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Sulkhan Oniani *

Fault in the “Georgian Compendium of Nomocanon Laws”

1. Introduction

The researches of Georgian Law history know that the issue of fault has already been on high level developed in the XI century. The basis for the hereof conclusion is the activity by Euthymius of Athos, consideration of which cannot be evaded by any of the specialists of Georgian ancient law.

Interest by the clergyman (and not by the King, retinue or viziers) in the fault means a lot: it directly confirms influence of Christian doctrine on Georgian secular law – the activity of Euthymius of Athos in Christian doctrine is the thought of a thoroughly erudite clergyman and not a product of mind of him, as of a scientist. It was Christianity that brought the Code of Morality of the most severe requirements in history of mankind and it appeared the only doctrine, assuming the hardest task, so drastically different from other religions – Trinity Dogmata and the issue of two natures of Jesus Christ: how can the God be the Essence Trinity, incarnate, be of two natures and correspondingly, “two natural volitions – Divine and Human, two natural actions – Divine and Human, two natural self-righteousness – Divine and Human, Wisdom and Knowledge – Divine and Human”,¹ to simultaneously be “Whole God with Humanity, as well as Whole Human with Divinity”.² The high interest to volition of Jesus Christ naturally led the religious figures to research the human mind and free will, law, justice, crime, sin, goal of penalty, fault problem and guilt. Christianity turned the offensive action, as well as thought, idea and internal commitment to the hereof action, also the model of behavior on future situation already existing in human, into the subject for discussion and declared as a sin.

The casus provided in the Georgian compendium of Nomocanon Laws, in modern terms, entails mixed evaluation upon consideration and raise the questions: does the monument recognize the intention and negligence or solely defines deliberate and non-deliberate actions? Does it differentiate negligence from casus? How many members have the classification used by the author? Which is the source for the hereof classification etc.

Iv. Javakhishvili, Al. Vacheishvili, I. Surguladze, N. Kordzaia-Samadashvilisa and G. Nadaerishvili offer their own answers to these questions, which sometimes do not coincide but due to this fact we can state that they not only contradict with each other but partially fill each other as well.

The hereby Article is the humble attempt to briefly resume these opinions and to give own evaluation in addition to the activity of Euthymius.

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¹ *John of Damascus*, Exposition of the Orthodox Faith, Tbilisi, 2000, 396 (in Georgian).

² *Ibid*, 411.

2. Opinions Expressed upon Evaluation of the “Georgian compendium of Nomocanon Laws”

Iv. Javakhishvili, with the analysis of the Georgian compendium of Nomocanon Laws, concludes that the faults, mainly, were divided into two large groups (although, the author also mentions the third group). In each group, the Compendium of Nomocanon Laws separates the sub-groups and the differentiation of the hereof sub-groups, i.e. the principle of definition of fault and individualization of penalty depended on the circumstances of the crime.³ So, the Compendium of Nomocanon Laws attaches particular attention to the circumstances of the crime.⁴

Al. Vacheishvili develops the ideas of *Iv. Javakhishvili*. He underlines the third component and considers that the given text outlines not two but three-member division, which can be explained with influence from Roman Law: “The Compendium of Nomocanon Laws gives the characteristics of various types of fault. It has a clear and comprehensive conception about two forms of fault – intent and negligence.

Though it does not apply to the term “negligence” but the cases mentioned make it obvious that the author understands the nature and legal meaning of negligence. ... When the author gives any of the examples, it serves for the particular purpose. The purpose is to cover, to show and to give us the awareness of the idea, which is provided in this given example. This is the explanation for the order of the cases, provided in this monument, for the system of reporting: the monument starts with the case, where the fault, according to the author, does not exist at all. Then gradually it notes the light and grave forms of negligence and in the end, it characterizes the forms of deliberate crime; it approximates the grave forms of negligence to the deliberate actions (*culpa lata* in Roman Law was considered as “*prope dolum esse*”, “*culpa dolo proxima*”. The Compendium of Nomocanon Laws provides as well: “it is approximated to deliberate murder”, “willingly approximating”. As we see, here we have similarity as well, which shall be explained with influence of Roman Law indeed). ... Compendium of Nomocanon Laws defines the forms of guilt according to the preliminarily outlined plan, according to the specific system, which is the best evidence that it has raised the general doctrine about the issue; it is not

³ *Javakhishvili Iv.*, Works in 12 Volumes, Vol. VII, Tbilisi, 1984, 199 (in Georgian).

⁴ “And again we preach for confession of the repenting. There are ten of the crimes to be confessed.
a. As there is one, committing the minor crime with one person and having the will to repent and deliver of the crime.
b. And other is, sunk in sin for many times with many persons.
c. And other is, heart full with fornication by nature, sinning with one, or two and sinning many times till senility.
d. And other is, with sinning with flesh by nature, though eliminating the sins with the fear of the God.
e. And there is another, repenting as being ill or in plague and trouble, or repenting as lying on the deathbed, taken by the death immediately.
f. And other is, who is pardoned of the sins and repenting afterwards, feeling regret.
g. And other is, sinning before confession and eliminating all sins after confession, starting to regret.
h. And other is, confessing own sins but fail to eliminate them, but fall in sin again.
i. And other is, promising to eliminate sins but remain devoted to the sin to one person.
j. And others are, being in a trip or by force, or by fear or talent, or ignorance or by some other type, fall in sin and then going to repent and confess.” See *Euthymius of Athos*, Georgian compendium of Nomocanon Laws, Tbilisi, 1972, 107-108 (in Georgian).

confused in details and legal casuistic, never deviates from the chosen path. The separate details and specific casus express the general idea for it”.⁵

In opinion of *Al. Vacheishvili*, “the doctrine in the XI century in Georgia about the subjective elements of fault was quite a high level and the reason for this state shall be found in ...Byzantine, and according to the final report - in influence of Roman Law. Roman Law is one of the sources for the Christian Church to find the norms, necessary for arrangement of its organization and relations”.⁶

Al. Vacheishvili has demonstrated the very important parallels between the definitions of Roman Law and Compendium of Nomocanon Laws: The Nomocanon of John the Faster provides the guidelines for the Confessors when discussing importance and gravity of various faults (sins); the monument indicates to the numerous conditions, subject to be taken into account while evaluating the human actions... “With deliberate intent he falls in sin, or captured with admiration, or found drunk, or forced with the master of his, or with the order of the King, or out of fear, or driven with poverty”... “and still, those who willingly or deliberately, fell in sin and those who were caught instantly with admiration”.

The hereof section bears the sign of influence of Roman Law; these words obviously reveal influence of the above-mentioned approaches because of the Nomocanon, though it provides the list of various conditions, subject to be taken into account by the Confessor upon final evaluation of the sin, but the deliberate sin, committed of admiration is underlined amongst them”.⁷

Al. Vacheishvili supposes that “...three types of faulty actions, provided in the Nomocanon: 1. “willingly”, or “deliberate”, 2. “instant”, or “sudden”, and 3. “with admiration” – are equal to division of fragment of Marcianus, enclosed in the digests: “aut proposito, aut impetus, aut casu”. The translation demonstrates the original idea brilliantly: “proposito – deliberately, impetu – with admiration, casu – suddenly. ...There is some coincidence between these two monuments, the translation is thorough and accurate and it gives the ground to think that the Nomocanon uses the Roman source; this coincidence cannot be explained with an accident. Our opinion will not be exaggerated if you consider the circumstances that the Ecclesiastical law often borrowed the concepts from the Roman sources”.⁸

According to *Al. Vacheishvili*, this division was not the gains of Roman law solely, “the division relative to fault could be also found in Greek philosophy: Plato differs three types of murder - willy, unwitting and committed influenced by resentment, anxiety (affect). It disposes the latest between the first two types... The Law of Athens and judicial practice, ever since the Dragon period, distinguished three different murders... The particular judicial system corresponded to this division. Therefore, this classification belonged to Athens valid law. It was recognized in judicial practice when division by Plato was of a pure theoretical character”.⁹ But in opinion of the scientist, the source for the Euthymius’ text must be still the Roman and not the Greek Law – “The idea may be born that the opinion of Plato had influence on legal way of thinking of Byzantium but the idea is more natural that here we can find the direct influence of Roman Law. The last greatest monument –Corpus juris civilis – has been developed in Byzantium and validity thereof in some or another way or capacity has never been ceased in

⁵ *Vacheishvili A.*, Novels from History of Georgian Law, Vol. I, Tbilisi, 1946, 164-165 (in Georgian).

⁶ Ibid, 153.

⁷ Ibid, 158-159.

⁸ Ibid, 159-160.

⁹ Ibid, 160-161.

Byzantium. It facilitated to spread of the Roman law ideas and institutions in various countries and establishment and assimilation thereof in life of Georgian people".¹⁰

To enhance the hereof opinion, the author provides other specific examples as well: "Digests envisage lots of various cases where the issue of fault is reported and solved in some or another way. If we have a thorough look at the examples in the digests, we will conclude that the second monument of Canonic Law has been translated by Euthymius of Athos – the Compendium of Nomocanon Laws VI of the Council used the material of Roman law. Correctness of this idea is obvious from the individual context of the particular cases provided in the Compendium of Nomocanon Laws. Some examples are of the nature and the structure that it seems directly extracted from the digests unchanged."¹¹

According to the indications by *Al. Vacheishvili*, "the digests provide several types of murders and mentions the rescript by Hadriane, which attaches the particular attention to the internal side of the crime, the will of murder and solves the issue on absence or existence of this internal moment according to usage of the weapon – the external sign. By force of rescript, the alleviated crime is imposed to the person, who unwittingly commits murder upon the battle. The Compendium of Nomocanon Laws envisages this case and considers it as equal to "deliberate murder" (example N3)... The following section of the digests is particularly noteworthy: ... the cobbler beats up his apprentices to teach them, hurting their eyes – here the law exempts the responsibility on the basis of the Akheilias Law, inasmuch as the Cobbler hit not to damage but to teach... and the pedagogue is empowered to impose the light penalty. ...the similar case can be found in the Compendium of Nomocanon Laws as well (example №2) except that it considers death of an apprentice as a result of the injury. The Compendium of Nomocanon Laws considers this action as unintentional and underlines the circumstance that the pedagogue wanted not to kill the apprentice "but to deliver him/her from disgrace".¹²

Al. Vacheishvili provides one more casus from the digests: "the Pruner does not warn the passers-by, drops the branch and thus, kills a person. This case relates to the first example, provided in the Compendium of Nomocanon Laws. Worth mentioning the case, when the Archer or the Spear-thrower kill the slave during the games. The Law takes various circumstances into account... The Akheilias Law was not applied in the events solely, if the slave himself/herself passed to the playing field, as he/she should not be there in undue time, where the masters played, and finally, let's mention one example from the digest, which with the nature thereof relates to the latest cases and similarly expresses negligence or a pure accident... Someone throws the spear, wounding the Barber in his hand, which entails death of the client (slave). The prosecutor considered the Barber guilty, if he worked where the masters played".¹³

And finally, *Al. Vacheishvili* concludes that the source for the Georgian compendium of Nomocanon Laws is the Roman legislation: "Some may consider the idea admissible and correct that the closer and more natural source for the Compendium of Nomocanon Laws is the Holy Scripture and the legal doctrine therein but this idea omits the fact that the Jewish criminal law, provided in the Holy Scripture, is poor with the content, and in comparison with the Roman Law it is on much lower level. At

¹⁰ Ibid, 161.

¹¹ Ibid, 161.

¹² Ibid, 162-163.

¹³ Ibid, 163.

the same time, the hereof provisions of the Compendium of Nomocanon Laws on the forms of guilt, evidence quite a high development of legal mind, maturity of thinking, the Compendium of Nomocanon Laws well realizes importance of various nuances and types of subjective mood of a conscious offender, which for the Jewish legislation is inaccessible and unfamiliar. All this gives us the ground to recognize Roman Law as the source of provisions of the Compendium of Nomocanon Laws in formation of concept of guilt.”¹⁴

It is noteworthy that solution of the issue totally in favor of the Roman Law can appear exaggerated. If we speak about the influence of Roman Law on Canonic Law, then the issue requires to be further investigated to define the level of influence of Christian doctrine on the Roman Law itself – Justinian is the Emperor of the Christian Rome and the King, canonized by the Church, the corps of which followed history of persecution official by the state status for 2 centuries and unofficial for 3 centuries. Moreover, the Holy Scripture and the Old Testament are not at that extent primitive in terms of the issue of fault as it may seem at one glance and the Christian doctrine cannot be equalized with the Law of Moses inasmuch as the Gospel is the Moral Code, drastically different from the Old Testament and with the severe requirements currently valid.

The part of the opinions of *Al. Vacheishvili* are not shared by *N. Kordzaia-Samadashvili*, who considers that the second casus (when the master accidentally kills the apprentice) speaks not about negligence (carelessness) but the accident: “Euthymius excludes guilt in the action of the person (the person has not violated the security measures, has not beaten the aggrieved enormously etc.), and the action itself was quite lawful and accepted according to the then views. Hence, there is no ground to suppose that here Euthymius implies any of the forms of fault and that this is not the casus. In our opinion, as in the first so in the second casus, Euthymius of Athos implies the fault without infliction of injury”¹⁵.

It is noteworthy that the position of *N. Kordzaia-Samadashvili* is not easy to be shared inasmuch as the casus, as such, is not recognized by the Georgian compendium of Nomocanon Laws. In this latest event the relevant spiritual direction should be undoubtedly imposed on the sinner repenting. However, we will consider the hereof issue in details in the following chapter.

N. Kordzaia-Samadashvili does not as well share another idea of *Al. Vacheishvili* and elucidates: “the legal literature expresses the opinion that Euthymius of Athos knows the difference between the intention, negligence and the accident, inasmuch as the examples, provided by him in the monument, prove that he well understands the meaning of negligence and knows the graver forms thereof as well but the analysis of the provisions by Euthymius in fact allows us make quite a different conclusion: “willing action” – it is the main form of the fault according to Euthymius of Athos. “Unintentional” – is the contrary, as an action, excluding denunciative nature of an action, the fault of the subject. There is an action amongst them, equalized with the intention and approximated thereto (“with the will it is”, “with the will it comes”). The latest, as noted, is characterized with the fact that the intention of the person, on the one hand, was “indecent”, deserving condemnation, or the intention of the person might not include

¹⁴ Ibid, 162.

¹⁵ *Kordzaia-Samadashvili N.S.*, Issues of Fault in the Works by Euthymius of Athos, Works of Tbilisi State University, Vol. 119, 1967, 147-148 (in Russian).

murder but the action was directed to harm, mutilation or violent abortion – that is, it carried the forbidden character; on the other hand, the fact that the manner of an action was life-threatening, it was tend to the lethal outcome (the person used the weapon, such are the sword, arrow; gave the poison etc.). Such construction of the hereof two forms has much in common with the medieval indirect intention. This concept, as we know, has been developed by the Italian lawyers on the basis of the Canonic law of the XII century. According to these rules, the priest, for instance, was responsible for any consequences of the actions forbidden thereto. The secular law assimilated this provision of the Canonic Law and developed the concept of indirect intention (*dolus indirectus*). The cases have been considered as the part of an intention, when the criminal consequences were entailed as a result of the forbidden action even though the guilty person had not the desire of this result but could, or should consider it as the action itself had the natural trend to entail this particular outcome. Intention, for instance, was considered as indirect, which according to the case scenario, comprised usage of the lethal weapon”.¹⁶ Hence, in opinion of *N. Kordzaia-Samadashvili*, “the medieval understanding of an indirect intention and the forms of the fault by Euthymius of Athos, are not obviously identical but similarity thereof is quite evident”.¹⁷ *N. Kordzaia-Samadashvili* enhances this opinion with other arguments as well: “Nomocanon considers the cases when a person does not know the character of his/her offensive action, does not realize the prohibition and condemnable nature thereof. When analyzing such cases, we have the impression that we deal with the illegitimacy consciousness. Moreover, committing an action without consideration of the condemnable nature thereof is opposed to the case of awareness of prohibition of the same action (committing a crime after being punished for the same crime) and with the systematic action, which obviously excludes unintentional action – unconsciousness of the committed offense.

The person, committing the action without realizing himself/herself being “wicked and evil”, sinned with ignorance, - he/she can, after repentance, be absolved by the priest, and in case if he/she “continues with crime, never abandoning it”, he/she loses this right at all”.¹⁸

G. Nadirashvili follows the line of *Al. Vacheishvili* and considers that “Euthymius of Athos outlines various forms of fault: intention, negligence and accident. According to Euthymius, using these concepts and material, developed in Roman and Byzantine Laws, if someone throws a stone to a dog or a tree to get the fruit, but the stone hits a person and kills him/her, this action shall be estimated as “unintentional and without intention and conscious”, inasmuch as “intention and will” did not imply death of a person. Then, Euthymius, by means of an example, provides cases of negligence: if someone, in view of correction and training, scourges an apprentice or a slave or hits him/her with a wand, that is – beats him/her, which entails death of an apprentice, as the master wanted to correct an apprentice or a slave (“the master had no will of heart to kill the boy but to deliver him from misbehavior”) and not to kill, so this action is “unintentional and not deliberate” and thus, it shall be considered as negligence. There is the number of actions, going beyond the sphere of crime “willingly or unwillingly”. That is, they are not attributed to this form of fault. They are so-called sphere of accident, where the responsibility is exempted. Accident implies the situation when the subject, not only has not considered

¹⁶ Ibid, 150.

¹⁷ Ibid, 151.

¹⁸ Ibid, 151.

the consequences of the action committed but nor could imagine possibility of such circumstances and thus, the issue is being negatively solved in terms of existence of ability taking the consequences into account.”¹⁹ *G. Nadareishvili* supposes that “the examples, provided by Euthymius and discussions thereon reveal that he not only differentiates the intention, negligence and accident, but dissolves the concept of negligence and separates the forms of negligence, which are equal to “willingly murder”, for instance: this will be the action if someone beats the opponent with fist or a stick, willing to hurt, injure, but the injured dies”.²⁰

Iv. Surguladze divides the Georgian compendium of Nomocanon Laws into two parts: “I. Any: 1. murder by the robber for covetousness, robbery; 2. Willing and evil murder, when “by will of the heart” the murderer does not want to kill, for example, when a woman makes a man take the potion to make him love her but it entails death; the aim of the will to be loved is promiscuous, the mean is similar, so such murder shall be equalized (“is equal”) to willy murder; 3. murder for revenge with spare, sword or ax, entailing death – willy murder; 4. “with the will it comes” when a person throws a stone or a stick to another person to hurt him/her, not willing to kill but due to anxiety, cannot measure the weight of a stone or a stick, or the stone or a stick hits the point, dangerous for health. The described example can be negligence; 5. “is equal to willy murder”, when a person, in a battle, kills another with a fist or stick, though never willing to kill, only to hurt or injure but in a rage, accidentally kills; II. “unintentional”: 1. the example of “unintentional and unwilling”: a person throws a stone or a stick to the dog but it hits a man; or a person hits the stick to the tree to get the fruit but kills a man; this case is “truly unintentional”. 2. the master or a tutor beats an apprentice or a boy to make him study but it entails death of an apprentice or a boy – this is also an “unintentional” crime”, – *I. Surguladze* concludes – “as we see, Euthymius of Athos has a clear opinion on the fault. Euthymius considers definition for responsibility of the will of a person participating in committing of a crime. According to the monument, killing an “infant” in a womb of a mother is a deliberate murder; a mother and the doctor wanted to kill a baby in a womb. On the other hand, the doctor is responsible for health of a mother, preventing her from death. If a mother dies, an action by the doctor may either be an indirect intention or negligence. We can clearly state that the fact, called by Euthymius of Athos as equal to deliberate crime, is actually negligence.”²¹

After consideration of opinions by the researchers of Georgian history of law, we need to evaluate the Georgian compendium of Nomocanon Laws not with modern legal method but with regards and with the approach, implied by the clergyman – the author of the monument.

3. Doctrine on Fault in “Georgian Compendium of Nomocanon Laws”

The primary principle, which shall be taken into account upon working on the hereof issue, is the characteristic of the Ecclesiastic Law, to which in general *N. Kordzaia-Samadashvili* attaches her attention – “in view to understand the character of the sanctions, determined by Euthymius of Athos, we need to consider that he, first of all, was guided under the Religious-Ethic and Criminal-Legal views. According to the opinion, dominating in that period, any damage inflicted, regardless of the subjective

¹⁹ *Nadareishvili G.*, Some Issues of Georgia Legal Culture in XI-XII Centuries, Tbilisi, 1959, 36 (in Georgian).

²⁰ *Ibid*, 37.

²¹ *Surguladze I.*, Political and Legal Opinions of Sul Khan-Saba Orbeliani, Tbilisi, 1959, 166-167 (in Georgian).

attitude thereto, was considered as a sin and required repentance. Moreover, even when a person was a passive victim of homosexuality, she/he still should repent for sanctification".²² And yes, the Georgian compendium of Nomocanon Laws is not the monument of a common law. It is a compendium of cathedral, clergy purpose, which grants it some specific originality and direct search of the institutions of the common law therein is the pre-condition of illogical conclusions,²³ and if we look at it with the right angle, we will see the full complex picture and these institutions, in secular terms as well, will be correctly evaluated. We shall as well remember that the monument does not aim at punishment (revenge to) of an offender – "let the law be followed with transition of law as to heal mistakes of its own".²⁴ It aims at healing of a soul²⁵ and correction of an offender, the sinner – for instance, the Compendium of Nomocanon Laws stipulates that "every sin, committed accidentally while being under 30, can be easily sanctified, as the sin is grave and under 30 the mind is ignorant and temper dominates over the man, thus the sin will be alleviated to sanctify. And every sin, committed after 30, being it grave, is subject to all the laws".²⁶ Obviously, we deal with not the age of a subject of the criminal law but with the person (monk or a secular man), confessing and repenting his sins to the priest (and punishment is deprivation of communion or excommunication).²⁷ And the secular sanction on the same sin (if it, at the same time, is the secular offense), was naturally applied to younger age. Based on this, it is considered that Euthymius of Athos has never mentioned unpunished cases – casus, as at one glance can be considered the cases of accidental murder entailed with the stick thrown to the tree to get the fruit, or thrown to the dog to repulse it, or entailed with the tutor beating his apprentice. Here we have the punishment of not secular meaning but of refusal of giving a grace, abstraction from grace. Such examples may be like of the cases in the point of view of modern secular law but the Compendium of Nomocanon Laws still envisages sanction thereto (within 10 years of deprivation of communion). It is crystal clear – according to the monument, "as Basil, blessed he is and full of wisdom and divine science, says: you who willingly, with intention kill a man and repent and confess thereafter, shall be subject to 20 years of deprivation of communion".²⁸ there is not notification for it as Basil of Caesaria decrees".²⁹

And "you who unwillingly and unintentionally kill a man, shall be subject to 10 years of deprivation of communion".³⁰ It is clear that the author, according to the rules by Basil of Cappadocia, differs willy and unwillingly murder, and sets twice a high sanction to the first.

²² *Kordzaia-Samadashvili N.S.*, Issues of Fault in Works of Euthymius of Athos, Works of Tbilisi State University, Vol. 119, 1967, 145-146 (in Russian).

²³ The sin as both, fall and doctrine burden the evil and never a tutor shall swear and sin and an apprentice to be made to sin and thus be powerless the repentance for the tutor". See, *Euthymius of Athos*, Georgian compendium of Nomocanon Laws, Tbilisi, 1972, 93-94 (in Georgian).

²⁴ *Ibid*, 24.

²⁵ The provision of the Compendium of Nomocanon Laws derives from this: "you who knew the covert sins of your brother and did not disclose it to the priest, you assume the fault of your brother as it is said: "seer or thief, you are with him", that is, in this case the soul of the sinner is hard to be cured. See *ibid*, 93-94, 122 (in Georgian).

²⁶ *Ibid*, 102-103.

²⁷ This age originates from the clergy age of the Old Testament, which is also the "age of Jesus Christ".

²⁸ *Ibid*, 77.

²⁹ *Ibid*, 78.

³⁰ *Ibid*, 78.

Then he clearly notes that voluntary and involuntary murder, in its turn, can be sub-divided into various types, as Basil of Caesaria provides: “and there are many subdivisions to voluntary and involuntary murder. And the most important is that: he, after naming the casus, once more confirms the circumstance: “and there are many other types of voluntary and involuntary murder, defined by the confessors collected into the law, is it willingly or not”.³¹ And the other example confirms this aspiration: the Nomocanon considers the fact of killing a man even being on war as a sin, though insignificant.³² Moreover, “those who fight the thieves will be deprived of communion. If a clergyman fights the thieves, he shall be dispersed of honor as “all who rises the spare, - as it is said – will die of spare” (Mathew 26.52) – it states.³³

Taking the hereof principles into account, it is crystal clear that Euthymius of Athos speaks about division of fault into two main groups –intentional and unintentional and into the sub-groups –totally unintentional, relevantly unintentional, obviously intentional and relevantly with less expressed will. The division is based on the principle, adapted by the Christian doctrine from the antique philosophy (Aristotle) and applied in own prism, according to which, a man has mind and will,³⁴ which is the basis for his freedom and relevantly, for responsibility. Upon considering two natures and wills of Christ, the Christian doctrine has thoroughly processed this important issue provided in the “Nicomachean Ethics” by Aristotle, which was conditioned with particularly severity of the problem of relations of the Essence of Trinity, claim of one will to the divine nature of a human nature of Christ.

The difference between a man and an animal is manifested in existence of narrative, reasonableness and free will. The desire and a true will were differentiated. An animal, guided with the desire; a child obedient to the desire; and unlikely, a grown up man, managing the desire – have turn into ordinary examples for the Christian doctrine. The attention was attached to the fact that a man has a reason, letting him differ good and evil. And it is the basis for two large groups and four possible versions, formed with correlation of intellectual and volatile sides of fault, which serves as the basis for the casus system of the “Georgian compendium of Nomocanon Laws”:

	Will	Reason
a)	1. volatile	reasonable
	2. volatile	ignorant
b)	3. unintentional	reasonable
	4. unintentional	ignorant

³¹ Ibid, 80.

³² “Murders during the battle were not considered as murders by our fathers as, in my opinion, they were forgiven as servants of purity and kindness. But maybe it would be better to advise them, as impure with hand, to abstain from communion for three years”. See the Nomocanon, Tbilisi, 2009, 360 (in Georgian).

³³ Ibid, 373.

³⁴ “If encroachment of unity of intellectual sides, integrality thereof in the beginning of this century was not difficult, today inviolability of this union is the sustainable criminal axiom. ...In modern Criminal Law, similar to the then psychological doctrine, necessity of inter-relation of not only intellectual and volitional sides is recognized but necessity of contextual change of both sides upon transition from one sub-type of the fault to another. That is, if the intellectual sign of direct intention is consideration of necessary emergence of harmful consequences, in eventual intention this necessity shall be replaced with capability”. See *Kutalia L., Fault in Criminal Law*, Tbilisi, 2000, 279-280 (in Georgian).

In this term, it is easy to distinguish the first (volatile-reasonable) and the fourth (unintentional-ignorant) cases. The first case comprises the examples as follows: "and you who rise the spare for revenge, no comfort for you, nor kind word as with your will you threw yourself to the abyss killing a man, is it with spare, or arrow or ax to sooth your ulcer, it is the deliberate murder. There are deliberate murders that torture you with eternal flame: murder by thieves in the battle, enslaving and killing, as thieves kill for covetousness and gain of treasures and warriors kill and destroy neither for fear or train but for demolition of enemies, and there are deliberate murders with intention. And if you give the poison, you are a deliberate murderer and evil; ... and still: you giving the poison to kill the baby in the womb, you are murderers, and you who take the poison, you are the murderers".³⁵

And the fourth case contains the examples as follows: "and totally unintentional and without reason and will committing an action, as you throw a stone to the dog or to the tree to get the fruit but the stone or a stick hits a man and kills him, is an unintentional peril as your will and intention was to the beast or the tree but accidentally kills a man, this action is unintentional. And there is an unintentional murder when you train a slave or an apprentice with a whip, or stick and accidentally kill, as your will was to deliver him from misbehavior but not to kill. And when you accidentally kill him, this action is unintentional and not volatile".³⁶ The key to this casus is following phrases: "strangely" (unknowingly), "self-acted" (itself, independently from the human impulse, accidentally, when an action emerged itself, was "self-acted", happened, happening), "not extremely torturing" etc.

All other causes are disposed amongst the transitional (2nd and 3rd) cases and the Georgian compendium of Nomocanon Laws provides that they shall be attributed not to the third (unintentional-reasonable) and the fourth (unintentional-ignorant) but to the second (volatile-ignorant) cases. It is evident from the text: "it was declared as an unintentional murder", - as author underlines and provides an example - as anyone undergoes through the argument and accidentally kills a man with a stick or with a fist", - and cites the reason for declaration of this casus as unintentional - "as the will of heart was to hurt and injure but not to kill but accidentally kills",³⁷ - but the author of the Georgian compendium of Nomocanon Laws does not agree with this qualification and provides an argument - "but this case is approximated to the deliberate murder as a man, being in a rage and disappointment, commits the crime as was under the violent resentment".³⁸ Then, there is the same process in the casus and here the author considers the case as approximated to deliberate but not unintentional: "who throws a stone, or a log to another without mind to kill but to hurt, and in a resentment, the weight of the stone or a log entails death of a man, this action is declared as murder to be unintentional. But it comes with the will".³⁹ The similar qualification is given to one more example: "and without the will to kill, you give the poison, is declared as a deliberate murder. As women give the potion to men to make them burn with love but accidentally kill them but without the will to kill but to love, regardless of devilry of the action, it entails death and is deliberate murder".⁴⁰ The opinion of the author is similar regarding the doctors giving special medicine

³⁵ *Euthymius of Athos.*, Georgian Compendium of Nomocanon Laws, Tbilisi, 1972, 79-80 (in Georgian).

³⁶ *Ibid*, 78-79.

³⁷ *Ibid*, 79.

³⁸ *Ibid*, 79.

³⁹ *Ibid*, 79.

⁴⁰ *Ibid*, 79.

for abortion but accidentally killing a mother, and regarding the mother herself on suicide: “who gives the poison to kill a baby in the womb, and who take the medicine are both killers, as not the baby solely but the mother takes the poison and dies, which is declared as suicide”.⁴¹

We may ask: which is the example of the third case? This is coercive unintentional action, which is not mentioned in the Georgian compendium of Nomocanon Laws in this part but which, based on the doctrine by Aristotle, is thoroughly considered by Nemesius Esema and it is reiterated by John of Damascus in the Chapter of “Tradition” as “voluntary and involuntary” – “An involuntary act is one in which the beginning is from outside, and where one does not contribute at all on one’s own impulse to that which one is forced. And as we declare: voluntary is, which originates from external coercion. All involuntary acts depend, on the other hand, on ignorance, when one is not the cause of the ignorance one’s self, but events just so happen. For, if one commits murder while drunk, it is an act of ignorance, but yet not involuntary: for one was one’s self responsible for the cause of the ignorance, that is to say, the drunkenness. But if while shooting at the customary range one slew one’s father who happened to be passing by, this would be termed an ignorant and involuntary act”.⁴²

It is obvious that involuntary and acknowledged (it means, thought with mind all over but the will is not aspired to commit), mean coercive involuntariness. A. Prangishvili has precisely found each nuances when studying the dictionary of psychological nature by Sulkhan-Saba Orbeliani and indicated as to John of Damascus, so to Nemesius Esema and Aristotle (“Nicomachean Ethics”) – “according to this elucidation, “involuntary coercively” is characterized with the property that we are forced “by others”, i.e. the reason for action is not buried in us but comes from outside. It means that the action is coercive when we are imposed to commit by others and we act though we do not agree with our faith (“unfaithful”), do not agree with our essence, with our desire (“nor we cherish desire”) and we do not facilitate (“nor we are co-active”) etc. In this elucidation, we can see the opinions by Aristotle reiterated on involuntary entailed with coercion. Aristotle says: “the principle of coercive action comes from outside and in the manner that an actor, i.e. suffered is not co-active of own actions” (“Nicomachean Ethics”, Book III, N1). This opinion by Sulkhan-Saba is according to Nemesius Esema. The noteworthy fact in elucidation is that the criterion for differentiating voluntary and involuntary is named as the fact where there is the reason for the action: in the actor or from outside, and the fact whether it is echoed in

⁴¹ Ibid, 80.

⁴² Cited from the translation by Ephraim the Small. Comparison: the version by Arsen of Iqalto – “Further, what is involuntary, depends in part on force and in part on ignorance. It depends on force when the creative beginning in cause is from without, that is to say, when one is forced by another without being at all persuaded, or when one does not contribute to the act on one’s own impulse, or does not co-operate at all, or do on one’s own account that which is exacted by force. Thus we may give this definition: “An involuntary act is one in which the beginning is from without, and where one does not contribute at all on one’s own impulse to that which one is forced.” And by beginning we mean the creative cause. All involuntary act depends, on the other hand, on ignorance, when one is not the cause of the ignorance one’s self, but events just so happen. For, if one commits murder while drunk, it is an act of ignorance, but yet not involuntary: for one was one’s self responsible for the cause of the ignorance, that is to say, the drunkenness. But if while shooting at the customary range one slew one’s father who happened to be passing by, this would be termed an ignorant and involuntary act”. See *John of Damascus*, Exact Exposition of Orthodox Faith, Tbilisi, 2000, 134 (in Georgian).

the actor, that is, is the action committed with pleasure or not".⁴³ It is noteworthy that the scientific research by A. Prangishvili is known to I. Surguladze, who upon studying political-legal opinions by Sulkhan-Saba Orbeliani, attracts attention to the moment of classification of volatility: "According to elucidations by Sulkhan, coercive involuntary action is classified as an action, which is committed against the will of an actor: the actor has no desire to commit the action but is forced to. We can provide the following examples to illustrate the involuntary coercive action: a henchman, assigned by the superior, commits the action without the will to do so. Similar is the case of necessary repel. The defender does not burn with desire to commit any action, for instance, to kill an aggressor but is forced to kill him for defense not to be killed. The similar example is an action committed during the war etc."⁴⁴ The fact why the coercive involuntary action in this section of the Georgian Compendium of Nomocanon Laws is not considered, can be explained with the fact that the monument is casuistic and the doctrine on fault is manifested in casus. It is not the theoretical doctrine, evaluated according to the modern standards on fault. It as well, might not be considered as according to the author, it was not the problematic case. For the addressee of the Nomocanon it was clear that coercive involuntariness is naturally conscious and it as well was clear that it could not be volatile-reasonable inasmuch as an actor acted against the own will, he/she did not want, she/he was forced to act that way. At that, the author of the Compendium of Nomocanon Laws implied that the doctrine, serving as the basis for the classification offered thereby, is well known for the then law-enforcers and does not attach his attention to this case particularly. It is indicated in the circumstances alleviating fault upon general discussion: "further, the division of the places and the types, with which the sin has been committed, as they are of many types and if one invites another or one is invited by another, or with the will committing the sin, or with ignorance, or with drunkenness or with assignment by the king or with fear or with poverty, or was it with his will of heart"⁴⁵

Hence, the author of the Compendium of Nomocanon Laws considers that not involuntary-coercive and involuntary-ignorant but volatile-ignorant and involuntary-ignorant cases are problematic to be dissolved and thus, when he "re-qualifies" the examples attributed to involuntary into the volatile, he is guided under the hereof theoretical principles. "Sulkhan-Saba Orbeliani, in description of the word "ignorant", tries to specify the concept of "ignorance". Ignorant is described in the dictionary: All involuntary acts depend, on the other hand, on ignorance, when one is not the cause of the ignorance one's self, but events just so happen. For, if one commits murder while drunk, it is an act of ignorance, but yet not involuntary: for one was one's self responsible for the cause of the ignorance, that is to say, the drunkenness. But if while shooting at the customary range one slew one's father who happened to be passing by, this would be termed an ignorant and involuntary act". Then, according to this elucidation, an actor, committing an action being drunk or offended, this is not an ignorant action, in this event, ignorance is voluntary as the reason for ignorance is the person himself/herself... This opinion as well derives from Aristotle. And the example, provided in elucidation by Sulkhan-Saba Orbeliani, belongs to

⁴³ *Prangishvili A.*, Novels from History of Human Psychological Mind in Georgia, Tbilisi, 1959, 173 (in Georgian).

⁴⁴ *Surguladze I.*, Political and Legal Opinions of Sulkhan-Saba Orbeliani, Tbilisi, 1959, 283 (in Georgian).

⁴⁵ *Euthymius of Athos.*, Compendium of Nomocanon Laws, Tbilisi, 1972, 103 (in Georgian).

Aristotle (See. “Nicomachean Ethics”, Book III, N2).⁴⁶ Hence, the murders committed while being “offended”, when the killer did not want to kill the aggrieved but to hurt merely, is a voluntary but at the same time, ignorant action. Ignorance here lies in the fact that an actor does not take it into account that his/her action will entail death of a man but inasmuch as it is neither volatile-reasonable nor ignorant-involuntary (as it has been considered, as the author of the Compendium of Nomocanon Laws states), and obviously it is neither involuntary-reasonable as coercion is the classical example of this case, which we cannot find here and thus, it would be logical that we deal with volatile-ignorant action. This case is similar to the actions committed in drunkenness as it bears ignorance but this ignorance does not expulse the moment of voluntariness as in the case when a man follows his resentment – “we, all the men, without intention to do so, commit an action with resentment, we do it voluntary and not with reason”.⁴⁷ This principle is clearly provided in the Compendium of Nomocanon Laws in the section when the author specially notes: “it comes approximated to voluntary murder as the actor, being in rage and offended, cavalierly acted as being driven with resentment”.⁴⁸ The similar is discussed in the same casus of the Compendium of Nomocanon Laws – “as same as involuntary is when a man in the battle, swings a staff or a fist to frighten and injure, to revenge but not to kill, it comes with will as when a man swings a staff for revenge, not avoiding hurting another, it is clear that the action is driven with will”.⁴⁹ In the second case as well: when you throw something and you hurt someone, the Compendium of Nomocanon Laws gives the same qualification though here it no longer separately elucidates why but just indicates that it “comes equal to”. In its turn, the second casus in the Nomocanon gives separate elucidation: “and who throws a log or a stone with a natural power, shall be equalized to voluntary. And as the log or a stone was thrown not to kill but to hurt out of resentment but entailing death, and it was immediate to demolish but not to kill”⁵⁰ – despite of the fact that an actor intended another action but committed quite another, it is still approximated to voluntary as he/she was driven with resentment. One more detail of the Nomocanon is as well noteworthy, which is not provided in the compendium of Nomocanon laws. It focuses on a very interesting moment: “and who swings a sword or other weapon, cannot be justified as he threw an ax to hurt but the weight of an iron ax penetrated a man causing lethal injuries”.⁵¹ The Compendium of Nomocanon Laws grants the same casus with the hereof qualification (volatile-reasonable) but all these cases are aggregated therein (using the sword or another lethal weapon) – “further, who takes the sword and uses it for revenge, no comfort for him, nor kind word is for him as he fell in abyss killing a man even in the battle or with a sword or ax or arrow to sooth his revenge, is the voluntary murder”.⁵² The Nomocanon has a special indication – “further, who hits an ax and not a fist to hurt with intention”.⁵³ Here we can see that unlike the preceding causes, when throwing a blunt object, or

⁴⁶ Prangishvili A., *Novels from History of Human Psychology in Georgia*, Tbilisi, 1959, 175 (in Georgian).

⁴⁷ See translation by Ephraim the Small., *Compare: Arsen of Iqalto*: “as we act with resentment not with will but with intention”. See *John of Damascus.*, *Exact Exposition of Orthodox Faith*, Tbilisi, 2000, 135 (in Georgian).

⁴⁸ *Euthymius of Athos*, *Georgian Compendium of Nomocanon Laws*, Tbilisi, 1972, 79 (in Georgian).

⁴⁹ *Nomocanon*, Tbilisi, 1975, 478 (in Georgian).

⁵⁰ *Ibid*, 478.

⁵¹ *Ibid*, 478.

⁵² *Euthymius of Athos*, *Compendium of Nomocanon Laws*, Tbilisi, 1972, 79 (in Georgian).

⁵³ *Nomocanon*, Tbilisi, 1975, 478 (in Georgian).

killing with a fist, usage of a special lethal (martial) weapon indicates to existence of voluntary and reasonable action, and the act of throwing expulses the idea that the thrower can control the action endeavored. Thus, due to the fatal consequences, no justification is left. Therefore, using the martial weapon in the fight, argument, when being offended, despite of the possible death as a result, was not intended by an actor, not desired to kill the aggrieved, thus the action shall be considered as a voluntary action as the reason, the impulse lies therein. The moment of weapon itself qualifies this action as voluntary inasmuch as according to the then opinion, bringing your weapon out of the sheath meant offense of the opponent, and using the weapon meant hazard action and high possibility of direct intention.

As to the causes concerning the love potion by a woman or poison for abortion purpose, they are similarly qualified –despite of the fact that a mother never considered (ignorance) to kill a man but on the contrary, plotting to burn a fire of love in him (a woman does not want to kill a man, which is underlined by the fact that she wanted the “anti-kill” result – “affection”) but the will is evil, it cannot be considered as unintentional-ignorant as the reason of death is the potion. Similar is with murder of a baby in the womb. It is clear that a mother has never considered to kill herself but despite of the ignorant action (here we mean suicide), it shall not be considered as unintentional as the reason lies in it and due to this, the action is voluntary.

It is clear in discussion of Nomocanon – “further, if forced by someone prepares a poison but kills the poised, is considered as a voluntary murder. And if a woman, burning with desire to a handsome man, gives him the potion to blur his mind to make him love but kills him when her will was impropriety and adultery”.⁵⁴

Here we have one more detail to be précised in order to comprehend the imaginations serving as the basis for the examples of the Compendium of Nomocanon Laws. We speak about pure unintentional and relevantly less unintentional actions. Euthymius does not mention them but they shall be necessarily considered as they obviously were known to Euthymius inasmuch as they belong to the same doctrine which is the basis for differentiation of sins by the Compendium of Nomocanon Laws. Namely: Sulkhan-Saba Orbeliani, elucidating “involuntary”, says: “involuntary and unintentional are to be divided – involuntary is killing an enemy and rejoice, and unintentional is killing an enemy and regret”. According to this elucidation, involuntary is an ignorant action which gives us joy; for instance, when without the deliberate intention, not knowing I kill an enemy (I never had a will to kill); but as I rejoiced with the result, it is an action which is unintentional but shall be differentiated from an unintentional action, the result of which does not give me joy and thus, it shall be called “involuntary”. “Unintentional” is the action, which is no reason for joy but for regret. This is unintentional indeed”.⁵⁵ The hereof provision, Sulkhan-Saba Orbeliani, has borrowed from Nemesius Esema, which in his turn, sources from Aristotle. Naturally, each of them was known to Canonists. “Such division of ignorant action derives from Aristotle. Aristotle says: “as to ignorant actions, they cannot be ever called voluntary but can be called unintentional solely when they result in grief and regret as an actor, committing with

⁵⁴ *Nomocanon*, Tbilisi, 1975, 478-479.

⁵⁵ *Prangishvili A.*, *Novels from History of Human Psychology in Georgia*, Tbilisi, 1959, 173-174 (in Georgian).

ignorance and never regrets, has never acted voluntarily as he/she did not know about his/her actions, but he/she acted not with involuntarily as he/she does not feel regret. So, we might consider that a man, acting with ignorance and regrets afterwards, acts unintentionally. And a man, never feeling regret, acted not voluntarily. Due to difference with the first case, it would be better to lodge it a special name” (See “Nicomachean Ethics”, Book III, N2). The same opinion is reiterated by Nemesius Esema: “Ignorance is of two types: one of them is voluntary and another unintentional. We commit actions with ignorance and we feel joy of them, as it is a voluntary murder of an enemy, giving us joy, and it is to be called involuntary and not unintentional. Further, we commit an action with ignorance and then regret it; and it is to be called unintentional, as we grieve for it”.⁵⁶

Here we clearly see that ignorant action is not generally called voluntary but it is still mentioned as such inasmuch as the action is committed without will and with ignorance but the consequences of the action are positively evaluated by an actor. As it seems, discussions by Aristotle appear too familiar for Christian doctrine. Taking the basic principles of Christian doctrine into account, despite of the fact that the sin by a man was unintentional and ignorant, if a man “post factum” feels joy for the result, then the action shall be considered not as quite unintentional and ignorant but unlikely – it is the sin, graver than quite unintentional and ignorant (the author, providing the example of murder of father and a child, wants to underline the fact that an accidental murder of a father aggrieves a child and it clearly is an unintentional murder). That is, when a person repenting comes to the confessor and repents such case, the moment, upon definition of qualification and spiritual direction of his/her sin, that he/she with ignorance, unintentionally killed a man and then realizing he was an enemy and rejoicing, would be unintentional-reasonable crime. Unintentional, as his/her will was not to kill at that moment but reasonable, as when his/her mind realized that the killed man is an enemy, it gave joy and the mind approved and gave positive evaluation to this unintentional action. That is, if he/she knew that this man was an enemy, maybe he/she would even have a will to kill but as he/she did not know and killed unintentionally, then realizing his/her action, his/her will remains unchanged for the moment of commitment (the action is unintentional, impulse does not lie in this person) but evaluation of an action thereby changes – the mind, consideration, mechanism of measuring good and evil, attitude to the committed action.

This standard of evaluation of an action is directly provided in the Gospel. Christ, preaching at the mountain, teleological elucidates the moral code (Ten Commandments) of the Old Testament and reveals the objective of the supreme law upon development of the Nomocanon: “Have you heard what ancestors said: thou shalt not kill; the killers are subject to trial”. And I say that everyone in rage to his brother is subject to trial, and everyone saying “dumb” is subject to the flames”. (Mathew 5.21-22). The similar is provided towards every concept, for instance: “Have you heard: thou shalt not commit adultery. And I say that everyone coveting a woman, commits adultery in his heart” (Mathew 5.27-28). The New Testament considers the behavior expressed in environ on one panel – murder and aggression towards another, which is expressed in environment in verbal insult solely. Essence of both is one: a man, as in the first so in the second case, is ready in his heart to demolish others, thus putting himself over others. And this is forbidden in Christianity inasmuch as Christianity preaches attitude to your

⁵⁶ Ibid, 174-175.

neighbor to be as you have it towards yourself. The Ten Commandments of the Old Testament aim not only at prevention of murder, adultery, false witness etc. but to make mankind better with nature thereof.

I. Surguladze also emphasizes unintentional-ignorant problem upon studying opinions by Sulkhan-Saba Orbeliani: "According to the definition by Sulkhan-Saba Orbeliani, evaluation of an action is based on moral matrix. According to definition, the internal state of an actor is important. ...The fact unquestionably derives from the definition that behavior of an actor is to be measured according to the voluntary or involuntary action thereof. In the event of voluntary action, if the hereof action is offensive, the actor bears moral and legal responsibility. But if the actor acts with ignorance, i.e. without his/her will but the hereof action bears signs of crime and the actor feels positive to this crime, thus the action reveals his/her criminal nature. Therefore, he/she is responsible not only for the voluntary action. The causes in the definition by Sulkhan-Saba Orbeliani do not directly envisage negligence but according to the general essence of the definition (namely, if we take the definition by Sulkhan-Saba Orbeliani regarding involuntary action into account), we may conclude that responsibility for negligence is natural in opinion of Sulkhan-Saba Orbeliani. The matter is: the ignorant actor did not know what he/she was doing but after commitment of an action, the ignorant actor has realized the deed, i.e. the deed which was initially unknown to him/her, - in the end it became clear. According to definition by Sulkhan-Saba Orbeliani, the question is: how the actor estimates the consequences of his/her actions. Is evaluation positive or negative? This shall be the datum for evaluation of the person himself/herself."⁵⁷

The same conclusion but in the psychological manner instead of jurisprudence, is made by A. Prangishvili as well: "The hereof definition is noteworthy due to the fact that it clarifies the issue of voluntary and involuntary criterion. According to the definition, the outcome for the action – joy or regret, is considered as criterion for voluntary and involuntary. If we "allow" the action and rejoice, then the action is voluntary but if the action entails regret, then it is involuntary. Hence, we encounter reiteration of the concept provided in definition of "coercive unintentional"; namely, that the action is voluntary which entails positive echo in the person regardless of the cause to derive from outside and the essential meaning is granted to the action entailing grief and regret. In this concept, recognition of the feeling in the behavior, as index of personal attitude, is of importance."⁵⁸

It is no accidental that the Doctrine of Holy Fathers emphasizes the issue of volatility. Holy Fathers have always used philosophy for dogmatic theology service. The Christian doctrine considers the issue as axiom that unlike animals, if humans have the will, they have the power to curb their desire.

A man has the mind and therefore, has the free choice – "Every one, then, who deliberates does so in the belief that the choice of what is to be done lies in his hands, that he may choose what seems best as the result of his deliberation, and having chosen may act upon it. And if this is so, free-will must necessarily be very closely related to reason. For either man is an irrational being, or, if he is rational, he is master of his acts and endowed with free-will. Hence also creatures without reason do not enjoy free-will: for nature leads them rather than they nature, and so they do not oppose the natural appetite, but as soon as their appetite longs after anything they rush headlong after it. But man, being rational, leads nature rather than nature him, and so when he desires aught he has the power to curb his appetite or to

⁵⁷ *Surguladze I.*, Political and Legal Opinion of Sulkhan-Saba Orbeliani, Tbilisi, 1959, 286-287 (in Georgian).

