn J.*, Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on China – Audiovisuals, Melbourne Journal of International Law, №11, 2010, 135.
29 *Flores Elizondo C.J.*, Case Comment, Manchester Journal of International Economic Law, Volume 11, Issue 2, 2014, 319-320.

morals of states was recognized. Specifically, according to the Panel, ordinary meaning of public morals "denotes standards of right and wrong conduct maintained by or on behalf of a community or nation".[30] Besides, the Panel also considers the fact that the content of the concept "public morals" "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values".[31] Highlighting that public morals is based on the believes which exist in certain state and which are conditioned by social, cultural and religious traditions of this state, proves that the state has high level of autonomy when defining the concept of public morals.

Accepting broad determination of the concept of public morals comes in unison with that general attitude, established by the practice of the dispute settlement bodies of the WTO. For instance, the AB stated in the case *US — Shrimp* that "right to invoke one of [Article XX of the GATT] exceptions is not to be rendered illusory",[32] danger of which would exist in case of narrow and restricted interpretation of the Article XX of the GATT and Article XIV of the GATS.

At first glance, such broad interpretation discretion gives authority to member states to justify trade restrictive measures by requirements of public morals, even if public morals contradict to international law of human rights, as recognized by the majority of international community. But it is wrong to claim that wide interpretation authority implies unlimited freedom of state to define the content of public morals. It is noteworthy, that wide interpretation authority of the "public morals" concept is supported by other international structures as well. For instance, the European Court of Human Rights stated that "By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of … requirements [of public morals]".[33] As the case of *Handyside v United Kingdom* shows, the ECtHR is supporter of wide interpretation of public morals, though it does not mean that such approach is neglecting human rights – it is inconceivable that the ECtHR supported such wide interprettaion of public morals which might pose threat to the interests of protection of human rights.

Moreover, the nuances given in the decision on the case *US-Gambling* suggest that the Panel is not supporting to give unlimited freedom of determining the concept of "public morals" to the state. First, it should be mentioned that the Panel states that members should be given "some" scope to determine and apply for themselves the concepts of "public morals"[34]. Highlighting "some scope" by the Panel means that the Panel considers that the authority of the state to determine the concept of public morals is not unrestrained.[35]

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30 *US-Gambling,* Panel Report, WTO, 2004, Paragraph 6.465.

31 Ibid, Paragraph 6.461.

32 US-Shrimp, AB Report, WTO, 1998, Paragraph 156.

33 Handyside v United Kingdom, Application №5493/72, ECtHR, 1976, Para 48.

34 US-Gambling, Panel Report, WTO, 2004, Paragrph 6.461.

35 It is noteworthy that Nicolas F. Diebold evaluates indication of the WTO Panel that states have freedom to determine "some scope" of public morals not as restriction of the states' authority of defining public morals, but, on the contrary, as states' high level of freedom to outline the concept of public morals. According to the author, "some scope" denotes universally recognized right of the WTO member to determine own level of protection, in which it has unrestrained freedom. As Diebold considers these two

Besides, it is noteworthy that for corroborating the fact that prohibition on gambling is prompted by requirements of public morals, the court refers to practice of other states that gambling is against public morals.[36] Reliance on the practice of other states suggests that viewpoint of individual states on public morals is not absolute and the position of other states should be given due consideration.

Great importance of that part of the Panel's decision, where the Panel indirectly talks about necessity of considering perspectives on public morals of other countries, is demonstrated by the huge attention of scholarly works to this excerpt of the judgement.

Marwell, for instance, writes, that when the Panel relied on practice and views of foreign countries regarding the gambling, it implicitly determined the concept of public morals as morals of majority.[37] The author says that "The decision, at least implicitly, suggests that States invoking public morals defense will be expected to present evidence of similar practice by other states. Taken to an extreme, the *Gambling* doctrine might be read as implying that states cannot unilaterally determine public morals."[38] Author himself has the view that if the WTO member states are able to provide relevant evidences they should be unrestraindly free to define the concept of public morals[39] and this view has recently gained some support in scholarly works.[40] Though at the same time Marwell himself admits that today jurisprudence of the WTO Panel and the AB and positions of member states adhere to more universal rather than unilateral approach in defining public morals.[41]

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terms "some scope" and "own level of protection" are identical in meaning and he thinks that when determining the content of the term "some scope", member state has same level of freedom as in defining "own level of protection" (*Diebold N.F.*, The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole, Journal of International Economic Law 11(1), 2007, 51-52). It is hard to agree with Diebold in this opinion, as according to jurisprudence of the WTO, the term - "own level of protection" – should employed on the second stage of the so-called three-stage test, when the necessity of using trade restrictive measure for the purpose of protecting legitimate interests listed in the Article XX(a) of the GATT or the Article XIV(a) of the GATS is evaluated. In the case *US-Gambling,* the Panel uses the term "some scope" not on the second stage of the three-stage test, but on the first stage, when the Panel studies whether banning of gambling falls within the scope of the concept of "public morals". As Diebold himself admits, it is a mistake to use the term "own level of protection" on the first stage of the test (Diebold N.F., The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole, 53). Considering this it is legitimate to ask, why should we think that the court made a mistake and used the term in the wrong place. There is no ground for thinking that the Panel used the terms "some scope" and "own level of protection" as interchangeable concepts. Moreover, according to the ordinary meaning of the mentioned two terms it is doubtful that the term "some scope" means such high level of autonomy in determining its content by the state, as determination of "own level of protection" implies.

36 *US-Gambling,* Panel Report, WTO, 2004, Paragraph 6.471-6.473.

37 *Marwell J.C.*, Trade and Morality: The WTO Public Morals Exception After Gambling, New York University Law Review, Vol. 81, 806.

38 Ibid, 817.

39 Ibid, 824-826.

40 *Nachmani T.S.*, To Each His Own: The Case for Unilateral Determination of Public Morality under Article XX(a) of the GATT, University of Toronto Faculty of Law Review, № 71, 2013.

41 *Marwell J.C.*, Trade and Morality: The WTO Public Morals Exception After Gambling, 820-823, see fn.32.

In fact, Marwell's view that in the case *US-Gambling* the Panel and the AB adopted pro-universal approach in interpreting public morals concept, is disputable. The Panel's decision on the case *US-Gambling* was not crucial in solving the long-standing unsettled issue - giving privilege to universal or unilateral approach to defining the concept of public morals.[42] Due to difficulty of the issue it was expectable. It is worth mentioning that due to the complexity of the problem, even before the WTO Panel and the AB discussed the issue what "public morals" mean for pruposes of the WTO agreements, Feddersen stated, that the concept should stay "indefinite"[43] and it should be determined considering all factual circumstances and factors of each particular case.[44] Though, at the same time Feddersen specified that "Such method lies at intersection of a contracting party's national sovereignty with the minimum of a uniform interpretation of an internationally binding agreement".[45]

The approach, that the concept of public morals in every certain case should be determined in the context of individual state, but not averting universal values, is mostly acceptable. It gives opportunity to prevent those shortcomings, which accompanies universalist and unilateralist approaches. As Wu writes, with universalist approach there is a risk that the Article XX(a) of the GATT and the Article XIV(a) of the GATS will become completely "useless", as number of values shared by all states, is insignificant.[46] Accordingly, grounds, which may be qualified as moral grounds for trade restriction, would be extremely narrow.[47] Besides, Wu states that giving freedom to the states to determine unilaterally the concept of public morals will cause danger of manipulation: the states may overexploit the right to introduce the trade-restrictive measures with mask of public morals.[48] Charnovitz goes even further and states that the concept of public morals established by the state unilaterally will not be "legitimate" and necessarily will require "internationalization".[49]

Identifying shortcomings of universalist and unilateralist approaches, Wu offers framework for integrating mutually excluding universal and unilateral conceptions of public morals. Specifically, Wu maintains that "countries need not agree on the specifics of the norm itself, just that the category as a whole constitutes a moral issue. For example, states may differ about the specific religious restrictions to be imposed on imports of food and beverages, but most would recognize that the "category writ large

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42 *Diebold N.F.*, The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole, 51, see fn.30.