⁵⁸ *Prangishvili A.*, Novels from History of Human Psychology in Georgia. Tbilisi, 1959, 174 (in Georgian).

indulge it as he pleases. Hence also creatures devoid of reason are the subjects neither of praise nor blame, while man is the subject of both praise and blame”.⁵⁹ These issues are directly linked with the problem of two wills of Christ as Christ showed how his human will obeyed to the divine will: “And once again, the Gospel tells us that, He, having come into the place, said ‘I thirst’: and they gave Him some vinegar mixed with gall, and when He had tasted it He would not drink. If, then, on the one hand it was as God that He suffered thirst and when He had tasted would not drink, surely He must be subject to passion also as God, for thirst and taste are passions. But if it was not as God but altogether as man that He was athirst, likewise as man He must be endowed with volition. Moreover, the blessed Paul the Apostle says, He became obedient unto death, even the death of the cross. But obedience is subjection of the real will, not of the unreal will. For that which is irrational is not said to be obedient or disobedient. But the Lord having become obedient to the Father, became so not as God but as man. For as God He is not said to be obedient or disobedient”.⁶⁰ Hence, in opinion of John of Damascus and other holy Fathers, two natures are confirmed in Christ, “But obedience is subjection of the real will, not of the unreal will. For that which is irrational is not said to be obedient or disobedient”.⁶¹ That’s why Christ prays sitting on the stone in the Garden of Gethsemane: “Father, if it be possible, let this cup pass from Me”. Manifestly as though He were to drink the cup as man and not as God. It was as man, then, that He wished the cup to pass from Him: but these are the words of natural timidity. Nevertheless, He said, not My will, that is to say, not in so far as I am of a different essence from Thee, but Thy will be done, that is to say, My will and Thy will, in so far as I am of the same essence as Thou”.⁶²

It is crystal clear that the simple human will and real passion has been drastically dissociated in Christian doctrine. “But His human will was obedient and subordinate to His divine will, not being guided by its own inclination, but willing those things which the divine will willed”.⁶³ Thus, Christianity has immediately dissociated real will and simple desire and considered it upon imposition of spiritual direction to the sinners”. Will and desire coincide when the will obeys desire but when the will is the basis for action against own will, then the will and desire do not coincide. Human nature of Christ wanted to evade from torture but His human nature wanted not what He desired but what the Lord has desired – His divine nature. So, it is not accidental the fact that the prayers, composed by St. John of Damascus, often emphasize these principles, for instance: “the prayer at dawn and prayer at dusk by St.

⁵⁹ Ind. translation by Ephraim the Small. Comp. Arsen of Iqalto: “Every one, then, who deliberates does so in the belief that the choice of what is to be done lies in his hands, that he may choose what seems best as the result of his deliberation, and having chosen may act upon it. And if this is so, free-will must necessarily be very closely related to reason. For either man is an irrational being, or, if he is rational, he is master of his acts and endowed with free-will. Hence also creatures without reason do not enjoy free-will: for nature leads them rather than they nature, and so they do not oppose the natural appetite, but as soon as their appetite longs after anything they rush headlong after it. But man, being rational, leads nature rather than nature him, and so when he desires aught he has the power to curb his appetite or to indulge it as he pleases. Hence also creatures devoid of reason are the subjects Neither of praise nor blame, while man is the subject of both praise and blame”. See *John of Damascus.*, Exact Exposition of Orthodox Faith, Tbilisi, 2000, 139 (in Georgian).

⁶⁰ Ibid, 184.

⁶¹ Ibid, 184.

⁶² Ibid, 206.

⁶³ Ibid, 412.

John of Damascus” provide the phrase: “forgive me Father as many are my sins, voluntary and unintentional, reasonable and ignorant, and deliver me from evil, deliver my poor sinner soul fighting”.⁶⁴ You can find this formulation in any of the evening prayers to be said everyday where you can find the prayer to the Holy Spirit: “forgive me, your unworthy slave, as a man I have sinned today, willingly or not, reasonably or with ignorance”, followed with the detailed list of the sins: “admiration, immodesty” etc. You can find the same in the pre-communion prayers etc. This formulation of Orthodox prayers is not accidental, it is emphasis on the volatile and intellectual side of the sin (fault, guilt) (“voluntary and involuntary, reasonably and ignorant”) and not the mere order. This is the criterion, serving as the basis for differentiation of deliberate and negligent actions in doctrines of modern fault, they merely are more sophisticated and are further being improved, which is exactly indicated by *L. Kutalia*: “From the point of view of modern concepts of criminal fault, it is utterly impossible to imagine how an action can simultaneously be relevant to the will and in contrast with the desire... The representatives of the normativity theory of fault consider that negligence is not the primary but conditional (!) form of criminal fault, as “it does not reveal the subjective will”. In fact, we shall mention the fact that upon committing the negligent action, the subject categorically does not want but willed the outcome hazard for society... if upon direct intention, the subjective will lies in the desire of unlawful outcome, in other events it is revealed, correspondingly, in deliberate admission of unlawful outcome (indirect intention), in guidance under the frivolous supposition (self-reliability) and in non-usage of possibility to consider the unlawful outcome (negligence).”⁶⁵

4. Conclusion

Offenses considered in “Georgian Compendium of Nomocanon Laws” are revelation of sharply systematized doctrine and not the random list of the offenses. The monument does not, in modern terms, know the casus and considers Ecclesiastic responsibility for all types of sin.

The examples provided therein correspond to various qualitative gradations of fault accepted with correlation of will and mind – volatile-reasonable, volatile-ignorant, unintentional-reasonable and unintentional-ignorant.

The hereof system subsists on the century-old philosophy of dissociation of will and mind, to which the Christian doctrine attaches particular attention in as much as it is the cradle for necessity to dogmatically argument dissociation of divine and human natures in one person.

⁶⁴ See Prayers, Gelati Spiritual Academy, Kutaisi, 1999, 124 (in Georgian).

⁶⁵ *Kutalia L.*, Fault in Criminal Law, Tbilisi, 2000, 220 (in Georgian).

Mariam Khoperia*

The State Attitude to Family Separation

1. Introduction

Announcements of Christianity as state religion had a great influence on the development of Georgian culture and legal thinking. The more prominent became the influence of Greek-Roman law on the Georgian traditional law. Like Greek or Roman lawyers Georgian lawyers were especially attentive to the family institution; In relation to every essential issue, connected with a family, a legislator was considering a factual situation of the case and acting according to the law.

As a result the following question is arisen: how was the family separation regulated by the state and what kind of legal document was certifying the authenticity of the family divorce?

2. Legal Norms of Family Separation in Georgian Monuments of Law

Generally the state was not interfering in internal affairs of a family. The family separation was such an unacceptable and rare occurrence in early feudal Georgia that in early legal Georgian monuments there can't be found articles about family divorce.

Later when family divorce became intensive, in the monuments of the late feudal age there were several articles and even the whole part of them was dedicated to this issue. By the Georgian legal monuments it is confirmed that according to the legislation satisfaction of a claim about the family divorce immediately was not considered to be reasonable. The family divorce was happening, if it was impossible to maintain the family without divorce.

Family members usually preferred separation without meddling of other persons. "People often preferred coming to an agreement domestically rather than by state interference".¹ State officials thought that it was desirable for big families, as for economically strong units, to live without divorce. The demand of inseparability is confirmed as in case of nobility, as well as in case of peasants. Therefore not only the ruling class, but the state was also contradicting the disintegration of big families into small and economically poor families.

For the evidence of the above mentioned fact we can name the judgments of Erekle I *on case of the Amilakhvars' family dwelling*, dated on the 5th of March, 1692.

“. . . and for that purpose spared we no efforts and we, the kings, ourselves, stood as mediators and engaged our bishops and the laic as the mediators and prevented their separation and we

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¹ *Davitashvili G.*, Court Organization and Process in Georgian Traditional Law, TSU Publishing House, Tbilisi, 2004, 209.

*mind them to way reunite and stand under a common family name; and thus we united them and reconciled them this”.*²

Against divorce of a big family was also Vakhtang VI. It was emphasized in article 98 of the law book of Vakhtang VI:

*“They shall be summoned by the master; a senior one shall be mentored and put wise about, while a junior one shall be reprimanded; if the bondmen have quarreled or treated each other badly, they shall be told not to break up, not to separate; this way shall they be guided and advised by the courtier in order to prevent their split, but if that does not work and they stand their ground, they shall be let separated”.*³

Of course protection of the family integrity was resulting from the family name interests themselves, but a realist legislator was also considering the fact that human life was not always possible without separation. In connection with it in Article 99 of the law book of Vakhtang VI the following can be read:

*“[304r] 99. Separation has made the world develop since Adam’s times. If it has not been for separation, the latter would not exist either.[...]Separation is a rather complicated matter”.*⁴

As it is seen from the documents, there were cases, when despite the great concerted efforts of authorities, clerics and noblemen the families were divorcing anyway. The interests for separation of ownership on property were acting very strongly against the family integrity – “breach of the home order”, “striving for individualization of property”, “dividing of the income from the common manor” and etc, which caused the separation, splitting-up of the nobleman’s family into small families.

*“We tried to bring them about and advised them not to separate for three-four years. Their co-ownership matter was not considered and settled either, but the Kularagas (chief of king’s yeoman) was stuck to separation”.*⁵

There are several articles on divorce in Bagrat Kuropalat’s law. One of them concerns the rules of divorce in noblemen, the other - in peasants. In both cases a legislator is using the same principle, namely he distributes the property in the following way: for an elder person he states

² Monuments of Georgian Law, Court Decisions (XVI-XVIII centuries), Vol. IV (the text was issued, and research and vocabulary was added by *I. Dolidze*), Publishing House of Academy of Science of Georgia, Tbilisi, 1972, 158.

³ Monuments of Georgian Law, Vol. I, Collection of Laws of Vakhtang VI (the text was issued, and research and vocabulary was added by *I. Dolidze*), Publishing House of Academy of Science of Georgia, Tbilisi, 1963, 507.

⁴ Ibid.

⁵ Monuments of Georgian Law, Court Decisions (XVI-XVIII centuries), Vol. IV (the text was issued and research and vocabulary was added by *I. Dolidze*), Publishing House of Academy of Science of Georgia, Tbilisi, 1972, 557.

better village or a manor with better location and productivity. That means that age is preferable, according to which the law is in compliance with the old usage and demands to divide the rest of the property in equal parts. This norm also confirms that divorce was taking place as in high as well as in low circles of the society.

[275r] 154 *“If noblemen separate, they shall select the best village as the elder’s share (Saukhutseso) and the rest be divide into two the gain be produced this way.”*⁶

155. *“If peasants separate, the elder’s or the head house, i.e. one vineyard and main utensils be selected as the elder’s share, whereas the rest shall be divided into two”*.⁷

According to article 98 of the Collection of Laws of Vakhtang VI the state considered divorce of the family admissible in case when it was impossible for a big (multi-member) family to live under one roof, accordingly relations between family members were strained and divorce was the best way out:

“Conversely, if the brothers, or a farther and the sons, or an uncle and the nephews, or first cousins, or any other relatives of a common family name, possessing a single estate, cannot live together amicably and intend to separate, they shall be separated under the procedure as follows:

Whenever there is a split and discord between the family members, the next of kin and the bondmen shall report to the master upon learning about their split and until then, if they fail to reconcile, they shall not abuse their bondmen and neither shall they misuse bread and wine, otherwise, if they have to separate, they will have to calculate and recover the aforesaid to each other.

If it is ruled out that they separate and can no longer live together amicably, the master shall appoint a person to observe and prevent the damage of family estate or overspending”.⁸

In the Collection of Laws of Vakhtang VI there are also several important articles, in which a lawmaker demands from the separation wishing father as well as his son to have respect to each other, particularly, article 80 says the following:

[80] *“It does not pertain to a child to disrespect [...] a father”*.⁹

And also:

⁶ Monuments of Georgian Law, Vol. I, Collection of Laws of Vakhtang (the text was issued, and research and vocabulary was added by *I. Dolidze*), Publishing House of Academy of Science of Georgia, Tbilisi, 1963, 507.

⁷ Ibid.

⁸ Ibid.

⁹ Monuments of Georgian Law, Vol. I, Collection of Laws of Vakhtang VI (the text was issued and research and vocabulary was added by *I. Dolidze*), Publishing House of Academy of Science of Georgia, Tbilisi, 1963, 501.

[80] Perhaps a father detests or oppresses one child for his/her weakness or mischievous behavior and therefore regards with favor another child, he should not do so – senior one shall be treated as senior and junior – as junior. Father should not distinguish his children”.¹⁰

In order to support positions of the law Article 78 of the Collection of Laws of Vakhtang VI reminds the son to have respect for father by means of religion too:

“[78¹] “If a son has battered or mistreated his father, he is worth of being treated badly, since the Tenth Commandment teaches to honor thy father and thy mother”.¹¹

The family separation and distribution of estate in late feudal Georgia needed more caution and prudence. Accordingly resulting from the gravity of the case a lawmaker was obliging a judge to act with maximal caution and fairness in consideration a divorce case.

“(304r] 99. ... However, as mentioned above, a judge shall deal with each case with caution and judicial integrity, especially as separation is a very complicated matter”.¹²

B

When a family was divorcing by state interference, a law was obliging a judge to distribute not only estate property between elder and younger brothers, but to distribute serf-peasants too.

“(103⁴). In case there are more or less than twenty bondmen and allocation of an elder’s share (sauproso) or charging a separation share (gasamkrelo- king’s share) or a middle’s share (sashualo) is a problem, the matter needs to be profoundly studied and a judge is required to clear up the matter and make all necessary calculations.”.¹³

So, by Vakhtang VI law there were precisely stated the grounds according to which family divorce was regarded to be admissible.

Brought up on the ideas and spirit of French enlighteners David Batonishvili shares the demand of Vakhtang VI connected with separation and calls judges for more strictness and fairness:

“([29] Ib. For Separation

But judges have somehow become stricter, so that to fairly and equally share and distribute the property subject to sharing and thus avoid turmoil, caused by unequal sharing”.¹⁴

¹⁰ Ibid, 502.

¹¹ Ibid, 501.

¹² Ibid, 507.

¹³ Monuments of Georgian Law, Vol. I, Collection of Laws of Vakhtang VI (the text was issued and research and vocabulary was added by *I. Dolidze*), Publishing House of Academy of Science of Georgia, Tbilisi, 1963, 509.

¹⁴ Law of David Batonishvili, (edited by *D. Phurtseladze*), Science, Tbilisi, 1964, 23.

In his works – “Obozrenie” (“Review”) (articles 342, 735) and “Samartali” (“Law”) - about distribution of the property on divorcing families David Batonishvili leaves the rules of Vakhtang VI unchanged. For clarity we can name the corresponding articles:

“[102] *kg. For Separation of Father and Son*

*If a father separated from his son and the estate remained undistributed, afterwards, his successors shall distribute the property and items inherited from predecessors; whereas no one shall claim interest and contend for the father’s owned items, bequeathed by him to anyone by will”.*¹⁵

“[117] *For Parents’ Transfer of Estate Inter Vivos*

*In case, parents transferred their estate inter vivos, a heir’s claim for the estate, submitted before the judges during the parents’ lifetime, will not be considered. Whereas, if the estate is bequeathed by parents’ will, then judges shall consider the case as the occasion requires”.*¹⁶

[160] *ie. For Fraternal Estate*

If an estate is designed to brothers, it, as usual, remains a fraternal estate.

And if the fraternal estate is granted to bondsmen, in case of separation, the one, to whom it falls to, shall take possession of it.

*However, if the greatest portion of the granted estate is allotted to brothers, it shall be subject to fraternal division.*¹⁷

However in the article taken from the work of David Batonishvili about portions of property transferred to the possession of elder and younger brothers there is a very important statement, by which David Batonishvili repeals the traditionally established rule and initiates to transfer equal portions to brothers.

“[29] *Ib. For Separation*

*“However, we do not touch upon the division of elder’ (sauproso) and junior’ (saumtsroso) share [...] it is inappropriate to inquire into and divide them, be it the elder’, the junior’ or the middle son’s share, since that is exactly, what gives ground to turmoil, hatred and animosity; and what gives rise to hatred and animosity is, in itself, indecency and a natural sin. And therefore, everything (all shares) shall be distributed equally”.*¹⁸

According to the opinion of M. Garishvili, “David Batonishvili exercises firmness and sequentially perceives enlighteners’ opinions about law and lawfulness. The progressive nature of his opinions [...] is expressed by general recognition of the supremacy of law, legality and law and

¹⁵ Ibid, 62.

¹⁶ Ibid, 67.

¹⁷ Law of David Batonishvili, (edited by *D. Phurtseladze*), Science, Tbilisi, 1964, 90.

¹⁸ Ibid, 24.

order”.¹⁹ Considering time demands David Batonishvili “was trying to form a concept of subject of law, namely a civil law in a new manner and define its characteristic legal capacity and competence”.²⁰

3. Description of the Separation Book

By studying archive materials we can suppose that the execution of documents of family separation in Georgia approximately started in the XVI century. We have not got earlier documents of family separation. In our opinion the documentation of family separation either did not happen or was very rare before the XVI century or the proper document presumably has not been saved.

The divorce of large families, the documentation of which is observed from the above mentioned century, was gradually getting more intensive causing a number of changes from the legal point of view. The legality of the family divorce must have been confirmed by the proper document, without which the divorce was not regarded to be lawful, “the divorce was not certain. “

*“If brothers separated and divided estate and cattle, and did it in public, without fairly reflecting and recording it in the separation book (geo. gasamkrelos tsigni), separation and division of property without the book shall not be considered valid”.*²¹

The document of divorce was being drawn up in a proper form observing norms and rules of law. As a rule most of the divorce books studied by us are begun with the address to God the Father, God the Son, Holy Spirit and God’s mother, the Virgin Mary, for example:

*“Upon the will and with the assistance of thy Lord, the blessed Holy Spirit and thy Queen, Virgin Mary, and through the efforts divine of the Heads of Twelve Martyr Apostles Peter and Paul, Archangels Michael and Gabriel, born in the vicinity of Ukhar, baptized and bless by three hundred and sixty-three St. Georges, with the mediation and vouch thereof and the city meliq (governor) and the headman, I, the son of Mamedna, Aruthena, has done and submitted the separation book and the deed herein, claiming that everything, many or few, inherited by me from by father and grandfather, be it houses or any other property, divided we between each other and the grandfather took possession of their houses, half of reception room and the indoor thone (Georgian bakery) and the hall in front of reception room, whereas Prunen, in turn, got half of the grove, and rows and tools...and our mother’s grave was also transferred to him; and if our father’s any other copies appear or anything should be given away, we undertake to assume responsibility for it jointly, and there is no more dispute and not a jot of disagreement between us and there is peace henceforth, and the witnesses hereof are the headman and city governor Amakhrbum and Oseph of Kharim and Nsats of Okoa ...July 1726”.*²²

¹⁹ Garishvili M., Political and Juristic Opinions of David G. Bagrationi (Batonishvili), Tbilisi, 2004, 111.

²⁰ Ibid, 114.

²¹ Monuments of Georgian Law, Vol. I, Collection of Laws of Vakhtang (the text was issued and research and vocabulary was added by I. Dolidze), Publishing House of Academy of Science of Georgia, Tbilisi, 1963, 257.

²² Archive of old documents, Fund 1448, Case № 1109.

Some books of divorce are started with mentioning of God and Saints, next are listed secular participants of the family divorce and officials (headmen), for example:

“The God himself, and all his Saints, all fleshy and fleshless are the witness hereof, and from the human: Meliq (governor) Avtandil. Seal Meliq Avtandil and Headman Giorgi. Seal: Headman Giorgi and Garsua of Iavanguli and Osina and Karkasha, Papua and Meliq’s Vartan, and I, Ohana, have written and hereby certify.

Written in qoronikonitni (Georgian chronology, 1672), March A. † †”²³

In the archive there are such books of divorce, which are started directly with mentioning of Saints, for example:

***Ruling on the case of separation of Bandura and his sons, Aruthena and Giorgi
Mid-March, 1716***

“...With solicitation of Peter, Paul, Andrew, the Holy Prophet, [and John] the Forerunner, John the Baptizer and John Chrysostom; St. George’s prop, St. George’s GoriJvari, St. George’s Mognini, St. George’s Teleti, as well as that of Meliq and headman, have divided the house we, the sons of Bandura, Aruthin and my brother Giorgi.

And whatever house and facilities we had, have we divided equally and Giorgi has got a tavern managed by Sakoa of Kalmo, as well as the tavern in the outskirt district, in the upper edge, managed by Khna’s nephew; and half of the orchard, and the mill, purchased from Paremuz Javakhishvili in Akhalkalaki, and that purchased from Shaprta, including a man and a woman and the farmstead.; and also Iase, with his brother and his mother.

Aruthena, who manages the tavern, shall be responsible for a debt to the tavern, amounting to twenty tumani (two hundred roubles) of the total value of the tavern. And half of the orchard was given to Giorgi.

And the Lord, himself, is the witness hereof. And from the human:

Meliq (governor) Ashkharbeg seal: MeliqAshkharbeg

Headman Zurab seal: Headman Zurab

Chitha’s Oseph seal: not clear

Zakar’s Beria seal: not clear

Podoa’s Grikora seal: Grikur

Surgun’s Osepha seal: not clear

²³ Monuments of Georgian Law, Court Decisions (XVI-XVIII centuries), Vol IV (the text was issued and research and vocabulary was added by I. Dolidze), Publishing House of Academy of Science of Georgia, Tbilisi, 1972, 557.

²³ Monuments of Georgian Law, Court Decisions (XVI-XVIII), Vol. IV, (the text was issued and research and vocabulary was added by I. Dolidze), Publishing House of Academy of Science of Georgia, Tbilisi, 1972, 127-128.

Khudin's Naskida seal: Naskida

Aslanbeg's Avetisa seal: not clear

I, Tandina, the son of Solaghi, wrote this and hereby certified. The book and the deed herein were written in mid-March, in qoronikonud (Georgian chronology 1776)''²⁴

Apart from mentioning saints in the separation book there is also a list of laymen. For clarity we can name the following sources:

c. Upon the will and with the assistance of thy Lord and on the order of the king of kings, master Shahnavaaz, have sat we, Mdivanbeg (Pers. Supreme judge) Edisher and the secretaries to divide and separate Shanshiashvili Papia and his brother Dolmaza. 25

c. We, the King of Georgia, Irakli II. In this place of transaction, we approve the book herein on the sixth of March.

c. We, Kemikchmash Ashamime, the son of Ioane Ezronika, Zaal and the Erastishvilis, applied to the supreme royal court to consider the estate matter. However, for the sake of our parents and love and respect to each other, we withdrew consideration of the matter in court and the Supreme Judge, Bezhan Chavtsadze, Emivaghasham Garsevan Vachadze, Luarsab Jimit's bailiff Zaal Makashvili, and the son of Korchibash, Bezhan, have set and persuaded us to content ourselves with this present deal.

c. Bezhan Shali bargained that the area below Sakiziko should be divided in three – one share belongs to Ioane, one – to Zaal and c one more – to the Erastishvilis. Under the same Bezhan Shali's bargain, Sakiziko marginal land shall be regarded as those three persons' commonty and, before separation, they shall not prohibit tilling of that land to each other. c. besides, the undivided part of the edge of the commonty shall be of general use and shall be tilled by Ziareltkaula's son. Any demand for more or less shall not be concealed from each other and no one but our men shall take possession of this landed property. And if tilled by any other man, a quitrent charged for it shall be divided into three.

c.. The common wood, from here and up to the seigniorial arable fields, shall be divided equally between the aforesaid three brothers and what remains from the whole commonty shall be divided into a farmstead and if the lands are in common use with the bailiff, the land share accrued to us, before the division, shall be tilled jointly. And when divided, it shall be divided between the three brothers in March vb. We made the ruling herein...1784²⁶

In some cases the document of family divorce is started with mentioning of the Catholicos and laic noblemen, for example:

²⁴ Ibid, 269.

²⁵ Monuments of Georgian Law, Court Decisions (XVI-XVIII), Vol. IV, (the text was issued, and research and vocabulary was added by I. Dolidze), Publishing House of Academy of Science of Georgia, Tbilisi, 1972, 123-124.

²⁶ Archive of old documents, fund 1448, Case № 682.

Anton I's ruling on the Maghaladzes' Separation Case

1 July, 1755

c. We, the blesser of All Georgia, high royal halo, Catholikos-Patriarch, the son of the King of Georgia Jesse, master Anton, in the presence of Orbeliani Mdivanbeg (supreme judge) and all Mtskheta noble descendants, have separated secretary Maghaladze Nikoloz and his brothers David and Svimon from their cousin, Sakhlukhutsesi (court administrator) Giorgi.

and fairly granted Nikoloz and his brothers the bondsmen and landed property in accordance with the letter herein and as part of their share.

c. in Zerti: Terenashvili Ivane with his household, with the lands currently possessed

c. in Tsikhebdavi: Saba the son of Maisa, with the lands currently possessed.

c. ib. Tsikhebdavi: Khomizuri Giorgi's landed property and monk Kopadze's owned lands in Dighomi, the lands currently possessed.

c. Bogveli Giua from Trialeti Akhasheni with his household, with the lands in Akhasheni he currently possesses and Kopiti's owned landed property in Chocheti, that he currently possesses.

c. in Mtskheta: Khakhutashvili Iase with his brothers and household, with the house and land area, currently possessed.

c. in Tsinarekhi: Aghapishvili Goderdza, landless

c. in Dzegvi: Shashutashvili's estate, with the lands currently possessed.

c. An estate of Dzasarashvili from Trialeti, with the lands currently possessed.

c. ib. Leui Mamuka's estate, with the lands currently possessed.

c. ib. Half of the estate and dairy in kvemo ubani (lower district)

c. A due share in the place of Karvasla, vicinity of Qashoeti, Tbilisi city outskirts.

c. as well as a mansion place in the outskirts and the due share.

c. and half of Akhoshi Batsanidze's owned lands, and the share of the arable fields in Zerti, Niab-Chocheti and Tsikhedidi or former vineyards, accrued to court administrator Giorgi and secretary Nikolaoz and his brothers, shall be divided into two.

This be incumbent upon them as part of the share and based on the letter herein.

c. Besides, the following saumtsroso (junior's share) was passed down to Nikolaoz and his brothers: a mansion with tower, as referred to in the old separation book; and, apart from Sakhlukhutsi (court administrator) Amilbar's built houses, reception and bedroom, the area within thone (bakery) and marani (wine storage facility), built by court administrator Revazi and archimandrite Nikoloz, reaching the edge where the garden passes along, and down to the lower road – a part within the rose garden fell to Nikoloz and his brothers as the junior's share.

Whereas the area beyond the rose garden, namely, the settlements and the stable, built by court administrator Amilbar, reaching the opposite road, fell to the court administrator Giorgi.

And whatever did the court administrator Solomon and his sons purchase or earn separately, be it the bondsmen, estate or a position, shall they possess separately as before.

Under the law, the purchased things shall not be included in the share, so we did not include it either.

And let no one try to annul and terminate our deal.

And if there are any records or books, done before the present deal, they shall be held void under the present (separation) book.

And the positions have been fairly judged and allotted. Until present, the court administrator's position was not included in the letter and share and thus we have bargained the court administrator's position. And court administrator Giorgi has got Tsikhedidi Gelkhauri court administrator's post, and, equally, the positions of secretary, sermonizer and headman have fallen to Nikolaoz and his brothers.

And this have we fairly bargained.

Recorded on 1 July, by the hand of our Archdeacon Kirile, in qoronikoniumg (Georgian chronology 1755) after Christ, AD²⁷

Our attention was attracted by the case concerning the Mamulashvilis' divorce.

Ruling on the Mamulashvilis' separation case

10 January, 1731

c. When Mamulashvili brothers separated, the household and the livestock they possessed and the lands they had, I, your master, Secretary Sulkhan, have divided between you.

And one of the brothers, Ebal, had a bad luck in separation, since the cattle did not fall into him and that was a pity, since he was going to be left without a cattle share

And therefore, a one-day tilling land of the common manor they had, has been left with Ebal.

Other brothers have no claims; justice has been met.

Written on 10 January, in qoronikoniuit (Georgian chronology 1731)

Seal: Secretary Sulkhan²⁸

This document is not started with mentioning of either Holy Trinity or Saints or kings-nobility. However this document supposedly was drawn up as the above mentioned documents. So we think that this document has been saved merely in an incomplete form.

On the basis of the materials discussed by us the following was stated:

Later when written monuments of law were created on regulating an issue of property of subjects in connection with the family separation a lawmaker was guided by state interests; was taking decision

on the basis of law in accordance with the factual state of case, though at the same time was considering the rules of traditional law.

²⁷ Monuments of Georgian Law, Court Decisions (XVI-XVIII), Vol. IV, (the text was issued and research and vocabulary was added by *I. Dolidze*), Publishing House of Academy of Science of Georgia, Tbilisi, 1972, 440-442.

²⁸ Monuments of Georgian Law, Court Decisions (XVI-XVIII), Vol. IV, (the text was issued and research and vocabulary was added by *I. Dolidze*), Publishing House of Academy of Science of Georgia, Tbilisi, 1972, 324-325.

4. Conclusion

Summarizing the study of the archive materials we can conclude the following: regardless of the fact with the address to whom (God the Father, God the Son, Holy Spirit, God's Mother, Saints, kings and nobility) the written form of divorce document is started, it obviously talks of the development of legal thinking, the legal regularity of the divorce document, which is confirmed by the following legal issues precisely defined in the book of divorce:

1. How and in what form was the family divorcing (without the interference of outsiders or with the help of a mediator);
2. Who were the subjects of family divorce; the personality of each subject was pointed out precisely;
3. What portion of property fell to each family member's lot in case of family divorce?
4. Who attended and confirmed the fact of the family divorce;
5. By whom and in how many copies was written the divorce document.

Finally the precise date of the family divorce was written and the document was approved by signature and/or seal.

So in late feudal Georgia the divorce document was drawn up according to the legal standards observing the proper form and rules.

Tamar Zarandia*

Liability of Bailee in Case of Bailment at the Commercial Warehouse: Subtle Standard of Reasonable Care

1. First Approach

Under the bailment contract one party – bailee receives movable item from the second party – the bailor, undertakes to store good, to demonstrate “reasonable diligence” and return the item without fault. Liability of storing is the key element of bailment contract, as this contract under the normal condition of the item is based on the storage guarantee.¹ **Contract on commercial warehouse bailment represents the special form of bailment contract;** the Article 768 and following Articles of the CCG are used as complementary in case, if norms regulating the commercial bailment (Articles 780-798, CCG) do not cover the specific special regulation.

Under the commercial warehouse bailment contract bailee undertakes liability to store (warehouse) the goods in the warehouse. In return, bailor is liable to pay the fees agreed under the bailment contract. **According to the Article 764 (I) of CCG, if the bailment is carried out within the scope of business activities, despite the agreement between the parties a bailment fee is deemed to be tacitly agreed.** Agreement on bailment fee is deemed as concluded if tariff rates are displayed in the form of standard terms and conditions.²

If goods are warehoused by the cargo consignor or cargo carrier, they also represent the bailors at the commercial warehouse. However, the above is not valid for warehousing, which is conditioned directly by the transportation, as in this case warehouse bailment might be implemented within the scope of transportation.³ Goods in this case are warehoused on a temporary basis for organizational purposes or for the transfer to other carrier, as the transportation shall be conducted using other transportation facility (for example: truck, used for goods’ transportation turned out to be defective and it is necessary to replace it with other truck). Warehousing carried out in the process of shipment is in place, when it is closely connected with the transportation by means of transportation facility and such connection is so essential that transportation is the key element of the contract and the warehouse bailment is only the addition to such contract. Bailment could be an additional liability in relation to the contract on works, if the contractor has received items for repairs under the conditions considered in the contract on works and contractor is liable for proper and conscientious fulfillment of liabilities under the contract;⁴ contractor is not released from the liability for storing by the completion of contracted works and stays liable to store the items until their return⁵.

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¹ See The Supreme Court of Georgia, №as-150-452-04, Resolution, [06.07.2014] (in Georgian).

Compare with Decision of the Tbilisi City Court, №2/14671-11(53748), 30.01.2012 (in Georgian).

³ Compare with Frantzioc in: Münch Komm. HGB 2. Aufl. § 467, Rn, 2.

⁴ On the issues of proper and diligent performance of works considered under the contract on works; see *Dzlierashvili Z.*, Legal Nature of Contract on Works, 2011, 45-53 (in Georgian).

⁵ Compare *Méga Code Civile*, 2012, 3268-3269.

Commercial warehouse bailment is the special form of bailment contract and relevant norms of bailment contract are applied with the consideration of characteristics, which are considered under the discussed chapter of the Civil Code, for the warehouse bailment.⁶ **Warehouse bailment contract is a concessional contract.** Contract is deemed as concluded, when the expressions of overlapping wills required for the contract are in place. Owner of warehouse undertakes the liability to store goods in the warehouse; however the law does not set the transfer of goods as a pre-condition for liability generation.⁷ For the real contracts it would be necessary to have goods transferred to the bailee in the warehouse. Hence, in case of commercial bailment, entering of contract into force may precede the bailment of goods. It is evident that real liabilities of bailee arise in the moment of factual depositing of goods; however, bailee based on already concluded contract is liable for the receipt of goods delivered.⁸ Dispositional norms valid for the warehouse bailment are complimented or restricted by the standard contractual terms.⁹

Commercial warehouse considers only the commercial warehouse, which **under the scope of business activities carries out professional services related to the storage.** For the implementation of such activities, the commercial warehouse must have permission, which is issued one time for the warehousing activities for unlimited time to any person seeking the permission who satisfies set permission conditions. Mentioned permission is issued by the Legal Entity under the Public Law – Revenue Service, subordinated to the Ministry of Finance of Georgia.¹⁰ The **customs warehouses** are regulated differently and the norms regulating their functioning are provided in the form of special regulations.¹¹

Permit requirements for the commercial warehousing activities, as well as technical and safety requirements, which must be satisfied by permit holder or permit seeker, are set under the resolution of the Government of Georgia.¹² According to the above mentioned governmental act warehouse represents the territory consisting of territorially separated buildings and/ or land plots located on the territory of Georgia; goods are stored and other commercial transactions are carried out within the boundaries of such territory. The following requirements are valid for the commercial warehouses functioning in Georgia: holder of permit on warehousing activities is obligated to fulfill the warehouse protection conditions, exclude the possibility for unlawful disposal of goods kept in the warehouse, carry out recording and processing of data related to the goods which are subject of the warehousing

⁶ *Sukhitashvili D.*, Comments to the Civil Code, Book IV, Vol. II, Article 780, 67 (in Georgian).

⁷ Compare with: *Sukhitashvili D.*, Comments to the Civil Code, Book IV, Vol. II, Article 780, 68-69 (in Georgian).

⁸ Compare with: Frantziochin: MünchKomm. HGB 2. Aufl. § 467, Rn. 6.

⁹ See *Gasviani T.*, Transformation of Standard Contractual Terms into the Composing Part of Contract, Justice and Law, №1(16)08, 39-48 (in Georgian).

¹⁰ See Resolution of the Government of Georgia № 9, dated 05 January 2011 on the approval of instructions on the rules for issuing permissions for warehousing activities and activities of free trade points, Article 1, §2 (in Georgian).

¹¹ In relation to the customs' warehouses, see: Law of Georgia "On licenses and permits", Article 24; also Order of the Ministry of Finance of Georgia № 290, dated 26 July 2012 on the Approval of instruction on the movement and registration of goods on the customs territory (in Georgian).

¹² See Resolution of the Government of Georgia № 9, dated 05 January 2011 on the approval of instructions on the rules for issuing permissions for warehousing activities and activities of free trade points (in Georgian).

transactions or goods kept in the warehouse on a temporary basis with the application of automated systems, equip the warehouse entry and exit, as well as facilities functioning on the warehouse territory with the video recording devices; using such devices the images must be recorded in a uninterrupted manner; to fulfill other liabilities set by the instruction.¹³

I. Subject and Contents of Contract on Commercial Bailment

Owner of commercial warehouse shall place the goods in **the area designed and equipped for such goods** for the set period of time. Specially allocated area could be commercial warehouse, elevator, refrigerator or other warehouse space. Sometimes, clear definition of bailment subject is related to some complexities. Bailment is not in place, when truck with driver stands by the warehouse, due to warehouse closure.¹⁴ “Storing” together with organization of appropriate storage areas considered under the contract implies implementation of control by the bailee over the movable items. Simple warehousing of goods does not necessarily consider existence of storage and return liability accordingly, existence of bailment contract.¹⁵ Certain actions to be implemented depend on the subject of commercial bailment. Bailee is liable to demonstrate reasonable care over the goods, namely protect bailed goods from destroy, loss and damage. Mentioned above case **liability for safekeeping represents the key liability under the contract on bailment at the commercial warehouse**. Bailee is obligated to place the goods in accordance with rules, control goods’ condition on a regular basis and provide bailor with the information on changes in the condition of goods. Hence, bailment in the commercial warehouse is in place, if the bailee receives the goods for warehousing and storage, under his custody and care in accordance with the contract terms.

II. Bailor’s “Reasonable Diligence”

1. Obligation for Faithful Fulfillment of Liability for Storing

According to Article 781 (CCG), bailee at commercial warehouse shall fulfill duties on bailment of goods with the diligence of faithful businessman. Principle of good faith is the universal evaluative category of private law.¹⁶ It is reinforced by the provisions of the first book of Civil Code – “Participants of legal relationship shall exercise their rights and duties in a good faith” (Article 8 (III), CCG). The fact that above mentioned principle is reinforced in a systemic manner in the general

¹³ See Resolution of the Government of Georgia № 9, dated 05 January 2011 on the approval of instructions on the rules for issuing permissions for warehousing activities and activities of free trade points, Article 7 (in Georgian).

¹⁴ Compare with Case on the truck loaded with goods, Paris, 5 ch.B, 17 juin 1988, *MégaCodeCivile*, Dalloz, 2012, Art. 1915, 7, 3274.

¹⁵ *Méga Code Civile*, Dalloz, 2012, Art. 1915, 7, 3269.

¹⁶ Compare with *Zimmermann R., Whittaker S.*, Good Faith in European Contract Law, 2000, 8 and following pages; *Kereselidze D.*, The Most General Systemic Concepts of Private Law in Georgian Law, Tbilisi, 2009, 83 (in Georgian).

provisions implies its universal nature and covers the whole private law.¹⁷ Guidance by principle of good faith protects participants of legal relationship from the possible negative outcomes of relationship, supporting the stability of civil turnover as a whole.¹⁸

Liability of bailee is not limited with only the contents of specific liability. Debtor, in some cases is more liable than it is required by the specific liability.¹⁹ The above norm shall be also interpreted in conjunction with the Article 316 (II) of CCG.

2. Diligence of Faithful Businessman

Principle of good faith provides court with possibility to specify and modify law norms in some cases; moreover, is enable court to develop norm with the consideration of time requirements.²⁰ Good faith principle specifies the limits for the free action of individual, as based on the legal norms; bailee shall demonstrate the same diligence towards the bailed items as would the faithful businessman demonstrate towards the bailed goods. Assessment is made via the criteria of objective observer. Liability of bailee at commercial warehouse to fulfill duties on bailment of goods with the diligence of faithful businessman is valid at any stage of warehouse bailment of goods. For example, if bailee is not an owner of bailed goods, reasonable diligence of bailee implies that he/she must comprehensively examine the authorities of person in relation to the goods and only following such examination, fulfill instructions given by the bailor. Bailee must also check the liabilities of person requesting transfer of goods carefully, with the diligence of faithful bailee. If bailee is not able to verify the truth regarding the authority of person requesting transfer of goods, he/she is not allowed to transfer goods to such person. Article 199 and following Articles of CCG apply to the assignment of right to request return of goods from the commercial warehouse bailee. Accordingly, assignment of claim right is possible without consent from the commercial warehouse bailee, if not against the contract between the parties (199 (I), CCG). Prior to notification of debtor about assignment of claim, the debtor has right to fulfill the liabilities against the original possessor of claim right (200); hence, fulfillment of liabilities by the commercial warehouse bailee against the original creditor is valid, except for cases, when the bailee ensuring the performance of obligation was aware about the assignment of claim.

Interpretation of contract on commercial warehouse bailment shall be conducted based on the principle of good faith. It could be proceeding from the above that it is agreed between the commercial warehouse bailee and bailor that bailee has obligation to carefully check the legitimacy of not only third parties in relation to the goods, but also authenticity of signatures and existence of authorities for signatories.²¹ Bailee in the commercial warehouse is always liable to act with the diligence of faithful businessman in the process of decision making. In case of evident and prominent deficiency the

¹⁷ Compare with: *Zoidze B.*, Reception of European General Law in Georgia, 2005, 275, *Dzlierashvili Z.*, Fulfillment of liabilities, 2006, 14; *Kereselidze D.*, The Most General Systemic Concepts of Private Law in Georgian Law, Tbilisi 2009, 92 (in Georgian).

¹⁸ Compare with *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 86.

¹⁹ Compare with *Chanturia L.*, Comments to the Civil Code, Book III, Article 316, 32 and etc. (in Georgian).

²⁰ *Whittaker S., Zimmermann R.*, Good Faith in European Contract Law: Surveying the Legal Landscape, Cambridge University Press, 2004, 32.

²¹ Frantziöch in: Münch Komm. HGB 2. Aufl. § 467, Rn. 9.

liability of commercial warehouse bailee is raised, if it is confirmed that based on the principle of action with the diligence of faithful businessman the mentioned shortcoming must have been noticed.

Hence, bailee is responsible to perform duties related to the goods' storage with the diligence, ensure "reasonable care" regarding the goods, normal storage conditions, in other words, store the items in accordance with standards set for such items.²² Moreover, acting with the diligence of faithful businessman does not require from parties to adopt some special measures or actions, which are related with the additional high costs. The above for both parties implies obligation for mutual respect and tactfulness in order not to violate rights of counteragent due to the irresponsible and careless approach and not to create danger for goods.²³

3. Checking the Quantity of Goods by the Bailee

3.1. Generally

According to the Article 782 (CCG), bailee is not responsible to check the quantity, size, weight, variety, quality or other features of the goods at the moment of their delivery, unless otherwise considered under the internal regulations. If the goods transferred for storage to the bailee are discovered to be damaged or not in full set in the process of goods' transfer, and the above deficiencies are observable by the visual examination, then bailee must immediately notify the bailor. If bailee does not fulfill this obligation, then he/she must reimburse incurred loss.

Generally, at the moment of receipt of goods parties jointly determine the quantity, size, weight and other components of goods to be stored. If goods are packed, then the packaging is described.²⁴ Receipt of goods in the commercial warehouse implies receipt generating possession of goods for the purpose of warehousing. Therefore, it is important that person authorized for receipt carries out receipt of goods in the commercial warehouse.²⁵ Article 782 (I) is based on the view that quantity, weight, variety, quality and other similar indicators at the moment of receipt of goods do not belong to the risks of bailee; However it has to be noted that at the stage of goods' receipt and in the event of absence of dispute regarding the composition and condition of movable items, it is deemed that bailee received goods in a good condition.²⁶

The first sentence of Article 782 (II) establishes special duties of bailee in the commercial warehouse in the event of handing over the goods damages to which are visually observable. In such case the liability for notifying the bailor is valid. On the basis of the second sentence, Article 782 (II), bailee at the commercial warehouse is responsible for damages if he/she does not fulfill above mentioned liability.²⁷ The norm may be valid for the stage of pre-contractual negotiations²⁸ - during

²² Compare with Tbilisi Appeal Court, N2b/1075-09, resolution, 29.10.2009 (in Georgian).

²³ Compare with *Chanturia L.*, Comments to the Civil Code, Book III, Article 316, 32 (in Georgian).

²⁴ Compare with *Sukhitashvili L.*, Comments to the Civil Code, Book IV, Vol. II, Article 789, 89 (in Georgian).

²⁵ Compare with Frantzioc in: Münch Komm. HGB 2. Aufl. § 475, Rn. 7.

²⁶ Compare Méga Code Civile, Dalloz, 2012, Art. 1924, 3275.

²⁷ Compare Frantzioc in: Münch Komm. HGB 2. Aufl. § 470, Rn. 1.

which there is a possibility that contract has not been signed yet, however the goods are already transported - from the moment when the goods fall under the area of bailor's safekeeping.

On the other hand, the second sentence, Article 782 (II) represents legal basis for claiming reimbursement of losses by the bailor from the bailee, due to the violation of liability of notification in case of visually observable damages to the goods or their delivery in incomplete form.²⁹

3.2. Receipt of Goods

Voluntary bailment implies mutual consent – of the person implementing bailment and the person receiving the item for bailment.³⁰ The duties of bailee at the commercial warehouse are first time generated at the moment, when the goods are actually delivered to the bailee. Bailee can avoid such liabilities by rejecting receipt of goods. If the contract on bailment of goods at the commercial warehouse has been already concluded, then bailee has obligation to carry out full custody over the goods delivered for the purpose of storage, in other words to receive the goods.³¹

In general, at the moment of delivery of goods to the commercial warehouse, if the contract on warehousing goods has not been yet concluded, bailee is not liable to receive such goods. However, if he/she has business relationships with the bailor or he/she has offered in the past to the bailor the services related to the storing of goods in the commercial warehouse, bailee is liable to immediately reject already provided offers on the delivery of goods. Bailee's silence might be considered as acceptance according to the Article 335 of CCG.³² If bailee has already received goods, then he is responsible for protection of goods from possible damages with the diligence of faithful bailee. The above is based on the duty for custody, care for the goods in the ownership of other person; which itself is based on his position of businessman involved in commercial warehouse bailment.³³

3.3. Contents of Duty

According to Article 782 (I) of CCG, bailee is not responsible to check the quantity, size, weight, variety, quality or other features of the goods at the moment of their delivery if not otherwise envisaged under the law or agreed between the parties.³⁴ Moreover, under the reasonable care standard bailee is responsible to check the goods for external damages and deficiencies at an acceptable cost and should not be satisfied only with the fulfillment of duty for warehousing the goods. For bailment contracts it is

²⁸ Compare *Chanturia L.*, General Section of Civil Code, 2011, 75, *Vashakidze G.*, System of Complex Liability in the Civil Code, 2010, 81 and etc (in Georgian).

²⁹ Compare: *Bioling H., LutrinhouseH.*, Systemic Analysis of Bases for Claims in the Civil Code, 2009, 126.

³⁰ Compare *Leclerc*, *Droitdescontratsspéciaux*, L.G.D.J., 2007, 460.

³¹ Compare Frantziach in: Münch Komm. HGB 2. Aufl. § 470, Rn. 5.

³² Compare *Chanturia L.*, Comments to the Civil Code, Book III, Article 335, 146 and etc (in Georgian).

³³ Compare Frantziach in: Münch Komm. HGB 2. Aufl. § 470, Rn. 5.

³⁴ Compare Case on the processed cheese stored in the commercial warehouse; processed cheese was bailed in hermetically protected boxes and accordingly, identification of any deficiencies related to its quality was impossible for bailee. In such case bailor must prove that goods deposited were of good quality and complied with the set standards, Tbilisi Appeal Court, N2b/1075-09, Resolution, 29.10.2009 (in Georgian).

usually characteristic to examine the goods received for storage for the detection of damages to packaging, as such damages could be generated during the transportation and for avoiding the possible misunderstanding the law assigns to the bailor to re-examine the integrity of packaging and defects. In addition to the damages caused by transportation, there could be observable qualitative deficiencies or goods not considered under the contract. The notions of deficiency and damage in this case are very wide, however responsibility of bailee is limited by the fact that bailee is not liable to “discover” such deficiencies of goods, which are not observable via the external examination. Such liability for bailee at the commercial warehouse is in place only if relevant agreement is reached between the bailor and bailee or the above mentioned was considered under the standard contract terms.³⁵

3.4. Legal Outcome

If the bailee at the commercial warehouse detects any deficiencies considered under the Article 782 (II), for example, if goods are damaged or delivered in incomplete sets, then he is responsible to notify the bailor. If bailee does not perform notification duty, then he becomes responsible against bailor for the reimbursement of incurred damages.³⁶

4. Right to Examine Bailed Goods

4.1. In General

According to the Article 783 of CCG bailee is responsible to allow the bailor to examine bailed goods, take samples or carry out necessary measures during the working hours.

When the goods are in the commercial warehouse under the custody of bailee, the bailor has legitimate interest, to have access to the warehoused goods. Therefore, Article 783 of CCG considers liability of bailee to make it guaranteed for the bailor to get information via the examination of goods. Bailor has right to examine goods during the working hours; evaluate the form of warehousing, condition of goods. Bailor has right to examine goods together with the person interested in above goods.³⁷ Hence, Article 783 represents legal basis of claim for the implementation of actions necessary for examination, sampling and other actions related to items transferred by bailor to the bailee for storage.³⁸

³⁵ Compare Frantziach in: Münch Komm. HGB 2. Aufl. § 470, Rn. 6.

³⁶ It has to be noted that German Law defines liability for the examination of damages observable externally in case if transportation and storing, depositing of goods is performed in absence of bailor. In this case, according to HGB§470, goods which were sent (are sent) to the bailee at the commercial warehouse will be discovered to be damaged or deficient in the moment of delivery, and the above is observable externally, then bailee at the commercial warehouse must ensure (protect) the requirements of bailor on the reimbursement of losses and immediately notify bailee on the above. These liabilities cannot be restricted by the standard contract terms. See Frantziach in: Münch Komm. HGB 2. Aufl. § 470, Rn. 8 (in Georgian).

³⁷ Compare Frantziach in: Münch Komm. HGB 2. Aufl. § 471, Rn. 1.

³⁸ Compare *Bioling H., Lutrinhouse P.*, Systemic Analysis of Bases for Claims in the Civil Code, 2009, 126 (in Georgian).

It might be necessary to take some samples or implement necessary actions for examination of goods' condition or for intended sales. Therefore, above represents the authority for control over the storage of goods transferred for storage by bailor.³⁹ Moreover, law does not require any type of involvement or co-participation; bailee at the commercial warehouse must only allow the implementation of control exercised by the bailor via ensuring access during the working hours.

Request of bailor on ensuring accessibility of bailed goods is based on the contract on commercial warehouse bailment; however, such right of bailor could be generated even prior to the conclusion of contract, if the goods are delivered to the bailor at the commercial warehouse for the further warehousing. Bailor also has such right, if we are dealing with actual warehousing relationships, for example, when the contract is void or voidable for some reason. However, in such cases, request of bailor on the examination of goods could be opposed by the request of bailee on the return of goods.⁴⁰ At the stage of return of goods the examination and inspection of goods is liability of both parties. If party implements this action independently and discovers shortage of or damage to the goods, then the party is liable to immediately inform the other party.⁴¹ When the bailor and owner of goods stored in the commercial warehouse are not same persons, the bailor and not the owner of goods has right to request the access to warehoused goods.⁴² The bailor is liable not to abuse such right and not to hinder normal functioning of warehouse with the frequent examinations and systematic and groundless taking of samples.⁴³ The norm limits such right of bailee with the working hours and does not provide bailor with ability to control the goods during the night (non-working) hours, when the warehouse is under the special protection regime. Commercial warehouse bailor is entitled to transfer the right for exercising the control over the goods (examination of goods, taking samples and etc) to other person. During the implementation of such right by the above mentioned person responsibility for the damages are assigned to the bailor.⁴⁴

4.2. Right to Examine Goods

Bailor at the commercial warehouse is equipped with the special authority for the purpose of implementing control over the storage of goods.⁴⁵ Bailor can request the bailee at the commercial warehouse to allow bailor, accompanying persons or persons granted with relevant authorization to inspect the goods. Bailor must be able to examine goods. Within the above authority of bailor, bailee is responsible to ensure: entry of bailor or persons granted with the relevant authority to the territory, indication of location of goods, implementation of other similar actions and measures, necessary for the implementation of ordinary examination by bailor. The authority to examine is not excluded by the fact that under the contract between parties, the bailee could himself ensure the maintenance of goods. Therefore, on the one hand, from the perspective of bailee at the commercial warehouse there could be

³⁹ Compare see *Sukhitashvili D.*, Comments to the Civil Code, Book IV, Vol. II, Article 783, 72 (in Georgian).

⁴⁰ Compare Frantziach in: Münch Komm. HGB 2. Aufl. § 471, Rn. 3.

⁴¹ Compare *Sukhitashvili D.*, Comments to the Civil Code, Book IV, Vol II, Article 783, 72 (in Georgian).

⁴² Compare Frantziach in: Münch Komm. HGB 2. Aufl. § 471, Rn. 4.

⁴³ Compare *Sukhitashvili D.*, Comments to the Civil Code, Book IV, Vol. II, Article 783, 72 (in Georgian).

⁴⁴ Compare Frantziach in: Münch Komm. HGB 2. Aufl. § 471, Rn. 5.

⁴⁵ Compare *Sukhitashvili D.*, Comments to the Civil Code, Book IV, Vol. II, Article 783, 72 (in Georgian).

no need for the intervention of bailor and examination of goods for the purpose of identifying the measures required for retaining the goods; however, bailee is not authorized to reject bailor to examine goods indicating on the above circumstances. Hence, under the right to examine goods, the bailor shall be equipped with the possibility to check condition of goods, its warehousing and make relevant conclusions based on the above, as well as bailor shall be provided with the conditions enabling bailor to show goods to third parties (for example, potential buyers) if this is required. Right for examination entitles bailor at the commercial warehouse to examine goods together with accompanying persons.⁴⁶

4.3. Restriction of Right for Examination of Goods

Under the agreement between parties, it is possible to restrict the right of examination for the bailor at the commercial warehouse; for example, the parties may determine time cense – specific hours during the day when the examination of goods is permitted. Parties can agree on the implementation of right for examination of goods only in specific days or during the specific hours. Bailor is obliged to implement mentioned above authority faithfully and at the level according to the established practices. Namely, bailor at the commercial warehouse cannot abuse his/her authorities, causing disruption of functioning of commercial warehouse. Full restriction of bailor's right for examination of goods or inadequate restriction of such rights due to the specific circumstances, even based on the contract contravenes the essence of contract on bailment and therefore, could be considered as void. It has to be also noted that the bailee at the commercial warehouse also has liability to periodically check bailed goods with the purpose to prevent undesirable changes in the condition of goods. In general, bailee is not responsible for prevention of such danger or/and carrying out works for avoiding such danger for the bailed goods.

4.4. Right to Take Samples

Example, in other words sample is the small quantity of goods, which is not included in the weight of goods. Taking samples causes minor changes in weight and therefore is non-tangible. It is possible to take samples for the purposes of checking the suitability, quality of goods or for the purposes of degustation. The bailor at the commercial warehouse can request the bailee to take samples of goods. Right to take samples, in general, is practical only in case if the goods consist of one type of replicable mass. Part of goods' mass could be taken from the commercial warehouse by the bailor for the personal needs as well as for presentation of samples to third parties. Bailee is not authorized to resist the taking of samples by bailor even if the goods are pledged. In addition, it is important that request factually concerns only the taking of samples. Bailor does not have right to extract those part / parts of goods, under the motive of taking samples, which in economic sense bear higher importance compared with sample.⁴⁷ As the right to examine, bailor can use the right to take samples only in faithful manner, at a certain level and only during the working hours.

⁴⁶ Compare Frantziöch in: Münch Komm. HGB 2. Aufl. § 471, Rn.6.

⁴⁷ Compare Frantziöch in: Münch Komm. HGB 2. Aufl. § 471, Rn. 10.

Under the contract on commercial warehouse bailment or separately valid agreement between the bailee and bailor, it could be defined that bailee at the commercial warehouse can himself take samples and transfer them to bailor or third party indicated by bailor. Bailee must perform this type of assignment with the diligence of faithful businessman. In case of non-performance, non timely performance or improper performance of assigned duty the bailee is responsible against the bailor in accordance with the concluded contract.⁴⁸

4.5. Necessary Actions

Article 783 of CCG, in addition to the liability to examine goods and take samples, assigns to the bailee the liability to implement necessary actions. In general, retaining goods in the commercial warehouse during the period of storing the goods in the warehouse is the business of bailor. For the above reason, Article 783 of CCG grants bailor with the right to request permission from the bailee at the commercial warehouse for the implementation of actions required for the preservation of goods; for the above purpose, bailee has right to enter the commercial warehouse.

Actions, which must be implemented by the bailee at the commercial house in accordance with the contract, do not belong to the actions required for the preservation of goods; for example, warehousing of goods. The above mentioned concerns only actions, which fall under the business of bailor at the commercial warehouse. Based on the above, bailor cannot himself implement certain actions belonging to actions of bailee at the commercial warehouse; for example cannot move goods from one place to other. Moreover, liabilities of bailee at the commercial warehouse are limited only to the issuing permission for the necessary actions. Bailee at the commercial warehouse is not liable to ensure supply of tools to the bailor at the commercial warehouse or involve support personnel in the implementation of necessary measures. Moreover, measures necessary for the preservation of goods are those measures, which serve the preservation of substance. Any measures related to the modification, change, processing, grading, special marking or new packaging cannot be requested based on the Article 783 of CCG.⁴⁹

Similar to the right of bailor to examine goods and take samples, request for the implementation of measures necessary for the preservation of goods could be implemented only based on the principle of good faith. Bailee at the commercial warehouse is authorized to allow implementation of such actions only during the working hours valid for the place of goods' warehousing. There could be exceptions from this rule for avoiding the directly anticipated dangers. Implementation of such actions could be also requested during the hours beyond the working hours.⁵⁰

4.6. Legal Outcome

If bailee violates liabilities generated from the Article 783 of CCG, he/she based on the contract on commercial warehouse bailment is responsible for the damages caused. The bailee shall reimburse

⁴⁸ Compare Frantziöch in: Münch Komm. HGB 2. Aufl. § 471, Rn. 12.

⁴⁹ Compare Frantziöch in: Münch Komm. HGB 2. Aufl. § 471, Rn. 14.

⁵⁰ Compare Frantziöch in: Münch Komm. HGB 2. Aufl. § 471, Rn. 15.

damage, for example, if as a result of hindering the sample taking the sale of goods planned by the bailor failed or by not allowing the implementation of measures necessary for the preservation of goods the goods were destroyed. If we are dealing with the intended violation of above liabilities by the bailee, he is fully responsible for the damage incurred due to the violation of liability.

5. Liability of Bailee to Notify Bailor about the Transfer of Goods to other Warehouse or Change of Goods' Features or Existence of Such Danger

5.1. In general

According to the Article 784 of CCG, bailee is responsible to immediately notify the bailor, if the bailee transfers goods bailed for storage to other warehouse, or if bailee discovers that characteristics of goods have changed or there is a danger for such change. Bailee shall notify the holder of warehouse certificate known to him. In case of violation of the above liability, bailee is responsible to reimburse the incurred losses.

Bailee at the commercial warehouse has an obligation to immediately notify bailor if the bailee transfers goods bailed for storage to other warehouse, or if bailee discovers that characteristics of goods have changed or there is a danger for such change. Liability for notification compliments the general liability of bailee for custody, under which the bailee is also liable to systematically check the condition of goods and appropriateness of conditions in the warehouse. Notification is made to the last holder of warehouse certificate known to the bailee (sentence 2, Article 784).

5.2. Immediate Notification

Reasonable care over the bailed goods implemented by the bailee at the commercial warehouse implies that he is liable to protect bailed goods during the period of warehousing from changes, which could cause devaluation of goods. Moreover, it should be possible to detect changes in the goods under the condition of implementation of supervision with the relevant attention. Liability for notification covers the case of warehousing of goods at other place. The liability of notification is not generated only when the changes in the characteristics of goods are already in place, as well as when such danger is in place. Liability of notification is in place, for example, in the event, when bailor delivered to the commercial warehouse for storage processed cheese, which after some time suffered some changes, started spoiling, in particular, the total number of microbes increased, however the taste, color and smell of cheese were satisfying all requirements. The bailor shall implement all possible measures to ensure that goods are not fully devaluated. Moreover, the issue on whether the changes could be foreseen by the bailor under the control implemented with the appropriate care is determined based on the circumstances of specific cases.⁵¹ According to the Article 784, **the form of**

⁵¹ For the same case on processed cheese, this liability may not exist, if processed cheese is placed in the hermetically closed boxes and it is impossible to check its fitness via the visual examination, compare: case on the processed cheese bailed at the warehouse, the Supreme Court of Georgia, N-497-466-2010, 30.09.2010 (in Georgian).

notification is not determined; however it is expedient for the bailee to use the form, which could be used as evidence.⁵²

5.3. Receiving Instructions

In the event of expected damage to the goods, the bailee at the commercial warehouse is additionally liable to get or obtain instructions from the bailor, as bailor can better than bailee define the outcomes of changes to the goods stored. By obtaining instructions from bailor, the appropriate response to the created situation with the consideration of existing circumstances and in accordance with the interests of bailor is ensured. Mentioned above instructions are important with the consideration of the fact that bailee usually does not hold sufficient information on goods and generally is not responsible to carry out any actions to preserve the goods, for example to dry, remove pests from goods or similar actions. If parties under the contract determine certain liabilities, under which bailee is liable to carry out some actions, in this case issues belonging to the liabilities of bailee are defined based on this very contractual agreement.⁵³ If bailee at the commercial warehouse does not himself fulfill relevant liabilities, he loses right for his own claims against the bailor for the incurred losses.

5.4. Absence of Liability for Notification

It has to be considered that in case of moving goods within the same warehouse the liability of bailee to notify bailor is not generated. Such moving, which is not related to the transfer of goods to other commercial warehouse, is within the boundaries of dispositional authority of bailee. The above does not concern moving of goods to other commercial warehouse, as Article 784 contains the clear regulations. If bailee is not able to receive relevant instructions from bailor or the last holder of warehouse certificate known to bailee within the reasonable time, the bailee can implement measures considered as relevant in bailee's opinion.⁵⁴

5.5. Legal Outcome

If bailee violates the liability generated based on the Article 784, he/she based on the contract on commercial warehouse bailment is responsible for the generated damages against the bailor.

6. Level of Bailee's Liability

6.1. In General

Bailee is responsible for the losses incurred due to the loss of or damage to the goods transferred for storage, with the exception of cases, when damages could not be avoided even by the faithful bailee. The bailee at the commercial warehouse is responsible for material care for the bailed goods;

⁵² Compare Frantziöch in: Münch Komm. HGB 2. Aufl. § 471, Rn. 18.

⁵³ Compare Frantziöch in: Münch Komm. HGB 2. Aufl. § 471, Rn. 19.

⁵⁴ Compare Frantziöch in: Münch Komm. HGB 2. Aufl. § 471, Rn. 23.

the above should be implemented with diligence of faithful businessman. The bailee at the commercial warehouse is responsible for losses and/ or damages to the goods warehoused and stored by bailee, with the exception of cases when the loss or damage was caused due to such circumstances, avoiding of which was not possible under the condition of acting with the diligence of faithful businessman. Hence, **the principle of fault liability** is valid for bailee at the commercial warehouse. Bailee at the commercial warehouse shall protect goods from danger generated from internal as well as external factors.⁵⁵ Hence, Article 785 represents legal basis for the claim of bailor on the reimbursement of loss incurred due to the damage or loss of goods against the bailee.⁵⁶

6.2. Loss

The loss is in place if goods are destroyed, cannot be located or could not be provided by the bailee to the authorized consignee within the projected time period. The subjective incapability of bailee at the commercial warehouse to fulfill the initial request on the return of item to the authorized person due to the loss of goods' substance is essential. It is not essential whether we are faced with the intended or careless behavior of bailee at the commercial warehouse. We shall differentiate full and partial losses. Loss in this case implies the physical destroy of goods as well as facts, when bailee at the commercial warehouse lost an item, for example as a result of robbery or appropriation and it is not possible to return goods. In case of robbery bailee at the commercial warehouse shall prove that he adopted sufficient safety measures, however the robber used the facilities, which could not be opposed under the action with diligence of faithful businessman and could not be foreseen.⁵⁷ Moreover, transfer of goods to the non-authorized person or person, who although should have received the goods, but if under the presence of specific pre-conditions (for example in the event of payment of purchase price), such pre-conditions have not been fulfilled at the moment of goods' transfer, is equalized with the loss of goods. If it is impossible to locate the goods, we can talk about the loss of goods. Such damage to the goods or cases, where the goods lose its economic value without impact over its substance is not considered as loss of goods.⁵⁸

6.3. Damage

Under the definition of Article 785 damages to goods are any changes to the substance of goods, which may cause reduction of goods' objective value. Based on the above, the simple reduction of value if it is not related to the impact over the item substance does not represent damage to goods. In general, it is not essential what is the purpose of utilization of goods by specific consignee, as objective value must be reimbursed as damage. The impact over the item substance is in place, if the item, as such, is preserved, but certain damaging characteristics are added (for example – smell, or

⁵⁵ Frantzioc in: Münch Komm. HGB 2. Aufl. § 475, Rn. 3.

⁵⁶ Compare *Bioling H., Lutrinhouse P.*, Systemic Analysis of Bases for Claims in the Civil Code, 2009, 127 (In Georgian).

⁵⁷ Compare *Malaurie Ph, Aynès L.*, Cours de droit civil, lex contrats spéciaux, 1991, 478, 889.

⁵⁸ Compare Frantzioc in: Münch Komm. HGB 2. Aufl. § 475, Rn. 4.

melting of frozen goods). It is not also essential whether the substance changes are irreversible, whether there is a possibility for the improvement of conditions.⁵⁹

6.4. Boundaries of Liability

Bailee at the commercial warehouse is responsible for goods from its receipt until its return. Receipt of goods means receipt generating the possession of goods with the purpose of warehousing of goods. If possession over the goods has not taken place for some reasons, then the receipt of goods is not in place.⁶⁰ Moreover, it is important that receipt of goods from the side of bailor shall be conducted by the person authorized for receipt.⁶¹ Transfer of goods implies that bailee at the commercial warehouse gets the direct possession of goods, and the bailor is provided with the possibility of indirect possession.⁶² Direct possessor in relation to the indirect possessor has independent, however subordinated status.⁶³ Element of possession enables us to differentiate bailment from other types of contracts, subject of which is the access to some objects without their possession.⁶⁴

6.5. Guilt and Burden of Proving

Bailee at the commercial warehouse is responsible for the loss of or damage to goods only in case of presence of guilt.⁶⁵ Moreover, guiltiness is from the beginning assumed, as Article 785 with its formulation is the opposite version of burden of proving – “**with the exception of case, when**”. Hence, in relation to the paid bailee the presumption for existence of guilt is valid, which makes bailee responsible to prove that damage was not caused by his guilty action to release from the liability.⁶⁶ Bailor, on the other hand, has to prove that loss or damage to the goods was generated during the period when goods were transferred for storage. Evidences that damaged or lost goods were actually warehoused belong to the above. If the fact on the return of goods becomes disputable between the bailor and bailee, bailee must prove the fact of receiving the goods by the bailor,⁶⁷ as bailee is respon-

⁵⁹ Compare Frantzioc in: Münch Komm. HGB 2. Aufl. § 475, Rn. 5.

⁶⁰ Compare case on Truck loaded with goods, which stopped near the warehouse due to closure of commercial warehouse, *MégaCodeCivile*, Dalloz, 2012, 3274 (in Georgian).

⁶¹ Compare Frantzioc in: Münch Komm. HGB 2. Aufl. § 475, Rn. 7.

⁶² As the ownership of goods is generated based on the contract on bailment, we are dealing with direct as well as indirect ownership; compare: *Zoidze B.*, Property Law, 2003, 61 (in Georgian).

⁶³ Compare *Kochashvili K.*, Possession and Ownership – Fact and Right in the Civil Law, 2015, 126 and etc (in Georgian).

⁶⁴ Compare in the French court practice, difference between the contract on bailment and contract on use of deposit safe, which provides client with the right to use deposit safe in the bank. The bank implements supervision over the bank safe and safe is accessible only with the help of bank employee, which complicates qualification of this relationship as bailment or rent (see Veli, comments to Article 763) *Leclerc*, *Droitdescontratsspéciaux*, L.G.D.J., 2007, 454 (in Georgian).

⁶⁵ Compare *Chitashvili N.*, Importance of Guilt for the Definition of Contractual Liability, Law Magazine, 2009, №1, 194-198 (in Georgian).

⁶⁶ Compare *Leclerc*, *Droitdescontratsspéciaux*, L.G.D.J., 2007, 465 (in Georgian).

⁶⁷ Frantzioc in: Münch Komm. HGB 2. Aufl. § 475, Rn. 15.

sible to protect conditions for warehouse functioning, exclude the possibility for unlawful disposal of goods stored in the warehouse and to carry out recording of warehoused goods included in the commercial warehouse transactions or temporarily stored in the warehouse using the automated system for data processing.⁶⁸ Otherwise, bailee must prove that he demonstrated diligence of faithful businessman and it was impossible to avoid loss or damage of goods.⁶⁹

6.6. Release From Liability

The responsibility of bailee for the loss and damage to the goods is not generated, when loss or damage is caused by such circumstances, which could not be prevented even under the diligence of faithful businessman. In each specific case decision on the issue must be made with the consideration of specific circumstances.

6.6.1. Meteorological Conditions

In general, change in meteorological conditions can be considered as force majeure circumstances; however, for example, **frost** is not considered as force majeure condition and accordingly, cannot be basis for release of bailee at the commercial warehouse from the liability.⁷⁰ In majority cases **heavy rain** also is not considered as force majeure circumstance, more so, it could not be used as the basis for the release of bailee at the commercial warehouse from the liability, when we are dealing with special car parking unit, which at least had to roof car parking area, the above representing the ordinary condition for storage.⁷¹ In case of **strong wind** or **storm**, the court shall investigate all circumstances; the actions of bailee at the commercial warehouse are assessed with the consideration of these specific circumstances. For example, bailee will not be released from responsibility with the indication to the force majeure circumstances in case, when cars were located along the semi-destroyed building. The damaged wall could not endure storm and was destroyed, wall ruins fell on the cars and damaged them. For the mentioned case, the appeal court clarified that in town Poti, where the accident took place, approximately 8 days in October are characterized with strong winds, and hence this was not unexpected and abnormal event. Moreover, the wall was not destroyed only due to the fact that wind was devastating, but due to the emergency condition of the wall.⁷² It was possible to avoid damage to cars in case of demonstration of reasonable diligence.

⁶⁸ See Resolution of the Government of Georgia № 9, dated 05 January 2011 on the approval of instructions on the rules for issuing permissions for warehousing activities and activities of free trade points, Article 7 (in Georgian).

⁶⁹ Compare Frantziach in: Münch Komm. HGB 2. Aufl. § 475, Rn. 15.

⁷⁰ Compare Paris, 25 ch A, 29 mai 1990, Jurus-Data n 022232, MégaCodeCivile, Dalloz, 2012, 3280.

⁷¹ Compare Case on the car damaged due to the strong rain, Tbilisi City Court, decision N2-14965-12, 26.02.2013 (in Georgian).

⁷² Case on the car damaged due to the ruins of wall destroyed by the storm, the Supreme Court of Georgia, №as-418-391-2010, 5.07.2010.

6.6.2. Flood

Consideration of flood as force majeure circumstance is disputable; however, flooding of commercial warehouse could be the risk, consideration and prevention of which is possible.⁷³ Force majeure circumstances are those circumstances, avoiding of which is impossible objectively due to their insurmountable nature; this is somewhat insurmountable obstacle, when the party is not able to avoid some natural event, storm, cyclone, earthquake, tsunami, flood, destruction caused by thunder storm and etc.⁷⁴

6.6.3. Protest Action

In the French law, with the consideration of circumstances, the protest action of farmers was considered as force majeure situation, which was transformed into the unrest and was followed by the fire in some areas of one of the warehouse, where the fruits were stored.⁷⁵ However, fire is not always considered as force majeure circumstance. Actions of bailee shall be assessed; in particular, it is important to have the bailee who considered possibility for quick and strong fire; moreover, bailee's actions shall be assessed in the light of his, as professional's actions for the prevention of fire. Bailee shall ensure proper functioning of anti-fire system and take measures required for avoiding the fire.⁷⁶

6.6.4. Armed Attack

The armed robbery with taking of hostages and robbery with violence are also considered as force majeure circumstances; however, in such cases there must not be carelessness, for example demonstrated by the employee of the commercial warehouse.⁷⁷

6.7. Reasonable Diligence

Level of diligence to be applied by the bailee at the commercial warehouse, as well as types of safety measures to be used for the specific cases based on the characteristics of goods are assessed with the consideration of specific cases. Butter, furniture, antiques, cereals or high value computer equipment must be stored and protected differently.

Bailee at the commercial warehouse, based on the contract on bailment, is first of all responsible to store goods transferred for bailment in an appropriate manner, in order not to have loss of or damage to goods. Therefore, bailee, in addition to the storage conditions, shall ensure goods' protection measures, in order to prevent entry of third parties in the warehouse. Moreover, bailee shall warehouse goods in the

⁷³ Compare Civ, 1, 13 déc.1988: pourvoi n 87-13.338, Méga Code Civile, Dalloz, 2012, 3280.

⁷⁴ Compare Tbilisi City Court decision №2-14965-12, 26.02.2013 (in Georgian).

⁷⁵ Compare Case on protest action of farmers, Cass. civ.1, 17 November 1999, Bull.civ. I, №307, *Leclerc*, Droit des contrats spéciaux, L.G.D.J., 2007, 465-466.

⁷⁶ Méga Code Civile, Dalloz, 2012, 3281.

⁷⁷ Méga Code Civile, Dalloz, 2012, 3281.

way that spoiling or damaging of goods should not be conditioned by the way of warehousing.⁷⁸ Doors, windows, walls, ceiling⁷⁹ and floors shall be sufficiently protected against the penetration.⁸⁰ However, it could be requested from bailee to implement only such protection measures which are affordable in economic sense. Requesting non-standard, highly priced safety measures from bailee is not admissible, if the above has not been preliminarily and specially agreed upon by the parties.

6.8. Checking the Authority of Recipient of Goods

Bailee at the commercial warehouse is liable against bailor to check authority of person, who, by order of bailor or by the assignment of claim carried out by bailee, requests transfer of goods with the diligence of faithful businessman. Bailee shall conduct above checking as transfer of goods to non-authorized person represents loss of goods under the Article 785. This liability covers request of written document from such person by the bailee and diligent examination of documents presented.⁸¹ However, this protection mean is not also absolute and liability of bailee will be only generated in the event of violation of liability for checking and not for all cases, when the non-authorized person takes goods from the commercial warehouse.

6.9. Responsibility

For the responsibility of bailee the general norms on responsibility are applied. Moreover, the Article 785 is extended only over the reimbursement of losses incurred as a result of loss or/ and damage to the goods transferred for bailment. Article 411 covers reimbursement of actually incurred proprietary losses and unearned revenues.⁸² In case of co-guiltiness the deductions shall be made with the consideration of guiltiness of parties.⁸³ Moreover, it is admissible to restrict liability via the standard contractual conditions, or to have certain contractual agreements on the release or limitation of liability.⁸⁴

⁷⁸ Compare Frantziuch in: Münch Komm. HGB 2. Aufl. § 475, Rn. 11.

⁷⁹ Compare Case on the robbery of bailed jewelry; the court decided that “ordinary caution was dictate the company to check the possibility to make whole in the ceiling” - Com., 12 nov. 1986, B. IV, №205; J.C.P., 87.IV.27, *Malaurie Ph., Aynès L.*, Cours de droit civil, lex contrats spéciaux, 1991, 476, 888.

⁸⁰ Compare *Malaurie Ph., Aynès L.*, Cours de droit civil, lex contrats spéciaux, 1991, 889.

⁸¹ Resolution of the Government of Georgia № 9, dated 05 January 2011 on the approval of instructions on the rules for issuing permissions for warehousing activities and activities of free trade points, Article 7, in the German Law - Frantziuch in: Münch Komm. HGB 2. Aufl. § 475, Rn. 14.

⁸² Compare the Supreme Court of Georgia, Resolution № as-250-571-04, 6.07.2004 (in Georgian).

⁸³ Compare Frantziuch in: Münch Komm. HGB 2. Aufl. § 475, Rn. 17.

⁸⁴ Compare Frantziuch in: Münch Komm. HGB 2. Aufl. § 475, Rn. 21.

III. Characteristics of Storing the Generic Items and Liability of Bailee in Case of Mixing of Goods

1. In general

According to the general rule, bailee at the commercial warehouse shall store goods transferred to him separately; by this way we will be dealing with **separated warehousing**.⁸⁵ Moreover, according to the Article 786 of CCG, in case of storing generic items, the bailee has right to mix them with the items of same type and characteristics, only if there is such permission issued by the bailor (I). The bailors have co-ownership rights over the goods generated after such mixing. Share of each bailor shall be determined according to the quantity of deposited goods (II). Bailee is responsible to return deposited goods to each bailor according to their due shares without consent from the rest of bailors (III).

Accordingly in the cases considered under the Article 786 (CCG) the special form of bailment is in place, which requires the existence of specific pre-conditions. First of all, the case should relate to the bailment of generic items and there must be permission from the bailors on the mixed warehousing. Hence Article 786 (I) (CCG) regulates the authority of bailee at the commercial warehouse to mix generic items of same type and characteristics, if there is permission issued by co-participating bailors. Permission from co-participating bailors is necessary in this case. The above acquires special significance due to the fact that as a result of mixing shared ownership is generated instead of sole ownership over the goods generated after mixing, from the moment of mixing of goods.⁸⁶

2. Ability to Identify Based on the Generic Characteristic

In the event of mixed warehousing it is necessary to have movable, substitutable items which could be identified based on their generic characteristics; identification of such goods in the turnover should be possible according to their quantity, volume or weight.⁸⁷ Notion of substitutable item shall be understood objectively. The item can be substituted, which is not distinguished with the clear individual features and hence, it is easily possible to substitute the item. We could deal with solid substances, such as gravel, sand, as well as cereals and animal feed, also liquid substances, such as fuel, as well as air substances – for example natural gas. Assigning item to the above category in some cases should be done with the consideration of specific circumstances.⁸⁸

⁸⁵ Frantzioc in: Münch Komm. HGB 2. Aufl. § 469, Rn. 4.

⁸⁶ It has to be noted that according to the paragraph two, §469 of HGB (German Trade Code), joint ownership over the mixed items is generated from the moment of bailment; as for the Georgian Law – from the moment of mixing of items; compare 786 II. It has to be taken into consideration that in the German Law co-ownership over the mixed items had been also generated from the moment of mixing in the past, but later the regulation changed and generation of co-ownership was linked with the moment of warehousing, as it is much simpler to determine the exact time of warehousing (bailment of goods in the warehouse) compared with the actual process of mixing (in Georgian).

⁸⁷ Compare *Zoidze B.*, PropertyLaw, 2003, 35-36 (in Georgian).

⁸⁸ For example, in case of wine, if there is collection wine in place, it could be considered as the item determined under the individual sign, for the qualification as item determined under the generic characteristic it is decisive to have items, which are determined by the generic characteristics in the civil turnover (in Georgian).

3. Joint Warehousing

The key essence of joint warehousing is that bailee at the commercial warehouse stores the generic items owned by the bailor and transferred for storage together with the same type generic items owned by other bailor and moreover mixes the above items. In this case rules envisaged under the Article 194 (CCG) is applicable; according to the mentioned Article, prior to the merging of movable items owners become the co-owners of joint goods according to the value of merged goods.⁸⁹

Hence, bailee at the commercial warehouse is not responsible to return goods in kind when generic, substitutable items are bailed. In this case, bailee must return not the item which was received for storage, but the analogical goods of the same type and quantity. Moreover, bailee is not released from liability in case of force majeure as the genus does not destroy (*generanonpereunt*).⁹⁰ Joint warehousing is in place only if the generic items owned by different bailors are stored together in the commercial warehouse. Storing one type of goods in the same warehouse, when such goods do not generate one composition and are stored separately does not represent joint warehousing. Joint warehousing requires permission from bailor. If we are dealing with items characterized with individual features which cannot be substituted, the joint warehousing is not generated under the Article 786 (CCG). Moreover, theoretically joint warehousing is possible for goods that cannot be substituted; however, the above is not possible in practical sense. Bailee at the commercial warehouse is responsible for the reimbursement of goods in case of mixing of goods.⁹¹ If in case of generic, substitutable items, bailee at the warehouse performs mixing of substitutable items owned by one bailor with the items of same type and characteristics owned by other bailor without permission,⁹² then bailee is responsible for the generated losses.⁹³ Bailee is also responsible against the bailor for any loss incurred due to unpermitted mixing of items of same type but different qualities.

4. Permission for Joint Storage

Bailor at the commercial warehouse must issue the permission for the joint storage of goods in the commercial warehouse. In the German law, where it is necessary to issue clear consent⁹⁴, it is

⁸⁹ According to the article 194 of CCG if moving items are connected with each other in the way that they become essential composing parts of a new united item or moving items merge with each other, then previous owners become co-owners of a new item. Definition of share in accordance with the value of items at the moment of their merger. It has to be noted that § 948 of BGB reviews the cases of mixing and merger of movable items and determines the similar legal outcomes. As CCG does not offer any specific regulation for the case of mixing of the moving items, the above norm shall be interpreted widely and similar to the German regulation, cover the merger as well as mixing of moving items (in Georgian).

⁹⁰ *Malaurie Ph., Aynès L., Cours de droit civil, lex contrats spéciaux, 1991, 475, 886.*

⁹¹ Compare Frantzioch in: Münch Komm. HGB 2. Aufl. § 469, Rn. 9.

⁹² Unauthorized mixing, when there is no specific issuance of such authority to the bailee at the commercial warehouse by the bailee (in Georgian).

⁹³ Compare Frantzioch in: Münch Komm. HGB 2. Aufl. § 469, Rn. 10.

⁹⁴ §469 HGB (German Trade Code) concerning the joint warehousing and Article 786 (I) are similar; for the mixing of substitutable (generic) items by other items and goods of same type by the bailee at the commercial warehouse, the above norms consider the need for the direct (clear) consent from the bailor (in Georgian).

defined as preliminarily issued permission or endorsement issued later.⁹⁵ The German law differentiates preliminarily issued consent – permissions (Article 100, CCG) and later consent – endorsement (Article 101, CCG), therefore for the purposes of Article 786 (CCG), permission could be defined widely⁹⁶ and to imply later consent – endorsement too. Based on such interpretation, in case of unpermitted mixing of goods in the commercial warehouse, if the original owner of goods endorses such mixing later, such permission will acquire the retroactive power and the deficiency of lacking permission on mixing the goods in the commercial warehouse will be eradicated. Retroactivity is the important characteristic of endorsement and it eradicates the original deficiency of a deal and legislation considers such deficiency as non-existing from the beginning.⁹⁷

For the permission for joint storage of goods the simple silence of bailor is not sufficient; moreover, any type of concluding action should not be sufficient too. Mentioned above permission must be clear and non-vague, and it could be issued orally or in a written form. The law does not require that the permission is issued in a written form. Permission could be issued for specific cases or in each case of all future warehousing. Permission could be envisaged under the standard terms of contract on bailment. Original owners become co-owners of new items, their shares are determined based on the value owned at the moment of mixing the items.

Based on the Article 786 (1) (CCG) implementation of authority for joint warehousing of substitutable items is restricted with the following- bailee at the commercial warehouse can mix the warehoused goods only with the items of other bailee which belong to one variety and have the same quality; For example, mixing of maize grains or oil owned by two bailors in one reservoir. What are the items of the same type is defined according to the position established in the civil turnover, which is objective criterion as well. **Creation of joint composition in the warehouse is only possible based on the permission from all bailors whose goods are to be mixed with each other.** The goods of bailor, who has not issued permission, could not be mixed with the joint composition.⁹⁸

5. Legal Outcome of Mixing the Goods

From the moment of goods' mixing, the co-ownership over goods in the warehouse is generated according to the owned shares.⁹⁹ Via the generation of joint ownership the original owner loses his right of ownership over the items composing the joint composition and acquires joint ownership over the share in the total joint property. Bailor, who is not owner of goods by issuing permission on joint

⁹⁵ Compare Frantziöch in: Münch Komm. HGB 2. Aufl. § 469, Rn. 19.

⁹⁶ In relation to the issues of norm interpretation see *Chachava S.*, Competition of Claims and Claim Bases in the Private Law, Dissertation Thesis Work, 2010, 50-55, <https://tsu.ge/data/file_db/faculty-law-public/sofio_chachava.pdf>, [1.04.2015] (in Georgian).

⁹⁷ Compare *Chanturia L.*, General Section of the Civil Law, Tbilisi, 408 (in Georgian).

⁹⁸ See Frantziöch in: Münch Komm. HGB 2. Aufl. § 469, Rn. 20.

⁹⁹ In the German law co-ownership over the mixed items in the commercial warehouse was originally generated as a result of mixing of goods, but it is much easier to identify the exact time of warehousing (bailment of goods in the warehouse) compared with the actual process of mixing, later the regulation changed, by which the risk of co-owners has somewhat increased, as above is related with the loss of ownership by them; in relation to the above see: CC 46, also Frantziöch in: Münch Komm. HGB 2. Aufl. § 469, Rn. 21 (in Georgian).

warehousing to the bailee, and even in case of mixing the goods without such authority still loses exclusive ownership rights over such goods. However, in such circumstances, the owner possesses the right to claim reimbursement of loss against the bailee at the commercial warehouse, which depends on whether this special and exclusive right has been terminated via the unlawful and guilty action of bailee. Unlawful conduct is not in place if bailor at the commercial warehouse issued the permission on mixing the items, with the exception of cases, when bailee at the commercial warehouse was aware or had to be aware that the bailor was neither owner of goods nor could issue consent on mixing of goods under the condition of joint warehousing.¹⁰⁰ With the termination of ownership right over the mixed goods all other rights over the given item are annulled (Article 196); however, as the owner of goods becomes co-owner, the rights of third parties continue to be effective for bailor's share, which replaces the ownership right over the item.¹⁰¹ Although Article 786 (II) (CCG) discusses joint ownership right over the goods generated as a result of mixing of goods, share of each bailor is determined in accordance with volume of goods transferred for storage; however, norm should consider cases, when bailor is at the same time owner of the goods. If bailor is not owner of bailed goods, then the owner of goods and not the bailor should become the co-owner of joint composition generated after the mixing of goods at the commercial warehouse.¹⁰² Hence, from the moment of warehousing co-ownership is generated for original exclusive owners. Moreover, shares are determined based on the volume of goods transferred for warehousing (786 (II)). As the second section of the Article refers to the items of one type and quality, it is important to determine the ratio (proportion) of goods transferred for storage by each bailor to the total volume of goods. If, new goods are added to already existing joint composition of goods, the new bailor gets share in the co-ownership, which equals to the ratio (proportion) of goods transferred for storage by new bailor to the total volume of goods. It is essential to consider actually delivered goods (already delivered and mixed) and not the planned composition (depositing of which was planned but has not been implemented). If there is certain shortage in the joint inventory and quantity of actually warehoused goods is reduced, then accordingly the share of each co-owner is reduced. Accordingly the bailors suffer losses in proportion of their shares.¹⁰³

IV. Sale of Bailed Goods by the Bailee

1. In General

The measures to be implemented by the bailee at the commercial warehouse include the authority granted to the bailee under the Article 787 (CCG) to dispose warehoused goods for self-support. It is important that pre-conditions of the Article shall be implemented strictly, as non-authorized sale practically causes loss of ownership for the owner of goods. Bailee shall strictly follow terms for the bailment of goods at the commercial warehouse included in the contract concluded between the bailee and bailor; however, in certain cases, if required, liability for the implementation of reasonable care

¹⁰⁰ Compare Frantziöch in: Münch Komm. HGB 2. Aufl. § 469, Rn. 24.

¹⁰¹ Compare § 949 2 BGB.

¹⁰² Compare § 949 2 BGB.

¹⁰³ Frantziöch in: Münch Komm. HGB 2. Aufl. § 469, Rn. 27.

make the bailee liable to change the conditions for the bailment at the commercial warehouse. The above is in place if it becomes evident for the bailee that form of warehousing performed in the past contains danger for goods, and it is impossible to receive timely instructions from bailee. This liability for changing the storage conditions is based on the view that bailee is responsible to ensure protection of goods from damage during the period of bailment and storage of goods.

Moreover, if it is evident, that changing condition of goods' storage is not effective and goods are destroyed or changed at a level creating danger for devaluation of goods, bailee shall immediately notify bailor and within the reasonable time wait for bailee's decision. If spoiling of goods is unavoidable and bailee does not have time to notify bailor or provide notification to the authorized person, then bailee is entitled to sell the goods. Hence, without waiting for decisions from bailor or authorized person, bailee at the commercial warehouse can independently sell the good only if the postponement of sale can cause unfavorable outcomes, for example cause destruction of /damage to goods.

2. Spoiling of or Changes to Goods

Spoiling of or changes to goods under the Article 787 (CCG) is such change in the substance of goods, which could cause changes in the value of goods. Changes in substance are in place when, for example, the goods are preserved, but some damaging features are added to the goods (for example: acquiring smell, rotting, fungus or other harmful organisms, other types of changes of quality).

3. Good Faith

Authority of bailee to sell bailed goods shall be implemented in accordance with the principle of good faith. Bailee is responsible to consider interests of bailor and if he does not have instructions from the bailor, he should act in compliance with the interests of bailor. Such cases mainly concern the perishable items, danger for damage-destruction of which is in place, the above mainly concerns food products. Moreover, it has to be considered that in case of such urgent sale it is assumed that only portion of real market value of goods will be received.¹⁰⁴

4. Liability of Bailee

If precondition for the validity of Article 787 (CCG) are in place and bailee abstains from the selling of bailed goods, then bailee is liable to reimburse damage caused by such inactiveness.

V. Conclusion

It can be stated in conclusion that level of diligence to be applied by the bailee at the commercial warehouse is assessed based on the characteristics of goods and consideration of specific cases. Bailee is responsible for arranging the storage area. Certain actions to be implemented depend on the subject

¹⁰⁴ Compare Frantziach in: Münch Komm. HGB 2. Aufl. § 471, Rn. 24.

of commercial bailment. Bailee is responsible to implement reasonable care over the goods; in particular, protect bailed goods from destruction, loss and damage. Liability for mentioned custody, care represents the key liability under the contract on commercial bailment. Bailee is responsible to place goods in line with rules, to regularly control goods' condition and provide bailor with the information on the changes to the condition of goods.

Bailee at the commercial warehouse is responsible to fulfill the liabilities determined under the legislation with the diligence of faithful businessman. If bailor is not owner of bailed goods, then reasonable diligence of bailee implies that bailee is responsible to thoroughly check authority of person in relation to the mentioned goods and only following such examination perform the instruction of bailor. Bailee has to also thoroughly, with the diligence of faithful businessman, check authority of person who requests transfer of goods. Interpretation of contract on bailment at the commercial warehouse must be carried out based on the principle of good faith. Based on the above, bailee in some cases is responsible to thoroughly check legitimacy of third parties in relation to the goods as well as authenticity of signatures and existence of authority for signing.

Receipt at the commercial warehouse implies receipt generating possession of goods with the purpose to warehouse the goods. Therefore it is important that receipt of goods at the commercial warehouse is carried out by the person authorized to receive the goods. The checking of quantity, variety, weight, quality and similar indicators at the moment of receipt of goods does not fall under the risk of bailee; however, it has to be noted that at the stage of receipt, under the absence of disputes over the composition and condition of moving items, it is assumed that bailee received goods in a good condition. Bailee is liable to guarantee the possibility for bailor to get information via the examination of goods.

Reasonable diligence of bailee at the commercial warehouse implies that he is responsible to protect deposited goods during the period of bailment from changes, which can cause devaluation of goods. Moreover, changes to the goods must be identifiable under the condition of supervision carried out with the relevant attention. Liability of notification extends over the cases of warehousing goods in other places. Liability of notification is not generated only in case when changes to the goods' characteristics are already in place and also there is similar danger present. Bailee at the commercial warehouse is additionally responsible to receive or obtain instructions from bailor in case of anticipated damages to the goods, as bailor compared with the bailee can generally better define the outcomes of changes to the warehoused goods. Bailee is responsible for the losses incurred due to the loss or/damage to the goods deposited for storage, with the exception of cases, when even the diligent bailee could not avoid such damage or loss. Hence, fault liability principle is valid for the bailee at the commercial warehouse.

According to the Georgian legislation, for the joint warehousing of goods there must be permission issued by the bailor at the commercial warehouse. Unlike the German law, where it is necessary to have clear consent, which in the German law is defined in the form of preliminary permission as well as later endorsement, Article 786 (CCG) considers only requirement for permission. It is desirable to define permission in a wider manner for the purposes of Article 786 and to include later consent-endorsement too. Via such interpretation, in case of unauthorized mixing of goods carried out

in the commercial warehouse and receiving endorsement from original owner of goods following such mixing, the above would acquire retroactive power and by this way the deficiency of absence of permission in case of unpermitted mixing of goods would be eradicated.

Measures to be implemented by the bailee at the commercial warehouse also include the authority granted to the bailee under the Article 787 (CCG) to dispose warehoused goods for self-support. If precondition for the validity of Article 787 (CCG) are in place and bailee abstains from the selling of bailed goods, then bailee is liable to reimburse damages caused by such inactiveness.

Ketevan Kochashvili*

Dedicated to the Memory of Honored
Scientist, Incomparable Teacher and High Moral Person
Professor Sergo Jorbenadze

**“I Think, Therefore I am”¹
 (“I exist as a subject of right”)²**

1. Human Being – the Crown of Creativity

There is a view that “the whole world and its elements are composed of simple and non-divisible substances of nature, which are not characterized with any internal structure and multiplicity of contents. It is one from the start to the end and it is referred to as Monad (Greek: monos – unit). Monads are eternal, indecomposable and un-annihilatable, it possesses only one capability – it is an acting force” (Leibnitz).³

Existence is a divine gift and when human being is found in the ocean of existence without its will, it is forced to exist, endure his own and other being’s sensible or unexpected behavior, which is often over the power of human being.⁴ From the birth of human being the universe starts effecting human being, such impact continues up to a decease and originality of human being is nothing else, than his energy, power and will.⁵ Will lays in the nature of human being and accompanies growth and development of human being; evolution of human being is the necessary condition for the growth of self-consciousness and firmness of the will.⁶

Human being is a thinking creature, anything human is only human, as it is produced from thinking,⁷ and those who do not think are in the condition when “you have wings and you don’t know about them” (*Mamardashvili*). There was always requirement for the human being – “Cognize

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¹ “Cogito, ergo sum” – *Rene Dekart*

² *Besarion Zoidze* (in Georgian).

³ *Nutsubidze Sh.*, Introduction to Philosophy, Problem of Cognition, Tbilisi, 2009, 85 (in Georgian).

⁴ *Andrich I.*, Small Country Among the Universes, Lecture Delivered at the Ceremony of receiving the Noble Prize in literature, 1961-1985, Tbilisi, 2011, 9 (in Georgian).

⁵ Conversations of Goethe with Eckermann, translated by *Gelovani A.*, Batumi, 1988, 7. According to *Hart* “Minimal contents of natural law”, which is created from the human condition is manifested together with other factors in the strength of will, implying being with the hope of own self and not with the hope of collaboration with other human beings. *Wacks R.*, Philosophy of Law, Very short introduction, Tbilisi, 2012, 39 (in Georgian).

⁶ *Gvazava G.*, Main Principle of the Constitutional Right, 2nd ed., Editor: *D.Gegenava*, Tbilisi, 2014, 27 (in Georgian). “For us equivalent of time is our effort, life is effort in time.” *Mamardashvili M.*, Conversations of Philosophy, Tbilisi, 1992, 52 (in Georgian).

⁷ *Hegel F.*, Science of Logic, Tbilisi, 1962, 43. Reference: *Lobzhanidze G.*, *Tukvadze A.*, *Jaoshvili G.*, Introduction to the Philosophy of Law, Tbilisi, 2006, 208 (in Georgian).

yourself”; the above has not been performed by anybody up today and nobody can perform it in a perfect manner, as human being does not know where he is coming from, where is he going, knows little about the external universe and the least about himself.⁸ The mystery of human being is not only the existence, but also what does the human live for; however the human beings do not have firm understanding on the above.⁹

According to *Platon*, human being cognizes with mind, he has the ability to think via the mind, in other words the beginning of the cognition is in the mind, and human being stands over the transient via the mind and perceives those sides of reality, which have some association with eternity.¹⁰ According to *Aristotle*, cognition starts from the linking of feeling and mind, feeling – is initiated with desire, mind – is related to the essence, which is over the human being and the human being unites in itself these two sources.¹¹

According to the view of Tokvil, the acute, unremitting and inextinguishable drive for the truth is flamed up time to time in the heart of human being,¹² however, not everybody is capable to contemplate the existence. Strive for cognition implies¹³ a drive towards wisdom¹⁴ and understanding the existence is first of all the fate of philosophers (people, who possess knowledge about the knowledge).¹⁵ They possess ability to understand identity, eternity, as for the others – they walk among the multiple items and variety.¹⁶ Philosophy is not only an intellectual pleasure and not only an attempt to learn something, this is an act of constructing human being by the human being,¹⁷ philosophy is an element of how human being achieves possession of own mind, thoughts, feelings, which is the very condition for the reason.¹⁸

Philosopher is driven by the contemplation of truth, he makes attempts by the use of dialectics (dialectics is the moderate, balanced spirit of opposition, which is inherent characteristic of each

⁸ Conversations of Goethe with Eckermann, translated by *A. Gelovani*, Batumi, 1988, 190. “Our life is rounded by two events – birth and death. Birth is mysterious, as we don’t get knowledge – “where from”, death – is horrible, as we are not able to understand “where to”. *Robakidze G.*, Portraits, translated from Russian by *M. Kvataia*, Tbilisi, 2012, 27 (in Georgian).

⁹ *Dostoevski T.*, Karamazov Brothers, Book I, translated from Russian by *V. Akhaladze*, Tbilisi, 2011, 376 (in Georgian).

¹⁰ *Nutsubidze Sh.*, Introduction to Philosophy, Problem of Cognition, Tbilisi, 2009, 38 (in Georgian).

¹¹ *Nutsubidze Sh.*, Introduction to Philosophy, Problem of Cognition, Tbilisi, 2009, 51 (in Georgian).

¹² *Tokvil A.*, Democracy in America, translated from French by *D. Labuchidze – Khoperia*, Tbilisi, 2011, 341 (in Georgian).

¹³ “Wisdom is never provided in the form of theory or system. It is expressed via the short proposition, which is so deep that even the wise person conveying it cannot explain more than said”. *Mamardashvili M.*, Conversations on philosophy, Tbilisi, 1992, 129. “Academies of philosophy are only shadows of wisdom, the wisdom itself is not there” – *Schopenhauer A.*, Aphorisms of life wisdoms, translated and commented by *Z. Khasia*, 2012, 17 (in Georgian).

¹⁴ *Platon*, The State, translated by *B. Bregvadze*, Tbilisi, 2013, 79 (in Georgian).

¹⁵ *Socrates*, View is referenced in: *Lobzhanidze G., Tukvadze A., Jaoshvili G.*, Introduction to philosophy of law, Tbilisi, 2006, 207. Term “Philosophy” has ancient Greek origins: “philos” – love, “Sophy” – wisdom, and originally meant love to philosophy. *Lobzhanidze G., Tukvadze A., Jaoshvili G.*, Introduction to the philosophy of law, Tbilisi, 2006, 9 (in Georgian).

¹⁶ *Platon*, The State, translated by *B. Bregvadze*, Tbilisi, 2013, 227 (in Georgian).

¹⁷ *Nodia G.*, Preamble, *Mamardashvili M.*, Conversations on Philosophy, Tbilisi, 1992, 4 (in Georgian).

¹⁸ *Mamardashvili M.*, Conversations on Philosophy, Tbilisi, 1992, 86 (in Georgian).

human being, as well as a big talent, which enables human being to distinguish truth from the false),¹⁹ and mind to learn the essence of item, until the human being does not reach by his mind the top of the universe, which can be reached by the mind.²⁰ Philosophy and reasoning, in general, is characterized with creativity and human being shall strive to get to the point, where he possesses whatever he has got and can do whatever he desires to do.²¹

2. Human Being – Distinctive Creature

In the social-humanitarian thinking, "human being" is specified with the following terms: individual, personality. Individual is a specific human being, who opposes social group, collective,²² fights against the collective dictatorship for the achievement of freedom in the middle of the existence.²³ Naturally, freedom does not exist as a feature, which could be attributed to the item,²⁴ freedom is the reward possessed only by the human being, in other words by the creature, who possesses a skill, different from the skill of desire, skill of conscience.²⁵ Freedom is either unknown for the soul or is the feeling possible for the human being.²⁶ Freedom is not the bare will, it is an existence generated from the own being; freedom considers free thinking and creation of selected by the mind,²⁷ the freedom is granted to those who identified themselves and are happy with the given fate.²⁸ Human beings desired freedom in order to become equal; desire for equality implies desire for self-judging everything.²⁹ Equality makes human beings independent from each other, develops their disposition for guiding private action by their will.³⁰ Will is certain capability of mind and causality of mind;³¹ mind provides human being with the capability for logical thinking, to understand the meaning of event and relationship between the events; human beings, as social creatures, from the beginning

¹⁹ Conversations of Goethe with Eckermann, translated by A. Gelovani, Batumi, 1988, 158 (in Georgian).

²⁰ Platon, The State, translated by B. Bregvadze, Tbilisi, 2013, 289 (in Georgian).

²¹ Mamardashvili M., Conversations on Philosophy, Tbilisi, 1992, 26 (in Georgian).

²² Ribakov O. U., Tikhonov C. V., Problem of Relationship of Human being and the State in the Theory of Law Policy, Journal "Justice", 2011, №3, 314 (in Russian).

²³ Bellow S., Writers are Highly Respected; lecture delivered during the Nobel Prize award ceremony in the field of literature, 1961-1985, Tbilisi, 2011, 155 (in Georgian).

²⁴ Mamardashvili M., Conversations about Philosophy, Tbilisi, 1992, 147 (in Georgian).

²⁵ Kant I., Establishment of metaphysics of Morals, translated by L. Ramishvili, edited by N. Natadze, Tbilisi, 2013, 301 (in Georgian).

²⁶ Mamardashvili M., Conversations about Philosophy, Tbilisi, 1992, 147 (in Georgian).