43 It is worth mentioning that even drafters opted to leave the concept undefined. For the detailed drafting history of the Article XX(a) of the GATT see *Charnovitz S.*, The Moral Exception in Trade Policy, Vanderbildt Journal of International Law, №38, 1998.

44 *Feddersen C.T.,* Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation, Minnesota Journal of Global Trade ,№7, 1998, 112-114.

45 *Feddersen C.T.*, Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation, 114, see fn. 43.

46 *Wu M.*, Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine, Yale Journal of International Law, №33, 2008, 232.

47 Ibid, 232.

48 Ibid.

49 *Charnovitz S.,* The Moral Exception in Trade Policy, Vanderbilt Journal of International Law, №38, 742.

qualifies as an issue of public morality."[50] In other words the author thinks that public morals should be determined by each state individually, but the state's view on public morals should be understandable for other states, so the states should be convinced that this or that trade restrictive measure is indeed prompted by concerns of public morals, despite the fact whether similar view about public morals is shared by them unilaterally or not.

It is noteworthy, that the attitude, according to which the state is given discretion to determine the concept of public morals or other categories so that at the same time this determination should be understandable for international community of the states, is well established in international structures. For instance, the EU Court of Justice, which was discussing in case *Omega Spielhale* how acceptable it is on the basis of public policy of Germany to restrict the freedom of providing services, stated: "it is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected… [Thus] the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State."[51]

Wu's approach enables to bring consistency in the concept of public morals, as defined by the Panel and lately shared by the AB in the case *US-Gambling*. Specifically, the approach proposed by Wu, gives possibility of co-existence of universalist and unilateralist elements of public morals within the scope of single concept. Consequently, decision in the case *US-Gambling* can be seen not as judgement full of contradictory elements, but as rationalized decision, which gives possibility that individual views of the state about public morals be viable within the scope of even such multinational system like the WTO.

In the light of the afore-said we can conclude that, when in the *US-Gambling* the Panel and the AB stated that public morals should be based on the views existing in separate society about public morals, actually, the Panel and the AB recognize that individual state itself has decisive role in determining the concept of public morals. Though when the Panel refers to practice of other countries, it can be explained as attempt of not endorsing such concept of public morals, which will be incomprehesible for other countries. It should be highlighted, that incomprehesible does not mean different. In other words, for recognzing some rule as moral rule, it is not necessary that other countries share or accept analogue or somehow similar rule, but it should be understandable and convincing for other countries that appropriate rule can indeed be the moral rule in the given society.

Having determined public morals as understandable and convincing for all WTO members moral standards, is it possible that the WTO Panel and the AB accept violations of human rights as claims of public morals? The given determination of public morals is somehow a filter, which will not give opportunity to very serious and grave violations of human rights, which are completely unacceptable for

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50 *Wu M.*, Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine, 243, see fn. 45.

51 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, European Court of Justice (First Chamber), 2004, Paragraphs 37-38, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-36/02>.

international community as a whole, to be qualified as public morals. Other less serious types of violations, will probably pass this filter, as, for instance, it is still understandable and convinsing for modern world that despite their unacceptability, restrictions of women's rights are deeply embedded in religion and culture of particular countries and represents component of public moral. This conclusion leads us to the next chapter, which covers the issue whether less serious violations of human rights satisfy requirements of necessity test.

3.3 The Necessity Test

The necessity test for the public morals exception is established by the Panel in the case *US-Gambling*. In applying the necessity test the Panel and the AB engage in "weighing and balancing" of the importance of interests or values that the challenged measure is intended to protect and asses the extent to which the challenged measure contributes to the realization of the ends pursued by that measure, as well as the trade impact of the challenged measure.[52]

Will trade restrictive measures, imposed on the ground of public morals and violating human rights, pass the test?

It is noteworthy that in the case *US-Gambling*, when discussing importance of interests and values for which challenged trade restrictive measure was introduced, the Panel focused not on importance of protection of public morals as such, but on importance of social purposes and interests, which the ban on gambling fostered. The Panel emphasized that the challenged measure confronted perverse social practice, such as money laundering and corruption.[53] Considering such approach and analysis of the issue by the Panel, it seems that only protection of moral values is not enough cause and that trade restrictive measure should also have so called "instrumental" social or other rational.[54]

Though, as subsequent practice shows, protection of public morals as such is considered to be of central concern. As the Panel in the case *China — Publications and Audiovisual Products* stated: "undoubtedly … the protection of public morals ranks among the most important values or interests pursued by Members".[55] In the case *EC — Seal Products* the Panel stated that "protection of … public moral concerns is indeed an important value or interest".[56] Considering this, the element of necessity test, which implies assessment of importance of interests or values that the challenged measure pursues becomes superfluous and therefore, it can be considered that any measure established on the ground of public morals automatically satisfies the first element of the given test.

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52 US-Gambling, Panel Report, WTO, 2004, Paragraph 6.4777.

53 Ibid, 6.491.

54 *Howse R.*, *Langille J.,* Permitting Pluralism:The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Non-instrumental Moral Values, The Yale Journal of International Law, Vol. 37, 2012.

55 *China — Publications and Audiovisual Products*, WTO Panel Report, 2009, Paragraph 7.817.

56 EC — Seal Products, WTO Panel Report, 2013, Paragraph 7.632.

Actually, in the context of public morals exception the necessity test is perceived as "minimum derogation principle."[57] In other words, this test centers on the second and third elements, namely on extent to which the challenged measure contributes to the realization of the ends pursued by that measure and on impact the measure has on trade, to find out whether it is the least trade restrictive measure.[58]

The state which imposes trade restrictive measure, should demonstrate *prima facie* case of necessity and show that this measure is proportional to the purpose of public morals protection. Afterwards, burden of proof shifts to complainant, who has to produce the evidence that there exists least trade restrictive alternative,[59] which is not "merely theoretical in nature", but is "reasonably available".[60]

Moreover, the alternative measure should ensure the same level of protection as the challenged measure. As the AB has mentioned several times, determination of "level of protection" is prerogative of relevant state.[61] Speifically, with regard to the public morals exception the Panel in the case *US-Gambling* has stated the states should have discretion in ascertaining "different levels of protection even when responding to similar interests of moral concern".[62] Accordingly, if the state protects its own public morals with strict standard, which inevitably implies restriction of human rights, it should be considered as its discretion and other states should not apply less standard of protection when proposing alternative measures. Hence, the alternative will most likely involve human rights' violations of the same gravity. In other words, if protection of public morals inseparably is related with restriction of human rights, then any alternative measure will almost certainly cause restriction of human rights of similar magnitude.

To sum up, the measure introduced for protecting public morals, automatically satisfies the first element of the necessity test. As for the second and third elements of the test, they simply inquire whether there exists least *trade* restrictive measure and they are not concerned with existence of less human rights' restrictive measure. In other words, these elements of the test do not give possibility to reject trade restrictive measure on the ground that it conflicts with human rights. Moreover, even with alternative trade restrictive measure level of human rights restriction will apparently stay unchanged, because the level of protection of public morals should be maintained on the level as determined by the defendant.

Conclusion that the necessity test will not contribute anything to protection of human rights, triggers discussion of the issue whether restriction of human rights may be ground for challenging trade restrictive measure under the chapeau of the Article XX of the GATT and Article XIV of the GATS.

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57 *Kevin C.,* Kennedy, International Trade Regulation, 270 (Vicki Been et al. eds., Aspen 2009) (citing Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Nov. 6, 1998)) (see *Doyle C*., Gimme Shelter: The "Necessary Element" of GATT Article XX in the Context of the China –Audiovisual Products Case, Boston University International Law Journal, №29, 2011, 152).

58 US-Gambling*,* AB Report, WTO, 2005, Paragraph 308.

59 Ibid, Paragraph 310.

60 Ibi., Paragraph 308.

61 *Korea – Various Measures on Beef*, AB, WTO, Para. 2000, 176; *EC-Asbestos,* AB, WTO, 2000, Paragraph168.

62 US-Gambling, the WTO Panel Report, 2004, Paragraph 6.461.

3.4 Chapeau of the Article XX of the GATT and Article XIV of the GATS.

According to the chapeau of the Article XX of the GATT and the Article XIV of the GATS exceptions under these articles should not be "applied in a manner which would constitute means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade".