²⁷ Taboridze I., Role of Natural Law in the Establishment of Understanding of the Role of Law, Journal "Review of Georgian Law", Special Edition, 2004, 114 (in Georgian).

²⁸ Conversations of Goethe with Eckermann, translated by A. Gelovani, Batumi, 1988, 17 (in Georgian).

²⁹ Tokvil A., Democracy in America, translated from French by D. Labuchidze – Khoperia, Tbilisi, 2011, 331 (in Georgian).

³⁰ Tokvil A., Democracy in America, translated from French by D. Labuchidze – Khoperia, Tbilisi, 2011, 519 (in Georgian).

³¹ Kant I., Establishment of Metaphysics of Morals, translated by L. Ramishvili, edited by N. Natadze, Tbilisi, 2013, 305 (in Georgian).

were guided by the mind in the relationship with human beings. Autonomy of will means that human being is him/herself the law for him/herself.³²

Sign differentiating human being from all other creatures is self-assurance – “I am”, meaning his personality and manifesting human being as a conscious creature.³³ “I am a human being” – this is a measure of all existent and non-existent (*Protagoras*).³⁴

Human being includes egoistic origins – love of one self, which forces human being to have approach to everything in the world, which is only based on own interest, to give preference to him/herself over all others.³⁵ Individualism differs from egoism – this is thought through feeling, which disposes each personality to abstain from the mass of like and to be closed in his/her own circle.³⁶ Deep individualism is the basis of modern legal culture; it is relevant for modern law to have society of free, autonomous individuals – in order to be different from other “you must be your own self and not only somebody”,³⁷ “it means quite a lot – to have your own face.”³⁸

Hence, each human being must be able to develop a personality distinguished from others, to choose the mode of life he wants and to make free decisions.³⁹ Strive for freedom is not “another heresy, which will pass like others have passed meanwhile destroying many souls” (Stendhal).

3. Human Being’s Right for Self-Development

Human being is granted with the ability for infinite perfection;⁴⁰ human being develops his existence himself.⁴¹ Everything is based on motion; motion agitates reasoning of human being. Originally human being has firm faith in something, as accepts it without understanding the essence, later the resistance is generated, which becomes the reason for his doubt. Soon aggregate of new ideas

³² *Kant I.*, Establishment of Metaphysics of Morals, translated by *L. Ramishvili*, edited by *N. Natadze*, Tbilisi, 2013, 251 (in Georgian).

³³ *Robakidze G.*, Pro domo Sua, translated from German by *G. Kvataia*, Tbilisi, 2012, 67 (in Georgian).

³⁴ *Mamardashvili M.*, Conversations about Philosophy, Tbilisi, 1992, 44 (in Georgian).

³⁵ *Tokvil A.*, Democracy in America, translated from French by *D. Labuchidze – Khoperia*, Tbilisi, 2011, 381. In the process of analysis of human being’s intentions we’ll always encounter their adorable “I”, their intention is based on the above and not the strict notion of duty, which had many times required from the human being to reject himself. *Kant I.*, Establishment of metaphysics of morals, translated by *L. Ramishvili*, edited by *N. Natadze*, Tbilisi, 2013, 97 (in Georgian).

³⁶ *Tokvil A.*, Democracy in America, translated from French by *D. Labuchidze – Khoperia*, Tbilisi, 2011, 381 (in Georgian).

³⁷ *Van Den Pels B.*, Ways of phenomenology, providing answer, translated from French by *D. Labuchidze*, Tbilisi, 2013, 21 (in Georgian).

³⁸ *Bellow S.*, Writers are Highly Respected; lecture delivered during the Nobel Prize award ceremony in the field of literature, 1961-1985, Tbilisi, 2011, 142 (in Georgian).

³⁹ *Friedman L.M.*, Does the Modern Law Culture Exist? Translated from English *L. Bregvadze*, Journal “Herald”, 2006, №1, 239 (In Georgian).

⁴⁰ *Tokvil A.*, Democracy in America, translated from French by *D. Labuchidze – Khoperia*, Tbilisi, 2011, 333 (in Georgian).

⁴¹ *Zoidze B.*, Attempt to Understand the Practical Aspects of Law (mainly in the light of human rights), Essays, Tbilisi, 2013, 88 (in Georgian).

are acquired, human being is faced with the experience and is filled with distrust.⁴² Suspicion forces mind to look for and check, which as a result of faithful trial provides firm faith and confidence.⁴³

“On the road of cognition the inner voice, which supports talented person, tells him: to move forward with courage. You may feel that you are born for great things, however the mistrust to oneself could be created, and the feeling of nonsense could fill you.”⁴⁴ Therefore, human being needs self-confidence and unbiased appreciation of own real merits.⁴⁵

As a result, human being spoiled with success with the full ardor starts the road of perfection, falls down and stands up, is often disappointed, but never falls into despair.⁴⁶

Right for development is the key right of human being; moreover this is more a concept than a specific right.⁴⁷ Main law of Germany in the free development of person, first of all, implies development of the nucleus of the person, which conditions becoming a person, as reasonable, morale creature.⁴⁸

According to the article 16 of the Constitution of Georgia, everyone has right to freely develop own personality, each human being is interested to realize his virtual existence, develop his potential, to transfer his essence into the existence.⁴⁹

Right for the free development of person is related to the human being, as a key legal value, to the recognition of human being's dignity. Dignity of human being is the key motive and justification for the existence of right and freedom; without right for dignity the social progress, personal happiness of human being is impossible. This right ensures development of his talents, personal capabilities and skills.⁵⁰ Dignity of human being has double meaning: on the one hand, it is expression of human being's nature, on the other hand – indicator of the condition of society.⁵¹ Dignity is over any price,

⁴² *Tokvil A.*, *Democracy in America*, translated from French by *D. Labuchidze – Khoperia*, Tbilisi, 2011, 152 (in Georgian).

⁴³ *Conversations of Goethe with Eckermann*, translated by *A. Gelovani*, Batumi, 1988, 149 (in Georgian).

⁴⁴ *Balzac O.*, *The Magic Skin (La Peau de chagrin)*, translated by *G. Kikodze*, Tbilisi, 2010, 91 (in Georgia).

⁴⁵ *Balzac O.*, *The Magic Skin (La Peau de chagrin)*, translated by *G. Kikodze*, Tbilisi, 2010, 128 (in Georgian).

⁴⁶ *Tokvil A.*, *Democracy in America*, translated from French by *D. Labuchidze –Khoperia*, Tbilisi, 2011, 333 (in Georgian).

⁴⁷ *Economic, Social and Cultural Rights*, 2nd ed., editors: *A. Eide, K. Krauze, A. Rosa*, translated by *N. Japaridze –Chkoidze*, Tbilisi, 2005, 154 (in Georgian).

⁴⁸ *Shvabe I.*, *Decisions made by Federal Constitutional Court of Germany*, translated by *E. Chachanidze*, editor *K. Kublashvili, T. Ninidze, B. Loladze, K. Eremadze*, Tbilisi, 2011, 17 (in Georgian).

⁴⁹ *Marten R.*, *Person and Subject of Law*, translated by *E. Sumbatashvili*, Collection of works “Issues of Law”, dedicated to the 70 year anniversary of *R. Shengelia*, Tbilisi, 2012, 182 (in Georgian).

⁵⁰ *Gotsiridze E.*, *Comments to the Constitution of Georgia*, chapter 2, *Citizenship of Georgia*, Basic rights and freedoms of human being; group of authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Pirtskhalashvili A., Putkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.*, Tbilisi, 2013, 88 (in Georgian).

⁵¹ *Taboridze I.*, *Role of Natural Law in the Establishment of Understanding of the Role of Law*, *Journal “Review of Georgian Law”*, Special Edition, 2004, 117 (in Georgian). Right for dignity has been generated by the differences and inequality between the human beings. Following disappearance of the above differences the impact of dignity over the lives of society or individuals weakens. *Tokvil A.*, *Democracy in America*, translated from French by *D. Labuchidze – Khoperia*, Tbilisi, 2011, 483. By the provision included in some Constitutions, considering that dignity of human being is inviolable and must be protected, legislator

excludes any equivalent. What could be the goal itself does not possess relative value – price, it possesses – dignity.⁵²

Human being feels his dignity when it becomes a target and not tool for others. Hence, human being is driven by perception of him as a target, and then he becomes the true subject of the civil life.⁵³

4. Education – Mean for Self-Development

Right for education is one of the key means for the personal development of human being.⁵⁴ Education is the primary driving force, by which human being is able to freely develop his personality, dignity, to actively participate in the life of free society.⁵⁵ Hence, acquiring knowledge, education is the foundation for the personal development. Education is a necessary condition for avoiding the rejection/isolation of person;⁵⁶ ”knowledge is directed towards the existence, lack of knowledge – towards non-existence”.⁵⁷ Knowledge is power, it implies such potential of reasoning, by virtue of which human being is able or has power to transfer his own capabilities into the reality. It is the power of human being’s existence, by which drive becomes a real condition.⁵⁸ Fight for the power on the earth is identical to the fight for knowledge. At this stage of development of mankind the strive for science development, widening of knowledge is the vital condition of mankind existence.⁵⁹

“Human being is exhausted via two acts conducted instinctively, the above dries up the sources of his existence. This is a desire and power. There is another formula between these two boundaries of human action, which are possessed by wise people. Desire burns, power destroys, and knowledge places the organism of human being in the constant condition of peace.”⁶⁰

According to the article 13 (1) of the International Pact on the Economic, Social and Cultural rights, education could be defined as process and moreover, specific phase of the above process.⁶¹ It is

opposes any type of human discrimination, which is based on any ideological justification. *Schteiger H.*, Journal “Law”, 1991, № 6, 69 (in Georgian).

⁵² *Kant I.*, Establishment of Metaphysics of Morals, translated by *L. Ramishvili*, edited by *N. Natadze*, Tbilisi, 2013, 305 (in Georgian).

⁵³ *Zoidze B.*, Attempt to Understand the Practical Aspects of Law (mainly in the light of human rights), Essays, Tbilisi, 2013, 46 (in Georgian).

⁵⁴ Economic, Social and Cultural Rights, 2nd ed., editors: *A. Eide, K. Krauze, A. Rosa*, translated by *N. Japaridze –Chkoidze*, Tbilisi, 2005, 299 (in Georgian).

⁵⁵ *Smith R.K.M.*, International Human Rights, 2nd ed., Tbilisi, 2005, 435 (in Georgian).

⁵⁶ *Deili M.*, Accessibility of Social Rights in Europe, report of meeting № 8, European Committee for Social Integration, Tbilisi, 2007, 32. Referenced: *Tsanava L.*, Social-Economic Rights according to the 1921 year Constitution, collection of works: Democratic Republic of Georgia and 1921 year Constitution, Editors: *D. Gegenava, P. Javakhishvili*, Tbilisi, 2013, 64 (in Georgian).

⁵⁷ *Platon*, The State, translated by *B. Bregvadze*, Tbilisi, 2013, 220. “Learning in relation to the non-learning establishes serfdom by the mind”. *Gogebashvili I.*, Selected Works, Vol. I, Tbilisi, 1989, 144 (in Georgian).

⁵⁸ *Mamardashvili M.*, Conversations about Philosophy, Tbilisi, 1992, 136 (in Georgian).

⁵⁹ *Heisenberg V.*, The Part and the Whole, Tbilisi, 1983 (in Georgian).

⁶⁰ *Balzac O.*, The Magic Skin (*La Peau de chagrin*), translated by *G. Kikodze*, Tbilisi, 2010, 39 (in Georgian).

⁶¹ Economic, Social and Cultural Rights, 2nd ed., editors: *A. Eide, K. Krauze, A. Rosa*, translated by *N. Japaridze-Chkoidze*, Tbilisi, 2005, 290 (in Georgian).

impossible to have fully educated person in the youth. Education is achieved only through life experience. Education for the whole life is the ongoing process, active person always learns and this process is indefinite.⁶² Often the questions are raised: who is considered as professional in his business? The term "profession" has Latin origin: "professus", which is coming from the verb: "profiter", which means recognition, expression. In its original form the word meant exactly the self-expression, self-manifestation.⁶³ There is a position, according to which professional is a person, who is aware of the roughest mistakes in the relevant field and can avoid such mistakes.⁶⁴

According to the international legal acts, education must be based on freedom, morale, solidarity, each person should strive to establish dignified life, improve living conditions and become the useful member of society.⁶⁵

It is impossible for human being to resolve all issues himself. It will cause overloading of his mind, his intellect will become independent but exhausted, therefore human being shall make choice between many views and go deeper only into the issues interesting for him,⁶⁶ and transfer his mind's gaze to such issues.

Education has become the national goal for developed countries. The states entrust their authorized persons to up-bring the youth, by this way the states undertake the responsibility to formulate the feeling and thinking of youth.⁶⁷ More and more often education is acknowledged as the best financial investment, which could be implemented by the State. Moreover, highly educated, knowledgeable and active mind, able to think freely and diversely, is one of the pleasures and awards of mankind.⁶⁸ Mind is acknowledged as key condition for production, knowledge – as management tool, and intellect – as the social force.⁶⁹

5. Education – Basic Right

The topic of basic rights and freedoms of human beings is not only priority, but also determines the objectives and goals, which are defined by the legislator for the development of feasible and effective constitution.⁷⁰ "The Constitution, as the manifestation of loyalty to the democratic political

⁶² Adler M.J., Paideia Proposal, An Educational Manifesto, Tbilisi, 2007, 20 (in Georgian).

⁶³ Egnatashvili D., Modus Spirituality in Legibus, Collection of Works Dedicated to the 60 year Anniversary of Professor B. Zoidze, editors: D. Gegenava, S. Jorbenadze, Tbilisi, 2013, 5 (in Georgian).

⁶⁴ Heizenberg V., The Part and the Whole, Tbilisi, 1983, 247 (in Georgian).

⁶⁵ Economic, Social and Cultural Rights, 2nd ed., editors: A. Eide, K. Krauze, A. Rosa, translated by N. Japaridze-Chkoidze, Tbilisi, 2005, 295 (in Georgian).

⁶⁶ Tokvil A., Democracy in America, translated from French by D. Labuchidze-Khoperia, Tbilisi, 2011, 328 (in Georgian).

⁶⁷ Tokvil A., Democracy in America, translated from French by D. Labuchidze-Khoperia, Tbilisi, 2011, 530 (in Georgian).

⁶⁸ Economic, Social and Cultural Rights, 2nd ed., editors: A. Eide, K. Krauze, A. Rosa, translated by N. Japaridze-Chkoidze, Tbilisi, 2005, 776 (in Georgian).

⁶⁹ Tokvil A., Democracy in America, translated from French by D. Labuchidze-Khoperia, Tbilisi, 2011, 17 (in Georgian).

⁷⁰ Babek V., Fish S., Reichenberher Ts., Changes and Amendments to the Constitution of Georgia – Georgia's way towards Europe, with the preamble from Av. Demetrashvili, Annex 14, Extended Concept of New Edition of the Constitution of Georgia, Public Constitutional commission, Tbilisi, 2010, 301 (in Georgian).

order”,⁷¹ is on the top of any state’s legislative hierarchy and determines the aspiration of the whole law system. It is a legal basis for the normal co-existence of the state and the person.⁷²

There is a view that the constitution of Georgia shall start with the basic rights and freedoms of human being and by the recognition of values in this regard, which is necessary for ensuring the dignified human existence.⁷³ In the democratic state⁷⁴ the core of legal relationships is binding of legislation with basic rights and ability to verify such binding by the court.⁷⁵ There is no other important measure of the democratic nature of state, than protection of human rights, which on its own determines the place of the state in the commonwealth of the civilized states.⁷⁶

“Human rights – create a common language of the mankind, universality – the integral feature of the above right”.⁷⁷ Universality means the general recognition of set of human rights, which is considered as the necessary right-ability conditioned by the modern stage of mankind development.⁷⁸ Recognition of human rights proceeds from the unconditional assumption on the natural law; declaration of human rights considers the mind law as an axiom.⁷⁹ Therefore, human rights supersede any written law;⁸⁰ they are on the top of the value hierarchy (*Zoidze*) and are the values, which precede justice.⁸¹

Basic right (freedom) is the opportunity for any citizen, which is acknowledged and determined under the constitution, to independently choose the fair rules of behavior, use the benefits granted in line with personal as well as social interests. Opportunities defined under the law, in one instance, are referred to as a right, in the other instances – as a freedom. Right and freedom is the formula for granting the legal opportunities for the free choice of human behavior. When the choice of person is related to the utilization of specific social benefit, legislator applies the term – “right”, and when the issue concerns the legal opportunity, where it is expedient to underline freedom in choosing the mode of behavior – legislator applies the term “freedom”.⁸²

⁷¹ *Prabhoo A.I.R.*, 1996, Referenced: *Jorbenadze E., Macharashvili Z.*, Media Law, Tbilisi, 2014, 62 (in Georgian).

⁷² *Chanturia L.*, Basic Rights of Human Being and the Future Constitution of Georgia, Journal “Law”, 1993, № 5-6, 4 (in Georgian).

⁷³ *Chanturia L.*, Basic Rights of Human Being and the Future Constitution of Georgia, Journal “Law”, 1993, №5-6, 8 (in Georgian).

⁷⁴ Everyone is free and equal in the democratic state, everyone equally participates in the management-governing of state issues, and each one is legislator as well as executor of legislation. *Gvazava G.*, Key Principles of the Constitutional Right, Second Edition, editor *D. Gegenava*, Tbilisi, 2014, 12 (in Georgian).

⁷⁵ *Chanturia L.*, Basic rights of human being and the future constitution of Georgia, Journal “Law”, 1993, № 5-6, 4 (in Georgian).

⁷⁶ *Aleksidze L.*, Are the Basic Human Rights Covered under the Independent Field of the International Law? Journal “Human Being and the Constitution”, 1999, № 1, 27 (in Georgian).

⁷⁷ *Butros Butros – Ghali*, view is referenced in: *Aleksidze L.*, Are the Basic Human Rights Covered under the Independent Field of the International Law?!, Journal “Human being and the constitution”, 1999, № 1, 32 (in Georgian).

⁷⁸ *Aleksidze L.*, Are the Basic Human Rights Covered under the Independent Field of the International Law?!, Journal “Human being and the constitution”, 1999, № 1, 33 (in Georgian).

⁷⁹ *Wecks R.*, Philosophy of Law, Very Short Introduction, Tbilisi, 2012, 1 (in Georgian).

⁸⁰ *Radbruch G.*, Statutory Lawlessness and Supra-Statutory Law, translated by *D. Gegenava*, Journal “Law Journal”, 2012, № 2, 320 (in Georgian).

⁸¹ *Knipper R.*, Law and History, Baden-Baden, Alma-ata, 2005, 59 (in Russian).

⁸² *Tsereteli K.*, Dimensions of Basic Rights and Duties, Journal “Law”, 1993, № 5 – 6, 13 (in Georgian).

Right for education is considered under the basic category of rights. It represents social right. Legislative acts of 18th-19th centuries were mainly focusing on the basic civil and political rights. Economic and social rights were considered as only the means for their development; only the United Nations 1948 year Declaration on Human Rights and Freedoms has recognized social-economic rights.⁸³

Social right, similar to economic and cultural rights, represents claim against the State to receive something, which is different from political and civil rights, which consider the right – to act against the state.⁸⁴ Idea of social state was created in the second half of 20th century following the Second World War. According to the above idea, the State is based on the Constitution, fairness and is responsible for ensuring social justice and social protection. Reference to the principle of social state in the Constitution implies for the government assigning of the constitutional task to implement specific measures for the implementation of social justice.⁸⁵ In real life there must be social conditions for the implementation of basic rights, as each right is conditioned by the social context in which those rights exist.⁸⁶

Social state distinguishes the main list of human rights and ensures the minimal level of those rights; it creates kind of social network, establishing demand and expectation, in particular – the more the State does for people, the more people think that such service is the right granted from the god, which increases the guarantees for the realization of basic rights.⁸⁷ Hence, actions of state in this direction shall bear evolutionary nature.⁸⁸

Right for education has several functions: social-cultural, aiming at the development of spiritual life of society. Right for education impacts the process of personality development, establishes sense of social responsibility, provides possibilities for the preservation and development of spiritual heritage; social-economic function, related to the establishment and development of intellectual and scientific-technical potential of the society; Social-political function, which ensures the safety of society, social control and social mobility.⁸⁹

Human right to get education at the state or non-state educational institutions is recognized under various international acts; for example: international pact on the Economic, Social and Cultural rights, Social Charter of Europe, additional protocol of European Convention on Human rights and Freedoms and etc.⁹⁰ Despite the fact that the constitution of each country reinforces the above right, in case of states

⁸³ *Korkelia K., Kurdadze I., Human Rights' International Law According to the European convention on human rights, Tbilisi, 2004, 122 (in Georgian).*

⁸⁴ *Heller A., Freedom as a Supra Idea, see the link: <www.dissercat.com/content/kontsepsiya-prav> 3.19.2014 (in Russian).*

⁸⁵ *Orakhelashvili Al., Liberalism and the Constitution, Journal "almanac", 2001, № 16, 36 (in Georgian).*

⁸⁶ *Akhvlediani M., Right for the Protection of Health in the International Law, Journal "International law journal", 2011, № 1, 223 (in Georgian).*

⁸⁷ *Friedman L., Is there Modern Law Culture? Translated from English by L. Bregvadze, Journal "Herald", 2006, № 1, 241 (in Georgian).*

⁸⁸ *Zoidze B., Constitutional Control and Order of Values in Georgia, Tbilisi, 2007, 57 (in Georgian).*

⁸⁹ *Galdava G., Higher Education, as Public Law Function and Opportunities for the Transfer of its Implementation from the Public Law from (LEPL) to the Private Law Form, Doctoral Thesis Work, Tbilisi, 2010, 27 (in Georgian).*

⁹⁰ There is a position that education system established and controlled by the state must exist as one among the many other experiments, which must function as an example and stimulus for others, in order to retain some

joining the European Convention, in the process of definition of contents and boundaries of human rights and freedoms, the above convention acquires the importance of the “parallel constitution”.⁹¹

The higher education is worth mentioning separately; it represents the decisive factor for the widening and development of knowledge, socially valuable cultural and scientific achievement for all people as well as the society.⁹² Higher education, first of all, is considered as societal responsibility for the preservation of key academic and civil values.⁹³ In order to have education, as the “gate to equality” open to everybody, the proper functioning of the education system is required, which itself is a precondition for the proper functioning of political institutions, effectiveness of industry and business, viability of culture and well-being of each citizen and future generation.⁹⁴

6. Connection Between the Education and Science

Cultural right of human being is a right, granted to any individual and covers the rights for the participation in cultural life and use of results of scientific inventions.⁹⁵ According to the article 27 of the United Nations Universal Declaration on the Rights and article 15 of the international pact on the Economic, Social and Cultural rights, cultural right includes the following elements: right to participate in the cultural life, right to use the results of scientific progress, right of authors of scientific, literature or art works – to have their morale and material interests protected, freedoms required for the scientific and creative activities.⁹⁶

There is different definition of culture in place: on the one hand, this is a material heritage aggregated by the mankind or certain group of people, on the other hand – culture is not only the existing cultural capital, but also includes artistic and scientific creativity processes, which is important part of spiritual life of the society.⁹⁷

standard for qualification. Economic, social and cultural rights, 2nd ed., editors: A. Eide, K. Krauze, A. Rosa, translated by N. Japaridze –Chkoidze, Tbilisi, 2005, 292 (in Georgian).

⁹¹ *Gabrishidze G.*, Hierarchy of Norms and Human Rights, Collection of Works: Modern Challenges in the Human Rights’ Protection, Editor: *K. Korkelia*, Tbilisi, 2009, 88 (in Georgian).

⁹² Convention on the acknowledgment of qualifications on the higher education in the European region; see the link <www.nplg.gov.ge/gsd/> (in Georgian).

⁹³ 2003 year Grati Declaration, <www.nplg.gov.ge/gsd/> (in Georgian).

⁹⁴ *Adler M.J.*, Paideia Proposal, An Educational Manifesto, Tbilisi, 2007, 10 (in Georgian).

⁹⁵ Human Rights’ International Law, vocabulary-reference book, editor *L.Aleksidze*, Tbilisi, 2005, 7 (in Georgian).

⁹⁶ Economic, Social and Cultural Rights, 2nd ed., editors: *A. Eide, K. Krauze, A. Rosa*, translated by *N. Japaridze -Chkoidze*, Tbilisi, 2005, 29 (in Georgian).

⁹⁷ *Kantaria B.*, Comments to the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Basic rights and freedoms of human being; group of authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Pirtskhalashvili A., Putkaradze I., Kantaria B., Tsetreli D., Jorbenadze S.*, Tbilisi, 2013, 400 (in Georgian).

Principle of social state makes the state responsible to create conditions supporting the development of culture in the country,⁹⁸ to ensure unlimited participation of citizens in the cultural life. Each individual perceives his personality based on his culture.⁹⁹

Moreover, "all people, as well as each separate person, have its own biography, which reflects the cultural forehead of the people, as a spiritual product of its historical development, and order of cultural values reflects nature of organization of people in the form of state."¹⁰⁰

Georgia was and remains state of culture, as the key value for the country has always been culture.¹⁰¹ Georgia is hospitable and diverse country, which is located at the cross section of differing cultures, languages and religions and represents the prototype homeland for "foreign". Moreover, as the foreign will never become native without losing its characteristics, there is still "lancet of foreign" remaining here, which does not leave us in peace.¹⁰²

Observation of scientists confirms that cultural requirements represent the product of upbringing. All cultural practices and preferences given in the fields of literature, art or science are closely related with the level of education and then, with the social origins.¹⁰³

Creativity is the activity of human being as a result of which new creatures are produced. Creative work is an act of creation or invention, which gives birth to original, innovative and imaginary creatures. Creativity in a narrow sense implies only artistic activities, in a wider sense – any activity, which is distinguished with novelty, mastery and spirituality. Science with its nature is a creative work, as it is special integral aggregation of novelty, spirituality and mastery, as it is an unlimited basis for strive for freedom.¹⁰⁴ Science appeals to ensure acknowledgement of wisdom requirements and provide sustainability.¹⁰⁵

Human mind can divide science into three parts. The first part covers the purest theoretical principles and abstract concepts, practical application of which is still unknown, or application of which is possible in the far future; the second part considers those general truths, which are based on a pure theory, however, are directed towards the practical implementation via the short route; and the third part – covers methods and means of practical application.¹⁰⁶

⁹⁸ *Izoria L.*, Comments to the Constitution of Georgia, Chapter 2, Citizenship of Georgia, Basic Rights and Freedoms of Human Being; group of authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Pirtskhalashvili A., Putkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.*, Tbilisi, 2013, 294 (in Georgian).

⁹⁹ Economic, Social and Cultural Rights, 2nd ed., editors: *A. Eide, K. Krauze, A. Rosa*, translated by *N. Japaridze-Chkoidze*, Tbilisi, 2005, 115 (in Georgian).

¹⁰⁰ *Zoidze B.*, Contribution of Professor *L. Chanturia* in the development of civilest ideas, journal "Journal of Law", 2012, № 2, 343 (in Georgian).

¹⁰¹ *Zoidze B.*, Constitutional Control and Order of Values in Georgia, Tbilisi, 2007, 196 (in Georgian).

¹⁰² *Van Den Pels B.*, Ways of Phenomenology, Providing Answer, translated from French by *D. Labuchidze*, Tbilisi, 2013, 16 (in Georgian).

¹⁰³ *Bourdieu P.*, Difference, Social Critics of Argument, translated from French by *G. Baramidze*, Editor: *I. Brachuli*, Tbilisi, 2006, 9 (in Georgian).

¹⁰⁴ *Maisuradze N.*, Essence of Legal Freedom and Forms of its Manifestation, Journal "Human Being and the constitution", 2006, №1 (in Georgian).

¹⁰⁵ *Kant I.*, Establishment of Metaphysics of Morals, translated by *L. Ramishvili*, edited by *N. Natadze*, Tbilisi, 2013, 89 (in Georgian).

¹⁰⁶ *Tokvil A.*, Democracy in America, translated from French by *D. Labuchidze-Khoperia*, Tbilisi, 2011, 339 (in Georgian).

“Science is imitation of nature, scientific work is daily sacrifice, working hard as a silkworm, which is not visible for outsiders, and the only remuneration for which is the work itself;”¹⁰⁷ moreover, “in case of science one life is not sufficient for the human being”.¹⁰⁸ Practice of thinking, searching for ideas provide the researcher with the inexpressible joy in the same way as everything related to the mind.¹⁰⁹ Scientist is a person who looks for and not the one who is ready to prove that the government needs him. Scientist should not have ready answers on questions, as the above contravenes science and is the best manifestation of absence of freedom, the most negative side of ideology.¹¹⁰

Each word of scientist-researcher must be thought through, each paragraph – weighed, scientist shall evaluate the creative work without any bias.¹¹¹ In the process of creative work the language factor is important. Unconscious is structured as language and the structure of language is determined by the thought and desire (*Jacques Lacan*).¹¹² Human being does not have to invent his own language, he is born in a ready language environment, in other words, the negative and positive experiences of ancestors, engraved in the language material, is provided to human being as given.¹¹³ Each language, besides the regularities characteristic to the general human nature, possesses its vocabulary reserve and grammatical order, which has certain impact over the conscious of person’s speaking the language.¹¹⁴ Language is not only the mean for relationship, sometimes it becomes an instrument for magic, the sparkle might be born between the correctly expressed two words,¹¹⁵ ideas of human beings are realized in the language, moreover, human being himself participates in the formation of ideas (*Worp*).¹¹⁶ One perceives language with mind and heart, it reflects the multi-century standing of people,¹¹⁷ “language is a treasury of intellect,

¹⁰⁷ *Balzac O*, *The Magic Skin (La Peau de chagrin)*, translated by *G. Kikodze*, Tbilisi, 2010, 218 (in Georgian).

¹⁰⁸ *Jorbenadze S.*, *My Life Road*, Collection of Works Dedicated to the 75 year anniversary of Professor *S. Jorbenadze*, Tbilisi, 2003, 5 (in Georgian).

¹⁰⁹ *Balzac O*, *The Magic Skin (La Peau de chagrin)*, translated by *G. Kikodze*, Tbilisi, 2010, 101-103 (in Georgian).

¹¹⁰ Interview with the envoy of Vatican St. Church in Georgia, Monsignor Claudio Gujeroti: Tradition and choice of free conscience, Journal “Solidarity”, 2008, № 2, 21 (in Georgian).

¹¹¹ *Robakidze G.*, *Pro Domo Sua*, translated from German by *G. Kvataia*, Tbilisi, 2012, 8 (in Georgian).

¹¹² *Wecks R.*, *Philosophy of Law, Very Short Introduction*, Tbilisi, 2012, 139 (in Georgian).

¹¹³ *Oniani S.*, *Factor of Georgian Language Grammar, as Indirect Source for Cognition of Guilt*, Collection of Works Dedicated to the Memory of *L. Andronikashvili: Relevant issues in the Georgian Law*, editors: *N. Chigladze, T. Nemsitsveridze*, Tbilisi, 2014, 27 (in Georgian).

¹¹⁴ *Oniani S.*, *Factor of Georgian Language Grammar, as Indirect Source for Cognition of Guilt*, collection of works dedicated to the memory of *L. Andronikashvili: Relevant issues in the Georgian Law*, editors: *N. Chigladze, T. Nemsitsveridze*, Tbilisi, 2014, 39 (in Georgian).

¹¹⁵ *Ellitis O.*, *Art Speaks in the Language of Analogues*; lecture delivered during the Nobel Prize award ceremony in the field of literature, 1961 – 1985, Tbilisi, 2011, 172. According to the Platon’s view, there is no meaning in the writing; nothing happens in the process of writing, sparkle of reason is created only during the oral thinking. *Mamardashvili M.*, *Conversation about Philosophy*, Tbilisi, 1992, 43 (in Georgian).

¹¹⁶ Position is indicated in: *Levshits R.Z.*, *Modern Theory of Law*, Moscow, 1992 (in Russian).

¹¹⁷ *Seferis G.*, *Some Notes on Modern Greek Tradition*, lecture delivered the Nobel Prize award ceremony in the field of literature, 1961 -1985, Tbilisi, 2011, 25. “What is cognized by the mind must be necessarily felt by heart in order to get desired outcome.” *Zoidze B.*, *Reason for writing my book and its main idea*. 27.02.2014; preamble to the book: *Zoidze B.*, *Attempt to Understand the Practical Aspects of Law (mainly in the light of human rights)*, Essays, Tbilisi, 2013 (in Georgian).

morale, feelings of people, language is the spirit of people”, “only the mother tongue is of spirit and heart, and the foreign languages – are only the languages of memory.”¹¹⁸

Writing is a kind of craving, it is a motion from nowhere to essence for the perception of something mysterious.¹¹⁹ In the process of creative work symbiosis between the vague idea and language bring us to the result, which is immensely wider and richer compared with the original idea,¹²⁰ under the inspiration creator is capable to see and engrave the only correct agreement of idea and word and as a result the creator experiences joy due to the springing up and maturation of creative idea.¹²¹ The creator transfers lines onto the paper, changes, processes them, cuts into his own patterns; time will pass along these lines and the lines poured out in the form of ideas will acquire certain meaning for others;¹²² in the creative work process person may repeat other’s opinion and this will not be plagiarism, but the form of existence of the idea, as an idea exists in many different forms in many different heads independently from the time and place.¹²³

For ensuring the successful scientific activities natural abilities, in other words talent, drive, love for the chosen field and ability to work are required. Moreover, in the scientific creative work process, optimism is the necessary tool for success.¹²⁴

“Youth is thinking, seeking and talented. Searching by the youth, youth’s ability to make sacrifice, youth’s drive towards the science, demonstrates youth’s spiritual power and dignity. “(*Ilia II*).¹²⁵ The divine enlightening creating the extraordinary is related with the youth and fertility; what is a genius if not the fertile force, creatures of which don’t disappear without trace and is alive eternally; there is no genius without the long-term action of fertile forces.¹²⁶ Moreover, sometimes, the youth has a view that they were granted with the ability to create from mother’s stomach, however the ability to create is in general achieved via the hard work and experience of number of years.¹²⁷ Youth should learn that “talent taken alone cannot bring any benefits, if it is not accompanied by the diligent, systemic, highly yielding work, without which achievement of valuable results, taking the honored place among the nations is not imaginable.”¹²⁸

¹¹⁸ *Gogebashvili I.*, Selected Works, Vol. I, Tbilisi, 1989, 147 (in Georgian).

¹¹⁹ *Böll H.*, Attempt to Understand Poetry Mind, lecture delivered at the Nobel Prize award Ceremony in the Field of Literature, 1961-1985, Tbilisi, 2011, 110 (in Georgian).

¹²⁰ *Simon K.*, Adventure of Narration, Lecture Delivered at the Nobel Prize award Ceremony in the Field of Literature, 1961-1985, Tbilisi, 2011, 242 (in Georgian).

¹²¹ *Martinson H., Ionson E.*, Key Goal: Fairness for Everyone, Lecture Delivered at the Nobel Prize Award Ceremony in the Field of Literature, 1961-1985, Tbilisi, 2011, 127 (in Georgian).

¹²² *Böll H.*, Attempt to Understand Poetry Mind, Lecture Delivered at the Nobel Prize award Ceremony in the Field of Literature, 1961-1985, Tbilisi, 2011, 107 (in Georgian).

¹²³ *Mamardashvili M.*, Conversation about Philosophy, Tbilisi, 1992, 89 (in Georgian).

¹²⁴ *Ilia Vekua’s* appeal to the young generation: For the scientific creativity optimism is the necessary tool for success, Tbilisi, 1977.05.05. Newspaper “Tbilisi University”, 23.06.2007, 3 (in Georgian).

¹²⁵ Catholicos-Patriarch of all Georgia, His Holiness and Beatitude Ilia II, Christmas Epistle, 1980, Collection of Epistles, Tbilisi, 2012, 32 (in Georgian).

¹²⁶ Conversations of Goethe with Eckermann, translated by *A. Gelovani*, Batumi, 1988, 160 (in Georgian).

¹²⁷ Conversations of Goethe with Eckermann, translated by *A. Gelovani*, Batumi, 1988, 75 (in Georgian).

¹²⁸ *Jorbenadze S.*, Position is Referenced in: *Akhvlediani Z.*, “Batoni Sergo”, Collection of works dedicated to 75 year anniversary of professor *S. Jorbenadze*, Tbilisi, 2003, 32 (in Georgian).

According to the article 15 (3-4) of the Pact on the Economic, Social and Cultural Rights, states undertake liability to respect freedom, which is necessary for the scientific research and creative activities, to support international cooperation in the fields of science and culture. For example, at the world congress organized under the umbrella of UNESCO and United Nations Human Right centre, in 1993 year draft declaration was developed on the Academic freedom, which based on the idea was ensuring right for the free selection of research subject and methods by the researchers, freedom of study.¹²⁹

According to the paragraph 2, article 23 of the Constitution of Georgia, it is inadmissible to intervene in the creative work process; nobody has right to dictate creator any condition or standard in the process of expression of the creature to be created.¹³⁰ It is necessary to establish such system of organization of scientists, which can ensure creative freedom of scientist.¹³¹

University¹³² is a social institution. The latter implies all institutions, which create state mechanism and via these very institutions the human being perceives his/her valuable membership of civil society. It is impossible to have educated youth without the upgraded institutions, where the education adequate to the epoch and life style is accessible.¹³³ Human being must have hope of himself as well as social institution, as realization of skills determining his existence depends on the values existing outside the human being.¹³⁴ The following question is raised for social institutions – based on the cognition of the human being, what is the purpose of such institution? Principles of activities provide answer to this question, in order to retain the social institutions for each future generation, to have meaningfully justified social institutions.¹³⁵

Universities like other higher educational institutions, represent the important acting persons in the civil society. University is an autonomous institution, which due to the different historical heritage and geographic conditions, in various organized societies creates, verifies, evaluates and spreads culture via the research and teaching. University goes over the geographic and political boundaries and confirms the vital need for the inter-acknowledgement and inter-influence of various cultures. Moreover, teaching and research are indivisible from each other, in order to ensure that learning processes is not behind the changing demands of society and achievements of scientific knowledge.

¹²⁹ Economic, Social and Cultural Rights, 2nd ed., editors: *A. Eide, K. Krauze, A. Rosa*, translated by *N. Japaridze-Chkoidze*, Tbilisi, 2005, 317 (in Georgian).

¹³⁰ *Gotsiridze E.*, Comments to the Constitution of Georgia, chapter 2, Citizenship of Georgia, Basic rights and freedoms of human being; group of authors: *Burduli I., Gotsiridze E., Erkvania T., Zoidze B., Izoria L., Kobakhidze I., Loria A., Macharadze Z., Turava M., Pirtskhalashvili A., Putkaradze I., Kantaria B., Tsereteli D., Jorbenadze S.*, Tbilisi, 2013, 245 (in Georgian).

¹³¹ *Zoidze B.*, Constitutional control and Order of Values in Georgia, Tbilisi, 2007, 213 (in Georgian).

¹³² Word “university” originates from the Latin word *universitatis* -the aggregate; it means higher scientific-educational institution, which prepares highly qualified specialists in various fields of science and culture. Explanatory vocabulary of Georgian language; under the general edition of *Arn. Chikobava*, Tbilisi, 1960, 1554 (in Georgian).

¹³³ *Zoidze B.*, Attempt to understand the practical aspects of law (mainly in the light of human rights), Essays, Tbilisi, 2013, 12 (in Georgian).

¹³⁴ *Zoidze B.*, Attempt to understand the practical aspects of law (mainly in the light of human rights), Essays, Tbilisi, 2013, 9 (in Georgian).

¹³⁵ *Elinek*, view is referenced in: *Gogiashvili G.*, Relative federalism, Tbilisi, 2000, 230 (in Georgian).

Study and research are morally and intellectually independent from any political and economic power, freedom of research and study is the fundamental principle of university life.¹³⁶

Intention of Georgia to become/ develop democratic, social and legal state is reinforced by the Constitution. Autonomy of will and pluralism are necessary in any field. Unlike the justice in the education system during the Soviet period, the state does not any more have monopoly, however it remains dominant and it possesses mechanisms of control. For Georgia, as a small country, development of intellectual potential acquires special relevance. We must achieve the honorable place in the world commonwealth via our intellect, which is untouchable, intangible, however the most valuable. Education and educational collaboration is the key factor for the development and strengthening of stable, peaceful and democratic society.¹³⁷ Today, in the permanently changing and growing international society, the role of university must be understood well,¹³⁸ Accordingly, function of Georgian university is preparation of professionals satisfying the requirements of modern era, implementation of valuable scientific research, resolution of challenges faced by the Georgian science, in order to realize the glorious past in the present and future with the qualitatively new, worthy contents.

7. Conclusion

According to a certain position there is one objective, which must be assumed as a real in every reasonable creature due to the existing of natural need and this objective is happiness.¹³⁹ According to the Lincoln's statement, intention for the strive for happiness indicated in the Declaration of Independence of United States, was the oath given to the future but not yet realized.

Drive for happiness is the key drive for human motion, however, human being is a rebellious creature and can the rebellious soul be happy?¹⁴⁰ We are drawn into the world turnover and physical satisfaction achieved in this turnover will never give criteria for receiving of what is the happiness and how to achieve it.¹⁴¹ Human motion is caused by concern, dissatisfaction, irritation and its objective is to achieve condition, which is reasonable and natural, is relevant to justice, freedom and human dignity.¹⁴² On this road confidence in own power for the creation of better future is the most valuable. Moreover, it is desirable not to be alone, but to share the fate with others.¹⁴³

¹³⁶ Large Charter of Universities, Bologna, 1988.18.09, <www.nplg.gov.ge/gsd> (in Georgian).

¹³⁷ Joint declaration of the Ministries of Education of Europe, <www.nplg.gov.ge/gsd-> (in Georgian).

¹³⁸ Large charter of Universities, Preamble, Bologna, 1988.18.09, <www.nplg.gov.ge/gsd> (in Georgian).

¹³⁹ *Kant I.*, Establishment of Metaphysics of Morals, translated by *L. Ramishvili*, edited by *N. Natadze*, Tbilisi, 2013, 131 (in Georgian).

¹⁴⁰ *Dostoevski T.*, Karamazov Brothers, Book I, translated from Russian by *V. Akhaladze*, Tbilisi, 2011, 371 (in Georgian).

¹⁴¹ *Mamardashvili M.*, Conversations about Philosophy, Tbilisi, 1992 (in Georgian).

¹⁴² *Seifert I.*, Lyrical and Pathetical Conscience, lecture delivered at the Nobel Prize award ceremony in the field of literature, 1961-1985, Tbilisi, 2011, 220 (in Georgian).

¹⁴³ *Neruda P.*, On the Way to the Enlightened City, Lecture Delivered at the Nobel Prize award Ceremony in the Field of Literature, 1961-1985, Tbilisi, 2011, 99 (in Georgian).

According to the philosophical position – “We, human beings are establishing our positions towards the universe very late“(*Huserli*), “We manage to evaluate the life as whole very late” (*Nietzsche*).¹⁴⁴ The above mentioned with very rare exceptions, takes place only after the passing of life road and in this process the following question is raised: what was required, desirable, valuable for the life – active search for benefits, non-existence of random preferences between the values or human beings, unbiased approach and loyalty or respect to the main values? (*Phinis*).¹⁴⁵

Specific human beings generate nations; abolishing differences between the individuals and establishment of one nature and appearance as well as abolishing nations is fatal for the mankind. Nation is a generalized personality; even very small nation has its distinguished features, includes the special angle of the divine idea.¹⁴⁶ Georgian nation “with its whole essence is interested not to become homogenous, resembling symphony, where each person sings on his own and at the end we hear the polyphonic song” (*T. Ninidze*);¹⁴⁷ and the same will continue in the integral political, legal and cultural area, which is referred to as Europe and Georgian society immanently or thoughtfully feels the need for finding its place there; in the area where the trends for the aspiration for new thinking, establishment of peace, achievement of freedom, justice and wellbeing are distinguished.¹⁴⁸

¹⁴⁴ Position is indicated in: *Van Den Pels B.*, *Ways of Phenomenology, Providing Answer*, translated from French by *D. Labuchidze*, Tbilisi, 2013, 11 (in Georgian).

¹⁴⁵ Position is Indicated in: *Wecks R.*, *Philosophy of Law, Very short introduction*, Tbilisi, 2012, 21 (in Georgian).

¹⁴⁶ *Solzhenitsyn A.*, *Literature Can Support Mankind in the Times of Unrest*. Lecture delivered at the Nobel Prize award ceremony in the field of literature, 1961-1985, Tbilisi, 2011, 81 (in Georgian).

¹⁴⁷ Position is indicated in: *Babek V.*, *Development and adoption of the Constitution in Georgia (1993-1995)*, second edition, translated from German by *K. Kublashvili*, Tbilisi, 2013, 164 (in Georgian).

¹⁴⁸ *Bregadze R.*, *From the European Community to the European Union*, *Journal “Human being and the Constitution”*, 2005, № 4, 31 (in Georgian).

Natia Chitashvili*

Determination of Responsibility by Force Majeure Provision Within the Scope of Contractual Freedom and Equity

1. Introduction

Law and economy of any state impact functioning of one another in the mutual interaction process. Hence, economic stability of the civil turnover participants heavily depends on flexible legal regulation and the contractual mechanisms, proper formulation and enactment of which, even in the economic crisis conditions, guarantees maintenance of stability of civil turnover and balance of interests.

Parties' right, to regulate and adjust to their interests the legal outcomes of non-fulfillment of obligations and rules of mutual responsibilities through contractual provisions, is the expression of the autonomy of will. Long-term relations lack the legal determination and stability. Incorporation of the provisions excluding the responsibilities, into the contracts comprises the mechanism for ensuring flexibility thereof.

Goal of the work is study of the legal structure, necessary elements, requirements to contents and the legal outcomes of the provisions regulating force majeure and complication fulfillment as exemption from responsibility within the context of contractual liberty and equity.

2. Significance of the Provision Regulating Force Majeure and Fulfillment Complication

2.1 Wide Area of Provision Application

Particular emphasis is made on the study of force majeure and fulfillment complication regulating provision, as the basis for exemption from responsibility on the legal doctrines of certain countries¹, unified law, UNIDROIT² and UNCITRAL³ activities. It is of great significance for development of proper judicial practice. In the process of evaluation of the fulfillment complication legal preconditions and determination of contract adaptation conditions by the court, it is necessary to explain the clause reflecting the contractual will of the parties, which will they would have, if they had taken into consideration the changed circumstances in advance. Only in these conditions the court will be able to base contract adaptation on the parties' contractual interests or, in case of contract termination, suit the available legal remedies to the contractual will, to maximal possible extent.

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¹ *Živković V.*, Hardship in French, English and German Law, London School of Economics - Law Department, Institute of Comparative Law, Belgrade, October, 2012, 7, <file:///C:/Users/Student/ Downloads/SSRN-id2158583.pdf>, [24.02.2015].

² International Institute for Unification of Private Law.

³ UN Commission of International Commercial Law.

Incorporation of the force majeure and fulfillment complication provisions into the investment contracts is of particular significance, especially where the foreign element is present in such relations. As in absence of the contractual provision, the legal regulations of one of the countries determining responsibility may be unacceptable for any of the parties.

Such provision is especially widely applied in commercial, construction, insurance, goods, offshore, license/patent contracts and those of international joint stock companies. Long-term relations on oil supply should be especially distinguished in the international practice.⁴

2.2 Purpose Secured by the Provision

In the presence of contract provision, there is clear the guiding standard to be applied by the judge, in the process of contract adaptation or termination, motivated by the parties' contractual will, as well as the criteria ensuring realization of the parties' interests to maximal possible extent in the process of contract modification or termination on certain conditions.

By incorporation of provision regulating fulfillment complication the parties, instead of involvement of the court into contract adaptation process, give preference to regulate contractual responsibilities through mutual agreement⁵, which would become the law effective between the parties, provided, that it is not in breach of public order.⁶ Involvement of the court into the contract modification process includes the risk of contingent results for the parties.⁷ Hence, incorporation of the contractual provisions would equip the parties with the mechanisms for independent regulation of mutual responsibilities.

Purpose of the provisions regulating fulfillment complication and force majeure, as the contractual mechanism, is maintaining of stability of the relations within the obligations law in case of such force majeure circumstances as inflation, variation of exchange rates, legislative changes,⁸ hostilities⁹ and further

⁴ *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, Cal. W. Int'l L. J., Vol. 19, 1988-1989, 82, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

⁵ *McKendrick E.*, The Regulation of Long-term Contracts in English Law, Good Faith and Fault in Contract Law, 1995, 332-333.

⁶ *Fucci F.R.*, Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts, Practical Considerations in International Infrastructure Investment and Finance, American Bar Association Section of International Law, Spring Meeting, April 2006, 11, <<http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>>.

⁷ *Fucci F.R.*, Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts, Practical Considerations in International Infrastructure Investment and Finance, American Bar Association Section of International Law, Spring Meeting, April 2006, 43, <<http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>>.

⁸ *Fucci F.R.*, Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts, Practical Considerations in International Infrastructure Investment and Finance, American Bar Association Section of International Law, Spring Meeting, April 2006, 11, <<http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>>.

⁹ Georgian Judicial practice Interprets Hostilities as the Force Majeure. See Decision of 18.04.2011 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case № AS-218-204-2011; decision of 29.07.2011 on case № AS-837-888-2011; Decision of 01.08.2011 on case № AS-931-969-2011; Decision of 01.07.2013 on case № AS-160-153-2013, Decision of 07.03.2013 on case № AS-1162-1091-2012.

economic crisis.¹⁰ Said provision provides mechanism for contract adaptation and in absence thereof, the probability that the complicated contractual obligations, would be qualified as violation and would be terminated by the court would be higher.¹¹ Contractual provision regulating fulfillment complication and force majeure ensures setting of the parties' mutual responsibilities in accordance with the contractors' will and provides basis for prevention of intervention of the third parties into the contractual relations.

Purpose provided by contractual provision is ensuring stability of long-term contractual relations¹² and prevention of their termination on the basis of non-fulfillment of the obligations.

3. Inclusion of the Provisions Regulating Force Majeure and Fulfillment Complication into the Common Force Majeure Clause

3.1 Classification of Provisions by Contract Termination or Adaptation Purposes

Contractual mechanisms regulating force majeure and fulfillment complication are most frequently applied in practice.¹³ Hence, the contractual provision may provide for the purpose of regulation of fulfillment complication and contract adaptation (fulfillment complication provision)¹⁴ by the parties, independently, or through applying to the third party¹⁵ and/or suspension¹⁶/termination¹⁷ terms and conditions and applicable rights of secondary claims (force majeure provision.¹⁸ Legal

¹⁰ See Decision of 23.05.2011 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case №: AS-388-368-2011.

¹¹ *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, Cal. W. Int'l L. J., Vol. 19, 1988-1989, 104, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

¹² *Fucci F.R.*, Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts, Practical Considerations in International Infrastructure Investment and Finance, American Bar Association Section of International Law, Spring Meeting, April 2006, 3, <<http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>>.

¹³ *Uribe M.*, The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 14.

¹⁴ UNCITRAL – Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, Prepared by the United Nations Commission on International Trade Law, United Nations, New York, A/CN.9/SER.B/2, 1988, 241, <http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf>.

¹⁵ *Uribe M.*, The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 14.

¹⁶ *Konarski H.*, Force Majeure and Hardship Clauses in International Contractual Practice, Int'l Bus. L. J., Vol. 4, 2003, 405-407; *Al-Emadi T.A.*, The Hardship and Force Majeure Clauses in International Petroleum Joint Venture Agreements, oxford Student Legal Research Paper Series, №02/2011, July 2011, 4, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878558>.

¹⁷ *Uribe M.*, The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 14.

¹⁸ For the mentioned differentiation see: *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, Cal. W. Int'l L. J., Vol. 19, 1988-1989, 84, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

remedies provided for by the force majeure clause include suspension of obligations¹⁹ and extension of the terms for fulfillment of obligation by the period equal to the period of persistence of force majeure circumstances²⁰ or contract termination²¹, regarding whether impossibility of fulfillment caused by force majeure is of temporary or permanent nature.²² The said provision often contains the clause on obligatory negotiations, to ensure elimination of negative outcomes of force majeure or their fair distribution.²³

Outcomes provided by the clause regulating fulfillment complication are more flexible, compared with contract termination, as it provides mechanism for contract adaptation and, in many cases, fair distribution of contract costs between the parties.²⁴

In many cases, single provision combines both purposes: regulation of contract adaptation in case of fulfillment complication and, in case of impossibility thereof, regulation of the terms and conditions of contract termination.

Irrespective the above classification of the provisions, in many cases, presentation of their different nature is possible only theoretically as the circumstances providing basis for effectuation of the relevant provisions, are mostly mutually inclusive.²⁵ Provisions regulating force majeure and fulfillment complication, with respect of the circumstances giving rise thereto are mostly coinciding. Conceptual difference between these provisions is especially unclear, where both goals: contract adaptation in case of fulfillment complication and regulation of termination in case of impossibility thereof are incorporated into single provision. Provisions of this category are particularly widespread in contemporary practice and now it is impossible to clearly categorize them as force majeure or fulfillment complication provisions.

¹⁹ For example time determined for contract performance will be prolonged with the period during which the force majeure event exists. See, Decision of 03.02.2014 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case № As-834-792-2013.

²⁰ Decision of 17.03.2012 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case № AS-1300-1320-2011.

²¹ *Berger K.P.*, Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators., *Vanderbilt Journal of Transnational Law*, Vol. 36, 2003, 1352, <http://heinonline.org/HOL/Page?handle=hein.journals/vantl36&div=55&g_sent=1&collection=journals#1380>, [07.04.2015].

²² *Böckstiegel K.*, Hardship, Force Majeure and Special Risks Clauses in International Contracts, in: *Horn N. (Ed.)*, *Adaptation and Renegotiation of Contracts in International Trade and Finance*, Kluwer: Deventer, 1985, 159.

²³ *Berger K.P.*, Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators., *Vanderbilt Journal of Transnational Law*, Vol. 36, 2003, 1352, <http://heinonline.org/HOL/Page?handle=hein.journals/vantl36&div=55&g_sent=1&collection=journals#1380>, [07.04.2015].

²⁴ *Horn N.*, The Concepts of Adaptation and Renegotiation in the Law of Transnational Commercial Contracts, Book: *Horn N. (ed.)*, *Adaptation and Renegotiation of Contracts in International Trade and Finance*, Kluwer: Deventer, 1985, 3, 5.

²⁵ *Uribe M.*, The Effect of a Change Circumstances on the Binding Force of the Contracts, *Comparative Perspectives*, Intersentia, 2011, 226-227.

3.2 Approach of Force Majeure Provision to the Purpose of Contract Maintaining and Wide Interpretation thereof

Force Majeure provision should be given wide interpretation as it may include the cases of force majeure, absolute impossibility of fulfillment, as well as the circumstances causing non-fulfillment, extreme complication of fulfillment. For example, in the French law, force majeure and fulfillment complication provisions are mutually inclusive.²⁶ According to the statement by European Court of Justice,²⁷ force majeure conception cannot be restricted to the concept of absolute impossibility of fulfillment, rather it covers the unusual circumstances emerged beyond the party's control, which could not be avoided, irrespective of reasonable prudent efforts and due care, without extremely high costs.²⁸ Thus, by means of single mechanism of force majeure provision, the scopes of the parties' responsibilities, with respect of fulfillment complication or impossibility thereof, related to the changed circumstances, could be regulated at the stage of contract formulation. This is confirmed by interpretation of the contract in one of the decisions of Georgian court, setting as the basis for exemption from responsibility the delay or full impossibility of fulfillment of obligations caused by force majeure circumstances.²⁹

According to the traditional approach, these provisions of the two categories regulating fulfillment complication and force majeure give rise to different legal outcomes.³⁰ Though, in accordance with the new, wide interpretation of force majeure provision, different from the traditional methods, in the legal doctrine, the mentioned provisions increasingly approach to the substance of the contractual terms & conditions regulating fulfillment complication and ensure realization of the practically similar goals, in particular:

- Reduction of contract termination possibility and losses to maximal extent
- Overcoming and dealing with the circumstances hindering fulfillment of obligations
- Minimization/elimination of the negative outcomes of force majeure circumstances
- Maintaining of the contract, restoring of the contract balance on the basis of mutual negotiations between the parties.³¹

²⁶ *Živković V.*, Hardship in French, English and German Law, London School of Economics - Law Department, Institute of Comparative Law, Belgrade, October, 2012, 6, <file:///C:/Users/ Student/ Downloads/SSRN-id2158583.pdf>, [24.02.2015]; *Oppetit B.*, L'adaptation des contrats internationaux aux changements de circonstances: la clause de «hardship», 1972, 802, specified in: *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, Cal. W. Int'l L. J., Vol. 19, 1988-1989, 84, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

²⁷ European Court of Justice (ECJ).

²⁸ European Court of Justice, Judgment of 11 July, 1968, Case 4/68, Rec. 1968, 563, <<http://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:61970CJ0011>>, [24.06.2014].

²⁹ See Decision of 23.07.2009 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case №: AS-30-367-09.

³⁰ *Fucci F.R.*, Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts, Practical Considerations in International Infrastructure Investment and Finance, American Bar Association Section of International Law, Spring Meeting, April 2006, 10, <<http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>>.

³¹ *Al-Emadi T.A.*, The Hardship and Force Majeure Clauses in International Petroleum Joint Venture Agreements, oxford Student Legal Research Paper Series, № 02/2011, July 2011, 14-15,

Regarding the above, in this work the term “force majeure provision” will be used, with its wide conceptual interpretation, covering the purpose of regulation of the outcomes of both, fulfillment complication and impossibility thereof.

4. Correlation between the Legal Bases Excluding Responsibility and Contractual Provisions and Application Thereof

4.1 Exclusive Effect of Force Majeure Provision and its Restrictions

Though force majeure clause is stated as an independent provision, if its presence is related to the contract contents, it should be interpreted in relation to the substance of entire agreement, rather than separately from the other provisions, in isolated manner.³²

This provision is applicable if it sets the responsibility different from that provided for by the law,³³ otherwise its presence in the contract lacks any sense.

Court will not take the legal doctrines setting of the responsibility, if the parties have agreed upon the different manner of distribution of the risk of non-fulfillment or prevention of fulfillment of the contract and relevant responsibilities.³⁴ Such characteristics of the contractual provision are recognized as the sign of “exclusive nature of provision: in legal doctrine.³⁵ Unlike the mentioned, interpretation of Section 2-719(1)(b) of US Uniform Commercial Code³⁶ (hereinafter referred to as US UCC) states that contractual provision providing legal remedies applicable by the parties is optional, unless the contract includes the special clause providing for non-applicability of the regulations specified by the law and exclusive nature of the provision.³⁷

Provision should show its status: whether it sets exclusively the parties’ rights to secondary claim and excludes the mechanisms provided for by the law, or, rather, it should be interpreted only as the additional means setting the parties responsibilities.³⁸

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878558>.

³² Sabine Corp. V, ONG Western, Inc., 725 F. Supp. 1171 (W.D. Okla.1989), <<http://law.justia.com/cases/federal/district-courts/FSupp/725/1157/1407158/>>.

³³ *Declercq P.J.M.*, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 213, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.

³⁴ Kentucky Utilities Co. v. South East Coal Co., 836 S.W. 2 d 392, 397 (KY.1992).

³⁵ *Declercq P.J.M.*, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 227, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.

³⁶ Uniform Commercial Code, Cornell University Law School, Legal Information Institute, Copyright 1978, 1987, 1988, 1990, 1991, 1992, 1994, 1995, 1998, 2001. The American Law Institute and the National Conference of Commissioners on Uniform State Laws; reproduced, published and distributed with the permission of the Permanent Editorial Board for the Uniform Commercial Code for the limited purposes of study, teaching, and academic research, 2003, <<http://www.law.cornell.edu/ucc/ucc.table.html>>.

³⁷ See also, *Farnsworth E.A.*, Farnsworth on Contracts, Boston, 1990, 583.

³⁸ *Declercq P.J.M.*, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 247,

4.2 Preconditions and Scopes of Applicability of the Legal Bases for Responsibility

If the contract provisions do not provide for regulation of fulfillment complication and force majeure circumstances the mechanism provided for by the law shall be applicable.³⁹ Algerian law is the rare exclusion in this respect. According to its regulations (Art. 107(3)) the contract provision changing the legislative regime for regulation of fulfillment complication, shall be void.⁴⁰ Hence, awareness in the legal bases setting responsibilities is of particular significance for the person formulating the contracts, if his intention is to set the regime different from the one provided for by the law.⁴¹ Where contract interpretation shows that contract provision is substantially similar to the one provided by the law, than the latter shall prevail.

In addition, inclusion of the provision regulating fulfillment complication in the contract does not fully exclude applicability of law provisions regulating the issues of changed circumstances. It is recognized that legal regulation is effective to the extent to which the issue of fulfillment complication is not covered by contractual provision and remains beyond the scopes of its regulation.⁴²

In case of absence of contractual provision, if the parties fail to achieve agreement about contract adjustment through negotiations, the court makes one of the following decisions: 1. obligates the parties to continue negotiations for the purpose of contract adjustment to the changed circumstances; 2. terminates the contract in specified time and on specified conditions;⁴³ 3. adjusts the contract to the changed circumstances through fair distribution of the contractual losses and benefits to the parties,⁴⁴ for the purpose of initial contractual balance;⁴⁵ 4. Leaves the contractual terms and conditions in the initially agreed form.

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- ³⁹ <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>. *Trimarchi P.*, Commercial Impracticability in Contract Law: An Economic Analysis, *International Review of Law and Economics*, Vol. 11, Issue 1, 1991, 63; *Fucci F.R.*, Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts, *Practical Considerations in International Infrastructure Investment and Finance*, American Bar Association Section of International Law, Spring Meeting, April 2006, 11, <<http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>>.
- ⁴⁰ *Fucci F.R.*, Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts, *Practical Considerations in International Infrastructure Investment and Finance*, American Bar Association Section of International Law, Spring Meeting, April 2006, 11, <<http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>>.
- ⁴¹ *Declercq P.J.M.*, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, *J.L. & Com.*, Vol. 15, 1995-1996, 229, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.
- ⁴² *Van Houtte H.*, Changed Circumstances and Pacta Sunt Servanda, in: *Gaillard E. (ed.)*, *Transnational Rules in International Commercial Arbitration*. ICC: Paris, 1993, 110.
- ⁴³ *Al-Emadi T.A.*, The Hardship and Force Majeure Clauses in International Petroleum Joint Venture Agreements, *Oxford Student Legal Research Paper Series*, №02/2011, July 2011, 3, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878558>.
- ⁴⁴ See *Principles of European Contract Law – Parts I and II - Revised 1998, Part III – 2002*, <<http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/>>, [20.06.2014]) (hereinafter referred to as *European Principles*)⁴⁴ Art. 6:111-3 “b”.
- ⁴⁵ *Ciematniece I.*, *Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts*, Lambert Academic Publishing, Saarbrücken, 2010, 13.

5. Validity of Provision with Respect of Contractual Freedom and Fairness

Formulation of the force majeure provision is allowed with due regard of the general restrictions of contractual freedom.⁴⁶ For example, according to US UCC 1-102(3), contractual agreement cannot reject, exclude the obligations of fairness, diligence, prudence and due care provided for by the same Act. According to Article 1134 of French Civil Code⁴⁷, lawfully formulated contractual agreement shall become the effective law applicable to the parties and it shall be complied with in good faith.

Though, parties may agree upon the standards measuring fulfillment of the above obligations, with the exception of cases where the standards of the mentioned limitation are apparently unreasonable.⁴⁸ Non-compliance with the principle of faithfulness, unlike the obligations of fairness and reasonability, may set the independent type of obligation violation.⁴⁹

Force majeure provision should also specify the contractor entitled to application thereof. If both parties may take advantage of the provision, than the parties' interests should be balanced fairly to prevent judicial intervention into the contractual relations, with wide discretionary authorities.⁵⁰

Contractual provision will comply with the fairness standard, if it is not substantially intended for the contractor's interests. The purpose of contractual provision is to prevent the unfair outcomes in the conditions of breaking of the interests' balance. Therefore, in the US law, in case of presence of fulfillment complication, to indicate the contractual terms and conditions the term provisions regulating "gross inequity"⁵¹ is used.⁵²

⁴⁶ *Declercq P.J.M.*, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 231, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.

⁴⁷ French Civil Code, Translated by *Rouhette G.*, with the assistance of *Rouhette-Berton A.*, 2006.

⁴⁸ Uniform Commercial Code, Cornell University Law School, Legal Information Institute, Copyright 1978, 1987, 1988, 1990, 1991, 1992, 1994, 1995, 1998, 2001. The American Law Institute and the National Conference of Commissioners on Uniform State Laws; reproduced, published and distributed with the permission of the Permanent Editorial Board for the Uniform Commercial Code for the limited purposes of study, teaching, and academic research, 2003, <<http://www.law.cornell.edu/ucc/ucc.table.html>>.

⁴⁹ Analysis of Art. 405-III "b" shows that substantial violation of the obligation of due care gives rise to the right to secondary claim for abandoning of the contract. Hence, according to Georgian legislation, gross violation of the requirement of due care (being the element of the principle of integrity) is recognized as the independent type of non-fulfillment, to which the emergence of the right to secondary claim is associated. See also: *Declercq P.J.M.*, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 231, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.

⁵⁰ *Declercq P.J.M.*, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 247, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.

⁵¹ "Gross inequity".

⁵² For this issue see work: *Young M.O.*, Construction and Enforcement of Long-Term Coal Supply Agreements – Coping With Conditions Arising From Foreseeable And Un-foreseeable Events – Force Majeure And Gross Inequities Clauses, Rocky Mtn. Min. L. Inst. 127, Vol. 27, 1982.

In addition, certain restrictions are applicable to the above mentioned provision. In particular, it cannot become the source of unfair outcomes as the very sense of such clauses is ensuring equality rights.⁵³

6. Preconditions for Application of the Force Majeure Clause

Clause regulating fulfillment complication consists of two key components: first one should describe the circumstances emergence of which provide precondition for application thereof and the second one – the procedure and legal outcomes in case of emergence of circumstances specified in the clause.⁵⁴

In description of the mandatory content characteristics of the contract clause it should be necessarily taken into consideration that *breaking of the proportion between mutual obligations and contractual balance*⁵⁵ is a very wide, unlimited basis for application of the contractual clause. In contrast with the mentioned, to evaluate presence of the above mentioned conceptions - *proportion between mutual obligations and contractual balance* – the basis should be defined more specifically and specific criteria should be stated.⁵⁶

6.1 Content Requirements for Definition of Force Majeure Events

Scopes of applicability of the contractual clause could be stated by setting of the limited list of events or specific descriptions⁵⁷ thereof, which should be the precondition for exemption from responsibility in case of hardship or impossibility of fulfillment.⁵⁸ If the parties' interest is providing of wide opportunities for exemption from responsibility, according to the contractors' goal, it is also possible to define the general nature of the obstacles, instead of the specific list of events.

Though, to prevent the disputes in relation with validity of the contractual clauses and in addition, maintain the contract stability,⁵⁹ it is significant to describe the exact characteristics of the circumstances covered by the clause.⁶⁰

⁵³ Živković V., *Hardship in French, English and German Law*, London School of Economics - Law Department, Institute of Comparative Law, Belgrade, October, 2012, 16, <file:///C:/Users/Student/Downloads/SSRN-id2158583.pdf>, [24.02.2015].

⁵⁴ Fontaine M., *Les Clauses de Hardship, aménagement conventionnel de l'imprévision dans les contrats internationaux à long terme*, DCPI 51, 1976, 59, specified in: Uribe M., *The Effect of a Change Circumstances on the Binding Force of the Contracts*, Comparative Perspectives, Intersentia, 2011, 225.

⁵⁵ Draetta U., Lake R. B., Nanda V. P., *Breach and Adaptation on International Contracts*, An Introduction to *lex Mercatoria*, Butterworth Legal Publishers, 1992, 169.

⁵⁶ Uribe M., *The Effect of a Change Circumstances on the Binding Force of the Contracts*, Comparative Perspectives, Intersentia, 2011, 226.

⁵⁷ See e.g. Decision of 28.06.2000 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case № 3K-310-2000. In this Decision, the interpreted contract clearly specified the accident as a force majeure, i.e. the circumstances excluding responsibility.

⁵⁸ UNCITRAL – *Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*, Prepared by the United Nations Commission on International Trade Law, United Nations, New York, A/CN.9/SER.B/2, 1988, 233, <http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf>.

⁵⁹ Frick J.G., *Arbitration and Complex International Contracts*, Kluwer Law International, Schulthess, 2001, 36.

⁶⁰ Uribe M., *The Effect of a Change Circumstances on the Binding Force of the Contracts*, Comparative Perspectives, Intersentia, 2011, 225.

Thus, to ensure validity of the contractual clause, it should describe the event⁶¹ giving rise to the responsibility provide for by the contract.⁶² It should be noted as well that a party cannot demanded to foresee and describe in details any force majeure event in advance.⁶³ Hence, the part of contractual provisions shall include the wide list of events and the other one shall define the conception of force majeure and fulfillment hardship, describes the degree and characteristics of the obstacle to be deemed the event covered by the clause. If the contract contains any deficiency, in this respect, than the analysis of the legal preconditions determined by the law as the mechanism for event assessment is of significance.⁶⁴

Clause, providing for contract adjustment in case of fulfillment hardship must include description of fulfillment hardship substance⁶⁵ as the basis for clause application.⁶⁶

According to the force majeure clause standard set by the International Chamber of Commerce, the clause shall not be applicable to the events emerged only after execution of the contract, it is reasonable that it covered the events existing before contract date, provided that the parties could not reasonable know about their existence and foresee them.⁶⁷ If the parties' direct intent is exemption from responsibility only in case of certain circumstances emerged after the contract date, than this should be necessarily stated in the force majeure clause.⁶⁸

Non-fulfillment of the obligations by subcontractors cannot be regarded and specified in the contractual clause as a force majeure event. This would unreasonably aggravate the condition of creditor with legitimate expectation of fulfillment, from the side of contractor debtor.⁶⁹

⁶¹ See for example, Alfred C. Toepfer v Peter Cremer, [1975] 2 Lloyd's Rep 118.

⁶² *Wright W.C.*, Force Majeure Delays, Contract Interpretation/Force Majeure, Constr. Law., Vol. 26, 2006, 33, <http://heinonline.org/HOL/Page?handle=hein.journals/conlaw26&div=42&g_sent=1&collection=journals№196>.

⁶³ *Southerington T.*, in the book: *Maggi M.*, Review of the Convention on Contracts for the International Sale of Goods (CISG), 2002-2003, Kluwer Law International, Netherlands, 2004, 277; *Wright C.*, Force Majeure Clauses and the Insurability of Force Majeure Risks, Constr. Law, Vol. 23, 2003, 17, <http://heinonline.org/HOL/Page?handle=hein.journals/conlaw23&div=46&g_sent=1&collection=journals>, [06.06.2014]; *Horn N.*, Standard Clauses on Contract Adaptation in International Commerce, 1985, 134 in the book: *Horn N.*, (ed.), Adaptation and Renegotiation of Contracts in International Trade and Finance, Deventer/The Netherlands, Kluwer Law and Taxation Publishers, 1985; *Draetta U.*, *Lake R. B.*, *Nanda V. P.*, Breach and Adaptation on International Contracts, An Introduction to Lex Mercatoria, Butterworth Legal Publishers, 1992, 195.

⁶⁴ This issue was discussed in the author's article: *Chitashvili N.*, Legal preconditions of hardship and force majeure, "Besarion Zoidze 60", anniversary collection of works, Publishing house of Tbilisi State University, Tbilisi, 2013, 314-350.

⁶⁵ *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, Cal. W. Int'l L. J., Vol. 19, 1988-1989, 81, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

⁶⁶ UNCITRAL – Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, Prepared by the United Nations Commission on International Trade Law, United Nations, New York, A/CN.9/SER.B/2, 1988, 243, <http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf>.

⁶⁷ ICC Force Majeure Clause 2003, ICC Hardship Clause 2003, ICC Publication No. 650, 2003, 3, <<http://www.trans-lex.org/700700>>.

⁶⁸ ICC Force Majeure Clause 2003, ICC Hardship Clause 2003, ICC Publication No. 650, 2003, 3, <<http://www.trans-lex.org/700700>>.

⁶⁹ ICC Force Majeure Clause 2003, ICC Hardship Clause 2003, ICC Publication No. 650, 2003, 3, <<http://www.trans-lex.org/700700>>.

Hence, for exemption from responsibility, the debtor has to prove, that it was impossible to foresee, prevent the obstacles or avoid/mitigate their negative outcomes for him and his subcontractor and, in addition, the event emerged beyond the control of the debtor and his sub-debtor.⁷⁰

Article 79(2) of Convention on Contracts for International Sale of Goods⁷¹ (hereinafter referred to as Vienna Convention) provides the “double force majeure” rule, according to which if non-compliance of obligations is caused by the third person, involved by the debtor into full or partial fulfillment of the obligation, exemption from the responsibility of the debtor and third person is allowable in presence of bases specified in Art. 79(1). In addition, exemption of debtor from responsibility is allowed only if he proves presence of bases exempting from responsibility for himself and for the third party as well.⁷²

Thus, Art. 79(2) of Vienna Convention requires presence of the subcontract, related to the initial contract with its substance though party to the subcontract is organically independent from the party of the main contract.⁷³

For the purpose of exclusion of interpretation difficulties and ambiguity of fulfillment hardship at the judicial level,⁷⁴ the clause must specify the outcomes⁷⁵ caused by the force majeure event with respect of fulfillment of obligation.⁷⁶

Description of the legal outcomes, emergence of which is the precondition for clause application creates wider area of clause application, compared with the descriptions of individual circumstances. It would be better that the parties avoided specific legal outcomes than the unforeseeable factual circumstances.

⁷⁰ Double Force Majeure Rule.

⁷¹ United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980, United Nations Commission on International Trade Law, United Nations, New York, November, 2010 (United Nations' Publication – Sales No. E. 10. V.14), <<http://www.cisg.law.pace.edu/cisg/text/text.html>>, [03.07.2014].

⁷² *Gabriel H.D.*, Contract for the Sale of Goods, A Comparison of Domestic and International Law, Oceana Publications, Inc, Dobbs, Ferry, New York, 2004, 219; *Flambouras D.P.*, The Doctrines of Impossibility of Performance and Clausula Rebus SIC Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law - A Comparative Analysis, Pace Intl'l L. Rev., Vol. 13, 2001, 273, <<http://heinonline.org/HOL/Page?handle=hein.journals/pacinlwr13&collection=journals&page=261>>, [08.08.2014].

⁷³ *Pizer L.K., Smith M.R.*, (Eds. in Chief), *Southerington T.*, Review of the Convention on Contracts for the International Sale of Goods (CISG) 2002-2003, Kluwer Law International, The Hague, London, New York, 2004, 288.

⁷⁴ *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, Cal. W. Int'l L. J., Vol. 19, 1988-1989, 91, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

⁷⁵ *Declercq P.J.M.*, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 248, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.

⁷⁶ *Rhorer J.R., Warren P.R.*, Force Majeure Implications of Acid Rain Legislation: The Litigation Battle of the 1990s, J. Nat. Resources & Env'tl. L., Vol. 8, 1992-1993, 35, <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/jnatrenv18&div=10&id=&page=>>>.

6.2 Use of the Legislative Conceptions in Case of Incomplete Defining of the Events Covered by the Contractual Clause

Formulation of force majeure clause must be provided with high standards of determination, to prevent application of the mentioned clause as the basis for undermining of stability of the contractual relations. Use of open, unclear and ambiguous concepts and terms could be regarded as the precondition of non-uniform interpretation at the stage of clause application.

If the contract clause does not contain the list of circumstances causing application of the clause and does not provide definition of the concepts of force majeure and fulfillment hardship, than the preconditions provided by the law shall be used.

In particular, according to the first sentence of Art. 398 of Georgian Civil Code, contract adjustment to the changed circumstances is associated with presence of certain legal preconditions⁷⁷: (1) circumstances regarded as the contract basis; (2) substantial change; (3) emergence after contract date; (4) impossibility of foreseeing of the circumstances⁷⁸ - unforeseeable nature; (5) circumstances beyond the debtor's control and hence absence of the debtor's guilt;⁷⁹ (6) extreme hardship of fulfillment of obligation;⁸⁰ (7) causation⁸¹ – contract fulfillment hardship as a direct result of changed circumstances; (8) in case of foreseeing of the circumstances: (a) avoidance of the contract by the parties (i.e.) absence of contractual interest with respect of making contract, or (b) agreement upon its different contents.⁸²

It is significant that the most legal preconditions formulated above could be regarded as the legal characteristic of not only fulfillment hardship but also unintentional non-fulfillment – force majeure.⁸³

On the basis of the specified legal provision the additional preconditions necessary for occurrence of fulfillment hardship and force majeure not expressly formulated in the said provision. In particular, if

⁷⁷ For legal preconditions of application of Art. 398 of Georgian Civil Code, see Decision of 06.06.2010 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case № AS-7-6-2010; Decision of 25.11.2008 on case No:AS-466-707-08; Decision of 04.07.2011 on case № AS - 762-818-2011.

⁷⁸ Decision of 06.06.2010 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case: № AS-7-6-2010; Decision of 25.11.2008 on case № AS-466-707-08; Decision of 04.07.2011 on case: №AS- 762-818-2011.

⁷⁹ Prevention or impossibility of fulfillment is regarded as the basis for exemption from responsibility where this is caused by force majeure circumstances and is not related to the persons intentional action or negligence. See Decision of 10.11.2008 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case: № AS-617-842-08.

⁸⁰ Decision of 25.11.2008 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case № AS-466-707-08 it was stated that basis for adjustment of contract to the changed circumstances is dramatic change of economic basis of the contract and significant imbalance between the parties obligations.

⁸¹ Decision of 09.01.2014 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case № as-735-697-2013.

⁸² *Akhvlediani Z.*, Obligations Law, Tbilisi, 1999, 57.

⁸³ Force majeure, i.e. superior power prevents the party from fulfillment of obligations. Thus, force majeure situation means the objectively existing circumstances independent from the parties, persistence of which excludes the parties' guilt. See Decision of 23.07.2009 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case:№ AS-30-367-09.

change of circumstances is not proposed by the party as of the contract date, the precondition of non-foreseeing takes place, implying, at the same time, uncontrollable and unavoidable nature of circumstances. In particular, of the contractor has not taken into consideration the change of circumstances and he could not do so, hence, he was deprived of objective possibility to prevent, overcome the relevant objective obstacle, as well as to eliminate its negative outcomes⁸⁴ even in case of necessary prudence and diligence.⁸⁵

Existence of the above precondition places the obstacle beyond the debtor's control⁸⁶ and hence sets one more additional precondition of absence of the debtor's guilt with respect of the obstacle.

Hence, for exemption from responsibility, coincidence of the circumstances emerged in the contractual relations with the event provided for by the contract clause is not sufficient, it is also necessary that the parties were not able to foresee,⁸⁷ avoid or overcome⁸⁸ / mitigate negative outcomes for the parties and, in addition, the event must be beyond the debtor's control.⁸⁹ According to the contract, in one of the cases, the parties agreed not to include the outcomes of financial hardships, as well as those occurred as a result of relations with the fiscal and other state authorities, natural persons and legal entities into the force majeure circumstances.⁹⁰ The fact that prevention and management of the above obstacles is within the capacities of the debtor to certain extent, should be regarded as the reason for this.

⁸⁴ Lack of assets of one of the parties cannot be regarded as force majeure. See: **Decision of 18.04.2011 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case № AS-218-204-2011**. Similar to the above, in the doctrine, subjective insolvency is not regarded as the basis for exemption from responsibility (See *Busch D., Hondius E.*, *The Principles of European Contract Law and Dutch Law: A Commentary (Perspectives on Company Law)*, Kluwer Law International; 1st ed., August 27, 2002, 341), as it is regarded as being within the scopes of debtor's control and hypothetically, there is possibility of affecting it by the debtor.

⁸⁵ See Decision of 05.07.2010 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case: № AS-418-391-2010.

⁸⁶ *Liu Ch.*, *Changed Contract Circumstances*, 2005, <<http://www.cisg.law.pace.edu/cisg/biblio/liu5.html>>; *Lindström N.*, *Changed Circumstances and Hardship in the International Sale of Goods*, NJCL, 2006/1, 8, <www.njcl.fi/1_2006/commentary1.pdf>, [10.02.2014]; *Southerington T.*, in the book: *Maggi M.*, *Review of the Convention on Contracts for the International Sale of Goods (CISG), 2002-2003*, Kluwer Law International, Netherlands, 2004, 275-276. For recognition of the force majeure circumstances as those emerged independently from the parties, see also: Decision of 04.02.2010 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case: № AS-1162-1424-09.

⁸⁷ *Fucci F.R.*, *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts*, *Practical Considerations in International Infrastructure Investment and Finance*, American Bar Association Section of International Law, Spring Meeting, April 2006, 17, <<http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>>.

⁸⁸ If the alternative way of fulfillment is available to the debtor, than this excludes exemption from responsibility by the reason of force majeure as the debtor has not fulfilled the obligation of elimination of the negative outcomes of force majeure circumstances and did not use the available alternative mechanisms of fulfillment. See Decision of 27.07.2010 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case :№ AS-576-542-2010.

⁸⁹ ICC Force Majeure Clause 2003, ICC Hardship Clause 2003, ICC Publication №650, 2003, 2, <<http://www.trans-lex.org/700700>>.

⁹⁰ See Decision of 25.05.2010 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case: № AS-1220-1480-09.

In many cases, the parties set, as the precondition for application of the clause on exemption from responsibility, confirmation of the force majeure circumstances by the authorized state body, chamber of commerce or chamber of the notaries.⁹¹ For example, Georgian Chamber of Commerce⁹² recognized the fact of termination of the investment agreement by the reason of strained relations between Georgia and Russia as force majeure for the specific parties.⁹³ It is interesting, whether the Chamber of Commerce of Georgia is regarded as the exclusive authority confirming force majeure circumstances or not, whether the force majeure cannot be subject of assessment of the Chamber of Commerce only and it could be assessed by the contract parties or the other independent institution.⁹⁴ This issue could be regulated by the contractual provision and the parties may specify the subject entitled to assess force majeure circumstances. One of the court decisions states: Chamber of Commerce examines existence of force majeure, i.e. whether the event could be regarded as force majeure and the issues of the parties' responsibilities are beyond its competence.⁹⁵

7. Regulation of the Procedure and Legal Mechanisms Applicable to Force Majeure Circumstances by Contract provision

Contract should mostly state the rights and obligations of the parties⁹⁶ and legal remedies⁹⁷ - suspension of fulfillment of obligations⁹⁸ and extension of the contract term⁹⁹ by the period of

⁹¹ UNCITRAL – Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, Prepared by the United Nations Commission on International Trade Law, United Nations, New York, A/CN.9/SER.B/2, 1988, 240, <http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf>.

⁹² According to Subsection “d”, Section 3. Article 4 of Georgian Law № 1131 of 26.10.2001 on Chamber of Commerce and Industry of Georgia, on the basis of the application voluntarily submitted by natural person or legal entity. Chamber of Commerce and Industry of Georgia provides confirmation of the force majeure and other circumstances related to foreign economic activities.

⁹³ For the mentioned authorities of the Chamber of Commerce and Industry of Georgia, see: Decision of 18.04.2011 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case № AS-218-204-2011; Decision of 23.07.2009 on case № AS-30-367-09. Decision of 04.11.2010 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case № AS-878-826-2010.

⁹⁴ See Decision of 02.06.2014 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case: № AS-1118-1065-2013.

⁹⁵ See Decision of 05.07.2010 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case: AS-418-391-2010.

⁹⁶ *Maskow D.*, Hardship and Force Majeure, *Am. J. Comp. L.*, Vol. 40, 1992, 657,

⁹⁷ *Al-Emadi T.A.*, The Hardship and Force Majeure Clauses in International Petroleum Joint Venture Agreements, *oxford Student Legal Research Paper Series*, №02/2011, July 2011, 14, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878558>.

⁹⁸ *Fucci F.R.*, Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts, *Practical Considerations in International Infrastructure Investment and Finance*, American Bar Association Section of International Law, Spring Meeting, April 2006, 11, <<http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>>.

⁹⁹ *Al-Emadi T.A.*, The Hardship and Force Majeure Clauses in International Petroleum Joint Venture Agreements, *oxford Student Legal Research Paper Series*, №02/2011, July 2011, 12, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878558>.

persistence of the obstacles, alternative fulfillment of the contract or obligation of seeking of the alternative fulfillment,¹⁰⁰ contractor notification, negotiation in good faith, contract adaptation, or, in case of impossibility, termination thereof.

Hence, in formulation of the contractual clause, it is most significant that it stated provided legal outcomes with strict accuracy.

Contract clause must state the conditions of contract modification in force majeure circumstances preventing fulfillment.¹⁰¹ The procedure applicable in case of emergence of the circumstances provided for by the contract clause implies immediate notification, as well as the obligation of negotiating, including even the provision of extremely complex procedure of applying to the third person.¹⁰²

In many cases the clause contains the provision on participation of arbiter or the other independent third person, e.g. mediator in dispute resolution.¹⁰³ Clause should specify the rights and obligations of the parties in the contract adaptation process,¹⁰⁴ methods to be used¹⁰⁵ and framework principles of negotiating.¹⁰⁶

7.1 Contents of Notification Obligation Covered by Force Majeure Clause

Proper force majeure clause must contain requirement of written notification by the contractor as soon as possible, about emergence of the obstacles to fulfillment, their reasons,¹⁰⁷ degree¹⁰⁸ and scope,

¹⁰⁰ See Decision of 01.08.2011 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case:№ AS-931-969-2011. also Decision of 04.11.2010 on case:№ AS-878-826-2010 and decision of 29.07.2010 on case:№ AS-837-888-2011; in these two latter decisions the contract is interpreted where according to one of the clauses, the debtor shall seek the alternative ways for fulfillment that are independent from the impact of force majeure circumstances.

¹⁰¹ UNCITRAL – Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, Prepared by the United Nations Commission on International Trade Law, United Nations, New York, A/CN.9/SER.B/2, 1988, 242, <http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf>.

¹⁰² *Fontaine M.*, Les Clauses de Hardship, aménagement conventionnel de l'imprévision dans les contrats internationaux à long terme, DCPI 51, 1976, 59, specified in: *Uribe M.*, The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 226.

¹⁰³ *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, Cal. W. Int'l L. J., Vol. 19, 1988-1989, 103, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

¹⁰⁴ UNCITRAL – Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, Prepared by the United Nations Commission on International Trade Law, United Nations, New York, A/CN.9/SER.B/2, 1988, 243, <http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf>.

¹⁰⁵ *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, Cal. W. Int'l L. J., Vol. 19, 1988-1989, 81, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

¹⁰⁶ United Nations Commission on International Trade Law [UNCITRAL], Legal Guide on Drawing up International Contracts for the Construction of Industrial Works, New York, United Nations Publication, 1988, 241, <http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf>.

¹⁰⁷ See Decision of 23.07.2009 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case:№ AS-30-367-09.

notification form, procedure, terms, the issue of risk of non-delivery of notification to the addressee, obligation of due care for mitigation of negative outcomes of the event from the moment of notification,¹⁰⁹ actions, to be performed in this respect¹¹⁰ and information about elimination of obstacles.¹¹¹

For non-fulfillment of notification obligation, according to the contract clause, a party may be deprived of the right to exemption from responsibility awarded by the clause. Contract terms and conditions may also provide for the right to claim of losses caused by non-fulfillment of the notification obligation.¹¹²

Written notification must contain description of the event, its impact on fulfillment of obligation, information about the requested exemption from responsibility (full/partial) and the scopes thereof.¹¹³ Clause may also regulate the manner of giving notification. For example, the notification may be deemed delivered if a party does not reject terms and conditions thereof, for certain number of days; clause must also specify the outcomes of non-fulfillment of the notification obligations.¹¹⁴

In case of application of force majeure clause, from the date of notification of the other party about emergence of the force majeure event, a party shall be exempted from the fulfillment obligation. In case of non-fulfillment of immediate notification obligation, exemption from the obligations shall be applicable

¹⁰⁸ See Decision of 02.06.2014 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case:№ AS-1118-1065-2013. According to explanations provided in this decision, to regard the severe atmospheric phenomenon as force majeure, the degree, quality and causes of damages should be evaluated. On regarding the climatic phenomenon (snow) as force majeure, see: Decision of 23.10.2006 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case:№ AS-217-636-06.

¹⁰⁹ Decision of 29.06.2011 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case:№ AS-837-888-2011.

¹¹⁰ *Al-Emadi T.A.*, The Hardship and Force Majeure Clauses in International Petroleum Joint Venture Agreements, oxford Student Legal Research Paper Series, №02/2011, July 2011, 14, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878558>.

¹¹¹ *Al-Emadi T.A.*, The Hardship and Force Majeure Clauses in International Petroleum Joint Venture Agreements, oxford Student Legal Research Paper Series, №02/2011, July 2011,12-13, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878558>.

¹¹² UNCITRAL – Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, Prepared by the United Nations Commission on International Trade Law, United Nations, New York, A/CN.9/SER.B/2, 1988, 239-240, <http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf>.

¹¹³ *Young M.O.*, Construction and Enforcement of Long-Term Coal Supply Agreements – Coping With Conditions Arising From Foreseeable And Un-foreseeable Events – Force Majeure And Gross Inequities Clauses, 27 Rocky Mtn. Min. L. Inst. 127, 1982, 152, specified in: *Declercq P.J.M.*, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 244, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.

¹¹⁴ *Young M.O.*, Construction and Enforcement of Long-Term Coal Supply Agreements – Coping With Conditions Arising From Foreseeable And Un-foreseeable Events – Force Majeure And Gross Inequities Clauses, 27 Rocky Mtn. Min. L. Inst. 127, Vol. 27, 1982, 152-153, specified in: *Declercq P.J.M.*, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 244, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.

from the time of notification delivery to the addressee.¹¹⁵ On the basis of force majeure clause a party shall be exempted from the obligations of compensation of losses¹¹⁶ and payment of the sanctions.¹¹⁷

In case of force majeure circumstances of temporary nature, exemption from responsibility is limited to the period of persistence of such circumstances¹¹⁸ and after elimination of the mentioned circumstances, fulfillment of the contractual obligations shall recommence.¹¹⁹ In case of elimination of the circumstances the debtor has the notification obligation to the creditor.¹²⁰

7.2 Obligation of Negotiating for the Purpose of Contract Adaptation

Unlike Georgian legislation, the unified private law and most national legal systems provide for obligatory negotiations¹²¹ and preference of contract adaptation to the changed circumstances over termination. Therefore, it is significant that force majeure and hardship clauses contained the terms and conditions of fulfillment of the obligation of contract maintaining, negotiating, for the purpose of adaptation thereof and set the responsibility for non-fulfillment of the obligation of negotiating in good faith.¹²²

Recommendations on harmonization with the European law in this respect were offered by the legal doctrine.¹²³ Though, before the mentioned recommendation is shared at the legislative level, it is

¹¹⁵ Decision of 29.07.2011 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case:№ AS-837-888-2011.

¹¹⁶ ICC Force Majeure Clause 2003, ICC Hardship Clause 2003, ICC Publication №. 650, 2003, 3, <<http://www.trans-lex.org/700700>>. See also Decision of 23.06.2008 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case:№AS-858-1171-07 and decision of 28.12.2001 on case:№ 3K/992-01.

¹¹⁷ Decision of 08.12.2008 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case:№ AS-964-1166-08.

¹¹⁸ Recognition of the contractual obligations after force majeure event, for example, through fulfillment, cannot eliminate impossibility of fulfillment of obligations by the reason of force majeure circumstances within the term specified by the contract. See Decision of 23.06.2009 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case:№ AS-30-367-09.

¹¹⁹ If the alternative way of fulfillment is available to the debtor, than this excludes exemption from responsibility by the reason of force majeure as the debtor has not fulfilled the obligation of elimination of the negative outcomes of force majeure circumstances and did not use the available alternative mechanisms of fulfillment. See Decision of 01.08.2011 of the Department of Civil, Entrepreneurship and Bankruptcy Cases of the Supreme Court of Georgia on case:№AS--931-969-2011.

¹²⁰ ICC Force Majeure Clause 2003, ICC Hardship Clause 2003, ICC Publication №650, 2003, 3, <<http://www.trans-lex.org/700700>>.

¹²¹ Legal doctrine states that obligation to negotiate is higher value in French law than the principle of integrity in general law. *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, Cal. W. Int'l L. J., Vol. 19,1988-1989, 95, 96 <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

¹²² *Al-Emadi T.A.*, The Hardship and Force Majeure Clauses in International Petroleum Joint Venture Agreements, oxford Student Legal Research Paper Series, №02/2011, July 2011, 15-16, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878558>.

¹²³ See *Chitashvili N.*, Adjustment of the Contract to Changed Circumstances as the Legal Outcome of Fulfillment of Obligations, Tbilisi State University, Faculty of Law, :Magazine of Law", №1, 2014, 204-244.

significant that this gap was filled with the contract clause, to assist the parties, on the basis of autonomy of will, determined the scale of mutual responsibilities: set the preference of contract adaptation, as well as the guidance rules and principles¹²⁴ or, in case of impossibility of contract adaptation, establish the rules for termination thereof and distribution of responsibilities.

Provision on obligatory nature of negotiations for the purpose of contract adaptation and negotiating in good faith¹²⁵ ensure restoration of the contractual balance and flexible modification of the contract contents for its maintaining.¹²⁶ General provisions dealing with obligation of negotiating are often effective to ensure stability of long-term contractual relations.¹²⁷

Clause must contain terms of negotiating,¹²⁸ measures to be taken in case of failure of negotiations¹²⁹ and final offer of the parties.¹³⁰ Court of Delaware, USA, sets the scopes of the negotiating obligation by conducting of negotiations in good faith and making reasonable efforts.¹³¹ Similarly, Art. 158(d) of the National Act on the Labor Relations sets the obligation of conducting of negotiations in good faith to the parties.¹³²

It is significant that the clause established the status of the parties' mutual obligations in the process of negotiations for contract adaptation. If the contract clause is provided for one of the parties only, a party entitled to its exercising may be awarded the right of rejection of the fulfillment of his part by virtue of the same clause.¹³³ The clause shall also specify, whether negotiations suspend the

¹²⁴ UNCITRAL – Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, Prepared by the United Nations Commission on International Trade Law, United Nations, New York, A/CN.9/SER.B/2, 1988, 242, <http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf>.

¹²⁵ *Fucci F.R.*, Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts, Practical Considerations in International Infrastructure Investment and Finance, American Bar Association Section of International Law, Spring Meeting, April 2006, 41, <http://www.cisg.law.pace.edu/cisg/biblio/fucci.html>; *Uribe M.*, The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 224.

¹²⁶ *Berger K.P.*, Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators, Vanderbilt Journal of Transnational Law, Vol. 36, 2003, 1364, <http://heinonline.org/HOL/Page?handle=hein.journals/vantl36&div=55&g_sent=1&collection=journals#1380>, [07.04.2015]; *Horn N.*, Standard Clauses on Contract Adaptation in International Commerce, in: *Horn N. (Ed.)*, Adaptation and Renegotiation of Contracts in International Trade and Finance, Kluwer: Deventer, 1985, 130.

¹²⁷ *Uribe M.*, The Effect of a Change Circumstances on the Binding Force of the Contracts, Comparative Perspectives, Intersentia, 2011, 226.

¹²⁸ *Farnsworth E.A.*, Farnsworth on Contracts, Boston, 1990, 587-588.

¹²⁹ *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, Cal. W. Int'l L. J., Vol. 19, 1988-1989, 84-85, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

¹³⁰ *Farnsworth E.A.*, Farnsworth on Contracts, Boston, 1990, 587-588.

¹³¹ *Itek Corp. V. Chicago Aerial Indus.*, 248 A.2d, 629, July 10, 1968, <<https://casetext.com/case/itek-corp-v-chicago-aerial-industries-inc>>.

¹³² The National Labor Relations Act, 29 U.S. Code §158 - Unfair Labor Practices, <<http://www.law.cornell.edu/uscode/text/29/158>>.

¹³³ UNCITRAL – Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, Prepared by the United Nations Commission on International Trade Law, United Nations, New York, A/CN.9/SER.B/2, 1988, 242, <http://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf>.

contractual obligations or not. At the same time, it is reasonable that the clause specified the minimal fulfillment ensuring negotiating without causing losses to the parties.

7.3 Determining of the Outcomes of the Obligation of Negotiating

Obligation of negotiating implies taking all reasonable measures for fulfillment and showing due care (*obligation de moyens*), rather than obligation of achievement of the specific results (*obligation de résultat*) – achievement of agreement.¹³⁴ Though, the mentioned obligation substantially implies conducting of negotiations in good faith. Therefore, the court may obligate the party intentionally delaying or avoiding negotiations to re-involve into negotiations¹³⁵ and act in good faith for the purpose of achieving of the agreement.¹³⁶ French and general law system requires compensation of losses for non-fulfillment of the above obligation.¹³⁷

Agreement achieved through the process of re-negotiating, in many cases, is significantly preferable, compared with the arbitration award.¹³⁸ Therefore, the court should effectively apply the mechanism of imposing obligation of negotiating under supervision of the third person¹³⁹ or without such supervision, for realization of the parties' best interests.

In one of the cases¹⁴⁰, the court appointed the supervisor over parties' negotiation process, provided that in case of failure of negotiations the parties were entitled to apply to the court with the request of contract adaptation. By this decision the primacy of mutual negotiations provided by hardship clause was recognized before application of the contract modification mechanism by the court.¹⁴¹

¹³⁴ *Draetta U., Lake R.B., Nanda V. P.*, Breach and Adaptation on International Contracts, An Introduction to Lex Mercatoria, Butterworth Legal Publishers, 1992, 197; *Fontaine M.*, The Hardship Clause, 2 *Droit et Pratique de Commerce International* [Dr. Prac. Com. Int'l], 1976, 75.

¹³⁵ *Electricité de France c. Société Shell Française, Cass., J.C.P. II No. 18810, 1976*, specified in: *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, *Cal. W. Int'l L. J.*, Vol. 19, 1988-1989, 96-97, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

¹³⁶ *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, *Cal. W. Int'l L. J.*, Vol. 19, 1988-1989, 95, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

¹³⁷ *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, *Cal. W. Int'l L. J.*, Vol. 19, 1988-1989, 95-96, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

¹³⁸ *Ullman H.*, Enforcement of Hardship Clauses in the French and American Legal Systems, *Cal. W. Int'l L. J.*, Vol. 19, 1988-1989, 105, <http://heinonline.org/HOL/Page?handle=hein.journals/calwi19&div=9&g_sent=1&collection=journals>.

¹³⁹ *Živković V.*, Hardship in French, English and German Law, London School of Economics - Law Department, Institute of Comparative Law, Belgrade, October, 2012, 7, <<file:///C:/Users/Student/Downloads/SSRN-id2158583.pdf>>, [24.02.2015].

¹⁴⁰ *Electricité de France c. Société Shell Française, Cass., J.C.P. II No. 18810, 1976.*

¹⁴¹ For interrelation between the hardship clause and contract modification by the court, see: *Zivkovic V.*, Hardship in French, English and German Law, London School of Economics - Law Department, Institute of Comparative Law, Belgrade, October 1, 2012, 2, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158583>.

Unlike the French law, English law does not provide imposing of the re-negotiation obligation, without participation of the third party in dispute resolution. English law does not provide for the obligations of achievement of agreement and conducting of negotiations in good faith.¹⁴² Hence, the secondary claim rights available to the parties are limited as well, compared with the French and German laws.¹⁴³

In German law, clauses regulating fulfillment hardship serves to setting of the obligation of negotiating not provided by Article 313 of Civil Code, as well as the relevant procedure.

IN Georgian law, before regulation of the obligation of negotiating at the legislative level, it is significant that achievement of the goal ensured by this obligation was provided through regulating of the obligation of negotiating and outcomes of non-compliance by contract clauses.

7.4 Setting of Contract Termination Terms and Conditions in Case of Impossibility of Contract Adaptation

For the case of failure of negotiations intended for adaptation, the contract clause should provide termination terms and conditions and establish the rules of fair distribution of the relevant negative outcomes. Parties may establish the conditions different from the general rules of contract termination, in accordance to their priorities. The clause should also provide for the reasonable time of termination, for reasonable balancing of the interests.

The said process should serve to the parties' respectable interests. And such respectable interests provide basis for transformation and termination of the contractual relations.¹⁴⁴ The main thing is that in setting of the terms and conditions for contract termination the contractual clause ensured realization of the parties' interests with no detriment to the public or third persons' interests.

In case of compliance with this provision, even contract termination on the basis of contract clause, as the blast resort¹⁴⁵ and the strictest remedy,¹⁴⁶ within the contractual freedom, would become the mechanism for realization of the parties' best interests.