As the AB stated in the case *US-Shrimp*, chapeau embodies good faith principle and its purpose is not to allow abusing of exceptions under the Article XX of the GATT and Article XIV of the GATS.[63] Though as it seems from the text, for the chapeau good faith means prevention of discrimination between the states only. It does not focus on other aspects of discrimination and says nothing about the unjustifiabilty of, for instance, discrimination on the basis of gender between individuals. In other words, the chapeau enforces not the ban of discrimination generally, but specifically ban of discrimination between states specifically.

The AB also stated in the case *US-Shrimp* that the chapeau prohibits "*abus de droit"*, in other words, "the abusive exercise of a state's rights".[64] But according to the AB abusive exercise of rights implies only "breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting".[65] On the background of this pronouncement an attempt can be made to claim that a state, which invokes public morals exception in breach of its human rights' obligations, is abusing its rights. But this claim does not seem to have success, since put in context with the other parts of the judgment the pronouncement in question clearly implies abuse of rights and obligations of member states under the GATT and not under other treaties, operating outside the WTO system.

Considering the above-mentioned, chapeau will not be effective tool for preventing relying of states on such public morals which essentially amount to violatons of basic human rights principles.

4. Conclusion

At the current stage of development, there are no real mechanisms for integrating human rights in international trade law. International law of human rights is not operative within the scope of international trade law. Accordingly, neither the Panel, nor the AB can rely on international law of human rights for rejecting such public morals, which are in conflict with human rights. Besides, neither content, nor design of public morals exception secures from appealing to public morals at the dispute settlement structures of the WTO, when public morals clearly contravene to interests of protection of human rights. Consequently, public morals, which obviously contradicts to human rights, might be fully endorsed at the WTO. This inevitably leads to conclusion that even when human rights can release barriers of international trade, WTO has very limited legal capacity to advert to international law of human rights and on the pretext of protecting human rights safeguard trade interests.

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63 US-Shrimp, AB Report, WTO, 1998, Paragraph 158.
64 Ibid.
65 US-Shrimp, AB Report, WTO, 1998, Paragraph 158.

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Nataliya Kuznetsova*

Formation and Strengthening of Private Law Fundamentals of Civil Society in Ukraine

Problems of civil society for several decades are the subject of an animated discussion of political scientists, philosophers, economists and lawyers. Together with this, in the modern period and, especially, in the post-Soviet Union region the ideas of civil society have gained special significance. The reason for that is served by the necessity at times of "great changes" that coincided for the countries of former USSR with the millenniums' change to find social guides that allow to maintain the succession of historical development, to define goals linking fundamentals of the universe social advancement with national features, to make life of the society humane and a man itself - social.

Key words: *Civil society, civil law regulation, civil law principles, subjective rights protection.*

The research of legal problems in civil society in legal doctrine of Ukraine is still at the beginning phase.

Ukrainian legal scholars continue to discuss questions concerning the very notion of the term "civil society".[1]

In the doctrine there is no uniform understanding of what civil society corresponds to. Furthermore, the word combination "civil society" is quiet conditional considering that there is just no "non-civil", much less "anti-civil" society.

Virtually, the term "civil society" has gained in the scientific literature its special content and in the current interpretation represents a definite type (condition, character) of society, its social and economic, political and legal nature, the level of maturity, sophistication. In other words, civil society is the highest level of social community development and meets a range of criteria established by historical experience.

In the modern understanding and meaning civil society is "a society able to resist a state, control over its activities, able to point out its place, to keep in tight reins". That is to say that civil society is a society able to make its state a rule-of-law state. However it does not mean that the only activity of civil society is to struggle against the state. Within the frames of sociality principle, i.e. social state, civil society allows the state to actively interfere in social and economic processes. Another thing is that it does not allow the state to concentrate its power over itself, make social system totalitarian"[2].

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1 Правова доктрина України. Том 1. (автор підрозділу 3.1 «Громадянське суспільство: доктрина і вітчизняна практика» *А.М. Колодій*), 2013, 461-468.

2 *Протасов В.Н., Протасова Н.В.,* Лекции по общей теории государства и права, М., 2010, 535.

It is possible to agree with the opinion set forth in the literature that civil society arises only there and only at the time where state institution is not able to exercise its functions of a regulator of social relations; where there was an arrangement of prerequisites for civil compromise and worldview pluralism; where an aggregate of social institutions with their own status and being able to equal dialogue with state institution, able to resist political expansion of the state, to be its counterbalance, to restrain its strive for monopoly, transforming from the system of providing advancement of the society into the system of self-sustainment; where the authority of the state is substantially adjusted by the condition of civil society[3].

Without detailing the very notion of civil society, it should be noted that regardless national characteristics, regional features etc., we can talk about the presence of common grounds (principles) of the civil society functioning. They are economic freedom, poliform of property, market-based economic development, absolute recognition and protection of natural rights of a man and a citizen; legitimacy and democratic nature of the authority; equality before the law and justice, reliable legal protection of the individual; legal state built on the principle of separation of powers and interaction of its separate branches; political and ideological pluralism, the existence of legal opposition; freedom of speech, of thought, independence of the media, non-interference of the state into the private lives of citizens, their mutual rights, obligations and responsibilities; class harmony, partnership and a national consensus; effective social policy ensuring an adequate level of life.

Of course, the given list of basic principles is not exhaustive and can be extended and detailed.

Without intending to delve into this discussion, we restrict ourselves to stating that we agree with the definition of civil society as "association of free individuals and citizens' community formed voluntarily to assure liberty and initiatives of the individual, the rights and duties of a man and a citizen, serve other common interests, which due to private ownership in economic sphere, democratic in the political, pluralism in the spiritual, justice in the legal spheres that causes existence the vast majority of the so-called middle class that is able to subjugate democratic, legal, social state to the civil society"[4].

However, some researchers considering civil society as a number of non-governmental institutions that are capable of self-organization and cooperation closely with each other and the state, where the state is not opposed to civil society, and creates for its normal functioning and development the most favorable conditions, derive an individual citizen beyond the limits of the civil society. The stress is on the fact that the civil society is "a social phenomenon that consists of the institutions that are public (non-governmental) association, but not of separate persons"[5], in our view, unreasonably hypertrophies factor of institutional structure of civil society.

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3 И.И. Кальной и др.. Гражданское общество: истоки и современность / Науч. ред. проф. И. И. Кальной, доц. И. Н. Лопушанский. 3-е изд., перераб. и доп. — СПб.: Издательство *Р. Асланова* «Юридический центр Пресс». 492 с., 2006, 31.

4 Правова доктрина України, Том 1, За заг. ред. *О.В. Петришина,* 2013, 976 с., 466.

5 *Мерник А.М.,* Інституції громадянського суспільства: поняття, особливості, види. Автореф. канд. дис. Харків, 2013, 7.

The individual, personality, citizen is a core of the civil society. There is no civil society without roots of personality. A human being in the civil society is ambitious and goal-seeking. He or she understands his welfare depends only on him/her. He/she is civilized, tries to know the laws of its state, fights for their implementation and at the same time opposes them if they do not meet his/her interests. A man in a civil society must have a civic positions and not afraid to show them openly. He must understand that no one in his place is not able to solve his life's problems [6].

Just being based on such understanding of the civil society we can talk about "maturity" of public relations establishing both between individuals and between them and the numerous kinds of public associations formed on the principles of voluntariness and functioning as independent self-governing institutions.

One of the most difficult problems of formation and further functioning of the civil society is to determine the relation between that society and the state.

Undoubtedly, this question is of present interest only in relation to the democratic rule-of-law state, since only such a state can be associated with civil society.

The analysis of recent social phenomenon that is beginning to emerge in the era of capitalist relations, providing the individual a certain economic independence and freedom, gives grounds to affirm that the state as a systemic organization of society is a specific instrument to ensure its integrity and consolidation of the population.

Unlike the state, the civil society does not have a feature of systematicity.[7]

However, the dynamic processes of social development, first of all the development of civil society, including due to globalization and informatisation of public life, form a new social and community challenges of the state as a whole.