¹⁴² Živković V., Hardship in French, English and German Law, London School of Economics - Law Department, Institute of Comparative Law, Belgrade, October, 2012, 8, <file:///C:/Users/Student/Downloads/SSRN-id2158583.pdf>, [24.02.2015].

¹⁴³ Živković V., Hardship in French, English and German Law, London School of Economics - Law Department, Institute of Comparative Law, Belgrade, October, 2012, 12, <file:///C:/Users/Student/Downloads/SSRN-id2158583.pdf>, [24.02.2015].

¹⁴⁴ Zoidze B., Reception of Eurioeab Private Law into Georgia, T. Tsereteli Institute of State and Law, Academy of Science of Georgia, Institute of Private Law, Tbilisi, 2005, 300.

¹⁴⁵ Ciematniece I., Contract Renegotiation and Adaptation, Concept of Contract Renegotiation and Adaptation in International Commercial Law Contracts, Lambert Academic Publishing, Saarbrücken, 2010, 64.

¹⁴⁶ Horn N., Standard Clauses on Contract Adaptation in International Commerce, 1985, 137 in: Horn N. (ed.), Adaptation and Renegotiation of Contracts in International Trade and Finance, Deventer/The Netherlands, Kluwer Law and Taxation Publishers, 1985.

8. Stages of Interpretation of Force Majeure Clause

Analysis of force majeure clause is provided in four stages:

First stage includes examination of the factual circumstances specified in the clause. Second stage implies evaluation of whether the mentioned circumstances were beyond the party's control¹⁴⁷ and whether impossibility of its foreseeing has taken place. A party cannot rely on force majeure clause if the circumstances have emerged within his control¹⁴⁸ or it was objectively possible to foresee emergence of such circumstances.¹⁴⁹

At the third stage it is examined, whether obstacle to fulfillment of obligation or impossibility thereof was conditioned by the circumstances described in the clause and later emerged (causation, causal relations). As the contract clause establishes the procedures to be applied by the parties in case of emergence of changed circumstances,¹⁵⁰ the fourth stage of analysis of the contract clause establishing responsibility by the court implies examination, whether the mentioned procedure was followed by the party or not.¹⁵¹

9. Conclusion

Research clearly shows that significance of studying of validity, content requirements, structure, purposes and related legal outcomes of the contractual clause regulating force majeure and fulfillment hardship is proportional to necessity of fair contractual responsibility, turnover stability, legal determination and sustainable economic development.

Clause formulated in accordance with the requirements recognized in the practice and doctrine is an effective mechanism for balanced realization of the parties' mutual interests and fair distribution of responsibilities to the parties, even in the conditions of substantial loss of the contractual equilibrium.

Clause formulated through realization of autonomy of the parties' will, equipping the subjects of relations with the possibility to maximally approach realization of their legitimate interests, mutual responsibilities, their scopes and available remedies.

Clause regulating the outcomes of force majeure events in contractual relations, through establishing the obligation of due care, within the scopes of obligatory negotiations and reasonable prudence, with respect of the contractor's interest, promotes fulfillment of contractual obligations with due care and in addition, ensures fair realization of the contract sanctity principle.

¹⁴⁷ „Beyond Control“ (Eng.), „exteriorité“ (French).

¹⁴⁸ Declercq P.J.M., Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 238, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.

¹⁴⁹ Declercq P.J.M., Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 236-237, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.

¹⁵⁰ Živković V., Hardship in French, English and German Law, London School of Economics - Law Department, Institute of Comparative Law, Belgrade, October, 2012, 7, <<file:///C:/Users/Student/Downloads/SSRN-id2158583.pdf>>, [24.02.2015].

¹⁵¹ Declercq P.J.M., Modern Analysis of the Legal Effect of Force Majeure Clauses in Situation of Commercial Impracticability, J.L. & Com., Vol. 15, 1995-1996, 230, <http://heinonline.org/HOL/Page?handle=hein.journals/jlac15&div=14&g_sent=1&collection=journals>.

Giorgi Rusiashvili *

Place of Georgian Civil Law in European Legal Family

I. Introduction: Law and the National Spirit

According to the greatest lawyer of Germany, Friedrich Karl von Savigny, should be considered as the link between law and national spirit. The civil law is the representation of peculiarities of certain nations, as well as they language, customs and statehood. It arises from the common belief and internal need¹. “National Spirit” and the law based on it is represented for Savigny as another Hegelian tradition: “Law develops along with the Nation, acquires finalized forms and eventually dies with it².” The Law represents a historical phenomenon and its codification, of course if it does not correspond to the single level of legal development. In this case, it is the result of the harmful influence³. For this reason, after the Code Civil of France went in force, developed their own code one century later (1900), which mostly corresponded to their spirit. The previous period they completely used for molding of Roman law as part of the German Civil Code and learning of its history, cutting the casuistically received norms into the separate details.

Modern Civil Code of Georgia, which has been valid since November 25, 1997, from one single look, could not emerge from the national spirit. Georgian-German commission received it in quite a speedy way, whose master mind was Professor of Bremen, Mr. Rolf Knieper. This code did not base on traditions of the previous Soviet Code and quite opposite, German and partly French Civil Codes its main merit was renouncement of the Soviet one. Surely, it is possible to receive the one of the most civilized code of most developed legal tradition; however, it could also be harmful. If the legal soil had been fruitless for the transfer, this would have made it estranged. The fact that this result had been avoided is the straight contribution of the old Georgian legal tradition, which has always been trying to keep pace with the Roman law in Europe.

II. Roman Law and European Tradition

Goethe, while speaking with one of the most prominent lawyer Eckermann, resembles the Roman law with a duck. It dives in and out but finally it always keeps afloat⁴. Just as a duck, sometime the law disappears from the legal discourse so as it pops up in the central part of it again. However, at the end of

* Doctor of Law, TSU Faculty of Law.

¹ *Savigny F.C.*, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, Heidelberg 1814, 8.

² *Ibid*, 7.

³ *Caroni P.*, Savigny und die Kodifikation, in: Zeitschrift Savigny Stiftung Germ. Abt. 1969, 86 , 97, with further notes; *Savigny F.C.*, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, Heidelberg 1814, 29: „Law has its own existence and this existence is cohabitation of Law with a human being seen from a special point“.

⁴ Goethe zu Eckermann, 6. April 1829; *Rainer P.*, Das Römische Recht in Europa, Wien 2012, 1.

the day, the Roman law has always been in perspective of the legal discourse and never disappeared from the surface so as its importance were held doubtful⁵. Digests, the main combinatory bodies of the text, represent the start of European law, without which this culture in this shape is unthinkable⁶. It represents not only beginning of European legal culture but also the monument of the Roman law, which has reached to these days – the summation of Roman legal thoughts⁷. However, it is less understandable how the law, which had been created many years ago, be as a red line throughout the various context of European history including the Middle Ages, Enlightenment, Nationalism, Monarchies, Republics, etc., and still be the cornerstone of the current laws. This contrasts with the fact that in modern times the law received by one country could not work in the other, let alone differences in epochs. Other law did not resonate so considerably throughout the centuries, for which reason they are forgotten due to their merit. The very fact the Roman law, along with other disappeared laws, had not evaporated from the history, is that initially Roman refused the idea of nationality and opened so called “Open Legal System”, where different legal layers coexisted (*ius civile, ius gentium and ius honorarium*) and the Roman legal system (*peregrinus* – foreign, which according to Georgian nature one would call “outside”) of Roman citizens fully corresponded to its subjects. Romans had surpassed the formalism determined by the local cultural requirements. Thus, deal bargaining, mortgage, purchase, rent and other legal agreements could have been performed without maintaining the form, based solely on the mutual agreement of the parties⁸, which represents sophistication of the private autonomy. Based on this ritual formalism⁹, which is another representation of advanced principle of autonomy. Along with beating the ritual formalism, the civil agreements are based on the new legal ground – *fides*, which is the confidence of the parties shown to each other, which is valid for Romans and “others”. The bases of liabilities ensued from the contract, is the very relationship, which made the parties make it into contract and in case it is marred, the magistrate at the court penalized the violating party – forcing them to fix the problem based on the previous confidence – *quidquid dare facere oportet ex fide bona*. Thus, maintenance of the confidence became part of the legal discourse, which is the cornerstone of the modern legal systems.

Surpassing the national character of the law, also the autonomy of the private entities, behavior as the main principle of such regulations and the parties of the contract – their commitment to the contract – are those very principles Europe and the rest of the civilized world owes to – specifically in the form of the Roman law. At the same time, Roman lawyers never stopped developing the system, for what reason, one of the great historians of XX century law Heinrich Mitosis, attribute their main contribution to the voidance of the positive stupefaction of the law along with the blind commitment to its norms¹⁰.

⁵ Rainer P., *Das Römische Recht in Europa*, Wien, 2012, 1.

⁶ Spengler H.D., *Römisches Recht und europäische Rechtskultur*, in: *Die kulturelle Eigenart Europas*, Freiburg, Basel, Wien, Herder 2010, 48.

⁷ Ibid, 53.

⁸ Ibid, 61; Just as a Roman lawyer Ulpian quotes another Roman one, Pedius: „The contract meaning is of a very general character, as Pedius put it elegantly, there is no agreement or contract, which does not embody consensus in its body be it in words or through actions“ (Ulp. D. 2.14.13: Adeo autem conventionis nomen generale est, ut eleganter dicat pedius nullum esse contractum, nullam obligationem, quae non habeat in se conventionem, sive re sive verbis fiat).

⁹ Spengler H.D., *Römisches Recht und europäische Rechtskultur*, in: *Die kulturelle Eigenart Europas*, Freiburg, Basel, Wien, Herder 2010, 61, with further notes.

¹⁰ Mitteis H., *Vom Lebenswert der Rechtsgeschichte*, Weimar 1947, 129, 131.

Law scientists keep on debating the way European laws should be organized. According to one theory¹¹, European law is divided by Roman, German (they comprise the continental law) and general law (UK except for Scotland). What about another theory¹², one should differentiate only Roman law related and the rest of the countries. Though, both theories agree the legal foundation for the continental law ensues from the Roman one.

III. Greco-Roman Law and Georgian Legal Tradition

Roman law made its way into Georgia through Byzantine Empire. It could not be otherwise, which is proved by Byzantine canonical examples such are central and peripheral laws initiated into Georgia¹³. Ruis-Urbnisi Legal Decree (1103 w) is another representation of the fact¹⁴. What about general jurisdiction, in this regard Georgian law of XVII century is codified into the Legal Code of Vakhtang VI. The Code was created in 1705-1708 consists of the following parts: “Moses Law”, “Greek Law”, “Armenian Law”, “Catholic Law”, “King George’s Law” and “Agbuga’s Law”. Finally, the legal code of the Georgian King Vakhtang VI called “the Code of Prince George”.

Apart from Mkhitar Goshi, XII century Armenian Code, “Syria-Roman Law” is also included, which is the legal monument of the ancient law. It was supposedly created in Greek after the death of the Emperor Leon I (474 AD¹⁵). The author is presumed to be an Ambrosius¹⁶ and according to the text, it resembles the serious of lectures recorded. The text is based on canonical laws of the late Antic period such as a Code of Emperor Theodosius. Here are his novels, also those of Valentine III and Paul’s sentences along with the patches of various unknown lawyers of the time. Regardless the fact that this law was quite valid in Georgia before the Vakhtang VI’s times¹⁷, the prime version of its translation had been lost, the reason why along with Mkhitar Goshi, they had to translate it from Armenian. By the book of the law, although quite unsystematically and messy, but still, its primary shape had been preserved in Georgia.

The second place in the Vakhtang’s law is occupied by the Greek law. There are 418 paragraphs preserved to our days. These are Byzantine laws dating back from the third period of Byzantine Law¹⁸ represented by the compiled books of the XIV scholar and theologian Mathew Vlastar of Thessaloniki and the scholar of the same period Constantine Armenopoulos¹⁹. Syntagmatic text should have been received in an abridged version, what about the fractions from Armenopoulos and others, these are used as addenda.

The appeal of the various judicial books is the following: while using the textbook by Vakhtang VI, the priority is always stressed on his personal part. However, foreign law did not represent only non-compulsory addenda, from which a judge could apply only to the general principles. The foreign law

¹¹ *Zweigert K., Kötz H.*, Einführung in die Rechtsvergleichung I, Tübingen 1985, 72 and others.

¹² *Honsell H.*, Lebendiges Römisches Recht, in: Gedächtnisschrift für Theo Mayer-Maly, Wien 2011, 227.

¹³ *Zoidze B.*, Reception of European Law, Tbilisi, 2005, 38.

¹⁴ Ibid.

¹⁵ *Liebs D., Nagel P.*, Rezension des Werkes von Selb/Kaufmann, in: Savigny-Zeitschrift für Rechtsgeschichte, Rom. Abt. 121, 2004, 560.

¹⁶ Ibid.

¹⁷ *Sokolsky V.*, Greco-Roman law in Vakhtang VI’s institutions, Journal, Ministry of Education, 1896, 88.

¹⁸ *Bregadze T.*, Greek Law from the Lawbook by Vakhtang VI, Tbilisi, 1964, 20.

¹⁹ *Bregadze T.*, Greek Law from the Lawbook by Vakhtang VI, Tbilisi, 1964, 23 with reference to V. Sokolsky.

used to find its direct application as well. The king himself in his introduction says, “Whichever the judge chooses...” and even before he indicates to choose the very law, which is considered as discretionary. Documents²⁰ of various times also prove the usage of the foreign law. Therefore, Greco-Roman law of the late epoch constituted not only part of Georgian legal thinking, but also the valid law of the time supported the stance – along with the trend orthodox countries of the time shared by the same span of the law²¹.

IV. *Ius Gentium*: Other’s Law as Native One

The fact that the laws of other countries constitute the parts of Vakhtang’s Code represents the phenomenon, first noticed in the Ancient Rome. The idea of *ius gentium*²² had been forever introduced to the European nations by Romans and they used to apply it quite actively until their native states had been finally established²³. The short history of its origin is the following one: Roman civil law and its institutions applied only to Romans as well as other peoples but with exception that for those it was a subject of constraint. The creation of general legal system was possible only when Romans established the “*ius gentium*” (considering the specifications of the law of different peoples²⁴). It was the law of each person, which put constraint not only on foreigners but also on the Romans themselves²⁵. The necessity was caused first by economic factors and then subsequent extension of the Empire (from the third century AD onwards the expansion in the citizenship of Rome was another cause for it).

But not the factors determining this phenomenon are so much important, but the idea, which stays behind. According to Cicero, *Ius Gentium* is the idea, which naturally corresponds to the nature of the Roman law²⁶. True, its compulsory character is guaranteed by law, but, on the other hand, it is also

²⁰ Bregadze T., Greek Law from the Law book by Vakhtang VI, Tbilisi, 1964, 17 with further notes (in Georgian).

²¹ Sokolsky V., Greko-Roman Law in Vakhtang VI’s Institutions, Journal, Ministry of Education, 92 (in Russian).

²² Represents imprecise translation of the term, which is mostly caused by the impossibility of the same phenomenon in the modern legal system (*W. Kunkel, H. J. Schermaier, Römische Rechtsgeschichte, Köln, Weimar, Wien 2005, 96*) (in Georgian).

²³ In 1495, Maximilian I of the Holy Roman Empire created the calendar court of the empire. In case of other source existence, should judge the “general written law of the empire”, where the *Corpus Iuris* by Justine was meant.

²⁴ Widespread assumption until nowadays (*Kunkel W., Schermaier H.J., Köln, Weimar, Wien, 2005, Römische Rechtsgeschichte, 97*) according to which Romans never tried to study the laws of other peoples and used to spread over other peoples their own law in the framework of *Ius Gentium* – incorporate them in their legal sphere – needs to be considered as partial, especially after discovering so called “Babata Archive (to compare. *Chius T. J., Babatha vs. The Guardians of Her Son: A Struggle for Guardianship – Legal and Practical Aspects of P. Yadin 12-15, 27, in: Katzoff R., Schaps D., Law in the Documents of the Judean Desert. Leiden 2005*).

²⁵ Kaser M., *Ius gentium*, Köln, Weimar, 1993, 42.

²⁶ *Wieacker F., Zum Ursprung der bonae fidei iudicia*, in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Rom. Abt.* 1963, 80, 10. Unlike Roman law, the natural law was specific in striving towards the concept of mathematical precision and self-sustainable, close systems, which generates conclusions through premises, the fact which is not rather justifiable for the law as of a social phenomenon.

compulsory for the other peoples as well, while it corresponds to the general nature of humans²⁷. In his well-known definition, Gaius attributes *Ius Gentium* to the natural spirit - *Quod vero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur vocaturque ius gentium*: the law, which is originated in each person by natural spirit, is protected among all the people and is called people's law. *Ius Gentium* is not "other's law" because it was valid for Roman citizens as well, nor is it the International law in its current meaning, the purpose of which is prevention of any collision originating in various legal systems²⁸. *Ius Gentium* is actually valid law and represent the idea of converting the other's law into own one if it originates from "naturalis ratio".

Same idea lies under the compiling work after Vakhtand VI, who, as mentioned above, except for the Georgian sources, comprised Biblical, Creco-Roman and Armenian laws and through which the law of V century (Syria-Roman) became part of the Georgian Code. Studying the codes of foreign people along with the Georgian one had not been alien before the times of Vakhtang VI, the proof of which represents the Book of Beka-Aghbugha of XIII-XIV centuries²⁹. However, Vakhtang's version is the most vivid one. This was not the idea of filling in Georgian Law with the legal statutes imported from outside, which is clearly seen from citation indicated by Vakhtand in his introduction – when he leaves the right – which "naturalis ratio" to choose – solely to the judge.

For example, one of the court rulings by Solomon II (XVIII-XIX) is based³⁰ first by Biblical law, then by French and Peter the First's laws. Then come the laws of "tartars, Jews, pagans and of other kinds" as well as the law of "infidels". Greek laws are followed by citation of Vakhtang's laws, after which the king concludes, "By this true law the son inherited the land and property from his father Khutu Mikeladze" and recognizes the property right after female³¹. As we can see from decision by Solomon II, he uses the foreign law not for correcting the faults of the native one, which does not exist in this case, but to prove the authenticity of his own, legal ruling and thus reaches the idea of the firm, steady law, which on its own takes us back to the "naturalis ratio".

V. From the Dogma Stories of Roman Law

Apart from the general principles mentioned above, the modern European law is obliged by the Roman one through institutions such are property, immunity, will and many more³². In Europe, the subject of dogma is represented by the research of their function, economic, social and ideological character. This, in unity, yields possibility to understand why only partial reception of the dogma took place in appropriate cultural surroundings, and why the rest was given to oblivion. Of course, in the framework of this article, will not be able to encompass the full reception of initiated Roman dogmas into the Georgian law, neither fully nor partly. We will touch only two dogmas, which are of representative character and are part of the Roman legal domain.

²⁷ Cic. de off. 3.17.69; Cic. de har. resp. 14.32.

²⁸ Kaser M., *Römisches Privatrecht*, München, 1971, 202.

²⁹ Javakhishvili I., *Stories in Twelve Volumes*, Vol. 6, Tbilisi, 1982, 114 (in Georgian).

³⁰ Dolidze I., *Monuments of Georgian Law*, Vol. 6, Tbilisi, 1977, 431-434 (in Georgian).

³¹ Zoidze B., *Reception of European law*, 42 (in Georgian).

³² Honsell H., *Lebendiges Römisches Recht*, in: *Gedächtnisschrift für Theo Mayer-Maly*, Wien 2011, 225.

One of the greatest achievement of Roman law – party consensus as the main ground for any contract – is given in the Greek part of the Vakhtang’s Law (paragraph 4), “Every person chooses to sell and buy and they should agree upon their subjects and price”. Besides, the analysis performed by Ivane Javakhishvili³³ regarding the preserved purchase related treatises of Nikortsminda (XI century) concludes, up to that time, Georgian law had already passed the stage of the symbolic legal formalism. The purchase related document could be concluded both in a written and oral form. The maintenance of the form at its conclusion, in form of the presence of the witnesses, is not just the guarantee of its authenticity but serves the ease for its further fulfilment. The fact that in Georgia the stage of the symbolic formalism had been already over and the prerequisite of any contract was considered the party consent, is not of the least importance, especially if we note that the law, on its own, does not progress. For example, Germanic law in medieval ages displays those qualities, which had been peculiar for the Roman law of the V century BC. Ivane Javakhishvili accentuates³⁴ also on the formula given in the purchase related documents, which states, “God bless you and your future (generations) and let you have (it) and get multiplied”, what, according to the author, had the following functions: “As the purchase could appropriate an item after the sale based on mutual agreement, therefore it would be reasonable that this formula was used for the further enhancement of the deal”. This detail proves that the private autonomy mentioned above, that is the right for the self-determination of the legal transaction, is totally realized in Georgian law. In the purchase agreement the seller, to underscore the amount paid, can indicate that he (she) received the “full price” or “agreeable one” or replace it by indicating to the fact that he (she) had no claims to the other party (“God bless it for you”).

Besides, in Georgian law there are various similarities with Greco-Roman law regarding terms or institutions. For example, Roman “legatum”, the will is translated into Georgia as “leg(h)atum³⁵”. Roman word for possession – possession – that derives from the Latin “sedere” was translated into Georgian as “sitting”, which denoted the possession of the item. The property acquired by theft or any illegal means was not considered into possession pool, which is also the remnant of the Roman law. The capital punishment (hanging) could be attributed to the Byzantine law. By the Ruisi-Urbnisi Code, the marriage age for the woman (12 years) was also received from the Justine’s law. However, these similarities on their own could not be considered the reason for attribution of the Georgian law to the European one as well as its inclusion into reception of the Roman one because the same similarity persists regarding the Oriental (Arabic, Persian and Turkish) laws³⁶. What makes Georgian law as part of the European one (in perspective) are not just particular terms and institutions by which only Greco-Roman legal legacy is proved but the realization of the methods and fundamental principles derived from the Roman law.

³³ *Javakhishvili I.*, Stories in Twelve Volumes, Bd. 7, Tbilisi, 1984, 310.

³⁴ *Ibid*, 313.

³⁵ For this and the rest given here compare Vol. *Zoidze B.*, Reception of European Law, Tbilisi, 2005, 57.

³⁶ *Ibid*, 71, With further notes.

VI. Property

1. Dominium Duplex: Double Property

The outlines of the property existing in the modern law were finally defined by the Roman one. The doctrine of the Roman law in the first and second centuries AD determined the concept of absolute property – the proprietor is the party who holds the best right onto the subject and is the only one. But, along with development of the concept, one of the most interesting legal figure was being developed, which later European law inherited from the Roman one. This is duplex dominium, which is the right of the double property. The right, as the ultimate authority over the subject, occurring from this absolute, can be attributed to the only one party. In the Roman law, for the agricultural society, the right of property over land, cattle and slave was attributed only to the citizens of Rome – and the appropriation act was followed by the ritual, at which they would hit the scales by the bronze piece and with the presence of five witnesses, used to say these ritual words, “hunc ego hominem ex iure quiritium meum esse aio isque mihi emptus esto hoc aere aeneaque”. The items, due to this ritual, was called the emancipated ones (*res mancipi*). *Mancipatio* was the institution of *ius civile* and therefore not available for the others (outsiders). However, as the trade with pilgrims developed, time brought necessity to expand certain right like that over them as well. The Romans who had never annulled the old institutions, achieved it by *Ius Gentium* by establishing a new institution. In a Roman citizen sold an item and passed it over (tradition) to a non-Roman without this ritual – the citizen did not use to lose their rights on the subject and could try to reclaim it by vindication (*rei vindication*). However, the citizen would not reach this goal because *rei vindication* was met by resistance of the legal response of the purchasing party (*exception rei venditae et traditae*). By reclaiming the item, the seller would violate the trust (*fides*), what would leave his claim unfulfilled. That is, although non-citizen could not have the property right as that of the one (*dominium ex iure quiritium*), the item purchased, however, was protected from the reclamation of the claimant, same – citizen of Rome. The actual proprietor of the item was the purchaser of such. The acquisition of an item in such a kind is called *bonis habere* (“to have in property”) while the proprietor is called “bonitarian”. If a bonitarian meets a claim from another party, the one could reclaim the item by another law, called *actio publiciana*, which represented the analogue to the citizen’s property law; however, in this case, the bonitarian had to prove not the property right but the fact that the item was sold and handed in by the citizen, which, on its own, was quite an easy procedure³⁷. That is, in the Roman law along with the property right of a citizen, there was another, bonitary property right, and this very fact was called the duplex property right by Gaius³⁸.

Duplex dominium became official term in the European law of the medieval era. Absolute proprietor was *dominus directus* while the user of the right was called *diminium utile*³⁹. Disregard the critique, the concept of the duplex in the medieval era was quite prevalent and mostly concerned

³⁷ Kaser M., *Ius Gentium*, Köln, Weimar, 1993, 438; Citizens Could use this Claim if They Could not Prove it Otherwise as Having the Property Right Upon.

³⁸ Gai 1.54; 2.40: *aslo Iust. C. 7.25*.

³⁹ *Wieling H.J.*, *Sachenrecht*, Bd. 1, Berlin, Heidelberg 2006, 272.

relationship of peasants and their landowners. The lord was *dominus directus* while peasants had the right dominium utile. In the nineteenth century, this teaching was mostly abandoned⁴⁰ and the authors of Germanic civil law finally dropped the practice⁴¹. However, departure from this practice was only of a partial character because the flipside of this idea – *actio publiciana* – is still valid in German civil code (paragraph 1007).

How close Georgian civil code is to the European one is seen from the concept of “property”. “Property” was not the absolute propriety right over a subject – in case the term “gain” or “land” was used⁴². However, the concept according to which “property” meant possession was also dismissed⁴³. According to the complicated and patchy feudal property law, Georgian legal monuments, similar to their European counterparts, do not portray distinct differentiation between the notions of “property” and “possession”. These terms are intertwined and possession quite often comprised the meaning of “property”. The senior did not use to enjoy unlimited right for property while the vassal had not only the absolute right for property over a subject but also the right to dispose it (possess it in a modern concepts) in a certain framework. Same character of the property in Georgia is met in Beqa-Aghbugha law of XIII-XIV centuries⁴⁴. The land is possessed by the lord – “it’s a lord’s place”. However, it is in the vassal’s property and as long as his subjects work for him, the vassal does not have the right to confiscate the land, sell it or expropriate it. One can say that the same peasant had even a better right than their lord, which takes us back to the interest conflict between a citizen and bonitarian, which was solved in favor of the last one through *exceptio rei venditae et traditae* and *actio publiciana*. Thus, established right for possession is quite a wide authority and stays close to the Roman bonitary law rather than its modern concept. The contradiction between property and possession in Georgian law is enhanced by the fact that the property right could be inherited to the future generation by the will⁴⁵. This is a purely Roman idea, which is known by “duplex dominium” in the medieval Europe and surely is known in Georgian legal texts as well.

Today paragraph 1007 of German civil law in case of a property dispute protects the rights of a party with “better” property ownership (as a proprietor) and represents codification of *actio publiciana*⁴⁶.

⁴⁰ Wagner H., *Das geteilte Eigentum im Naturrecht und Positivismus*, Breslau 1938, 71, with further notes.

⁴¹ Jakobs H.H., Schubert W., *Sachenrecht I*, Berlin, 1985, 448.

⁴² Dolidze I., *Old Georgian Law*, Tbilisi, 1953, 141; Javakhishvili Iv., *History of Georgian Law*, Vol. 2, Exempt II, Tbilisi, 1929, 403.

⁴³ Dolidze I., *Old Georgian Law*, Tbilisi, 1953, 143; Javakhishvili Iv., *History of Georgian Law*, Vol. 2, Exempt II, Tbilisi, 1929, 403 (in Georgian).

⁴⁴ Ibid, 149.

⁴⁵ Contrary to Surguladze I., (“The institute of Property Protection”, university work XXXV, 1949, 244), Dolidze I., (*Old Georgian Law*, 149) assumes that the property meant only possession even in XIV century. However, as mentioned above, its meaning is far broader than its modern one and often it does not even have the primary character regarding the concept of property.

⁴⁶ § 1007. The rights of reclamation by the former owner, exception of the one having no claim rights in case of knowing such a fact:

(1) The person who disposed the item can claim it from the current owner if the last one does not acquire it in an honest way.

(2) If the item was stolen from the previous owner, or he (she) lost it or lost control of it in some other ways, then the previous owner can claim it from the one who acquired it in an honest way except for the cases, when the last one is the owner of the item and (or) the item was off his disposal before the previous owner possessed it. This norm is not applicable to money and precious papers.

The previous owner, who reclaims an item from the newer one, is not liable to prove the right for the subject. It is sufficient if he (she) proves that he (she) has better right on the subject than the current party because it is understood that he (she) already represents the party of the right. In Rome, as well, bonotary proprietor could not prove their (critical) right for property but still could reclaim the item using the “*actio publiciana*” because the citizen sold it and handed it over and therefore the first one had better right to own it (compared to anyone else).

If the period of temporary recession of the Roman law could be considered the epoch of National Socialism⁴⁷, in Georgia during the Soviet rule this period lasted longer. Regardless the fact that Soviet law borrowed many institutions from the Roman law, did not share its fundamental right. Therefore, in Georgian legal texts legal dispute regarding the right of property and protection seems interesting and somehow strange⁴⁸. The scientists of Georgian law intuitively realize (they never mentioned the idea of *actio publiciana* and duplex dominium in their dispute) that what they inherited from old Georgian law was not only the fact of property fact protection but protection of the right proper, what in Rome is the straight representation of *actio publiciana*.

German coincides with that of Georgian paragraph 160, “If an honest proprietor is bereft the right to possess, the party has the right to reclaim it from the new proprietor throughout the three year-long term”. This rule is applied when the new party has a “better” ownership right. The reclamation of the property is applicable to another party of a “better” right as well, if the last one acquired it through fraud or violation. This feature of a German law, from a single overlook, has its roots in an old Georgian law, because the same principle is determined in one of the documents of 1741⁴⁹ where the property right is boiled down to the proof of sheer possession⁵⁰. For example, “If (he) gives a vow or find a guarantor, (the property) should be held after him and never be bereft because in this case Vakhtang’s Law does not have anything to do with this property (newly planted vineyard, in this case). That is, actually the owner is the party who has “better” right for the property item to reclaim. However, the true owner might be the third party in general. *actio publiciana* in this very form is known in German law as well as in modern Georgian one; it was also known in old Georgian legal texts for which reason this form had never been copied but rather represented integral element of Georgian legal thinking.

2. Usupacio: Aging of Property Right

In case of acquiring property, in old Roman law there was a principle according to which nobody is enabled to pass over more than owned personally (50.17.54: *nemo plus iuris ad alium transferre potest quam ipse habet*). Unlike modern law, where acquiring the property by the non-owner is possible to be

(3) The Right to Reclaim is out of Question if the Previous Owner Purchased the Item in a Dishonest Way or Abandoned it. In cases Otherwise, norms 986-1003 are Applicable.

⁴⁷ Spengler H.D., *Römisches Recht und europäische Rechtskultur*, 64. However, the full replacement of Roman law from university sphere was, surely, impossible.

⁴⁸ Rtskhiladze T., *Property Protection, Soviet Law, 1928*, №1, 7-9; Putkaradze I., *the Issues from the History of Georgian Law*, Tbilisi, 1979, 116-118.

⁴⁹ Kakabadze S., *Documents, Documents*, Book 5, Tbilisi, 1913, 60.

⁵⁰ Putkaradze I., *Issues from History of Georgian law*, 110, Kakabadze S., *Historical Documents*, Book 5, Tbilisi, 1913, 60.

bequeathed (if legal), in ancient Rome non-owner could not pass over the property to the other party. However, regarding the interests of trade, in a number of cases, it was possible to protect the credit for honest acquisition even when the party was authorized with this right from the unauthorized one. For this reason, the Roman received another legal tool for property acquisition – the age of property right, which had spread into the age of Medieval Europe through the influence of Roman law and represents the heritage for the modern codifications. If the expropriator was not the owner but owned the item according to the law and honesty, with the passage of time the party received the right to own it. Therefore, this institution served to match the real and unreal legal circumstances⁵¹ - the fictional owner of the property turned to be it full-fledged legal owner. Gaius⁵² proves the necessity of this institution by the following, “They introduced it so as the status of the property did not hold suspended for a long time. At the same time the term of a year or two years, necessary for the legal age, is necessary for the would be owner to acquire the right for it”. The laws of twelve tables had comprised the elements of this institution according to which the land lot (real estate) needed two years of term while the rest of the items (subjects) one-year term of ownership. The terms and the items addressed used to change quite frequently. For example, in 1424 the emperor Theodosius II decreed that the term for general age of ownership to be 30 years, after the maturity of which the true owner would lose the right to reclaim it in any way. Justine changed this term but regardless specific changes, the owner the goal of the legal aging for the property was the one: the firm, reliable character of civil circulation and protection of all the parties involved – the person who honestly disposed the item along the legally determined period subsequently becomes the sole owner of the one. The credit of all those people is also maintained who would later acquired the item. However, the owner who lost the right of ownership with the time is left the chance and enough time to reclaim it.

Beka-Aghbuga law is another representation of the compromise between the civil circulation and the property rights (paragraph 77) according to which if the prime owner does not seek for his (her) property for seven years (the peasant who has escaped) and does not ask him (her) back, eventually loses the right of ownership over this peasant⁵³. This term can be extended to 30 years if the peasant has escaped far away and the lord does not know about his (her) physical location. Same proposition is foreseen in Vaktang’s law (paragraph 199⁵⁴). Thus, the same old Georgian law repeats decision of the Roman law and the aging for the property right, which is given in paragraphs 937-945 of German civil code and which had been invited into Georgian law in later years (paragraphs 165-168) had already been known in Georgian legal tradition.

3. The Prohibition of the Gifts between Spouses

Granting gifts between spouses had been banned in Roman law since the time immemorial⁵⁵. First time Roman lawyers mention this restriction during the Augustus reign. However, they did not

⁵¹ Honsell H., *Lebendiges Römisches Recht*, in: *Gedächtnisschrift für Theo Mayer-Maly*, Wien 2011, 230.

⁵² Gai 2.44.

⁵³ Dolidze I., *Old Georgian Law*, Tbilisi, 1953, 159 ,with further notes. (in Georgian).

⁵⁴ Dolidze I., *Old Georgian Law*, Tbilisi, 1953, 160, *Javakhishvili Iv.*, *Stories in Twelve Volumes*, Vol. 7, Tbilisi, 1982, 292 (in Georgian).

⁵⁵ *Wieacker F.*, *Hausgenossenschaft und Erbeinsetzung. Über die Anfänge des römischen Testaments*, Leipzig, 1940, 48, with further notes.

understand properly the true historical motives and prove it such according to the official reason (ideology) to avert the property related damage, which might ensue⁵⁶. One spouse should not get rich at the expense of the other – “According to the custom, it is established that spouses cannot grant gifts to each other so as they don’t rob each other through the irrational hand of mutual infatuation⁵⁷”.

One German researcher Klutmann⁵⁸ came up with assumption according to which the same tradition in Khevsureti (Georgia) was borrowed from the Roman legal tradition; thus, he approved the existence of such in other laws as well. Today this assumption is renounced⁵⁹. In Georgian law, the institution restricting or banning the granting of gifts between the spouses had never been the case similar to that of Rome. According to the Klutmann’s opposite assumption⁶⁰, this institution in Georgian legal tradition resembled old Oriental or Greco-Byzantine law. However, there are not evidence or case which example could be the case borrowed by the Georgian law. On the other hand, the existence of this legal fact is proved by the Vakhtang’s law (Greek version, paragraph 183⁶¹), which starts the title, “About the property gifts between the spouses”. The paragraph itself says that if spouses grant each other the whole or half of their property, this grant would not be held legal because, “it is preconditioned by infatuation” and this condition should not impoverish the parties. The title and the contents of the paragraph indicate that through the Greek law the legal element limiting or banning the property granting by the spouses still established in Georgian law, which on its own represents the milder version of the Roman one. The full banning of the property granting by the spouses is not proved within the Georgian law. However, the assumption according to which the spouses can impoverish each other by these very means (before the opposite is proved) can be viewed as the remnant of the old Roman law.

VII. Georgian Civil Code of 1997

The civil code, which is valid now, was received in 1997. By its structure and dogmatic character, it mostly resemble the German civil law. Besides, German legal scientists were those who mostly contributed to its development. The work started in 1993 did not aim at mechanical redrafting of German norms and institutions. The result should have been creation of a new Georgian law, which would have German legal values in common – the precondition of establishing modern Georgian civil society. It was not an easy task because Soviet law, which was valid even during the Post-Soviet period, only partly shared these values (for example by not attributing the right legal characteristics to the private property). The goal of Georgian legislature was creation of the law maintained by new values, the cornerstone of which is the private autonomy, freedom of contract and protection of private property. Through the help of Rolf Knieper (professor at Bremen University), lawyer Hartmut Fromm and Mario Pelegrino, Georgian legislature was successful enough to solve this problem.

⁵⁶ Kaser M., *Römisches Privatrecht*, München, 2005, 331.

⁵⁷ Ulp. 24.1.1: *Moribus apud nos receptum est, ne inter virum et uxorem donationes valerent. Hoc autem receptum est, ne mutuo amore invicem spoliarentur donationibus non temperantes ...*

⁵⁸ Klutmann R., *Analyse des national-grusinischen Obligationenrechts im Kodex König Wachtangs VI*, *Zeitschrift für vergleichende Rechtswissenschaft, einschliesslich der ethnologischen Rechtsforschung*, 29 (1878), 445, reference 24.

⁵⁹ Futkaradze I., *Historical Facts of Georgian Liability Law*, 40, with further notes.

⁶⁰ Ibid, 43.

⁶¹ Bregadze T., *Greek Law, from the Law Book by Vakhtang VI*, Tbilisi, 1964, 90 (in Georgian).

Goethe's idea, addressed to German law, is proved in case of the Georgian law as well. The classic Roman law and its principles had consecutive influence on Georgian law through redrafting of the first Roman-Syrian and then Byzantine norms. Eventually it was the German law based on the principles of the Roman one. Unlike Western Europe, in Georgian legal system Roman law did not enter through digests. It entered through the legal books of Rome, Syria, and Byzantine (simplifications of classic Roman law performed throughout the centuries⁶²), the parts of which in legal discussions are considered as "vulgar". However, it turned enough so as Georgian legal thinking institutionalized the legal principles of Rome.

Digests are the beginnings of European legal culture, but at some point the end of it as well. The well-known Romanist of the twentieth century, Theo Mayer-Maly through his article "Returning of the Legal Figures⁶³" clearly portrays the fact how Roman legal dogmas gradually wane to oblivion so as the reappear again. Quite often and unconsciously, the lawyers "contrive" the forgotten Roman dogmas because they represent the universal models of the legal thinking, which could not be averted. Georgian legislature did not reinvent Roman dogmas from anew. It received them from the German law but because Georgian law as well as German one derives common roots from the Roman one, these "received" dogmas turned to be well-forgotten ones happened to be right where they needed – where the legal culture to exploit them had been established centuries ago.

⁶² *Kunkel W., Schermaier M., Römische Rechtsgeschichte, 228.*

⁶³ *Mayer-Maly Th., Die Wiederkehr von Rechtsfiguren, JZ 1971, 26, 1-3.*

Debtor's Guarantee

1. Introduction

Fulfillment of the obligations undertaken by the parties of contractual relationships ensures stability of civil circulation. Accordingly, the ancient Latin expression – *Pacta sunt servanda* [agreements must be kept] is still relevant. In many cases performance of obligations is encouraged by the securities.

The forms of security for contractual obligations used in the civil law of ancient Greece and Rome have been presented, mostly similarly or with slight differences in the modern civil legislations, among which is the civil law of Georgia as well. However, the debtor's guarantee which is declared as an additional form of security by the Civil Code of Georgia of June 26, 1997 N786-2¹ (Articles 424-426), is an exception in this regard.

Before adoption of the Civil Code there had never been such a form of security in Georgian civil legislation. Accordingly, its history as of a form of securing contractual obligation, started from the Civil Code currently in force and the authors of the Code are the creators of the legal institute of the a debtor's guarantee.

German Law has considerably influenced the Civil Code and accordingly it belongs to German legal system. "By drafting the Civil Code of Georgia did not enter that system for the first time but it rather restored the "broken" bridge".² Therefore it is considered that introduction of a debtor's guarantee in the Civil Code is the result of German civil law reception.³

According to the Civil Code debtor's guarantee is one of the additional means of securing claim. Namely there is stated that "to secure the performance of an obligation the parties may also determine under the contract additional means: penalty, earnest money and a debtor's guarantee" (Article 416).

Analysis of the court practice shows that debtor's guarantee is relatively rarely used form of securing performance of obligation unlike other means of additional securities including penalty and earnest money. That can be simply explained by the fact that the institute itself is new and also by low awareness of the debtor's guarantee.

The above statements clearly demonstrate the importance of in-depth studies of debtor's guarantee institute and necessity to fill the information void over this particular form of security. The present legal research is designed to contribute to those challenges.

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¹ Georgian Civil Code №786-2 from 26.06.1997, hereinafter - Civil Code, <<https://matsne.gov.ge/ka/document/download/31702/77/ge/pdf>>, [14.04.2015] (in Georgian).

² *Zoidze B.*, From the History of Creation of Georgian Civil Code, "Georgian Law Review", №6/2003-1, 104 (in Georgian).

³ *Ioseliani N.*, Comparative Characteristics of Claim Related Means, Established by the Civil Code of Georgia and Civil Codes of the Commonwealth Countries, Law: Stability and Dynamics, edited by *Khabrieva T.Y.*, Moscow, 2007, 395 (in Russian).

2. Debtor's Guarantee in the Modern Georgian Civil Law. General Provisions

2.1. The Concept of the Debtor's Guarantee

The term – “debtor” – stands for a person responsible to fulfill the undertaken obligations in contractual relationships. As refers to the term – “guarantee” – this word has French origin (“*Garantie*”) and means securing, protection. Therefore the above mentioned form of security is designed to protect the contractual relationships between parties, namely ensure fulfillment of obligation.

Debtor's guarantee is a security of personal character because the debtor secures performance of obligation by promising to implement various actions, e.g. some unconditional action or an action which is beyond the subject of the agreement. Personal security arises from an obligatory agreement.⁴ Therefore it cannot be applied separately from the principal obligation and is considered as an accessory obligation. Unlike other personal securities (e.g. suretyship and bank guarantee) debtor's guarantee enables the debtor to secure his/her personal obligation himself/herself. In case of failure to fulfill an obligation the debtor performs the promised action himself/herself.

Debtor's guarantee is an ancillary form of securing performance of an obligation and it is usually enforced along with the principal contractual obligation. Like other ancillary securities debtor's guarantee's legal status depends on enforcement and validity of principal obligation. That is why the Civil Code states: “the period of limitation on additional claims shall be deemed to expire simultaneously upon the lapse of the period of limitation on the principal claim, even if the period of limitation on additional claims has not elapsed yet” (Article 145). Thus the Civil Code implies that along with expiration of limitation period of the principal claim this term shall be deemed expired for ancillary claims too (penalty, suretyship, debtor's guarantee, etc.)⁵.

So, debtor's guarantee is agreed between the parties for the purpose of ensuring fulfillment of the principal contractual obligation, in the form of promising additional performance which may be claimed by the creditor in case of failure of the debtor to fulfill the principal contractual obligation. The law does not provide for any similar promise for obligation by a creditor.⁶

While there are just several clauses regulating debtor's guarantee in the Civil Code often the issues related with the debtor's guarantee need to be solved by considering other articles and fundamental principles of the Civil Code.

2.2. Subject of Debtor's Guarantee

According to the Civil Code a debtor's guarantee applies when a debtor undertakes to perform an unconditional action or an action that is beyond the scope of the contract (Article 424). Therefore in

⁴ *Weber H.*, Security of Obligations – Kreditsicherungsrecht, translated from German by *Alekseev Y., Ivanov O.*, Moscow, 2009, 10 (in Russian).

⁵ *Todua M., Willems H.*, Obligation Law, Tbilisi, 2006, 19 (in Georgian).

⁶ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 617 (in Georgian).

case of breaching a contractual obligation the subject of debtor's guarantee is performance of some unconditional action or an action which is not a subject of a contractual obligation and is completely independent from such obligation. The subject of performance has to be precisely determined or generally definable. Otherwise it might be difficult or even impossible to perform appropriate obligation.⁷

In the decision of October 19, 2010 in the case №as-379-352-2010⁸ the Supreme Court of Georgia defined the concept of debtor's guarantee and its subject and distinguished it from the concept of assignment of claim. The subject of dispute was depriving the right of extracting minerals from a sand and gravel pit, entitlement of the creditor to use the pit and transferring the claim of title on it in case of breaching a credit agreement. Namely the plaintiff claimed that the respondent LTD should assign its ownership right on the pit because of failure to return the amount given as two installments, on the basis of a credit agreement which provided for implementing such measures in case of breaching the obligation. In the beginning the first instance court did not satisfy the plaintiff's claim and it agreed with the respondent party's argument about their director failing to manage the business in good faith.

Later the decision of the first instance court was appealed. The Appeal Court satisfied the plaintiff's appeal and the decision of the first instance court was reversed. The LTD was deprived the title on the pit and the possession right together with the right of extracting minerals was transferred to the appellant while the claim on extracting minerals from the pit was considered as a debtor's guarantee. The appeal chamber ruled that although transferring the installments to the LTD's account by the appellant preceded acquiring the above license and its registration in special license registry, according to the agreement the LTD would be deprived of the title on the pit and it would be transferred under the appellant's possession in case of failure to pay the credit. Accordingly it was deemed that for the purpose of securing the credit agreement the parties had agreed about debtor's guarantee which complied with the law. Agreement about the guarantee referred to the future right on which the LTD should be a real claimant while the amount needed for acquiring a license had been transferred and granting the license was prevented by technical reasons.

The Appeal Court's decision was appealed before the Court of Cassation by the LTD claiming reversal of the decision. The Supreme Court of Georgia considered that the chamber of appeal determined the objective factual circumstances in compliance with the law and made an essentially correct decision while legal qualification was inappropriate. According to the court of cassation it was unreasoned to consider the license as a subject of debtor's guarantee. The disputed agreement did not include any reference to the license or a provision on burdening the future right and the plaintiff did not mention that either. The agreement just stated that the LTD would be deprived of the title on the pit and it would automatically be transferred to another party but the Court of Appeal mistakenly assumed that the right on the pit could refer to license while it may not be automatically transferred and its transfer is regulated by applicable law.

⁷ Civil Law, Vol. 3, Obligation Law, 3rd ed., edited by *Sukhanov E.A.*, Moscow, 2007, 53 (in Russian).

⁸ The Ruling of Supreme Courte of Georgia №as-379-352-2010, October, 19, 2010, Tbilisi, <<http://prg.supremecourt.ge/>>, [08.04.2015] (in Georgian).

The Supreme Court of Georgia determined that debtor's guarantee is a personal security which obliges the debtor, in case of breaching the obligation, to perform an additional action precisely defined and agreed between the parties. Moreover, through performance of the promised action the debtor's guarantee "forces" the debtor to fulfill the obligation in time.⁹

According to the above mentioned decision it cannot be assumed that the parties had agreed upon a debtor's guarantee because in the disputed case there had not been undertaken performance of any unconditional action or an action beyond the scopes of the contract subject. In the disputed credit agreement the provision referring to transferring the right is related to occurrence of certain circumstances, namely to breaching the obligation. Accordingly the creditor secured its claim on return of the credit, with the assigning of the right on extracting minerals offered by the debtor. The court of cassation called it a "securing cession".

Civil Code does not provide for such concept as a separate form of security. Securing cession is a separate agreement under which the owner of the claim (cedent) transfers its right of claim to another person – a creditor (cessionary).¹⁰ Any private law or public law claim or right which may be alienated and pledged can be subject to such transfer.¹¹

So, the subject of debtor's guarantee shall be a promise of performing such an action which does not depend on any condition, differs from the principal contractual obligation or is beyond the scopes of the contract subject. Example: if a flight is cancelled an airline company provides the passenger with hotel and meal.

The Civil Code determines that the subject of a debtor's guarantee shall be a promise of performing an action but not generally some action. Accordingly, refrain from an action cannot be considered as a subject of such security.

2.3. Parties to the Agreement on Debtor's Guarantee

Parties to the agreement on debtor's guarantee are the subjects of the principal contractual obligation. Accordingly any person involved in private law relationships who is subject to a contract may act as a party in the agreement about the above security.

There exists an opinion that debtor's guarantee may even be used for securing performance of statutory obligations.¹² For the statutory obligations to arise no prior agreement between the parties is needed. That is why they significantly differ from contractual obligations. For that reason existence of the principal contractual obligation is the main prerequisite for existence of debtor's guarantee. Securing statutory obligations with a debtor's guarantee shall be understood as preliminary determination of the probability of arising statutory obligations within the contractual relationships while the law allows transformation of such obligations.

⁹ *Nachkebia A.*, The Practice of Interpretation of Norms of Civil Code in Supreme Court 2000-2013, Tbilisi, 2014, 169 (in Georgian).

¹⁰ *Chanturia L.*, Security Interest Law, Tbilisi, 2012, 257 (in Georgian).

¹¹ *Ibid.*

¹² *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 617 (in Georgian).

The law does not set any limitations in regard with using debtor's guarantee by the private law subjects. Therefore it can be used for securing the contractual obligations of both physical and legal persons. In this case physical person refers to the citizens of Georgia, foreign citizens and stateless persons and the concept of legal person includes Georgian commercial and non-commercial legal entities of private law and also the legal entities of public law and the foreign legal persons, which are participating in private contractual relationships.

2.4. The Form of the Agreement on Debtor's Guarantee

The Civil Code stipulates that a debtor's guarantee shall be valid only if concluded in written form. Namely, there is an imperative legal norm requiring that a guarantee must be executed in writing (Article 426). Despite the form of the principal contractual obligation debtor's guarantee shall be binding only upon written execution.

The parties of an agreement may choose either simple written form or complex notarized written form and include the debtor's guarantee in the wording of the principal agreement or in a separate agreement. Agreement on debtor's guarantee concluded separately in writing shall be an inseparable part of the principal agreement and encourage performance of the principal obligation.

Nonobservance of the debtor's guarantee form requirements will result voiding an agreement. If an agreement on a debtor's guarantee is not executed in a required form the principal obligation will not be considered void but if the principal agreement is void the agreement on debtor's guarantee shall also be void.

2.5. Functions of Debtor's Guarantee

Debtor's guarantee has two main functions: before fulfillment of the principal obligation the debtor's guarantee encourages performance of such obligation and it may be called the function of securing the principal obligation; in case of breaching the principal obligation debtor's guarantee ensures performance of another promised action.

2.5.1. The Function of Securing the Principal Obligation

Debtor's guarantee secures fulfillment of contractual obligation. Therefore, debtor's guarantee may be used for securing any contractual obligation. The Civil Code does not provide for any limitations for the degree of default, i.e. there is not specified whether debtor's guarantee should be used only in case of complete failure to fulfill the obligations or undue performance of obligations as well.

Naturally fulfillment of an obligation means that it should be performed duly and completely. The purpose and the logical end of any contractual relationship between the parties shall be due fulfillment of obligations. Accordingly, debtor's guarantee, indisputably, encourages due performance of contractual obligations and its main function is to secure such performance.

“Due performance of an obligations refers to complete compliance of the debtor with all requirements related with the subject of performance itself”.¹³ For example, if a debtor is obliged to deliver a thing of specific quality only delivering a thing of respective quality will be considered as due performance. When an obligation is fulfilled in compliance with the principle of due performance it is implied that all principles of fulfilling the obligation are observed.¹⁴ Therefore essence of due performance cannot be provided if any of the principles of fulfilling the obligation is not observed.¹⁵

Moreover the legal definition of debtor's guarantee allows that the above additional security also be used in case of undue fulfillment. The legal definition does not include any reference about using the debtor's guarantee only for complete failure to fulfill an obligation which means that it can also be applied in case of undue performance. So the Civil Code determines only the concept of the debtor's guarantee but not the cases of applying it. The presumption that debtor's guarantee may be applied in case of undue performance of an obligation becomes even stronger from the perspective of the principle of freedom of contract recognized by the Civil Code.

In order to ensure protection of debtor's legal and justified interests, the requirements of the Civil Code norm stating that a guarantee shall be valid unless it contravenes the rules laid down by law or obligates the debtor excessively (Article 425), shall always be observed. From this point of view court practice is especially important but unfortunately it does not provide official clarifications about the above issues yet.

2.5.2. The Function of Ensuring Performance of another Promised Action

When there is an agreement about debtor's guarantee the creditor has the right to demand performance of another action agreed in advance if the debtor fails to fulfill the principal obligation. Therefore the fact of non-fulfillment of the principal obligation shall be enough reason for the debtor to perform the additional unconditional action or the action beyond the scopes of the contract subject which was promised as a security.

For example, the guarantee given to a trader by a producer or manufacturer of some goods in regard to undertaking responsibility against the customer for the quality of the goods, can be considered as such unconditional action or an action beyond the scopes of contract subject.¹⁶ This is the case when a debtor undertakes the responsibility for some specific results which may arise in relationship with a third party.

If a debtor gives a creditor guarantee in regard to change in currency exchange rate it also will be considered as a debtor's guarantee.¹⁷ Another example of debtor's guarantee is the guarantee provided by the debtor to the creditor at trading in regard to a bill of exchange or stock rate.¹⁸ There is

¹³ *Dzlierishvili Z.*, Obligation fulfilment, Tbilisi, 2006, 12 (in Georgian).

¹⁴ *Sarbash S.V.*, Fulfilment of Contractual liabilities, Moscow, 2005, 104-105 (in Russian).

¹⁵ *Ibid*, 105.

¹⁶ *Akhvlediani Z.*, Obligation Law, 2nd edition, Tbilisi 1999, 81 (in Georgian).

¹⁷ *Chanturia L., Zoidze B.*, Commentary to the Civil Code of Georgia, Book 3, Tbilisi, 2001, 506 (in Georgian).

¹⁸ *Ibid*.

a debtor's guarantee when a debtor undertakes the expenses occurring because of changes in construction estimates.¹⁹ If a debtor undertakes the responsibility regardless his/her fault it may also be called a debtor's guarantee.²⁰

2.6. The Issue of Reimbursing Damages in the Debtor's Guarantee Agreement

The issues related with reimbursement of damages caused by breach of principal obligation secured by the debtor's guarantee are not included in the norms of Civil Code regulating the debtor's guarantee. There is not determined whether the creditor has right to claim damages together with another promised action when the debtor breaches the principal contractual obligation. The Civil Code does not include specific provision stating whether performance of another action shall be included in reimbursement of damages and whether performance of promised action deprives the creditor the right to demand compensation for damages.

The main goal of contractual relationships is fulfillment of the principal obligation while the securities serve reaching that goal. Accordingly the claim of damages arising from breach of obligation may not be limited to the agreed additional measures of securing obligations only. The additional securities are not absolute alternative for the principal obligation, though the securities to some extent imply the minimum amount of damages if not otherwise regulated by law.

The fact that the Civil Code does not provide direct regulations for the above issues should not be interpreted as though it completely excludes the creditor's right to claim damages.

Breach of obligation causes damages to the creditor. In order to determine the damages the innocent party shall be put into a condition which should have occurred if the obligation had duly been performed.²¹ Reimbursement of damages shall be an equal compensation for the loss caused by breach of obligation. There must be an adequate causality between non-fulfillment of an obligation and damages resulted.²²

In such cases along with the creditor's legal claims the debtor's interests should also be protected. Accordingly the debtor should not be required to fulfill the obligation and compensate damages simultaneously. The debtor may be obliged to compensate the damages instead of (but not together with) fulfilling the principal obligation unless otherwise provided by law. In some instances failure to perform an obligation itself excludes the possibility of its fulfillment, e.g. in case of personal service agreement.²³

For this reason the action promised by the debtor's guarantee, as in case of penalty (Article 419) and earnest money (Article 423), may be considered as reimbursement of damages. Such an assumption is supported by the Civil Code stating that the legal norm regulating the most similar circumstance (analogy of law) shall be applied to regulate a relationship not expressly determined by law (Article 5).

¹⁹ Ibid.

²⁰ Ibid.

²¹ Horn N., Kötz H., Leser H.G., German Private and Commercial Law: An introduction, translated by Weir T., Oxford, 1982, 110.

²² Introduction to German law, edited by Ebke W.F., Finkin M.W., The Hague, London, Boston, 1996, 184.

²³ Smith J.C., The Law of Contract, 4th ed., London, 2002, 235.

Unfortunately the court practice does not provide answers for the above questions yet. Nevertheless the proportionality has to be maintained between the amount of damages to be reimbursed and the legal burden of performing another action whenever such issue is reviewed by the court. “A person who is liable to pay damages shall restore the state of affairs that would have existed if circumstances giving rise to the duty to pay damages had not occurred (Article 408.1)”. Besides, “preliminary renunciation of the right to claim damages due to a breach of an obligation shall be allowed if so provided by law or by agreement of the parties (Article 410)”.

2.7. The Role of the Court in the Field of Protection of Civil Interests in Case of Unlawful or Overburdening Debtor's Guarantee

Validity of a debtor's guarantee requires its compliance with statutory requirements. Along with maintaining appropriate form, in order to ensure validity of debtor's guarantee two other conditions must be observed: it has to comply with the rules determined by law and it must not obligate a debtor excessively (Article 425).

According to the Civil Code participants of a civil relationship may exercise any action not prohibited by law including any action not expressly provided by law (Article 10.2). Compliance of debtor's guarantee with the rules determined by law implies that an agreement on an action contravening law may not be used as a guarantee. This provision refers to any law which may be applicable and shall be used to determine its legality.²⁴

The rules determined by law shall include both private law and public law regulations. Performance of the promised action has to be allowed by law. An action may not be promised as a debtor's guarantee unless it is essentially allowed by law or if the guarantee implies performance of an action in a way which contravenes the law. For example, promise of an action shall be considered unlawful if such action is declared to be an offence or if the law determines certain framework for performing such action but the guarantee agreement implies different way of performance, etc.

As regards to undertaking and overburdening action as a security by the debtor, it contradicts the essence of private law relationship itself. The will of agreement parties may not contravene the fundamental principles of private law. The principle of freedom of contract and free will of the participants of contractual relationships recognized by the Civil Code shall be constrained by civil regulations whenever the participants of civil relationships are put in unequal position by the will expressed by the parties.

Similar to the principal obligation, the action promised as a security has to be affordable for the debtor and it must not cause putting the debtor in an unequal or overburdening position. However, any contractual obligation is a legal burden but if an obligation implies unfairly big legal burden it shall be considered overburdening.

Determining the compliance of debtor's guarantee with regulations of law or its overburdening character is the sole authority of court. “The law-applier, usually, has to evaluate several values while it has to give priority to the one protected by law. There is no determined scheme of evaluation.”²⁵

²⁴ *Chanturia L.*, Introduction to the General Part of Georgian Civil Law, Tbilisi, 2000, 356 (in Georgian).

²⁵ *Khubua G.*, Law Theory, Tbilisi, 2004, 92 (in Georgian).

Accordingly, when a debtor's guarantee becomes a subject to dispute only the court is authorized to review the guarantee promised to the creditor and determine whether it is lawful or unlawful or overburdening or affordable.

The Civil Code does not provide a list of overburdening actions for debtor's guarantee. Even if there was such a list it could not be complete because in each case it should be separately evaluated, based on determining and studying the factual backgrounds, whether an action excessively obligates a debtor.

Thus, in case of disputing the compliance of debtor's guarantee with law the court has to be guided by rules determined by law. Compliance with the requirements of law has to be proved by the debtor's guarantee and compliance of the promised action with applicable regulations. Non-compliance of the promised action with the law shall cause considering the debtor's guarantee unlawful.

If an overburdening nature of debtor's guarantee is subject to dispute the main criterion of evaluation shall be adequacy of the promised additional action. When this issue is reviewed all circumstances of the case which may evidence that the debtor's guarantee is an overburdening contract term, shall be considered. For example, if a debtor undertakes to pay the expenses arising from the changes in construction estimates such changes have to be proven with appropriate evidences and they may not be based only on some assumptions; there must be considered financial standing of a debtor, creditor's fair interest, market positions of the creditor and debtor, etc. The favor lost as a result of breach of contract may depend on many hypothetical factors but the court must always attempt to evaluate the caused damages.²⁶

According to the Civil Code unlawful and overburdening debtor's guarantee shall be the reason for declaring it null and void. Therefore, diminishing the scopes of a promised action shall be fully excluded.

3. Debtor's Guarantee in the Civil Law of Foreign States

Introduction of the legal institute of debtor's guarantee in Georgian civil law proves reception of German law. However the civil code of Germany does not include the concept of the debtor's guarantee itself.²⁷ According to some points of view the German civil code provides neither for identical nor similar analogies.²⁸

Although paragraph 342 of the civil code of Germany enables us to discuss the German origins of Georgian debtor's guarantee. Namely the above norm provides regulation for a security other than financial penalty and states that in case of non-fulfillment or undue fulfillment of an obligation a promised performance other than paying money can be used as a security.²⁹ Providing such a penalty itself does not exclude creditor's claim on damages.³⁰

Accordingly, if contractual obligations are breached but an appropriate agreement exists, German civil code allows acceptance of other promised performance as a penalty which may include performance of other action as well.

²⁶ Chitty on Contracts, Vol. 1, General Principles, 28th ed., London, 1999, 1272.

²⁷ *Kropholler J.*, German Civil Code, Study Comment, 13th revised ed., Tbilisi, 2014, 868-869 (in Georgian).

²⁸ *Chechelashvili Z.*, Contract Law, Tbilisi, 2008, 201 (in Georgian).

²⁹ Civil Code of Germany, translated from German, 2nd edition, Moscow, 2006, 84 (in Russian).

³⁰ *Ibid.*

Civil law of other states of Europe also provides for promising performance of other action as a subject of penalty. For example, the Estonian law of obligations defines a penalty as an amount or performance agreed in prior, which shall be imposed on the breaching party in favor of the party suffering loss (paragraph 158).³¹ According to the Civil Code of Netherlands an agreement on a penalty may imply payment of some amount or fulfillment of other obligation notwithstanding the goal of the penalty, which may be either reimbursement of damages or encouragement of performance (Article 91).³²

Thus, it can be concluded that debtor's guarantee determined by the Civil Code is a legal institute resembling the non-fiscal penalty implying promise of performing some action, which is presented in the civil law of foreign states. The above institute was introduced in the Georgian civil law as a result of German law reception, namely as its certain modification and was given a status of an independent form of securing obligation.

Similarly to the Civil Code legal regulation of debtor's guarantee is included in the civil codes of Turkmenistan (Articles 434-436)³³ and Moldova (Articles 634-636).³⁴ According to the Civil Code of Turkmenistan, debtor's guarantee is an additional security. The civil code of Moldova defines it as one of the forms of securing obligation.³⁵

The concept and contents of debtor's guarantee is expressed in the above codes differently from the Civil Code of Georgia. The Civil Code of Turkmenistan states that "debtor's guarantee is an unconditional action which is beyond the contract subject" (Article 434). The Civil Code of Moldova defines debtor's guarantee as "a debtor's obligation implying unconditional performance or a performance exceeding the contract subject" (Article 634).

Accordingly, in the first case debtor's guarantee is considered to be an unconditional action which at the same time is beyond the contract subject while in another case the concept of debtor's guarantee includes a promise of an additional obligation rather than an action, which allows wider interpretation of its contents.

It should be assumed that introduction of this institute in the civil codes of Moldova and Turkmenistan was encouraged by the Civil Code of Georgia. The basis for this opinion can be strengthened by the sequence of dates of adopting the above codes: the Civil Code of Georgia was adopted in 1997, Turkmenistan adopted the code in 1998 and in Moldova the code was adopted in 2002.

³¹ Law of Obligations Act of Estonia, 26.09.2001, RT I 2001, 81, 487, <<https://www.riigiteataja.ee/en/eli/506112013011/consolide>>, [11.04.2015].

³² The Civil Code of the Netherlands, by *Warendorf H., Thomas R., Curry-Summer I.*, Alphen aan den Rijn, 2009, 659.

³³ The Civil Code of Republic of Moldova, N1107, from 06.06.2002, <<http://lex.justice.md/viewdoc.php?action=view&view=doc&id=325085&lang=2>>, [08.04.2015] (in Russian).

³⁴ The Civil Code of Turkmenistan N294-1, from 17.07.1998, <http://online.zakon.kz/Document/?doc_id=31295232&doc_id2=31295232#sub_id=1002646221&sub_id2=4340000&sel_link=1002646221>, [08.04.2015] (in Russian).

³⁵ Moldovan Civil Code does not recognize the classification of liability fulfillment guarantee in form of property law, obligation law, etc.

4. Conclusion

In Georgia civil law debtor's guarantee is one of the forms of additional securities, which enables to secure fulfillment of undertaken obligations with a promise of a different or unconditional action. It secures only the interests of a creditor party. Considering that contractual relationships are based on the principle of equality of parties the guarantee overburdening a debtor shall be null and void. The contents of debtor's guarantee also imply that no applicable law must be broken. Respectively, unlawful character of a debtor's guarantee also causes its avoidance.

The Civil Code provides for the scopes of determining the actions to be undertaken through debtor's guarantee only but such actions are not listed therein. From this point of view, unlike other securities, debtor's guarantee has a significant advantage. Namely, debtor's guarantee enables the parties to have any favorable action promised unless it contravenes law or excessively obligates a debtor.

Based on the above advantage the participants of civil relationships should get over the prudence in regard to using debtor's guarantee, which will significantly contribute to diversity of civil circulation and due fulfillment of obligations.

Tamar Lakerbaia *

European Standard for Informed Consumer

“Consumers are inadequately informed about their huge power and that business success depends on their choices”

Anita Roddic

1. Introduction

From the second half of 20th century, idea of united European market became one of the key objectives of community of European states. On the other hand, ensuring effective functioning of united market would not be possible without protection of rights of consumers, who were considered as integral parts of the market.¹ Moreover, individual acting for the satisfaction of private interests - consumer is the foundation for the consumer law, and protection of his rights is considered as an integral part of dignified existence of human being.² Furthermore, in terms of development of market policy, protection of consumer rights facilitates improved trust, safety, support to the trans-boundary trade relationships and support to the free participation of consumers in these processes.

The above is especially relevant under the modern conditions, where consumer area is extremely globalized in many regards.³ Same goods are offered at the markets of various countries. Therefore, establishment of common action market is factually impossible via only ensuring free turnover of goods and services, without creation of appropriate conditions for purchase of those goods and services by the consumers within the national boundaries as well as outside such boundaries.⁴

The European Union adopts acts protecting consumer rights in the form of directives; such directives make the suppliers of goods and service providers responsible to provide consumers with the full information about the goods to be supplied and services to be implemented.⁵ The directives do not have the power of direct effect; member states are responsible to ensure their implementation at

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¹ *Chirita A.D.*, The Impact of Directive 2011/83/EU on Consumer Rights, *Ius Commune Law Series*, Keirse, *Samoy and Loos*, eds., Intersentia, 2012, 5, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998993>, [12.12.2013].

² *Hondius E.*, The Notion of Consumer: European Union Versus Member States, *Sidney Law Review*, Vol. 28:29, 2006, 90, <http://sydney.edu.au/law/slr/slr28_1/Hondius.pdf>, [04.12.2013].

³ *Twigg-Flesner C.*, A Cross-Border-Only Regulations for Consumer Transactions in the EU, *A Fresh Approach to EU Consumer Law*, Springer Briefs in Business, 2012, 3, <<http://www.springer.com/cn/book/9781461420460>>, [10.11.2013].

⁴ *Antoniolli L.*, Consumer Law as an Instance of the Law of Diversity, *Vermont Law Review*, Vol. 30:855, 2006, 864, <<http://lawreview.vermontlaw.edu/files/2012/02/antoniolli.pdf>>, [3.12.2013].

⁵ *Smith J.M.*, Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind? Maastricht European Private Law Institute, working Paper № 2001/01, 7, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719104>, [21.11.2013].

the national legislation level. This very process implies harmonization of private law and aims at the development of common action strategy on the continent of Europe with the purpose to develop contractual law in general, as well as consumer law specifically.⁶

Present article covers the issue of generation of conditions required for making informed decisions by consumers. In particular, present article covers the definition of the contents and forms of information to be provided. Moreover, article reviews the standard of informed consumer established in the field of consumer rights' protection law via the European Union directives; the above standard must be taken into consideration in the regulation of relevant issues under the Georgian consumer law.

2. Contracts Concluded with the Participation of Consumers

From immemorial times, as the human beings were satisfying their needs via the inter-exchange of goods, the need for regulation of mentioned process had become necessary.⁷ After some time it acquired the form of trade and became subject to certain rules defined for sale-purchase transactions. Despite the above, at all stages of society development, market regulation has always been the constant concern for the justice of the relevant period; and the innate inclination of seller to acquire advantage over the buyer has to be taken into consideration.⁸ The above explains the fact that majority of legal systems often apply the artificial constructions of equality of parties, when the inequality is natural condition of free market.⁹

In the private law, consumer rights mean that contractual freedom of one of the parties to the contract, in this case, producer is restricted, if the other party is a physical person and enters the contract for the satisfaction of personal needs. On the other hand, such regulation of relationship was not familiar for a position dominating in the past, key principles of which were common for all parties, despite their status, main needs or economic position. In this regard, consumer rights' protection law had significant impact over the principles of private autonomy and equality. With the consideration of consumer interests and restriction of contractual freedom of producers, the number of imperative norms increased, the opportunities for the producers to freely choose the counter-agents and freely determine the contractual conditions were restricted.¹⁰

One of the key issues in the consumer rights' law is the protection of consumers from the abundance of asymmetric information present at the market.¹¹ Such approach is based on the idea of equality established in the private law, which implies manifestation of informed and coinciding will of

⁶ Collins H., *The European Civil Code*, Cambridge University Press, 2008, 195.

⁷ Zimmermann R., *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Juta & Co, Ltd, Capetown, Wetton, Johannesburg, 1992, 25.

⁸ Howells G., Ramsay I., Wilhelmsson Th., *Consumer Law in Its International Dimension, Handbook of Research on International Consumer Law*, Published by Edward Elgar Publishing Limited, Cheltenham, UK, 2011, 7.

⁹ Markesinis B., Unberath H., Johnston A., *The German Law of Contract*, Hart Publishing, Oxford and Portland, Oregon, 2006, 3.

¹⁰ Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L., *Contract Law*, Tbilisi, 2014, 29 (in Georgian).

¹¹ Nordhausen S.A., *Information Requirements, Modernizing and Harmonizing Consumer Contract Law*, Sellier, European Law Publishers, Munich, 2009, 213-237.

parties.¹² Formal, abstract freedom and private autonomy are based on the liberal model of society, where the person, consumer possessed with the economic interest is playing a key role.¹³ He/she satisfies his/her interests independently from the social circumstances, professional or personal development. Market paradigms are based on the presumption that all individuals participating in the commercial deals are capable and ready to systematically receive economic benefits and manage their financial capabilities.¹⁴

“Each of us is a consumer”- These words spoken by the President of the United States, Kennedy were preceding the universal acknowledgement of four fundamental rights of a consumer - the right to be informed; the right to choose; the right to safety; and the right heard (represented).¹⁵ Following such acknowledgement, informed consumer has become the integral part of modern justice system.¹⁶

In the European contractual law, liability to provide information to the consumer is defined under the imperative norms.¹⁷ Such model generates legitimate expectation for the protection of consumer rights and facilitates consumer’s activation at the market. Moreover, norms related to the information provision, create additional comfort for consumers and in some cases, provide them with the possibility to act improvidently. It is assumed that lack of information places consumer under unequal conditions in relation to the trader and shakes the contractual freedom of a person receiving the service.¹⁸ Therefore, unlike the general liabilities on the provision of information established in the contractual law, liability for the information to be provided and contents of the information are separately regulated in the contracts concluded with the participation of consumers.¹⁹

3. Liability to Provide Information

The general principle of Roman law - *emptor curiosus esse debet* – that all parties to the contract must be sufficiently interested in getting relevant information for the conclusion of contract is

¹² Howells G., Ramsay I., Wilhelmsson Th., Consumer Law in Its International Dimension, Handbook of Research on International Consumer Law, Published by Edward Elgar Publishing Limited, Cheltenham, UK, 2011, 11.

¹³ Dani M., Assembling the Fractured European Consumer, A New Concept of European Federalism, LEQS Paper, № 29/2011, 9, <<http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper29.pdf>>, [22.07 2013].

¹⁴ Dauner-Lieb B., A Special Private Law for B2C? Silver Bullet or Blind Alley?, New Features in Contract Law, Schulze R., European Law Publishers, Sellier, Munich, 2007, 109.

¹⁵ Hondius E., The Notion of Consumer: European Union Versus Member States, Sidney Law Review, (Vol. 28:29, 2006), 90, <http://sydney.edu.au/law/slr/slr28_1/Hondius.pdf>, [04.12.2013].

¹⁶ Twigg-Flesner CH., Information Disclosure about the Quality of Goods – Duty or Encouragement? in Howells G., Schulze R. (eds.), Information Rights and Obligations: a Challenge for Party Autonomy and Transactional Fairness, Aldershot: Ashgate, 2004, 9, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345009>, [13.06.2014].

¹⁷ Nordhausen Scholes A., Information Requirements, Modernizing and Harmonizing Consumer Contract Law, Sellier, European Law Publishers, Munich, 2009, 214.

¹⁸ Bussani M., Werro F., European Private Law: A Handbook, Sieburgh, C., Western Law of Contract, Stampfli Publishers Ltd. Berne, 2009, 174.

¹⁹ Dauner-Lieb B., A Special Private Law for B2C? Silver Bullet or Blind Alley?, New Features in Contract Law, Schulze R., European Law Publishers, Sellier, Munich, 2007, 114.

established in justice systems of almost all states.²⁰ However, development of European law for the recent period made it clear that it has factually lost its original meaning. In particular, there is different rule for obtaining information effective for the contracts concluded with the participation of consumers. First, the above is demonstrated in the delegation of rights-liabilities of parties for obtaining and provision of information, which is regulated by the European directives. In the contracts with the consumer representing one party, provision of information is an unconditional duty of producer.²¹

Involvement of consumers in this process is only limited to the subjective interest of consumer. Consumer can get familiar or not get familiar with the information on the essential or other terms and conditions of the contract. Standard of providence – knows or must know – is limited to only the responsibility of producer for the fullness of information to be provided, but not effecting consumer, who has neglected the opportunity to get information. In such case, the focus is directed towards the right to receive information and not towards the liability of party to obtain such information.²²

Such approach to the issue has been directly singled out in the court practice of the European justice system. For the case “Content Services Ltd v. Bundesarbeitskammer”, the court defined, that “businessman is responsible to provide information to the consumer without having expectation that consumers themselves will identify such information. Consumer should remain passive in terms of information.”²³

There is no direct response to the question - what has caused such modification of liability for the provision of information? There could be many reasons. First of all, this is a demonstration of special role of consumer in the contractual law of the European Union and adoption of number of legal acts in this field; second – technical progress, which had such a huge influence over the contracts and rights- liabilities of parties to the contract, especially in the area of electronic commerce.²⁴ Within the electronic commerce, it is much more difficult for consumer to understand the characteristics of goods to be purchased or to identify the person with whom the contract is concluded. The psychological attitude of consumer has the equal importance – this is the level of personal perception, circumstances under which the contract is concluded or all mentioned factors together.²⁵

²⁰ Nordhausen Scholes A., Information Requirements, Modernizing and Harmonizing Consumer Contract Law, Sellier, European Law Publishers, Munich, 2009, 213.

²¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal of the European Union, L 304/64, 22.11.2011, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:en:PDF>>, [10.10.2014].

²² Vashakidze G., Complicated Liability System of the Civil Code, Tbilisi, 2010, 70 (in Georgian).

²³ Case C-49/11, Content Services Ltd v. Bundesarbeitskammer.

²⁴ Twigg-Flesner CH., Information Disclosure about the Quality of Goods – Duty or Encouragement? in Howells G., Schulze R. (eds.), Information Rights and Obligations: a Challenge for Party Autonomy and Transactional Fairness, Aldershot: Ashgate, 2004, 11, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345009>, [13.06.2014].

²⁵ Nordhausen Scholes A., Information Requirements, Modernizing and Harmonizing Consumer Contract Law, Sellier, European Law Publishers, Munich, 2009, 213.

The above is reflected in the fact that requirements set for the information to be provided to the consumer has increased dramatically for the last decade and they became more detailed. Reforms recently implemented by the European Union have also facilitated the above process. One of the foundations of a new directive is the development of common concept related to the informed consumer and its homogenous introduction in all member states.²⁶ The above means that similar requirements will be defined for the information to be provided for all producers all over the European Union. Such regulation of issue must be considered as justified for the clarity of liabilities set for producers as well as for the establishment of common requirements for the provision of information to consumers.

4. Need for Setting Control over the Information

Probability for the incomplete information related to the subject or conditions of the contract contravene the supra-general principles of market policy. Informational advantage provides the supplier with the opportunity to define contractual conditions and terms in line with his interests and accordingly, in such relationships consumer becomes the “weak” party to the contract.²⁷ Based on the above, protection of consumers, especially in the context of information provision, also implies ensuring the implementation of right, according to which consumers are parties to the contract who hold equal rights.²⁸ The need for restriction of contractual freedom of producers is based on the structural imperfection of consumers, which is manifested in the informational inequality.²⁹ On the other hand, relevance of information affects the consumers as well as legal regulation of the above issue.

Therefore, in some cases, it becomes necessary to have direct intervention from the state. In this case legal regulation of consumer behavior rules, ensuring market equality with the trader, support to the production development and support to the innovative commerce are the bases for the restriction of private law norms. Moreover, harshness of the state intervention often is beyond the regulation of only misleading advertisements. For ensuring the protection of consumer rights, the state sets such regulations as liability to provide information, forcing to be a contractor, right to withdraw from the contract, control over the contents of contract.³⁰ Principle of acting in a good faith is provided in detail in the consumer contracts.³¹ Legislator defines comprehensively the contents and form of information to be provided to the consumer prior to the conclusion of contract.

²⁶ *Wrbka S.*, The Proposal for an Optional Common European Sales Law: A Step in the Right Direction for Consumer Protection?, *EUIJ-Kyushu Review Issue 1-2011*, 90, <<http://euijreview.kyudai.info/downloads/EUIJKR-1-3-2011.pdf>>, [10.12.2015].

²⁷ *Twigg-Flesner Ch., Schulze R.*, Protection Rational Choice: Information and the Right of Withdrawal, *Handbook of Research on International Consumer Law*, Published by Edward Elgar Publishing Limited, Cheltenham, UK, 2011, 132.

²⁸ *Dauner-Lieb B.*, A Special Private Law for B2C? Silver Bullet or Blind Alley?, *New Features in Contract Law*, *Schulze R.*, European Law Publishers, Sellier, Munich, 2007, 112.

²⁹ *Scherer E.M.*, Can Behavioral Research Advance Mandatory Law, Information Duties, Standard Terms and Withdrawal Rights?, *Austrian Law Journal*, 1/2014, 148.

³⁰ *Howells G., Ramsay I., Wilhelmsson Th.*, Consumer Law in its International Dimension, *Handbook of Research on International Consumer Law*, Published by Edward Elgar Publishing Limited, Cheltenham, UK, 2011, 2.

³¹ *Twigg-Flesner Ch., Metcalfe D.*, The Proposed Consumer Rights Directive – Less Haste, More Thought? *European Review of Contract Law*, 2009, 9, <<http://ssrn.com/abstract=1345783>>, [20.01.2015].

However, consumer contracts do not represent the only area, where the informational deficiency could be encountered. Norms regulating deals made with the mistake as well as intentional non-disclosure (deception) could be considered as attempts for overcoming informational imbalance at a more general level. Moreover, during the last decade the differentiation of information has been significantly widened under the “culpa in contrahendo”³², which was conditioned by the mandatory nature of retaining or consideration of good faith at the pre-contract stage. One of the important changes conditioned by such development is the intellectual coordination of general and consumer oriented liability for the information provision.³³

Moreover, establishment of liability on information provision is considered as the softest form of legal intervention. It does not intervene in *pacta sunt servanda* principle, however, attempts to ensure firm foundation for the parties for the contract conclusion. Liability to provide information is factually strengthening *pacta sunt servanda* principle. The above liability, in general, is related to the contracts, where the informational deficiency is evident. Especially, if one party to the contract is a consumer and the other party is a producer. Advantage of producers is manifested in various aspects of relationship. In one instance, these are complex contractual conditions, in other instances – utilization of special technologies and risks related to the above technologies; for example, impossibility to examine goods and etc. Above listed circumstances and many other aspects make such contracts closed type contracts in terms of information and reduce the level of their transparency.³⁴

Lack of information and experience, market power of producer or aggressive technique used by trader, influence the formation of consumer’s will and at the end condition unconscious consent to the contractual terms.³⁵ We are dealing with so-called “closed” choice of consumer, for example, when consumer is evidently mistaken in the correctness of made decision or has incorrect idea about the existence of alternative producer or supplier, which is caused by the convincing and intruding information on the unique nature of offered goods or services.³⁶

Therefore, theory on the creation of conditions required for the normal functioning of market raised the issue on the need for regulation of civil turnover via the restriction of freedom of certain parties participating in the turnover. In particular, private law is familiar with number of cases, when

³² Liability to provide information at pre-contract stage of negotiations between the parties. Establishment of “culpa in contrahendo” doctrine is related to the name of *P.Iering*, who was considering the provision of false information to counter-agent at the pre-contract stage as the precondition for declaring the deal as void and reimbursement of losses. Compare: *Kessel F., Fibe E.*, *Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study*, Harvard Law Review, Vol. 77, №3, 1964, 401-403.

³³ *Zimmermann R.*, *The New German Law of Obligations, Historical and Comparative Perspectives*, Oxford University Press, 2005, 212.

³⁴ *Zimmermann R.*, *The New German Law of Obligations, Historical and Comparative Perspectives*, Oxford University Press, 2005, 212.

³⁵ *Twigg-Flesner CH.*, *Information Disclosure about the Quality of Goods – Duty or Encouragement?* in *Howells G., Schulze R.* (eds.), *Information Rights and Obligations: a Challenge for Party Autonomy and Transactional Fairness*, Aldershot: Ashgate, 2004, 9, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345009>, [13.06.2014]; *Gheorghe A.N., Spasici C.*, *Consumer’s Right to Withdraw, Challenges of Knowledge Society, Private Law*, 2013, 267.

³⁶ *Haupt S.*, *An Economic Analysis of Consumer Protection In Contract Law*, German Law Journal, Vol. 04, № 11, 1148, <http://www.germanLawjournal.com/pdfs/Vol04No11/PDF_Vol_04_No_11_1137-1164_Private_Haupt.pdf>, [12.04.2014].

for the purpose to retain fair balance between the parties to the contract, intervention in the contractual freedom of parties is admissible and justified. Such approach is caused by the ideas related to ensuring stability and fairness of civil turnover. Contract as the result of expression of the free will of two or more persons cannot implement its function if received fulfillment and benefits do not match the interests of one of the parties. Therefore, if lawful society acknowledges contract as the outcome of self-determination of parties, then the society must ensure relevant control on whether the contract is truly the product of self-determination of parties to it.³⁷

6. Reasonably Thinking Consumer

The target of law is the reasonably thinking consumer.³⁸ The above implies that based on the adequate information provided by the producer, consumer is capable to make thought through and provident decision.³⁹ Therefore, the model of so-called informed consumer is dominating in the modern consumer law.⁴⁰ Idea of consumer wellbeing in combination with the offers at the market established new mechanism of regulation, which protects the freedom of consumer's choice and ensures provision of full information to the consumers on the goods to be supplied and services to be provided. Under such conditions consumer, on the one hand, is protected by the existence of competition and on the other hand, adequate information and market transparency are the important preconditions for the contractual freedom and effective functioning of market mechanism.⁴¹

Despite the above, there is still significant threat that in the process of making a choice the consumer will fall under the unfair influence over the formation of his will in the process of making a choice. First, the above can be explained by the insufficiency of information characteristic to the consumer markets. One has to take into account that modern consumers have to satisfy their demands under the significant level of competition. Day by day, the quantity of goods and producers is increased. Moreover, new goods emerge at the market, presented in a complicated form and making it difficult for consumer to make correct choice. On the other hand, suppliers use many different methods for sale of goods. The clear example of the above is the electronic commerce, which during the recent period created new conditions and placed the trade industry against the new challenges.

It has to be noted that Georgian legislation provides general legal bases for the protection of consumer rights. Following the annulation of the law of Georgia on the "Protection of consumer

³⁷ *Chanturia L.*, General Part of the Civil Code, Publishing house "Law", Tbilisi, 2011, 87, (in Georgian). *Zimmermann R.*, The New German Law of Obligations, Historical and Comparative Perspectives, Oxford University Press, 2005, 206.

³⁸ *Dani M.*, Assembling the Fractured European Consumer, A New Concept of European Federalism, LEQS Paper, № 29/2011, 13, <<http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper29.pdf>>, [22.07 2013].

³⁹ *Nordhausen Scholes A.*, Information Requirements, Modernizing and Harmonizing Consumer Contract Law, Sellier, European Law Publishers, Munich, 2009, 214; *Tscherner E.M.*, Can Behavioral Research Advance mandatory Law, Information Duties, Standard Terms and Withdrawal Rights?, Austrian Law Journal, 1/2014, 149.

⁴⁰ *Micklitz H-W.*, The Target Full Harmonization Approach Looking Behind Curtain, Modernizing and Harmonizing Consumer Contract Law, Sellier, European Law Publishers, Munich, 2009, 77.

⁴¹ *Dauner-Lieb B.*, A Special Private Law for B2C? Silver Bullet or Blind Alley?, New Features in Contract Law, *Schulze R.*, European Law Publishers, Sellier, Munich, 2007, 111.

rights”, the new law has combined the function of the void law, however only partially.⁴² In particular, code on the product safety and free turnover sets only general requirements for the liability related to the provision of information on the products.⁴³ Namely, code makes producer / distributor responsible to provide necessary, authentic and full information on the products to the consumer, which will enable consumer to make correct choice. Above-mentioned information must include name and type of product, trade name of the firm producing the goods, name of the country where the product was manufactured and etc. Above mentioned requirements are extended over the product packaging and does not cover the information to be provided on the products placed on the webpage. Accordingly, it does not ensure standard of implementation of fundamental right of consumer - right to receive information in the field of online trade.

In parallel, Civil Code of Georgia contains provisions on the supply of information; however, such provisions are not directed specifically towards the consumers. We could partially consider the liability of seller and contractor to transfer the non-faulty items as the basis for the protection of consumers. However, protection of rights by the above way is related to the long-term procedures, and the European regimes adapted to the consumer rights provide the ways for prompt resolution of defective relationships. It can be said that Georgian standard on the provision of information to consumers requires certain adjustments.

7. Requirements Set for the Information to be Provided to the Consumer

In the process of discussing the rational choice, first of all, one should clarify what type of information are we talking about. First of all, this is information about the goods and services that are allowed at the market, are the objects of free turnover and satisfy safety standards. Second – consumer must know who is he/she dealing with. In this regard, information on the identity, reputation and reliability of producer bears key importance. Third – consumer must be comprehensively informed on the contract terms and conditions and finally, some types of contracts are subject to the special legal regulation, under which consumers are provided with the additional rights against the supplier. The above generally implies contracts concluded on distance and under the unofficial circumstances and right to reject such contracts.⁴⁴

Two key regulations have been established for dealing with the informational misbalance existing in the modern market based on the mentioned classification: the first regulation concerns liability to provide information to the consumer at the pre-contract stage; the second regulation considers provision of consumers with additional guarantees.

⁴² *Bzekalava E.*, Consumer Rights according to the Civil Code of Georgia, Lado Chanturia 50, Anniversary edition, Law Institute of Davit Batonishvili, Under the General edition of *D.Gegenava*, Tbilisi, 2013, 66 (in Georgian).

⁴³ Law of Georgia on “Product Safety and Free Turnover”, LEPL Georgian Legislative Herald, 25/05/2012 (in Georgian).

⁴⁴ *Twigg-Flesner Ch., Schulze R.*, Protection Rational Choice: Information and the Right of Withdrawal, Handbook of Research on International Consumer Law, Published by Edward Elgar Publishing Limited, Cheltenham, UK, 2011,131.

7.1 Information Disclosure and Transparency

On the background of globalized internet sphere, volume and diversity of information is sometimes suppressing for consumers. Often the process of decision making on the conclusion of contract is hindered by not only the emotional attitude or impossibility to check the quality of goods, but also by the unlimited access to information and information diversity.⁴⁵ Instead of collection and analysis of required information related to the goods and producers, consumer, in general, makes decision based on only few data, which are the easiest to understand. Volume and contents of such information, which fall in the area of consumer interests depend on many factors, such as level of their cognitive perception, level of involvement, contract price and ability to analyze risks. We can assume that quality of information collected and processed by consumer is much lower compared with the information collected and held by producer, causing informational misbalance between the two.⁴⁶

Based on the above-mentioned factors, the scientists distinguish general liability for the information disclosure and liability to provide transparent information.⁴⁷ In relation to the latter, transparency of contract is important in terms of other party to the contract, as liability of disclosure is based on the assumption that supplier possesses information and such information places him at the advantageous position in relation to the consumer. It has to be taken into account that the newest directive regulating consumer rights⁴⁸ considers information provision and transparency under one context and accordingly, defines new notion: “transparent information”. Directives make the producer liable to provide information to consumer, and specify that the information must be unbiased and conveyed in an understandable language.⁴⁹

In this regard, information and its transparency are different notions. The first relates to the volume of information to be provided and the second – to the quality of information provided. For example, producer can, according to the liability to disclose, provide consumer with the information on the producer, key characteristics of goods, taxes and etc. Moreover, producer can provide the above information to the consumer in the way that its contents are unclear or provided incompletely. Hence,

⁴⁵ *Nimmer R.T.*, The Legal Landscape of E-commerce: Redefining Contract Law in an Information Era, Journal of Contract Law Conference, “Contract and the Commercialization of Intellectual Property”, Singapore Academy of Law and Singapore Management University, 2006, 6.

⁴⁶ *Luzak J.A.* To Withdraw or not to Withdraw? Evaluations of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking into Account its Behavioral Effects on Consumer, Amsterdam Law School Legal Research Paper No. 2013-21, Centre for the study of European Contract Law working Paper No. 2013-04, 13, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243645>, [20.01.2015].

⁴⁷ *Bar-Gill O., Ben-Shahar O.*, Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law, New York University Law and Economics Working Papers, 2012, 12-13.

⁴⁸ Directive 2011/83/EU of the European Parliament and of the Council of 25 October on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal of the European Union, L 304/64, 22.11.2011, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:en:PDF>>, [10.10.2014].

⁴⁹ *Campagna M.F.* Transparent Consumer Information In Directive 2011/83/EU, The Columbia Journal of European Law, Vol. 19, 2012, 38, <<http://www.cjel.net/online/transparent-consumer-information-in-directive-201183eu/>>, [22.09.2014].

liability for disclosure implies provision of information, and transparency implies provision of information in the way, which is adequately understandable for the middle level consumer.⁵⁰

In order to consider information transparent: 1) It must be conveyed in an unbiased manner, with the simple and understandable contents; 2) Sentences conveying information must consist of text, which is well thought through preliminarily; 3) The use of special terminology must be minimal. In other words, information must be conveyed in the way that it is understandable for middle level consumer. Following the receipt of information consumer must be able to make informed choice.⁵¹

It has to be also noted that language issues directly related to the information to be provided has been left outside the regulation. In particular, what language must be used for the provision of information? This issue is less problematic, if we are dealing with the consumer contracts concluded within one country; however, when we are dealing with trans-boundary contractual relationships it is not excluded to have disputes over the above mentioned language issue.⁵²

For example, legislators of Netherlands in the process of implementation of 2011 year directive in the national legislation, made a decision not to introduce additional language requirements in relation to the liability for the provision of information prior to the contract conclusion. It means that when the contract is concluded between the Dutch consumer and Italian producer, information is provided to consumer in Italian language. Of course, the above could be considered as one of the manifestations of informational misbalance; however, according to the Dutch legislator's understanding, such situation is fully relevant to the principle of contractual freedom. Producer is himself authorized to determine the language used for offering goods to consumers and accordingly, consumer based on the chosen language can decide to conclude or not a contract. On the other hand, when the information is provided in a language different from the native language of consumer, this is violation of transparency principle and can be considered as unfair commercial practice if consumer could make other decision regarding the conclusion of contract if the information was provided in a language desirable for him/her.⁵³

However, leaving the language issue outside the regulation has its justification. Producer is not required to check in every specific moment the level of consumer's cognition and moreover, the knowledge of language. Problem of perception in terms of language can be created in trans-boundary

⁵⁰ Ibid.

⁵¹ *Loos M.*, The Case for Uniformed and Efficient Right of Withdrawal from Consumer Contracts in European Contract Law, Published in *Zeitschrift Fur Europaisches Privatrecht*, 2007, 17; Consultation on the Implementation of Consumer Rights Directive 2011/83/EU, 2.12.2013. *Twigg-Flesner CH.*, Pre-contractual Duties – from the Acquis to the Common Frame of Reference, *Schulze R.*, CFR and Existing EC Contract Law, Sellier ELP, Munich, 2008, 116-117.

⁵² *Nordhausen Scholes A.*, Information Requirements, Modernizing and Harmonizing Consumer Contract Law, Sellier, European Law Publishers, Munich, 2009, 221; *Loos M.*, The Case for Uniformed and Efficient Right of Withdrawal from Consumer Contracts in European Contract Law, Published in *Zeitschrift Fur Europaisches Privatrecht*, 2007, 17-18.

⁵³ *Loos B.M.*, Consumers sales in The Netherlands after Implementation of the Consumer Rights Directive and with a view to the Future Common European Sales Law, Amsterdam Law School Legal Studies Research Paper No. 2014-53, Centre for the Study of European Contract Law, University van Amsterdam, The Netherlands, Working Paper Series No.2014-12, 3, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506048>, [20.01.2015]; *Nordhausen Scholes A.*, Information Requirements, Modernizing and Harmonizing Consumer Contract Law, Sellier, European Law Publishers, Munich, 2009, 231.

relationships as well as within the country. For example, consumer could be emigrant, who is not fluent in the official language of country and hence, cannot fully understand the contents of a contract. The above issues belong more to the consumer risks than to the responsibility of producer.⁵⁴

The contract, if it turns out that, information is not fully provided and consumer would make other decision under the condition of knowing the above information, must be considered as one concluded via the misleading commercial practice.⁵⁵

On the other hand, volume of information to be provided to consumer can be checked objectively; however, it is not always possible to check objective nature of transparency of information. Therefore, when we are talking about middle level consumer, we must take into consideration the market environment in which the contract is concluded. In other words, clarity and ability to perceive represent standard for measuring the information and its relevance depends on the means used for the conclusion of contract.⁵⁶

7.2. Requirements Set for the Provision of Information to Consumer in the Contracts Concluded on Distance

The European contractual law pays special attention to the requirements set for the distance contracts in relation to the information provision. In case of distance trading, pre-contract and contract information must be provided to consumer in a written form or via the “durable medium”.⁵⁷ Two issues are interesting: 1) what is the form of information provision for the contracts concluded at distance, and 2) what one should imply under the “durable medium”.

⁵⁴ Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR), edited by von *Bar Ch., Clive E., Schulte-Nolke H., and others*, Sellier, ELP, Munich, 2009, 375, <http://ec.europa.eu/justice/contract/files/european-private-Law_en.pdf>, [14.04.2014]; *Loos M.*, The Case for Uniformed and Efficient Right of Withdrawal from Consumer Contracts in European Contract Law, Published in *Zeitschrift Fur Europaisches Privatrecht*, 2007, 17-18.

⁵⁵ *Loos B.M.*, Consumers sales in The Netherlands after Implementation of the Consumer Rights Directive and with a view to the future Common European Sales Law, Amsterdam Law School Legal Studies Research Paper No. 2014-53, Centre for the Study of European Contract Law, Working Paper Series No.2014-12, University van Amsterdam, The Netherlands, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506048> [20.01.2015], 7.

⁵⁶ *Campagna M.F.* Transparent Consumer Information In Directive 2011/83/EU, *The Columbia Journal of European Law*, Vol. 19, 2012, 38, 39, <<http://www.cjel.net/online/transparent-consumer-information-in-directive-201183eu/>>, [22.09.2014].

⁵⁷ Directive 2011/83/EU of the European Parliament and of the Council of 25 October on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal of the European Union, L 304/64, 22.11.2011, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:en:PDF>>, [10.10.2014].

European justice court for the case “Content services”⁵⁸ defined the above requirement, set by the legislators, as liability of trader to provide information to consumer without expecting that consumers will themselves look for such information on website. Therefore, placing only re-directing links by the trader regarding the conditions of the contract at trader’s web site will not be considered as sufficient, as in such case consumer must implement some activities to see the information and consumer must remain passive in terms of obtaining the information. New standard on the provision of information makes the traders liable not only to disclose information, but also to ensure accessibility of such information. Accordingly, passively acting consumer is also under the protection.⁵⁹

In the decision made for the case “Content services” the court was based on the definition 11 of the directive on trade, according to which “application of distance communication rules shall not cause reduction of information to be provided to the consumer.” The court defined that opening of mandatory information on the trader’s web-site only after going of consumer to the re-directing links is against the objectives of directive on the distance trade. Moreover, the court indicated that with its essence web-page is not a “durable medium”. Provision of information to the consumer with the use of web-page does not ensure that consumer receives information in the same volume and via the same rules, as for example in case of physically handing over the contract printed on the paper. According to the definition provided by the European Justice Court, the information medium is durable if it provides consumer with the possibility to keep personally the information targeted to consumer and to be protected from the changes to such information. Moreover, possibility to receive unchanged copies of contract terms and conditions must be guaranteed.⁶⁰

Hence, based on the practice established by the European Justice Court, for the satisfaction of accessibility standards in distance contracts, provision of information via durable medium must create the same possibility for the access to information, which would be available in case of handing over the written document. In other words, information must be under the control of recipient, in this case - consumer. Consumer must be able to store information provided on the durable medium in the way that he is able to get familiar with the information at any time, as desired. Information placed on the web-page of online trader, despite its transparency and accessibility, remains under the control of producer and can be changed at any time. Therefore, modern regulation made online traders

⁵⁸ Directive on distance trade defines that consumer prior to the conclusion of contract or directly at the moment of contract conclusion must be “provided” or “forwarded” with necessary and complete information on the contract terms and conditions. Based on this record, Organization for the Consumer Protection of Austria made disputable that uploading contract terms and conditions on the web-page of service or/and goods’ provide or/ and provision of information on those terms and conditions only via going to hyper-link or after clicking, is not proper fulfillment of directive requirements and filed the claim against LLC “Contents services” at the Austrian Court. Austrian court applied to the European Justice court for clarifications: whether ensuring accessibility of information for consumers via only the hyper-link at trader’s web-page corresponds to the standard of informational provision envisaged under the directive – in Georgian. Case C-49/11, Content Services Ltd v. Bundesarbeitskammer.

⁵⁹ *Luzak J.*, Online Consumer Contracts, University of Amsterdam - Centre for the Study of European Contract Law (CSECL); University of Amsterdam - Faculty of Law, Amsterdam Law School Legal Studies Research Paper № 2014-47, Centre for the Study of European Contract Law, Working Paper Series № 2014-08, ERA Forum, Vol. 15, №3, 2014, 5, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487222###>, [21.01.2015],

⁶⁰ Ibid.

responsible to provide information to consumers in accordance with the rules set for the distance communications. In this regard, the most optimal mean would presumably be communication via the electronic mail and accordingly, it is desirable to provide pre-contract and contract information to the consumer with the use of his/her electronic mail.⁶¹

7.3 Contents of Information to be Provided to Consumer

Provision of information on the goods and services to consumers in accordance with the relevant regulation is one of the areas of concern of the European Union Court. In this direction, number of effective steps has been undertaken; however, this issue remains relevant and is still subject of discussions. Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety⁶² considers the list of information, which must be provided to the consumer by producer or/and distributor. See below the list of such information:

- Product name and type;
- Trade name and address of product manufacturer, the name of country where the product is manufactured;
- In relevant cases the expiry date of products (the last date for the use of product or the date of manufacturing and storage time), the consumption features of which decline after some time;
- In relevant cases product weight or / and volume;
- In relevant cases list of key consumer characteristics of product;
- In relevant cases, rules and conditions for effective and safe use of products, as well as special storage conditions;
- Guaranty period or /and other liabilities if such is provided by the producer / distributor;
- After the product expiry date the actions to be implemented by the consumer and anticipated outcomes if such measures are not implemented. Information on the possible risks related to the use of products;
- Product features, in particular its composition, packaging, mantling instructions and in relevant cases instructions on installation and repairs;
- Impact over the other product, when under the condition of reasonable use the use of above product together with the other product is assumed;
- Product presentation, product labeling, warnings about the product, instruction on its utilization and disposal and any other information related to the product;

⁶¹ *Nordhausen Scholes A.*, Information Requirements, Modernizing and Harmonizing Consumer Contract Law, Sellier, European Law Publishers, Munich, 2009, 225-230; *Luzak J.*, Online Consumer Contracts, University of Amsterdam - Centre for the Study of European Contract Law (CSECL); University of Amsterdam - Faculty of Law, Amsterdam Law School Legal Studies Research Paper № 2014-47, Centre for the Study of European Contract Law, Working Paper Series № 2014-08, ERA Forum, Vol. 15, № 3, 2014, 6, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487222##> [21.01.2015].