If the class nature of the state has been recognized for a long time by politicians, scholars, then among the modern tendencies of state studies it should be noted the interest of the researchers to the general social purpose of the modern state.

This is caused primarily by the fact that the civil society, which is formed as a stable community of citizens on the basis of the recognition of common values and the safeguards for the rights, requires the state to be an effective mechanism to ensure the inviolability of property and rights, since only the state has universal instrument that can be to provide such guarantees - legal regulation, the coercive means, army and other armed groups.

"The society overcomes the difficulties and contradictions and seeks ways of solution of new tasks in the political, economic, social and international spheres, - said Yu. A. Tikhomirov. - It inevitably puts that conditions of life for its self-preservation, which should ensure that the state, through its system-oriented means of influencing public processes. Gradually forms the substance that may be called “public mandate" that society gives to the state in order to achieve national goals. These are, firstly, the

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6 См. Философия права. Курс лекций, Том 2, Отв. ред. *М.Н. Марченко,* М., 2011, 211.

7 *Мерник А.М.*, Інституції громадянського суспільства: поняття, особливості, види. Автореф. канд. дис. Харків, 2013, 6.

life values of society and the people, secondly, on the most important spheres in which you want to provide a holistic regulation and management, thirdly, about taking care of people, their rights and freedoms insurance, the level of life, fourthly security in the broadest sense in the political, ecological and other spheres. This determines the high social role of the state.

But at the same time the society limits the operation of the "mandate" requiring from the state legitimacy, controlling the activity of national institutions and public officials, making responsible for the acts done. These are elements of "public mandate" of the state that are obligatory for it." [8]

As it is evidenced by the events of recent months in Ukraine, the state has not only recklessly ignored the elements of "public mandate" but cynically has been violated the rights and freedoms of Ukrainian citizens. That is what led to the mass protests of the Ukrainian citizens against the tyranny of the state and its officials, total corruption, riddled with all the mechanisms of state power, lawlessness and legal nihilism.

Analyzing the situation as a result of the revolutionary resistance of civil society, we can state that the state over the past ten years since the "Orange Revolution" failed to create the conditions to meet the requirements set by the community in November-December 2004: decriminalization of power, providing the transparency of the making-decision process concerning the most important government decisions, fighting corruption and lustration of state bodies from corrupt officials, the implementation of the Ukrainian national idea simultaneously with ensuring the rights of national minorities to self-preservation, to develop and promote their languages and traditions, the development of inter-regional, inter-ethnic and international cultural relations.

Without exaggeration, we can say that the state during this period did not provide the development on the appropriate level of local government, did not take into account regional features and needs of separate territories, did not ensure the unity of the Ukrainian nation, and did not formulate the modern Ukrainian national idea. As a result, having seizured state power, Ukrainian officials were engaged exclusively in their own interests, violating the interests of civil society.

The lack of the effective mechanisms of public control over the activity of the state made it impossible for opposition of civil society manifestations of criminal violations of fundamental rights and freedoms of citizens by the state as a whole and by its officials, that eventually led to massive public protests and numerous victims.

Even now, we cannot find the developed at the appropriate level functions, forms, tools, and mechanisms of public control over the state of civil society in the legal science.

Realizing that "civil society is organically linked with the state, it did not exist before the state and outside the state, and at the same time civil society has supreme sovereignty over the state, the meaning of which is that it is the interests of civil society are the country's priority over the public interest, the structure of the state apparatus, the forms of the state, state and legal regime and others."[9], should be determined at the current stage of development of the Ukrainian society and the Ukrainian state priority is to ensure real interaction between civil society and a democratic state.

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8 *Тихомиров Ю.А.,* Государство, М., 2013, 17.

9 Правова доктрина України, Том 1, За заг. ред. *О.В. Петришина,* 2013, 976 с., 470.

Today, first steps were made in this important area: to create important institutions such as the Anti-Corruption Bureau, lustration committee, and others. It is necessary to fill their job with content, directing the joint efforts of civil society and state influence on overcoming the crisis in the political, social and legal spheres.

Law is to play a crucial role in these processes.

Without pointing on the problems of modern legal thinking, to identify its nature and characteristics, as it is a separate object of study and deserves a detailed consideration of the legal, philosophical, political and sociological aspects, and it would be preferable to fix on the analysis of the role of law as a special phenomenon in the functioning of civil society, which refers to the key values, because that law is regarded as a measure of justice. At the same time the law is a powerful regulator of social relations.

S.S. Alekseyev considered law as an instrument (mechanism) of implementation and ensuring the reproduction of the social system, its permanence in a stable, contiguous functioning through time. "And thanks exactly to law being regarded as in the unity of the law, such kind of state of affairs achieves when this social system, continuously and without changing its qualities and features, “rolls” and “rolls" in a given mode of its informational and organizational structure, and (theoretically) so that its mission of "extreme freedom" and "permanent antagonism" focuses on defining and maintaining the boundaries of freedom of people. In principle this mission of law in society is unique, and - what is crucial - (and again, in principle) – have no political and moreover ideological content"[10].

It should be mentioned that traditionally the importance of law for the civil society functioning was seen primarily through the prism of formation of a rule-of-law state.

However, in modern researches we can be clearly seen the tendency to serious extension and detailing the approaches to the definition of the functions of law in modern public life.

The conceptual approach to understanding law as an element of civilization and culture allows to characterize the origins, importance and social value of law in a broad, generally social terms. As a profound element of culture law not only absorbs its values, but also implies fundamental requirements and achievements of civilization, thus ensuring the preservation and to some extent the augmentation of the potential of material, social and spiritual wealth of society [11].

Considering that fundamental economic principle of civil society includes private property, and, therefore, the regulation of property relations becomes extremely urgent and, first of all, private law mechanisms and in general private law become more important among the legal instruments.

The original sphere for the law as a phenomenon of civilization is exactly private law, i.e. the legal sphere that is not a product and an instrument of public authorities (and in this respect is not a "product derived from the authorities", though it is permanent connection with it), and is created spontaneously, due to the requirements of life itself, under the pressure in the transition of society in the era of civilization, under the influence of her strict imperatives. It is quite revealing that the same factors

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[10] *Алексеев С.С.,* Самое святое, что есть у Бога на земле. Иммануил Кант и проблемы права в современную эпоху, 2-е изд. М., 2013, 132.

[11] См. *Смоленский М.Б.,* Право и правовая культура как базовая ценность гражданского общества, Журнал российского права, 2004, №11, 73.

associated with the mind, mental and creative activity of the individual that determined the development of society during the transition to civilization (including private property, individualization), predicated the existence and intensity, largely predominant, the development of "horizontal" legal relations, which were based on many legal sovereign "centers", independence of the subjects, the free determination of the terms of its behavior [12].

Modern civil law, acting as core of the array of private law norms is intended to be a legal basis for civil society.

Law as a unique social phenomenon belongs to the fundamental values of the world culture created by mankind during its development. Defining social value of civil law, S.S. Alekseyev paid attention to such circumstances. Firstly, starting with the ancient works on law common trend was determined that manifested in the legal establishment, called over time as "civil law", not only began to cover the main elements of the practical life of people - property, employment, acquisition and transition of property, their protection, family etc. – but also in this context gained the role of the source of initially legal characteristics and mechanisms of social regulation.

Civil law establishment (as customs, precedents, and then the laws) began to form and put into practice all that original, unique, socially profound and regulatory elegant, it is typical for law as the highest form of social regulation of public relations in a civilization" [13].

Secondly, through the sphere of the civil (private) law back in ancient times there was a considerable intellectual enrichment of law, when mind has rushed into the sphere of social regulation, and in connection with the needs of business life and legal practice has shown its power in the creation of legal mechanisms, structures and categories of high intellectual order.

And third, the most important factor - exactly the civil law as a system of laws (codes) laid down the foundations of a modern civil society.

First of all, using the system of civil laws the culture of private law has realized, the essence and historic destination formulated by S.S. Alekseyev, paying attention to two basic principles. "Firstly, as the starting point *("spirit"), free democratic society - the place and the source of true and ensured freedom of the person, legal autonomy*, dispositivity, legal sources, without which no real democracy and no civilized market cannot be done in principle, by its very nature. And, secondly, private law, expressed in the civil codes, due to normative generalizations opened its nature and purpose also as the intellectual mechanisms and structures of high order (even higher than, for example, it was typical of the Roman private law)"[14].

At the present stage of renovation of civil law both in Western Europe and in the countries of the former USSR manifested all the signs of a new civil law, emphasizing its close connection with civil society and giving to every reason the grounds to conclude that it is the private law, the core of which is civil law, and acts as tool and most important instrument of civil society.

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12 См. *Алексеев С.С.,* Восхождение к праву. Поиски и решения, 2-е изд., М., 2002, 127.

13 *Алексеев С.С.,* Гражданское право в современную эпоху, М., 1999, 3.

14 *Алексеев С.С.,* Гражданское право в современную эпоху, М., 1999, 6-7.

The vast majority of the characteristic features of civil society is reflected in the Civil Code of Ukraine (hereinafter - the Civil Code), designed to ensure the normal functioning and development of civil society, that is, autonomous substance, independent from the state. Autonomy, independence, initiative of individuals can be ensured only if of natural, objective (overnormative) character of civil rights as those are recognized and determined by practice itself. That is why property and non-property relations based on legal equality, free will, property independence of participants who are the subject of civil law regulation and the basis of civil society, should be regulated by the Civil Code in accordance with its fundamental principles.

The fundamental principles of civil law, enshrined in Article 3 of the Civil Code of Ukraine, are: the inadmissibility of arbitrary interference with the private life of persons, the inadmissibility of the deprivation of property rights, except in cases provided by law; freedom of contract, freedom of enterprise, securing legal protection in case of violation of the rights, bono fides, reasonability, justice.

Thus, the conceptual feature of the new Civil Code of Ukraine is that it is a code of private law. It is through the institutions, structures and mechanisms of civil law as a private law society realized the principles, ideas and principles which make it a civil society.

As a certain state, civil society is characterized by the interaction of three principles:

1) generally recognized egalitarian law implying a certain minimum of freedoms for each person that is enshrined by the law of equal rights, duties and responsibilities of citizens (legal sphere);

2) private property (economic sphere);

3) publicly recognized the inner freedom of man (the sphere of personal, spiritual entity).

Namely such institutions of civil society as family, church, school and other communities, various voluntary organizations and unions, have the means of influence on the individual to comply by this individual generally accepted moral norms.

Civil society does not refer to state-political, and mainly to the economic and personal, private sphere of human life and activities; relations arising between the two of them. This is free, democratic, legal, civilized society, and there is no place for the regime of personal power, voluntarist methods of government, class hatred, totalitarianism, violence against human beings; where there is a respect for the law and morals, principles of humanity and justice. This is a market multistructure competitive society with a mixed economy, a society initiative entrepreneurship, a reasonable balance between the interests of different social strata.

As it was already noted, the dialectic of relation between civil society and the state is complex and contradictory. Civil society representing a self-developing system is constantly under the pressure from the government. However, the state is interested in the free development of civil society as a prerequisite for its own development. The maturity of civil society is one of the main conditions for the stability of the democratic regime. Civil society controls the action of a political authority. The weakness of the civil society makes the state to usurp its rights, resulting in the inversion of functions of the state and civil society. In this case, the state assigns the function of civil society, forcing it to perform only decisions on the national level. Then the relations between the state and society may be characterized as relations of

constant interaction and mutual contradictory and influence, and nature and direction of the latter to a large extent depend on the degree of development of civil society and its institutions. Civil society harmoniously coexists with the state in a democratic regime; it is in opposition to it under totalitarianism and constructive confrontation with the authoritarianism. [15].

Civil society is open, democratic, anti-totalitarian society, capable of self-development and where the central place is occupied by a person, a citizen, and an individual. It is incompatible with the directive and distributive economy. Free individuals-owners amalgamate to collectively meet their interests and serve the common good.

However, the evolution of approaches concerning human rights in the system of social values during the period of XXth century shows that dramatic events that accompany mankind in the edge of the third millennium created certain prerequisites for formation of the new legal consciousness.

"Revolutions and wars that were constantly taking place throughout the century, put the ground where intolerance and violence were established and flourished, that in turn served as the basis for the creation of new political regimes and specified corresponding the legal order, as said Professor M. De Salvia, famous researcher of European law. When such political system, totalitarian political system, law was so alienated from a man, instead of to guarantee freedom, as it was almost always stated in the fundamental laws of these states, often turned into an instrument of oppression; the individual was not recognized as value in himself/herself, and was only the amorphous part of the collective expression will. That meant that the fundamental rights of a citizen in such cases almost systematically subordinated to the interests of the state. Often enough freedoms were and to this day remain the prerogative of a small group of officials that used them to their advantage, while the vast majority of the population was almost depraved of these freedoms. In this case, it is noted fairly that freedom granted to the citizens subjects and the law argues that the freedom provided by a group of citizens, subjects, and the law - the expression of public interest - releases. Then it is necessary to reconcile freedom and law. Such reconciliation can only happen if we put a human being on the proper place, because it is the highest value and the bearer of values at the same time"[16].

This profound by its content and meaning conclusion explains the attention that is given to the individual development, securing human rights in the modern society.

Our state received certain additional impetus in this direction with the accession to the European Convention on Human Rights.

Of course, the Constitution of Ukraine particularly plays an important role in the realization of human rights, formation of the modern legal status of the citizen. However, not only constitutional law, but also other sectors of the national legal system must ensure implementation and enforcement, in particular the preservation and protection of individual human rights.

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15 *Пушкін О., Скакун О.,* Концепція нового Цивільного кодексу України // Українське право, № 1, 1997, 8.

16 *Сальвиа М.,* Европейская конвенция по правам человека, СПб., 2004, 23-24.

Civil law is the main regulator of social relations with private nature. Exactly the rules of it accompany the person from birth to death, and sometimes even longer (inheritance law, copyright). The Civil Code is not only a major act of civil law, but also the basis for the whole system of private law, the code of life for the whole civil society.

The Civil Code of Ukraine which not coincidentally was named as the constitution of civil society, in art. 1 provides that the rules of civil law govern moral and economic relations based on legal equality, free will, property independence of their participants. This approach is in harmony with the concept of civil society regarding the status of the person - the person in a civil society is emerging as an autonomous and sovereign identity. It is equal among equals, as people will have united in their community, and it is logical to assume that they themselves produce values, norms and rules that are going to follow [17].

The Civil Code of any country reflects the values of a particular society, makes it possible to determine the ideological foundation and property on which it plans to build its development and its future.

The new Civil Code of Ukraine became the legal foundation of civil society, an important tool for its construction. It should be seen as a social contract of the members of the Ukrainian community that accompanies their privacy and regulates all activities.

As already noted, private property constitutes ownership basis and the market economy for civil society, since they are the main tool of the autonomy and independence of the individual.

It is to be recalled that with the reformation of property relations, the revival of private property and the "equation" of its rights to other forms (mainly public), recovery of the market infrastructure of the economic sector the process of transition from a totalitarian regime to democracy, which was the prerequisite for the formation of civil society and the rule-of-law state.

Property category occupies a special place in the public mind and in the whole social life. As a multidimensional phenomenon, it has been and remains the subject of thorough historical, philosophical, economic and legal studies, and, consequently, the scientific debate, the severity of which is not reduced over time.

But today no one doubts the thesis that only in the country where the inviolability of property, not only declared, but also guaranteed, the citizen can be provided free personal development, prosperity and peace.

The state is obliged to provide the rule of law by establishing an effective regulatory framework (including, and, perhaps, above all - civil law one) of relations of the property.

That relationship of private property and the market economy as a whole constitute a material foundation of civil society, as they are the main tool of the autonomy and independence of the individual.

[17] См. И.И. Кальной и др.. Гражданское общество: истоки и современность / Науч. ред. проф. И. И. Кальной, доц. И. Н. Лопушанский. 3-е изд., перераб. и доп. — СПб.: Издательство *Р. Асланова* «Юридический центр Пресс». — 492 с.. 2006, 28.

Recall that it was a reformation of property relations, reviving private property, "the restoration of its rights" in relation to other forms (mainly public), recovery of the market infrastructure of the economic sector began the process of transition from a totalitarian regime to a democratic, which created prerequisites for the formation on the territory of the former Soviet Union, including Ukraine, of the civil society and the rule-of-law state. This does not happen accidently.

From the 20-30s of the last century, the rule of law within the Soviet state unequivocally monopoly (and subsequently - nation-wide) property entrenched, which is recognized as a socialist in nature. At the same time private property was seen as a derivative of the socialist one, and its existence was aimed solely at providing the consumer needs of the citizen [18].

Soviet legislation contained numerous restrictions to exercise by citizens of Ukraine, at the same time citizens of the USSR, the rights of private property. First of all, these restrictions related to the group and the number of objects that can be owned by citizens.

Fundamentals of Civil Legislation of the USSR and the union republics, being adopted in 1960 have fixed some of the most fundamental provisions which in view of their obligation had to be taken into account in the Civil Union Republics. In particular, art. 25 provided that property designated to satisfy their material and cultural needs may be in private ownership. Every citizen can have incomes and savings, a house (or part of it), a subsidiary household, household items, personal consumption and comfort in personal property.

It was particularly noted that property that is owned by citizens according to the right of private property, cannot be used for unearned income.

While in the law itself contained no direct prohibition on the acquisition of property of citizens in particular the number and size of the property, or the accumulation of earned income and savings, but still appropriate limits have been set. It is sufficient to recall the "norm" in the number of cattle determined by the Decree of the Presidium of the Supreme Soviet of the RSFSR of 11.13.1964, at which effectively negated the possibility of an individual farm and for decades have closed the prospects for the development of not only livestock, but also in the whole of the agricultural sector [19].

In the midst of serious regulatory restrictions it was also a house, which at the time belonged to the most important objects of personal property rights. In the 60-s an individual housing construction in large cities actually been terminated due to the decision of the CPSU Central Committee and Council of Ministers USSR dated 31 July 1957 it was encouraged in the cities to develop the joint construction of the citizens' multi-apartment houses on standard projects[20].

Articles 100-107 of the Civil Code of the Ukrainian SSR of 1963 consolidated restrictions that 30 years has been accompanying the right of property of citizens in the apartment building in Ukraine. For

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[18] *Ерошенко А. А.,* Личная собственность в гражданском праве, М., 1973 7-8; Советское гражданское право, Т. 1. Под ред. Красавчикова О.А., М., 1972, 295; Советское гражданское право. -Т. 1. Под ред. *Рясенцева В.А.,* М., 1975, 363-366.

[19] Об этих и других ограничениях детальнее см.: Маслов В.Ф., Основные проблемы права личной собственности в период строительства коммунизма в СССР. Харьков, 1968, 179-186.

[20] См.: СП СССР, 1957, № 9,102.

example, one residential building (or part of it) could be only in the personal property of a citizen. Cohabiting spouses and their minor children have the right to own only one residential house (or part of it), which was owned due to the right of personal property, or one of them is in their joint property (Art. 100 of the Civil Code of the Ukrainian SSR).

Analysis of the provisions of Art. 103 of the Civil Code of Ukraine is interesting from the standpoint of the general characteristics of the right to personal property in the Soviet period. According to this article, it was assumed that if the personal property of a citizen or a cohabiting couple would, on grounds permitted by law (emphasis added - NK), more than one residential house, the owner has a right to keep in his property in any of these houses. The other house (houses) must be sold within one year, presented or alienated in any other way. If within one year the owner does not exercise the right of alienation of the house in any form, by a decision of the executive committee of the local Council of People's Deputies, in whose territory it is located, the house is subject to a forced sale in the manner prescribed for the execution of court decisions (i.e., using the procedure public auction). If the sale of the house by force will not take place due to lack of buyers, the decision of the executive committee of the Council of People's Deputies of the house free of charge transferred it to the ownership of the state.

The legislation has determined also maximum size of the house - 60 m^2 (and from 1985 - 80 m^2). Only a citizen who has a large family or the right to additional living space, with the permission of the executive committee of the local Council of People's Deputies have the right to build or buy a house a larger area.

Other restrictions has been established as well on the rights of private ownership of the house[21].

In addition, the law defined the list of property that could be subject to the right of personal property. For example, the land on the basis of Articles 10, 11 of the Constitution of the USSR was the subject of exclusive property of the Soviet state as the basic means of production and other property that could be used for profit.

Although the citizen formally owned, used and disposed of property belonging to him at his discretion, taking into account the nature of the personal property of the consumer, these features were also largely limited.

First of all, it was not allowed the industrial use of property, as it was interpreted as unearned income. Commercial mediation, private-business activity were considered as the criminal offenses [22].

Analysis of the facts mentioned clearly indicates that with the strengthening of socialism the escalation of restrictions on the right of personal property took the place. And, as a consequence, the ordinary citizen of the USSR (and Ukraine in particular) the sense of ownership was virtually “driven away”.

It is in these circumstances and assumptions, restructuring and transformation of property relations in independent Ukraine began by the reform of property relations. And from this point of view, the Law

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21 *Дульнева Л. А.,* Право собственности на жилой дом, М., 1974, 56.

22 Детальнее см.: *Маслов В.Ф.,* Основные проблемы права личной собственности в период строительства коммунизма в СССР, Харьков, 1968, 204-223.

of Ukraine "On Property", adopted 7 February 1991, with no doubt, can be considered as the first and very important step to recovery (or rather, revival) of the institution of property in general, and the institution of private property in particular.

In all legislative instruments of 1991-1993 the legislator has enshrined the novels, which adequately has responded to the significant limitations of property rights contained in the previous legislation, and at the extent of his vision tried to eliminate them.

At the political level, the Constitution of Ukraine, adopted in 1996, entrenched the right of citizens to own property as an important attribute of the rule-of-law state and democratic society.

In particular, the Article 41 of the Constitution of Ukraine stipulates that everyone has the right to possess, use and dispose their property, the results of his intellectual and creative activity. No one can be unlawfully deprived of property rights. The right to private property is inviolable. The expropriation of private property may be applied only as an exception for reasons of social necessity on the ground and in the manner prescribed by law and subject to advance and complete compensation of their value. The expropriation of such objects with subsequent complete compensation of their value is permitted only under conditions of martial law or a state of emergency. Confiscation of property may be applied only by a court decision in the cases, amount and procedure that are established by law. The use of property shall be without prejudice to the rights, freedoms and dignity of citizens, the interests of society, shall not aggravate the ecological situation and the natural qualities of land.

At the same time, describing the fullness and depth of securing constitutional institution of property, it can be critical to note that not all of the fundamental principles of the right of ownership found in the immediate consolidation of constitutional provisions.

This statement is very important, taking into account its dominance in literature of the opinion that ownership is a complex legal institution, as there is a single right of ownership, which in turn implies that all subjects of law, which are determined by the owners have the same powers and the state should provide equal protection to all owners [23].

Being based primarily on the general principles of the legal system in the Commonwealth of Independent States, that by its roots is dating back to the tradition of Soviet law, a basic framework, basic principles of the single concept that is property rights, make constitutional norms.

Along with this, as content of the above art. 41 of the Constitution of Ukraine evidences, it has quite fragmentary nature.

In support of the integrated nature of the institute of property rights it may be noted that the criminal and administrative legislation contains rules which will determine the responsibility for violation of property rights in connection with the commission of a crime or administrative offence.

However, it is possible to say without any exaggeration that namely a civil law fills the institute of property rights with its "regulatory" content.

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[23] См.: *Литовкин В.Н., Суханов Е.А., Чубаров В. В.,* Право собственности: актуальные проблемы, М.: Статут. 731 с., 2008, 14.

One can hardly agree with the expressed view that by virtue of their nature the fundamental rules of law refer to a special kind of out-of-the-branch (fiducial) rules. This vision leads to the conclusion that an individual civil law or any other branch concept of property rights (for example, tax, administrative, criminal) does not exist. The law provides only one concept of public-private property rights, based on the norms of the Constitution and its accompanying norms of civil and other branches of law that define the individual elements of this concept [24].

No denying the complex nature of the institute of property rights as a single legal formation, we still believe that there are insufficient grounds for concluding that the law rules which established proprietary rights to own, use, dispose of the property, including the conditions of the general property (shared or joint) or provided peculiarities of real-legal methods to protect the violated rights etc., from the civil law are "transformed" into out-of-the-branch (fiducial) rules taking any new, additional qualities which change their legal nature.

Governing the relations of property and constituting one of the most important segments of the subject of civil law as a branch of the law, legal rules are aimed at establishing the legal regime of the right of ownership realization by implementing the possession, use and disposition of property, the grounds of acquisition and termination of property rights, as well as ways to protect it in the event of violations. These legal provisions are, first of all, in close unity with the whole array of civil law, concentrating in it the features and trends of the development of civil law at the current stage.

Similarly, the rules providing the criminal and administrative responsibility for violation of property rights (for examples, for theft, robbery, plunder etc.), do not lose the attributes of criminal and administrative rules and do not "leave" criminal or administrative law. At the same time, of course, regulating the property relations in society, they complement each other and create a complete legal regulation of all aspects of public relations of the property, creating an interdisciplinary (complex) institute of ownership.

By analysing the relevant articles of the Third Book of the Civil Code of Ukraine "The right of ownership and other proprietary rights," one can effortlessly draw the conclusion that the legislator establishes the basic norms, aimed at ensuring the economic freedom of each individual, the economic independence of the personality, based primarily on private property. Thus, Art. 319 of the Civil Code of Ukraine provides that the owner shall possess, use and dispose of property belonging to him at his own discretion. All owners are provided with equal opportunities to exercise their rights. The proprietor shall be entitled to make in respect of his property any actions not contradictory to the law.

Of course, the discretion of the owner in the implementation of his right to property belonging cannot be limitless - its limits are determined by the general rules established by Art. 13 of the Civil Code of Ukraine for the implementation of the subjective civil rights, in particular, the person is obliged to refrain from acts that could violate the rights of others, harm the environment or cultural heritage. The person is not allowed to perform acts with intent to cause harm to another person, as well as to abuse the

[24] См.: *Мозолин В.П.,* Модернизация права собственности в экономическом измерении // Журнал российского права, № 1, 2011, 27.

right in other forms. Art. 319 of the Civil Code, as well as art. 13 of the Civil Code provide that in exercising his rights and performing his duties, the owner is obliged to observe moral principles of society.

Guaranteeing the principles of the inviolability of property rights, Art. 321 of the Civil Code provides that no one may be unlawfully deprived of the right or restricted in its implementation. Cases of exception of property or restrictions on the implementation of property rights, as the order of exception (restrictions), may be established only by law. Such cases generally have the character of exceptions and can only be justified by reasons of social necessity. In case of violation of property rights, illegal encroachments on the property or creation of illegal barriers to the implementation of this law, the owner has an opportunity to use the full potential of civil protection methods, which have both a general nature and are provided in Art. 16 of the Civil Code, and are specially fitted for the recovery of violated property rights (Articles 386-394 of the Civil Code).

A.I. Solzhenitsyn, an outstanding writer and public figure of our time quite clearly defined the relationship between private property and civil society: private property creates independent citizens. Independent citizens create a civil society, and civil society, which is formed, in its turn, leads to the state governed by the rule of law [25].

Indeed, civil society "implies the existence of autonomous, sovereign, free individuals who are equal and endowed with private ownership for the conditions of their lives. It is private ownership for the living conditions that makes the human person really economically independent and free[26].

Analysing the Ukrainian legislation re ownership on its compliance with European standards, primarily with European Convention on Human Rights (hereinafter - European Convention), in particular, with Article 1 of Protocol 1, we should focus on some important aspects.

Article 1 of Protocol 1 to the European Convention, signed in Paris in 1952, provides that "every natural or legal person is entitled to own their property peacefully. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by the law and by the general principles of international law.

However, the previous norms in no way detract from the right of the state to enact such laws, which, in its opinion, are necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

The above mentioned article is the only norm of the European Convention relating to economic rights. At the same time, as noted by the researchers of the Convention, when drafting the text of this article, participating states reserved the considerable freedom of choice of standards to be applied to determine the scope of the law and the possible and permissible limits of its application.

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[25] Приводится по кн.: И.И. Кальной и др.. Гражданское общество: истоки и современность / Науч. ред. проф. *И. И. Кальной*, доц. *И. Н. Лопушанский*. 3-е изд., перераб. и доп. — СПб.: Издательство Р. Асланова «Юридический центр Пресс». — 492 с.. 2006, 104.

[26] Там же.

The analysis of the content of Article 1 of Protocol 1 confirms the presence of its three distinct but interrelated standards:

1) the first general rule, which establishes the principle of peaceful possession and use of property;

2) the second rule pertaining the deprivation of property and connecting it with special conditions;

3) the third rule recognizing that state has the right to control the use of property in accordance with the general interests [27].

In the decision of "Sovtransavto Holding against Ukraine" the European Court of Human Rights noted that these rules are organically linked. The second and third provisions of Article 1 are special cases of "interference with the right of ownership", and that is why they must be construed in the light of the principle set out in the first provision.

As a side note, jurisdiction of the European Court plays an important role in solving specific issues related to the application of the provisions of the European Convention. A long-standing doctrinal debate about whether court practice is the source of law or not, and according to the practice of the European Court of Human Rights, is unambiguously positive, its law-making role is not denied, noted *V.A. Tumanov* [28].

Thanks to it the catalog of rights, protected by Court, was consistently detailed and expanded, concise messages were filled with a wide content, rules not being not expressed "explicite" but in fact being hidden therein, were formed [29].

The comparative analysis of the property contained in the Ukrainian legislation on the property and the European Convention is significant in the context of a broad application of Article 1 of Protocol 1 and the practice of the European Court on this issue.

If in Ukraine traditionally both legislator and civil law doctrine consider ownership as property law, the object of which is, first of all, the objects of the material world, the European Convention considers property much broader, and uses the term as identic to property.

As the analysis of the European Court jurisdiction, the following relates to property in the context of the European Convention, except movables and immovable as:

- corporate securities;
- decision of the arbitration body in a dispute;
- claims on compensation for damages under local law;
- legitimate expectations that there is a certain provision;
- economic interests related to business management, and management of clientele (business reputation, intangible assets, etc.);
- right to pension (if, within a certain period particular contributions were made).

The Court independently assesses the definition of "property", and this evaluation may diverge from the definitions and evaluations commonly used in the domestic (national) law. This method of "autonomous" interpretation is widely used by the European Court.

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27 *Гомьен Д., ХаррисД., Зваак Л.,* Европейская Конвенция о правах человека и Европейская социальная хартия: право и практика, М., 1998, 406-407.

28 *Туманов В.А.,* Европейский Суд по правам человека, М., 2001, 89.

29 Там же, 89-90.

Thus, the literature indicates that in one of its decisions (in the case of "Beeler against Italy" on January 5, 2000), the Court noted that the concept of "property" in Article 1 of Protocol No. 1 has an autonomous meaning which is not limited by ownership of physical things. It is independent from the formal classification in domestic law: certain other rights and interests constituting assets can be regarded as the right of ownership, and thus as "possession" for the purposes of this provision [30].

The criteria for assessing are economic value of a property as defining, that is, its monetary assessment on the basis of objective factors, as well as an attribute of real property, that is the property should be available. The European Convention does not protect the future rights [31].

In connection with the above provisions of Article 1 of Protocol 1 and appears crucial the second question exceptionally crucial for the analysis: what are the limits of permitted (reasonable) state intervention in the affairs of the owner?

Referring again to the Ukrainian legislation, the right of property is determined by the classic formula: the owner may possess, use and dispose of property within the limits prescribed by law.

And because the law is a product primarily of state activity we can interpret this principle as the possibility to use the property at one's discretion, within the limits ***prescribed by law, defined by the state***, or to the extent ***provided by the State and entrenched in the law.***

As Article 319 of the Civil Code of Ukraine provides that the owner cannot use the right of ownership to the detriment of the rights, freedoms and dignity of citizens and the interests of society, etc., and Article 1 of Protocol 1 states that the restriction or deprivation of property rights may be carried out only in the public interest and subject to the conditions provided for by law and by the general principles of international law, in this regard there is quite a fair question.

Firstly, how to interpret the concept of "public interest" in the context of the Ukrainian legislation concerning property, and Article 1 of Protocol 1 to the European Convention?

Secondly, are there such restrictions in the Ukrainian legislation?

Thirdly, are these restrictions within the frameworks of "public interest"?

These questions can be viewed as a set of interrelated, and exactly the nature of the response to them will provide us with an opportunity to clarify the issue: whether Ukrainian legislation on property meets the standards of the European Convention in the broad meaning.

The analysis of the mentioned above norms of the Ukrainian legislation on the property hardly gives a rise to doubts about their inconsistency with the interests of the owner.

Getting acquainted with these rules, we face virtually perennial problem of our legislation – lack of reliable mechanisms of relevant rules. Ukrainian legislation is "oversaturated" with rules-principles, rules-declarations. The lack of a stable legal framework of citizens' interests protection often negates their effectiveness.

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30 *Старженецкий В.В.,* Россия и Совет Европы: право собственности, М., 2004, 50.

31 *Гомьен Д., Харрис Д., Звоак Л.,* Европейская Конвенция о правах человека и Европейская социальная хартия: право и практика, М., 1998, 409.

That sense of security and protection of subjective rights (including property rights) forms a human perception of the usefulness of its legal status and, consequently, the existence of the prerequisites for social activity.

Analyzing the meaning of property in these important social processes, S.S. Alekseyev fairly pointed out: "... in civil society an individual must be the bearer of property – such that gives support in life to the individual, provides him an independent existence and which therefore gives an individual the status of a person, independent of government and, moreover, capable with the presence of other prerequisites to obtain the mandatory public authority in relation to the government"[32].

The method of civil law regulation which defines the methods and techniques of the impact of civil law to the appropriate public relations initially requires as an obligatory condition the legal equality of all participants, their economic and organizational autonomy, freedom of expression in the exercise of any legal actions. This method is organically combined with the main basis and principles of civil society functioning. It can therefore be said without any exaggeration that if the property basis of civil society is private ownership and the market economy, the legal regulation of this basis is provided primarily by civil law.

Not only the mentioned norms relating to regulation of property relations and constituting the statics of civil regulation, but also civil rules governing the whole civil turnover (the dynamics of civil regulation), associated primarily with the various civil contracts both defined and non-defined, provide to each citizen and society as a whole an opportunity to realize the vital needs, interests, desires, aspirations.

Following the Constitution, the Civil Code provides that an individual is able to have all the property rights established by both the Code and other laws. All individuals are equal in the ability to have civil rights and duties (art. 26 of the Civil Code of Ukraine).

Civil legislation provides a wide range of subjective civil rights. Besides considered property right, the participants of civil law relations (individuals and legal persons) may have other property rights: ownership, servitudes, emphyteusis, superficies; enter into civil transactions (in particular, into agreements) both provided and not provided by the law, but not contradictory to him, to carry out business activities not prohibited by law.

Exactly the civil law provided a special structure of a legal entity, able to extend significantly the possibility of legal regulation, first of all, property relations involving collective entities.

In modern conditions the use of the structure of the legal entity makes it possible to ensure the proper functioning of not only the entire production infrastructure of civil society (joint stock companies, limited liability companies, production cooperatives etc.), but also a plenty of non-productive (non-profit) organizations.

Overcoming the border of the third millennium, humanity has entered a new era, which must be marked not only with the strengthening of human values, but also with the steady development of the human intellect. After all, the success of the solution to many political, economic and social problems

[32] *Алексеев С.С.,* Право: опыт комплексного исследования, М., 1999, 650.

depends on how significant the intellectual potential of civil society and its level of cultural development will be.

Now, no one would deny that the intellectual activity and its results acquire priority in today's world.

Human creativity is his deeply aware need for self-expression, self-assertion, the addition of deep spiritual experiences in the search for harmony and self-improvement into the world. The ability for creative and intellectual activity distinguishes man from other living beings and does not depend on age, health status, abilities and talents.

Enhancing the role of intellectual activity and intellectual property predetermines the need to strengthen the effectiveness of their legal protection.

Legislative rules regulating the use and protection of intellectual property rights (as well as the rules that make up institute of property rights) belong to different branches of law: constitutional, administrative, criminal, procedural etc. However, a special place among them belongs to the civil law.

Civil Code of Ukraine for the first time combined the rules relating to the protection of the results of creative intellectual activity in the separate fourth book "Intellectual property rights".

Despite the long discussions that accompanied the process of codification of civil law in the CIS countries, in general, we managed to defend the position of a civil nature and, accordingly, the sectoral affiliation of these rules.

A proactive position on this issue has been taken by the World Intellectual Property Organization (WIPO) in cooperation with the WTO. Experts of these influential international organizations were strongly opposed to the concept of universal regulation of intellectual property rights namely in the Civil Code. In their opinion, the basic regulation of corresponding relations should be carried out with the rules of special laws that at the time of the Civil Code adoption were in almost all CIS countries. As for the Civil Code of Ukraine, it has been suggested that it is enough to make a few general norms of a purely declaratory nature.

Such approach in no way did not respond the conceptual basis of civil law codification and caused fierce opposition on the part of the drafters of the Civil Code in all CIS countries. In general terms, this position was formulated by well-known Russian civilist *V. Dozortsev* [33].

Institute of Intellectual Property is one of the most important civil and legal institutions, which is why its rules are organically linked with the other institutions of civil law - a legal entity, contracts, methods of protection, responsibility, etc.

In our opinion, the need for sufficiently detailed regulation of relations connected with the implementation of intellectual property does not exclude, but rather involves the deepening of the fundamental general principles of intellectual property rights in special legislation, most of which at the time of the Civil Code of Ukraine has acted and the content of these laws (their civil law component) was taken into account in the formation of the provisions of the Civil Code of Ukraine.

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[33] *Дозорцев В.А.,* Интеллектуальные права. Понятие. Система. Задачи кодификации, М., 2005, 25-28.

Thus, it was possible to ensure a reasonable balance between regulation on the codification level and at the level of specific intellectual property laws.

General provisions on intellectual property rights, entrenched in Section 35 of the Civil Code of Ukraine, one way or another relate to all intellectual property rights, mentioned in Art. 420 of the Civil Code of Ukraine. An important principle of the regulation of intellectual property rights provided for Art. 419 Civil Code of Ukraine: the right of intellectual property and ownership of the thing does not depend on each other, and the transfer of the object of intellectual property rights does not mean the transfer of ownership of a thing, and vice versa.

In this connection it is appropriate to quote a prominent scientist in the field of intellectual property rights *A. Pylenko,* who in the early twentieth century argued that any invention "... has only abstract and ideological content and its real substrate can be identified only in the undeveloped thinking ... the essence of the invention is not limited to those material objects in which it is embodied, the invention is always ... is an intangible, ... the object of a patent right is always an intangible ... "[34].

The Civil Code of Ukraine has entrenched intellectual property rights to literary, artistic and other works (copyright), the right to perform, sound recording, video program and the program (transfer) of broadcasting organizations (related rights); the right to scientific discovery; the right to an invention, utility model, industrial design; the right to the layout of integrated circuits; the right to innovation; rights to plant varieties, animal breeds; the right to a commercial name, a geographical indication. Also, the Code provides for the rights to a trade secret.

Thus, civil law regulation covers the whole spectrum of intellectual property rights and includes them organically in a system of protection by civil law means.

Conclusion

Civil Code Ukraine secured as the basic principles of modern civil law principle of fairness, good faith and reasonableness. This approach of Ukrainian lawmakers, who took common humanistic concept of the drafters of the Civil Code, is quite symptomatic of trends of development of modern Ukrainian society.

In addition, it should be noted that a decade of experience in the application of Civil Code has confirmed the viability of this principle, and its being in demand by the judicial practice is the undisputed evidence of the deepening and further development of the private law fundamentals of civil society in our country.

[34] Пиленко *А.А.,* Право изобретателя, М., 2001, 9.

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