⁶² Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety, Official Journal L 011, 15/01/2002, 0004-0017, <http://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=vqQJJ9pBlkGwyVGGQVN9JWcJkhVbqhM4gdWRL1gpv9X40XyK0D1L!-238261744?uri=CELEX:32001L0095>, [10.10.2014].

– Consumer age categories, who could suffer damages due to use of the above product;

The above represents obligatory standard, effective for the products admitted to the market. However, volume and contents of standard may change based on the product's direct features. Moreover, producer is not restricted to provide additional information to the consumer.⁶³

8. Right of Withdrawal from the Contract

Together with the general liability regarding the information disclosure, the right to withdraw from the contract is considered as an instrument, protecting consumer from the negative outcomes of asymmetric information.⁶⁴ It is reinforced by the European Union law and is reflected in the directives regulating the specific contracts concluded with the participation of consumers.⁶⁵ Moreover, in such specific relationships right to withdraw is of imperative nature and is recognized as a mandatory provision of contract.⁶⁶ In this regard, we could name two key areas, where consumer suffers the worst informational vacuum and falls under the special protection of the European Union law.

The first area covers contracts concluded at distance, where the consumer is deprived from the possibility to personally examine goods to be purchased and collect all interesting and relevant information about the goods. The second area covers contracts concluded under unofficial circumstances, where contract signing is caused by the factor of inexpectency and often it is impossible to have informed consent. Of course, it is possible to consider right of withdrawal in all other relationships; however, unlike the above listed cases, the above would be a result of agreement between parties and not the manifestation of legislative requirement.⁶⁷

There are two key motives behind granting the right of withdrawal from contract to the consumer. Both of them are based on the view that consumer is weak, inexperienced, unprotected person and he/she requires firm guarantees in the process of establishing relationships with skilled trader. The first protective function is directed towards the protection of consumer from the psychological oppression, and the second – towards the avoiding negative outcomes of provision of inappropriate information.⁶⁸

⁶³ It has to be noted that law of Georgia - "Product safety and free turnover code" for the products admitted to the market considers liability for producers and distributors for the information provision in the same way.

⁶⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal of the European Union, L 304/64, 22.11.2011, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:en:PDF>>, [10.10.2014]

⁶⁵ *Schulte-Nolke H., Twigg-Fllesner CH., Ebers M.*, EC Soncumer Law Compedium, The Consumer Aquis and its Transposition in the Member States, Sellier, Munich, 2008, 454.

⁶⁶ *Gheorghe A.N., Spasici C.*, Consumer's Right to Withdraw, The International Conference CKS 2013, Challenges of the Knowledge Society; Bucharest, 17th -18th May 2013, 7th ed.; Pro Univertitaria Bucursit, 2013, 270, <http://cks.univnt.ro/download/100_e_book_final_.pdf>, [25.04.2014].

⁶⁷ *Smith J.M.*, Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contracts Law: The Right to Change Your Mind?, Maastricht European Private law Institute, Working Paper № 2001/01, 7, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719104>, [21.11.2013].

⁶⁸ *Ibid*, 9.

9. Requirements to be Satisfied by the Information on the Withdrawal from the Contract

For the protection impact of the right to withdraw from contract, provision of information on such right to the consumer has attained a decisive importance. Moreover, there are two types of standards effective for the provision of information to consumer in the contracts, where the right of withdrawal is ensured via the imperative norms.⁶⁹ The first type of standard covers information on the key characteristics of the subject of contract, which is identical to the general liability on the provision of information on the goods and services. In particular, before the consumer expresses his/her will on the conclusion of contract, producer must ensure provision of understandable and comprehensive information to the consumer on: the key characteristics of goods or/ and services to the consumer; terms for the delivery of goods or services; procedures for the submission of claim; in specific cases on the certificate of relevance; guarantee and possibilities for the after-sale services (exchange/ repairs to the purchased items); in specific cases term for the contract validity and mechanisms for its prolongation; final price of goods including taxes; where possible, mechanisms of payment; in case of indefinite term contracts, basis for its termination.⁷⁰

The second requirement covers the liability on the provision of information to the consumer: on the right of contract withdrawal, conditions and terms for its exercise; information on the identification data of producer; costs related to the return of goods; information on cash deposits and other financial guarantees, payable or secured by the consumer in case of such request presented by the producer; Information on the person, to whom the exercise of right on withdrawal shall be declared; also information about the circumstances or subject of contract, for which the right of contract withdrawal is not valid; For example, contracts concerning the perishable or fast use items as well as contracts on services, where services are provided immediately after the signing of contract.⁷¹

In addition to the above, the authorized person shall be notified about the address of the person, where the notification on the withdrawal from contract shall be sent in order to enable the authorized person to exercise right to withdraw. "Address" implies postal address, where the notification or directly the purchased item is sent. Moreover, if, for example, the trader provides detailed information on the company, such as company registration number, geographic location, but misses out details of territorial location, such as district, street or street number, liability to provide information is not considered as fulfilled. For example, if one party has right to withdraw from the contract, and the other

⁶⁹ Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR), edited by von Bar Ch., Clive E., Schulte-Nolke H., and others, Sellier, ELP, Munich, 2009, 293, <www.Law-net.eu>.

⁷⁰ Directive 2011/83/EU; Loos M., The Case for Uniformed and Efficient Right of Withdrawal from Consumer Contracts in European Contract Law, Published in *Zeitschrift Fur Europaisches Privatrecht*, 2007, 14-18.

⁷¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October on consumer rights; Terry E., The Right of withdrawal, The Acquis Principles and The DCFR, CFR and Existing EC Contract Law, Sellier, ELP, Munich, 2008, 154; Loos M., The Case for Uniformed and Efficient Right of Withdrawal from Consumer Contracts in European Contract Law, Published in *Zeitschrift Fur Europaisches Privatrecht*, 2007, 14-18.

party misses to indicate one, even not important detail identifying producer, then the standard on reasonable notification is violated.⁷²

It has to be noted that notification on the withdrawal from the contract does not imply that information on the starting and expiration dates for the exercise of withdrawal right shall be provided to the authorized person. It is sufficient and adequate to provide to the authorized person information on the duration of time for thinking and information on which date the term counting starts. However, if the indicated term turns out to be incorrect or has not been at all indicated, it is considered that notification format is violated. For example, party to the purchase contract notifies other party about the right of withdrawal, however, does not provide information that such right cannot be exercised after expiration of 14 days following the receipt of goods. Consumer was provided with information only regarding the right to reject the contract after the conclusion of contract and handing over the goods. The above will not be also considered as reasonable notification.⁷³

Moreover, independent standard for notification is effective for specific contracts, in terms of form of such notification. For example, in case of contracts concluded under informal circumstances, trader must ensure provision of appropriate information in a written form or other acceptable form, under the consent of other party. Information must be provided in an understandable and simple language. Accordingly, provision of information to the consumer in an oral form, in case of contract concluded under informal circumstances, is not sufficient. In distance contracts, trader is responsible to provide to the consumer above mentioned information with the understandable contents, in the format appropriate for the communications established via the distance manner. Any information presented on the durable medium must be readable and understandable for consumer.⁷⁴

Moreover, it is important that notification on the right to withdraw from the contract does not have the form of standard contract condition. The text must be presented in the way that consumer can read and perceive it. For example, party has right to withdraw from the contract, however, the information which is considered as mandatory is provided in the form of numerous standard conditions; above will not be considered as reasonable notification. Accordingly, maximal term will be valid for the contract withdrawal. In case, if party gets familiar with the right to withdraw from the contract but he/she is not provided with explanation that such right can only be exercised within the defined time period, then such notification will not be either considered as a reasonable notification and accordingly, in this case the maximal term for the withdrawal from contract will be effective.⁷⁵

⁷² Principles of the Existing EC Contract Law (Acquis Principles), Contract I, Pre-contractual Obligations, Conclusion of Contracts, Unfair Terms, prepared by Research Group on the Existing EC Private Law, European Law Publishers, 2007, 178.

⁷³ Ibid.

⁷⁴ Nordhausen Scholes A., Information Requirements, Modernizing and Harmonizing Consumer Contract Law, Sellier, European Law Publishers, Munich, 2009, 234; DG Justice Guidance Document, European Commission, DG Justice, June 2014, <http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf>, [20.03.2015], 20-24; Campagna M.F. Transparent Consumer Information In Directive 2011/83/EU, The Columbia Journal of European Law, Vol. 19, 2012, 37.

⁷⁵ Campagna M.F. Transparent Consumer Information In Directive 2011/83/EU, The Columbia Journal of European Law, Vol. 19, 2012, 37-38.

At the same time, liability to notify on the right to withdraw from the contract makes producers responsible to adopt additional measures for the declaration of the above right. First of all, information on the withdrawal right must not be provided in the contract text in the way that it requires extra efforts from consumer to find such information. It must not be provided in a tacit manner or together with other rights. For the clarity of right existence it is expedient to devote to the right prominent place, for example, use bold letters or text presented in the text box.⁷⁶

Information provided on the right to withdraw from the contract with the fulfillment of above discussed requirements, represents the essential pre-condition for exercising the right. It can be said that right to withdraw from the contract in conjunction with the information provision are considered as important instruments serving the purpose of protecting the rational choice of consumers. It is regularly used in the special cases of contract formation, where consumer holds weak position in comparison with producer in terms of making decision on concluding the contract and getting familiar with and perceiving the contents of contract. This case of interests' misbalance is considered as the one containing significant threat and one of the forms of undesirable binding. For the purpose to compensate the above unfavorable outcomes, the consumer is provided with additional time for releasing himself from the irrevocable power of provided offer. During the certain period, consumer is entitled to reject contract via the exercise of right to withdraw from the contract.⁷⁷

It has to be also noted that although, 2011 directive on “the Consumer rights” considers detailed list of information, which must be provided to consumer, however, it does not indicate on the outcomes of liability violation.⁷⁸ The above issue must be resolved based on the national legislation of each member state, which covers the conclusion, authenticity and effectiveness of contracts. Accordingly, directive does not provide an answer on the question – what type of damage must be reimbursed to consumer in case of provision of incomplete information? It does not indicate bases for declaring void contracts concluded under such circumstances or does not indicate on the possibility to terminate the contract.⁷⁹

Moreover, in terms of effective protection, there must be a matching regulation of private law regarding the reimbursement of losses with the law on consumer right protection. Protection of consumers requires implementation of effective measures for the restoration of violated rights, which

⁷⁶ Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR), ed., by von Bar Ch., Clive E., Schulte-Nolke H., and others, Sellier, ELP, Munich, 2009, 395, www.law-net.eu. *Loos M.*, The Case for Uniformed and Efficient Right of Withdrawal from Consumer Contracts in European Contract Law, Published in *Zeitschrift Fur Europaisches Privatrecht*, 2007, 17.

⁷⁷ *Twigg-Flesner Ch., Schulze R.*, Protection Rational Choice: Information and the Right of Withdrawal, Handbook of Research on International Consumer Law, Published by Edward Elgar Publishing Limited, Cheltenham, UK, 2011, 145.

⁷⁸ Directive 2011/83/EU of the European Parliament and of the Council of 25 October on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal of the European Union, L 304/64, 22.11.2011, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:en:PDF>>, [10.10.2014].

⁷⁹ *Campagna M.F.*, Transparent Consumer Information In Directive 2011/83/EU, The Columbia Journal of European Law, Vol. 19, 2012, 38, <<http://www.cjel.net/online/transparent-consumer-information-in-directive-201183eu/>>, [22.09.2014].

are effective in time and space. Loss reimbursement mechanism established in the private law, in general, requires long-term procedures for the protection of rights (court litigation process); the above is especially evident in case when we are dealing with small scale costs (low loss). Therefore, it is the subject of dispute - what is the maximal limit of private law to ensure protection of consumer right without development of special regulations.⁸⁰

10. Conclusion

The present article discussed mandatory standard, envisaged under the European Union contract law in terms of information provision to consumers; especially in contracts, which are concluded on distance or under informal circumstances. However, based on the specific features of each specific relationship, contents and form of information to be provided can be different. For example, treatment means and pharmaceutical activities are regulated under the independent norms and are subject to separate regulation. The same could be said about the contracts concluded on items containing increased danger and many other items. It is evident that discussion of all possible issues, with features characteristic to such issues within one article would not be possible and is not expedient either.

As a conclusion, it has to be noted that right to receive full and comprehensive information on the goods to be purchased or services to be received protected under the consumer law generates counter liability of producer on the provision of transparent information. These inter-dependent right-liabilities are common for all contracts concluded with the participation of consumer with the consideration of relevant specifics. Moreover, in order to consider information as transparent, it must satisfy certain standard. In addition to the liabilities in terms of contents, such information must be conveyed in an unbiased manner, in simple and understandable language; it must be clear and perceivable for a medium level consumer.

It has to be taken into account that Georgian legislative acts protecting consumer rights in terms of liability for the provision of information of general nature are corresponding to the European standards. However, such issue as right to withdraw from the contract is not yet elaborated in a proper manner. Moreover, although the above is encountered in the norms regulating contracts concluded in the street, however, norm does not fully convey the meaning of the right and boundaries for its utilization. As for the contracts concluded on distance and possibility for consumer to reject them, this issue has not yet been researched at a relevant level and reflected in the Georgian legislation on the protection of consumer rights.

⁸⁰ *Howells G., Ramsay I., Wilhelmsson Th., Consumer Law in Its International Dimension, Handbook of Research on International Consumer Law, Published by Edward Elgar Publishing Limited, Cheltenham, UK, 2011, 3.*

Daria Legashvili*

Terms for the Implementation and Protection of Sender's Rights

I. Introduction

In the development of modern trade turnover the contract on transportation of goods occupies an important and special place.

Strategic location of Georgia determines possibilities for transportation of cargo via sea, as well as motor, railway and air transport; due to the above, the country is an important transit point. It is true that for the improvement of above area, Georgia is a participant of numerous conventions and treaties;¹ however, the key for such development is elaboration of internal legislative framework. The Civil Code of Georgia² (hereinafter referred to as CCG) does not mention terms for the implementation and protection of sender's, as the participant of transportation contract, rights. However, implementation of civil rights significantly depends on the realization of such rights within the appropriately defined terms. In the event of existence of firm guarantees for the protection of rights, there is higher expectation for the implementation of such right. It is clear that contract participants, based on the principle of contract freedom, can themselves regulate their relationships; however, "the most aggravated outcome of contract freedom is that the civil turnover may stop."³ That is why, it is necessary to regulate terms for the implementation and protection of sender's rights via the legislative act.

The objective of present article is to define protection means and relevant terms not envisaged directly under the CCG. Identification of features characteristic to the terms for the implementation and protection of sender's rights is mainly carried out for railway, sea and air transportation.

The research is based on the analysis of court practice, normative, logical, doctrine, synthesis and comparative legal methods.

The second chapter of the article covers terms for realization of sender's rights in terms of cargo to be transported. The first sub-chapter of the above chapter identifies inter-relationship of consignee's and sender's rights for the purpose to define the terms for the validity of sender's rights.

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¹ See "United Nations' 1978 year Convention on Carriage of Goods by Sea"; Agreement on the International Goods Transport by Rail, dated 01 November 1951; Convention on "International Civil Aviation" ("Chicago Convention"); Montreal Convention on the "Unification of Some Rules for Air Shipments", dated 28 May 1999; Convention on the "Agreement on international transportation of goods via the road" ("Geneva Convention"); for key international acts regulating transportation of cargo via air vessels see *Gabichvadze Sh.*, Civil Legal Regulation of shipment of Cargo and Transportation of Passengers via air Transport, Thesis work, Tbilisi, 2012, 37-44 (in Georgian).

² Civil Code of Georgia, Parliament Herald, 24/07/1977, LEPL "Legislative Herald of Georgia".
<https://matsne.gov.ge/index.php?option=com_idmssearch&view=docView&id=31702&lang=ge>.

³ *Zoidze B.*, Reception of European Private Law in Georgia, Tbilisi, 2005, 297 (in Georgian).

The third chapter of present work is devoted to the definition of general and special terms for protection of rights for air, railway and maritime transportations and the expediency of envisaging the definition of the sender as the person authorized to submit the claim and consideration of submission of claim as the precondition for the realization of rights in the Civil Code of Georgia.

The fourth chapter of the article demonstrates importance of claim submission by consignee for the protection of sender's rights.

The fifth chapter of the work discusses limitation terms and inter-relationship of general and special norms of limitation period for ensuring the development of common court practice.

II. Terms for Realization of Sender's Rights in Relation to the Cargo to Be Transported

Although term of transportation contract defined under the article 668 of CCG⁴ except for the carrier, does not directly indicate,⁵ who is the second party to the contractual relationship, based on the analysis of the norm, parties to the cargo transportation contract are cargo sender and carrier, either physical or legal persons.⁶ In addition to the cargo sender and cargo carrier, other person is also involved in the contract – that is – cargo recipient. There are various views regarding the legal status of cargo recipient in the legal literature;⁷ however above is not a subject of present work.

Hence, based on transportation contract, rights and duties are generated for cargo sender, as well as its carrier and recipient. Essential conditions of contract are defined prior to the commencement of transportation process by the carrier and the person transferring cargo to the carrier for transportation purposes.

Existence of rights of parties to the transportation contract as well as generally civil rights does not itself mean that such rights are implementable,⁸ as their realization depends on the adherence to the appropriately set terms.⁹ Classification of legal terms is conducted via various bases;¹⁰ In terms of purpose there are following classifications in place: term for the generation of civil right; term for the realization of civil right; terms for liability fulfillment and protection of right (limitation period).¹¹

⁴ Article 668 of CCG. Under the transportation contract carrier is liable to ship cargo or transport passenger to the destination place for the agreed fee (in Georgian).

⁵ *Compare HoptK., Kumpan Ch., Merkt H., Roth M., Baumbach A.*, HGB Kommentare, B. 9, 36., Aufl., 2014, § 407, Rn. 16, 1502.

⁶ *Gabichvadze Sh.*, Civil Legal Regulation of Shipment of Cargo and Transportation of Passengers via air Transport, Thesis work, Tbilisi, 2012, 101 (in Georgian); *Akhvlediani Z.*, Liability Law, Tbilisi, 1999, 160 (in Georgian).

⁷ *HoptK., Kumpan Ch., Merkt H., Roth M., Baumbach A.*, HGB Kommentare, B. 9, 36., Aufl., 2014, § 407, Rn.17, 1503; *Gabichvadze Sh.*, Civil Legal Regulation of Shipment of Cargo and Transportation of Passengers via air Transport, Thesis work, Tbilisi, 2012, 49-51, 101; *Akhvlediani Z.*, Liability Law, Tbilisi, 1999, 160; *Zambakhidze T.*, Comments to CCG, Book Four, Vol. I, 2001, 317 (in Georgian).

⁸ *Chanturia L.*, General Section of Civil Law, Tbilisi, 2011, 117 (in Georgian).

⁹ On notion of terms and term types, see *Tumanishvili G.*, Introduction to Private Law of Georgia, Tbilisi, 2012, 185-191; *Kobakhidze A.*, Civil Law I, General Section, Tbilisi, 2001, 351-379; *Akhvlediani Z.*, Comments to CCG, Book 1, Tbilisi, 2002, 306-310 (in Georgian).

¹⁰ *Akhvlediani Z.*, Comments to CCG, Book 1, Tbilisi, 2002, 306 (in Georgian).

¹¹ *Akhvlediani Z.*, Comments to CCG, Book 1, Tbilisi, 2002, 306-308; *Kobakhidze A.*, Civil Law I, general section, Tbilisi, 2001, 353; Compare resolution of Chamber of Civil Cases, the Supreme Court of Georgia,

According to the definition provided by the Supreme Court of Georgia terms for the implementation of civil rights together with other terms considers terms of limitation for the protection of right.¹² However, the terms for right implementation and protection, in other words limitation terms shall be separated.

1. Terms for Cargo Management

1.1. Term for the Management of Cargo by Sender

The right to manage cargo transferred to carrier for the transportation purposes is possessed by consignor (sender) or consignee (recipient) of cargo; and in certain cases carrier may also possess such right.

Consignor may not receive cargo himself and determine person authorized for its receipt, which is cargo recipient; however, often there is possibility to have cargo consignor as the cargo recipient/consignee.¹³ In such case, terms and means for the implementation and protection of consignor's rights are identical to those determined under the CCG for cargo consignee. But if sender/consignor and receiver/consignee are different persons the terms for realization of their rights shall be separated from each other.

When consignor and consignee are different entities, conclusion of cargo transportation contract often preceded by the contractual relationship established between the consignor and consignee, such as purchase agreement, transfer as a gift, exchange, lease, rent, transfer in loan, leasing, transfer into management and etc.¹⁴ In such cases, term for realization of right depends on the agreement considered under the main contract concluded between the consignor and consignee.

For example, purchase contract may assign to the seller liability to send the goods; in such case seller shall conclude agreements necessary for the transportation of cargo to the agreed destination (article 480 (2), CCG); hence in such case seller is also sender of the goods, and buyer – cargo recipient.¹⁵

If consignor sends cargo to consignee based on the contract concluded between them, then for the definition of term for the realization of consignor's right, it is important to determine how does the purchase contract regulate issue on transfer of ownership right over the property, as sender has right to

dated 25 December 2013 for the case No as-266-254-2013 (Terms for the realization of civil right together with other terms implies right protection term – limitation period) (in Georgian).

¹² Resolution of Chamber of Civil Cases, the Supreme Court of Georgia, dated 25 December 2013 for the case No as -266-254-2013 (in Georgian).

¹³ *Gabichvadze Sh.*, Civil legal regulation of shipment of cargo and transportation of passengers via air transport, Thesis work, Tbilisi, 2012, 48 (in Georgian).

See Important Definition Provided by the Chamber of Civil Cases, the Supreme Court of Georgia for the case No as-792-1007-08, dated 11 June 2009 (in Georgian).

¹⁴ Compare *Gabichvadze Sh.*, Civil legal regulation of shipment of cargo and transportation of passengers via air transport, Thesis work, Tbilisi, 2012, 101, 45 (in Georgian).

¹⁵ Compare *Jesser-Huß*, Münchener Kommentar zum HGB, CMR Art. 12 [Verfügung über das Gut], 3. Auflage 2014, Rn. 5.

manage cargo to be transported until the recipient's right over the cargo is generated. Based on the above, it is important to determine the moment for generation of cargo ownership right by the recipient. According to the general rule, for the transfer of ownership right over the movable item, it is necessary that owner transfers item to purchaser based on authentic right^{16,17}. According to the article 681 of CCG, handing over the second copy of bill of lading to consignee is considered as transfer of cargo.¹⁸ According to article 680(3) of CCG, the right for management can be generated for consignee immediately after the issuing of bill of lading; in other words, in order to consider cargo (item) as transferred, in certain cases, it is not necessary to hand over to consignee the second copy of bill of lading. As, it is clear that if the right for management of item is generated for the person, then such item is considered to be transferred in his/her ownership, even if consignee has not yet received the item, as "ownership cannot be measured by the areal connection- relationship with an item"¹⁹ and "possibility for actual ownership of item cannot be taken to the physical contact with the item".²⁰ Based on the above, it has to be noted that handing over the second copy of bill of lading to consignee is considered as transfer of item to consignee, and if consignor indicates in the bill of lading that item disposal right is generated at the moment of registration of bill of lading, the registration of bill of lading will be considered as the transfer of item to consignee and in the latter case, at the moment of issuing the invoice the consignor loses the right for disposal of cargo to be transported. Therefore, consignor has a right to manage cargo until²¹ it has ownership right over the items. When is the cargo considered as handed over to consignee under the transportation contract is important for definition of validity of rights of consignor over the items to be transported as well as for the determination of boundaries of sender's responsibility. In particular, if purchase contract is the basis for relationship between consignor and consignee, with transfer of sold item the risk of loss or damage to the item by accident is transferred to buyer, if not otherwise considered under the agreement between parties (article 482 (1), CCG). However, if there is

¹⁶ Book I, Tbilisi, 2004, 97 (in Georgian).

¹⁷ Article 186 (2) of CCG. The following is considered as transfer of item: transfer of item to the buyer in direct ownership; transfer into indirect ownership via the agreement, in which case previous owner may remain as direct owner; granting by the owner to the buyer the right to claim ownership from third party (in Georgian).

¹⁸ Compare *Gabichvadze Sh.*, Civil Legal Regulation of Shipment of Cargo and Transportation of Passengers via airtransport, Thesis work, Tbilisi, 2012, 48 (in Georgian).

¹⁹ *Zoidze B.*, Georgian Item Law, Tbilisi, 2003, 56 (in Georgian).

²⁰ See the above reference, 56.

²¹ Norms regulating transportation contract do not define the specific meaning of right to manage cargo. Therefore management shall be defined as "element of ownership right, in which the nature of ownership is manifested the most". Namely, according to the interpretation of the Supreme Court of Georgia (Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case No as-531-864-05, dated 23 March 2006), "management implies purchase-sale, transfer as gift, renting, transferring in lease, transferring for storage, exchange of item and etc, the item itself including its destroy. The key characteristic of legal nature of management is that as a result of management the property ownership is transferred; however management also considers such cases when the item ownership is not transferred, the item is transferred to third parties for temporary ownership and use, in other words via management the legal fate of the item is decided or the ownership right is terminated (in case of sale, transfer as gift, exchange and etc.) or right on use or direct ownership is stopped temporarily (in case of renting, leasing, lending, transferring for storage and etc.)."(In Georgian).

other contractual relationship between the consignor and consignee (different from purchase contract), then it is important to precisely determine when is cargo considered as transferred to the consignee.

According to article 26(2) of the Railway Code of Georgia (hereinafter referred to as – the Railway Code), if cargo recipient or expeditor does not pay cargo transportation costs and costs of other services related to transportation (implementation of works), then railway has right to hold the cargo and to notify in writing the cargo sender, which is liable during 4 days following the receipt of notification to manage the cargo. If within the given period, based on the transportation contract the cargo consignee or expeditor does not cover the debt, and cargo sender does not manage the cargo, then the railway is entitled to sell the cargo under hold (if not otherwise envisaged under the transportation contract),²² with the exception of cargos which cannot be subject to sale.²³ It is evident, that sender shall have right to request the difference between the cost of cargo transportation and cargo sales income, if such difference is in place.

Hence, as already mentioned, if the right to manage for consignee is generated at the moment of issuing the bill of lading, from the same moment sender loses right to manage the goods to be transported. However, if consignee rejects to manage cargo, or does not pay costs related to the cargo transportation, again the sender receives the right to manage cargo; and if sender does not manage the cargo within the time period indicated in the notification forwarded by transportation agent, all the rights possessed by sender are transferred to the transportation agent and from such moment, sender does not any more have right to manage the cargo. Hence, right of sender to manage cargo depends on whether consignee receives or not the cargo.

Sender will not be able to use the right to manage cargo, if it does not present to transportation agency first copy of bill of lading (article 680 (5), CCG). Accordingly, the right to manage cargo is generated for sender after presentation of the first copy of the bill of lading. However, if consignee rejects to accept the cargo, sender is authorized to himself manage the cargo even without presentation of the first copy of bill of lading. Hence, when the right of sender to manage cargo is granted to consignee, sender becomes authorized to manage the cargo only if consignee rejects to accept such cargo.

The right of sender to manage cargo, together with all other rights considered under the management of item (property) also covers right to terminate transportation, to determine person responsible to receive the cargo and location for cargo receipt.²⁴ Namely, sender is authorized to request termination of transportation; sender can also request the transportation agency not to change destination or cargo, not to transfer cargo to other persons than those indicated in the bill of lading (article 680 (1), CCG).

Paragraph 415 (1) of German Trade Code²⁵ (hereinafter referred to as GCT) unlike the article 680 (1) of CCG provides sender with the right to at any moment of transportation contract validity²⁶ suspend

²² Article 356, order №26, dated 18 April 2003 on the “approval of rules for the transportation of cargo via railway”, issued by the Minister of Transport and Communications (in Georgian).

²³ See Article 26 (2) of the Railway Code (in Georgian).

²⁴ Compare *Gabichvadze Sh.*, Civil Legal Regulation of Shipment of Cargo and Transportation of Passengers via air Transport, Thesis work, Tbilisi, 2012, 105 (in Georgian).

²⁵ Handelsgesetzbuch (HGB) Aufl. 55, Stand 13, September 2013.

²⁶ In the Trade Code of Germany shipment contract is regulated under the chapter four, the term of shipment contract is defined in paragraph 407, it is referred to as “contract on cargo shipment”, “transportation

and not possibility to terminate such agreement.²⁷ Based on the article 680 of CCG, there is no basis for termination of agreement in place; therefore it has to be noted that sender has right to terminate transportation contract at any time.²⁸

CCG defines the timeframe within which the sender has right to request suspension of transportation contract.

According to the Georgian Maritime Code (hereinafter referred to as the Maritime Code) sender has right to return cargo prior to the departure of carrier vessel from the port.²⁹ Hence, according to the mentioned code, sender has right to request transportation termination until the vessel departs from the sea port. According to the article 143 of the same Code, sender under the relevant circumstances³⁰ may reject the contract even during the trip.

contract” (Frachtvertrag); according to the paragraph 407, via the transportation contract carrier is liable to ship goods to the determined destination and transfer to the recipient – (in Georgian).

(2) Sender is liable to pay freight for the cargo to be transported (Fracht).

(3) Norms of this sub-chapter are applied if:

1. Overland, air and water transportation is carried out.

2. Shipment (transportation) belongs to the business unit...”

§ 407 Frachtvertrag

(1) Durch den Frachtvertrag wird der Frachtführer verpflichtet, das Gut zum Bestimmungsort zu befördern und dort an den Empfänger abzuliefern.

(2) Der Absender wird verpflichtet, die vereinbarte Fracht zu zahlen.

(3) Die Vorschriften dieses Unterabschnitts gelten, wenn

1. das Gut zu Lande, auf Binnengewässern oder mit Luftfahrzeugen befördert werden soll und

2. die Beförderung zum Betrieb eines gewerblichen Unternehmens gehört.

Erfordert das Unternehmen nach Art oder Umfang einen in kaufmännischer Weise eingerichteten Geschäftsbetrieb nicht und ist die Firma des Unternehmens auch nicht nach § 2 in das Handelsregister eingetragen, so sind in Ansehung des Frachtgeschäfts auch insoweit die Vorschriften des Ersten Abschnitts des Vierten Buches ergänzend anzuwenden; dies gilt jedoch nicht für die §§ 348 bis 350.

HGB, §407, Aufl. 55, Stand 13. September 2013, 166.

²⁷ HGB, §415 (1), Aufl. 55, Stand 13. September 2013, 169 (Der Absender kann den Frachtvertrag jederzeit kündigen...).

²⁸ Compare with: *HoptK., Kumpan Ch., Merkt H., Roth M., Baumbach A.*, HGB Kommentare, B. 9, 36., Aufl., 2014, §415, Rn.1, 1515.

²⁹ Article 124 of the Maritime Code of Georgia: 1. The consignor shall have the right to request:

a) the return of the goods prior to the ship's departure from the port; b) the delivery of the goods in an intermediate port;

c) the delivery of the goods to a person not named in the bill of lading, provided that the person presents all copies of the bills of lading issued to the consignor and complies with all the provisions of this Code concerning the refusal of carriage by sea or presents appropriate security. 2. Any person lawfully holding a bill of lading, who has all copies of the bill of lading or the sea waybill shall enjoy the same right (in Georgian).

³⁰ Article 142 (1) of the Maritime Code of Georgia

a) during military or other operations, when the ship or cargo may be at risk of capture by others; b) if ports of shipment or destination are blockaded; c) if the ship is detained by order of the authorities for reasons beyond the control of the parties to the contract; d) if the ship is used for special purposes by its flag State or port State; e) if authorities prohibit the export of the goods intended for carriage to from the port of departure or import of the goods into the port of destination (in Georgian).

As the Civil Code of Georgia does not define until which moment has the sender right to terminate transportation contract, it is assumed that sender may terminate transportation contract at any time. Therefore, in the above mentioned case, we are faced with the collision of norms of special law. “in case of collision of general and special law norms”³¹ priority is granted to the basis for the claims regulated under the special law.³² Accordingly, for maritime transportations, sender shall be entitled to terminate transportation contract until the carrier vessel departs from the sea port and not at any time, and for the cases envisaged under the Code – during the trip too.

It must be noted that we are not dealing with contract termination in all cases; namely, when the transportation company is not fulfilling liability within the set terms or if transportation company, under the existence of circumstances making the fulfillment impossible, rejects delivery of cargo, it is not in interests of sender to annul the liabilities generated from the transportation contract, sender on contrary is interested to claim reimbursement of incurred losses from the carrier; accordingly, there is a precondition for withdrawing from the contract and not for the termination of such contract.³³

In the event of transportation of cargo via railway consignor's right to represent cargo is limited with the indication of authorized person; namely, sender of cargo is liable at the written request received from the head of railway station to immediately stop the delivery of cargo or limit the loading to the prohibited direction.³⁴

1.2. Terms for the Management of Cargo by Consignee

Consignee is entitled to request from consignor the second copy of bill of lading. Cargo is considered as handed over to the consignee after transfer of the second copy of the bill of lading to the consignee. Rights of consignee, which are based on the transportation contract, are generated from the moment of transfer of second copy of bill of lading. Immediately after the receipt of cargo consignee is entitled to realize all rights, which are based on transportation contract.³⁵ If not otherwise envisaged under the contract signed between consignee and sender, consignee prior to the receipt of cargo is entitled to manage the cargo only if such right is granted to consignee by the sender via the relevant indication in the bill of lading; in such case right of consignee to manage cargo is generated at the moment of issuing the bill of lading.

CCG defines boundaries for the management of cargo by consignee and indicates that if consignee issued instructions on transfer of cargo to third person, the latter is not entitled to name other consignee; however, CCG does not define specifically what is a time-frame for the entitlement of consignee to name other consignee; however norm analysis clarifies that recipient has such right until the cargo is transferred to consignee by the transportation company.

³¹ *Chachava S.*, Requirements and competition of requirement basis in the private law, Tbilisi, 2010, 126 (in Georgian).

³² See the above reference.

³³ Ebenroth R., Boujong, Joost/Strohn, *Handelsgesetzbuch, Münchener Kommentar*, Band 2, 2., Auflage, 2009, Rn. 23 f.

³⁴ Article 14 (6), the Railway Code (in Georgian).

³⁵ *Zambakhidze T.*, Comments to CCG, Book Four, Vol. I, 2001, 343 (in Georgian).

If consignee rejected to receive cargo, he/she can still request transfer of cargo; however consignee has such right until the transportation company receives from sender opposite instructions (CCG, Article 683 (1), (2)). Hence, rights of sender and consignee in terms of cargo to be transported are closely linked and it can be stated that often realization of sender's rights excludes the possibility to realize consignee's rights and vice versa.

Accordingly, term for the validity of sender's rights related to the cargo depends on the moment of generation of consignee's rights on such cargo.

Accordingly, sender has right to manage cargo until the second copy of bill of lading is received by consignee. Immediately after the handing over of the second copy of bill of lading to consignee the authority of sender to manage cargo terminates. Moreover, if sender grants consignee with the right to manage cargo immediately after the issuing of bill of lading, sender's right to manage cargo terminates immediately after the conclusion of contract and at the same moment right of consignee to manage cargo is generated.

Hence, it is only possible to manage cargo if person authorized to manage cargo presents to transportation company first copy of bill of lading, which contains new instructions for the carrier.

Cargo shall be managed and requested by the authorized person in a manner, making it possible to fulfill the instructions at their receipt; moreover, fulfillment of instructions should not cause damage to the cargo transferred for transportation, its segmentation and hindering the normal activities of transportation company. All costs and losses, incurred due to the implementation of above instructions shall be reimbursed to the transportation company.³⁶ Person named by consignees and authorized to manage cargo is limited by the boundaries for the realization of cargo management rights in the way that the latter does not have right to name other consignee. Sender loses right to manage cargo, when second copy of bill of lading is handed over to consignee; in other words when consignee receives the cargo. Hence, sender's right to manage cargo terminates at the point, where similar right of consignee is generated.

Based on the above, it is possible to establish the most general term for of cargo management in the process of transportation, according to which realization of right to manage cargo means fulfillment of instructions issued by authorized person by transportation company within the timeframe set for the cargo management.

2. Terms for the Management of Arrested Cargo, Cargo Transferred for Storing and Cargo Sunk in the Sea by Authorized Person

Cargo management for maritime transportation is characterized with certain features. Namely, cargo sender and cargo consignee lose right to manage cargo, if sea port captain arrests the cargo.³⁷ According to the Maritime Code, order of sea port captain on the arrest of cargo is valid for 3 days and nights; in other words, right of sender or consignee to manage cargo is suspended for the above

³⁶ *Akhvlediani Z.*, Liability Law, Tbilisi, 1999, 166(in Georgian).

³⁷ A port captain may detain a ship or cargo in the seaport, if: a ship-owner or a cargo owner fails to provide appropriate security (in the case of a fine, or failure to pay fees or to reimburse damage) – article 82 (2) of the Maritime Code (in Georgian).

mentioned period (this term does not include holidays and non-working days envisaged under the Georgian legislation) in the event if within this period court does not make decision on the arrest of ship or until the final settlement of dispute, if within this period the court makes decision on the arrest of ship. If within 3 day-nights' period court does not make decision on the arrest of cargo, they can immediately request to release the cargo from the arrest and accordingly to implement authority on its management. The above norm does not appropriately ensure protection of sender's (consignee's) right. As the decision of sea port captain on the arrest of cargo is not sufficient legal basis and it is possible to arrest cargo only based on the court decision. If court identifies that there are not sufficient basis for cargo arrest then the freedom of cargo management is unlawfully restricted during 3 days-nights' period. If cargo is contains perishable goods, then arrest of cargo may cause its decay.

Allocation of three day period to the court for the review of sea port captain decision on the arrest of cargo is not relevant period of time, as it has to be noted that court decision on the arrest of cargo at the sea port becomes similar to the resolution for the claim securitization, under which person is prohibited to carry out certain actions, namely to realize its right on the cargo disposal. Therefore, in such cases, article 193 of the Civil Code of Georgia shall be used via analogy³⁸ and order on the arrest of cargo shall be reviewed by the court within one day period.

If the cargo to be transported has sunk in the sea, owner of sunk property retains right of ownership on the property sunk in the sea during 2 year period after the accident. Following the expiry of above mentioned period the property sunk in the sea is transferred into the State ownership.³⁹ Accordingly, owner of property sunk in the sea is entitled to recall extracted property during 2 years' period after the sinking.⁴⁰ Sender might be owner of sunken property, and immediately after issuing the bill of lading by sender for consignee in case of granting the authority to manage cargo – the consignee, and if sender or consignee does not manage cargo during the period determined by the transportation company, such entity is a cargo carrier.

If ship is not able to enter port for the reasons independent from the transportation company, term for making decision by the sender on the cargo according to his interests depends on whether whole ship or its part is used for the transportation of cargo. Namely, in the first case – cargo sender within the reasonable time after the receipt of notification from the transportation company shall issue relevant order; in the second case – such order shall be issued within three day-night period after the receipt of notification from the ship captain. In the absence of order from sender, the captain has right to unload cargo at the nearest port or return it back to the sender's port or based on his decision unload cargo at the nearest port and notify the sender.⁴¹

In case of transportation of cargo via sea sender or consignee shall request the cargo transferred for storage within two months' period after the entering of the vessel in the port. In the event of sale of cargo transferred for storage the right on the funds received from sales shall be claimed within six months' period

³⁸ Article 193, Civil Procedural Code of Georgia. Rules for the review of application, Decision on the application regarding the securitization of the claim is made by the court reviewing the claim in one day after the filing of application without notifying the defendant (in Georgian).

³⁹ Article 109, the Maritime Code (in Georgian).

⁴⁰ Article 108 (1), the Maritime Code (in Georgian).

⁴¹ Article 145, the Maritime Code (in Georgian).

after the sale of cargo.⁴² Otherwise, amount recorded under debtors will be transferred to the budget of Georgia. The Maritime Code does not define whether the authorized person has right to request return of funds from the budget; however, as the norm considers six months' time for the realization of right, it can be stated that after the expiry of above term authorized person loses right to claim the funds.

III. Terms for the Implementation and Protection of Consignor's Rights in Relation to the Carrier

Terms for implementation and protection of rights of parties to the transportation contract differ for local and international transportations of goods. For example, the Maritime Code regulates rules for the submission of complaints and claims only for the relationships established in Georgia.⁴³ According to the Railway Code, it is necessary to plan transportation prior to sending the cargo, namely, cargo sender is liable to submit application to the railway no later than 10 days before the loading of cargo for local transportations and for the international or direct / mixed transportations - no later than 15 days prior to loading.⁴⁴ Within the similar terms the cargo sender shall submit application for the transportation of additional volume of goods or transportation of non-planned goods.⁴⁵

If cargo sender rejects to use offered transport means, he can realize his right on rejection in such way that he is not assigned to reimburse losses incurred; namely, if cargo sender at least 2 days prior to cargo loading warns railway station on non-use of carriage/van (container), then the amount to be reimbursed is reduced by one-third.

In case of maritime transportation, if whole ship or its part or some storage facilities of the ship are meant for transportation of cargo, sender has right to reduce cargo accordingly as well as reimbursement of incurred loss, if external cargo is not removed from the ship in a timely manner.⁴⁶

1. Rules for Submission of Reclamations

The process of review of disputes related to the cargo transportation is characterized with certain features,⁴⁷ namely, for improper fulfillment of liabilities undertaken under the transportation contract, realization of right to claim against the transportation company is implemented via the submission of reclamation (complaint)⁴⁸ by the sender.⁴⁹

⁴² Articles 153 (3), 155 (3), the Maritime Code (in Georgian).

⁴³ Paragraph "i", Article 15, the Maritime Code (in Georgian).

⁴⁴ Article 16, the Railway Code (in Georgian).

⁴⁵ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case №-as-119-114-2014, dated 07 July 2014 (in Georgian).

⁴⁶ Article 135, the Maritime Code (in Georgian).

⁴⁷ *Zambakhidze T., Comments to CCG, Book four, Volume I, 2001, 378; Gabichvadze Sh., Civil legal regulation of shipment of cargo and transportation of passengers via air transport, Thesis work, Tbilisi, 2012, 172 (in Georgian).*

⁴⁸ ("Reclamation is request made to the carrier with the claim to pay penalty for improper fulfillment of transportation liability or reimbursement of loss") *Zambakhidze T., Comments to CCG, Book four, Vol. I, 2001, 378 (in Georgian).*

⁴⁹ *Zambakhidze T., Comments to CCG, Book four, Vol. I, 2001, 378 (in Georgian).*

General rules for submission of reclamation (complaint) or claim are regulated under the Civil Code, and special rules are regulated under the transportation legislation.⁵⁰

Although CCG does not indicate on the mandatory submission of reclamation prior to the submission of claim, however, such requirement is based on the special norms regulating transportation relationships. For example, according to the Railway Code, prior to the submission of claim regarding the cargo (cargo-baggage) it is mandatory to submit to the railway the written reclamation.⁵¹ Paragraph one, article 30 of agreement on the “International Railway Transportation of Cargos”, dated 01 November 1951⁵² (hereinafter referred to as “Agreement on the International Railway Transportation of Cargos”) considers submission of claim against the transportation company only in the event if according to the article 29 of the above Treaty there is a reclamation submitted against the transportation company.⁵³ According to the Maritime Code, in the event of transportation of goods via sea prior to the submission of claim against the transportation company, it is necessary to submit reclamation against such company.⁵⁴ According to the Georgian Air Code (hereinafter referred to as –v the Air Code), prior to the submission of claim regarding the transportation of passengers, cargo or postal orders, the reclamation shall be presented to the transportation company, with the exception for cases related to the injuries to health or death of the passengers.⁵⁵ According to the Maritime Code, it is possible to submit claim against the dispatch without prior presentation of relevant reclamation,⁵⁶ namely in case of drafting dispatch in the event of accident on the vessel, the interested persons are entitled to appeal drafted dispatch during 6 months’ period, for the above reasons the notification and copy of appeal application must be sent to the dispatcher.⁵⁷

According to CCG, rules for presentation of reclamations differ for externally observable and externally non-observable damages.⁵⁸ Namely, in case of externally non-observable losses and damages, CCG defines the written form for the submission of reclamation, as for the externally observable losses and damages – CCG does not define the form for submission of such reclamation. There is a position expressed in the Georgian legal literature, according to which in latter case it is possible to submit

⁵⁰ See the above reference.

⁵¹ Article 53, the Railway Code (in Georgian).

⁵² International treaty on the “International railway transportation of cargoes”, dated 01 November 1951 has become effective for Georgia since 18 June 1993 (See resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case № – as-119-114-2014, dated 07 July 2014) (in Georgian).

⁵³ Article 30, § 1. Right to file claim based on the transportation contract, belongs to the person, who has a right to express the complaint against the railway. Claim can be only filed following the presentation of complaint in accordance with the article 29; 29; <http://www.railway.ge/files/sat/SMGS_01.07.pdf> - in Russian; Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case No3k-1495-02, dated 26 March 2003 (in Georgian).

⁵⁴ Article 364 (1), the Maritime Code (in Georgian).

⁵⁵ Article 85 (1), the Air Code (in Georgian).

⁵⁶ Dispatch –calculation of damage, inflicted to the cargo and vessel in case of accident. Annex to the Maritime Code, Maritime terms used in the Maritime Code, paragraph 21.

⁵⁷ Article 187, the Maritime Code (in Georgian).

⁵⁸ *Zambakhidze T.*, Comments to CCG, Book Four, *Vol. I*, 2001, 379; *Akhvlediani Z.*, Liability Law, Tbilisi, 1999, 176 (in Georgian).

reclamation in an oral form.⁵⁹ However, article 368 of the Maritime Code does not differentiate reclamation forms for externally observable and externally non-observable damages and losses, and according to the above mentioned article, reclamation is made in a written form. Convention of the United Nations Organization on the “Maritime transportation of cargos”, dated 01 November 1978 (“Hamburg rules”) (hereinafter referred to as – Hamburg Rules) indicates on the submission of written reclamation.⁶⁰ According to the article 53 (1) of the Railway Code, it is also necessary to submit written reclamation; as for agreement on the “International railway transportation of cargo”,⁶¹ it does not define the form for submission of reclamation.⁶² The Air Code defines written form for reclamations for international shipments and does not mention form of reclamation submission for local shipments.

Hence, reclamation may not be submitted in a written form only in two cases: for local air transportations and international railway shipments. As, for all other cases, it is necessary to submit written reclamation, therefore it is expedient to indicate the same in the article 698 of the Civil Code of Georgia, in order to avoid hindering of procedural realization of right by the material legal norm.

In order to realize right on the submission of reclamation, it is necessary to present to the carrier (written) reclamation within the defined time period. For example, in one of the decisions of the Supreme Court of Georgia,⁶³ where the party was requesting reimbursement of loss from the shipper due to the loss of cargo, the cassation chamber indicated, that claimant has missed the 7 day term provided for the submission of complaint, considered under the section one of the article 698, CCG; due to the above, even if the defendant was liable for the loss of cargo, he would still be exempted from the liability to reimburse the incurred losses.

As norms regulating all types of transportations consider presentation of reclamation as a pre-condition for realization of rights, and in many cases such reclamation shall be made in a written form, it is important to add to the article 698 of CCG provision indicating that prior to the submission of claim by the authorized person it is necessary to submit reclamation against shipper, with the exception of cases, for which claim submission is admissible without prior presentation of reclamation. Moreover, it has to be indicated that for all cases except for local air shipments and international railway shipments, such reclamations shall be made in written form, in order to provide relevant material legal norm for the real possibility of the right realization.

⁵⁹ *Zambakhidze T.*, Comments to CCG, Book Four, Vol. I, 2001, 380; *Akhvlediani Z.*, Liability law, Tbilisi, 1999, 176(in Georgian).

⁶⁰ Article 114 (3), the Maritime Code (in Georgian).

⁶¹ Соглашение о международном железнодорожном грузовом сообщении (СМГС), Действует с 1 ноября 1951 г. с изменениями и дополнениями на 1 июля 2014 г. <<http://www.railway.ge/files/sat/SMGS-01.07.pdf>>.

⁶² However stopping of the limitation time passing is only caused by presentation of written complaint, formulated in accordance with the article 29, to the railway by the sender of consignee (Статья 31, §3. Предъявление отправителем или получателем к железной дороге письменной претензии, оформленной в соответствии со статьей 29, приостанавливает течение срока давности, предусмотренных в §1 настоящей статьи). Agreement on the International Goods Transport by Rail (SMGS); <http://www.railway.ge/files/sat/SMGS_01.07.pdf>.

⁶³ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case No 3k-1495-02, dated 26 March 2003 (in Georgian).

1.1. Person Authorized for Submission of Reclamation

According to the article 698 of CCG, cargo consignee has right to submit reclamation.⁶⁴ Based on the norm formulation, cargo sender is not person authorized to submit reclamation. However, in reality sender also has requirement for such right. For example, when consignee rejects to accept the cargo, the sender again gets the right to manage cargo, therefore, the same right for reclamation against shipper, as envisaged for consignee under the article 698 of CCG, is generated for sender.

Norms regulating specific types of shipments directly grant the cargo sender with the right to present reclamation. According to the section two, article 53 of Railway Code, cargo sender (cargo consignee) or person authorized by the above has right to submit reclamation or claim against railway for the damage incurred during the shipment, in the event of full loss of cargo or damage to the cargo, its spoiling, shortage, worsening of quality of goods; in case of overdue delivery of cargo (cargo-baggage) or delays in issuing the cargo (cargo-baggage) – consignee enjoys the right to present the complaint.⁶⁵ According to the same code, cargo sender (cargo consignee) has right to transfer authority to present reclamations to other person. The Maritime Code also envisages the possibility for sender to transfer right on submission of reclamation to other person.⁶⁶

As for international railway shipments, conditions for the presentation of reclamation are determined under the “Agreement on the International Goods Transport by Rail”.⁶⁷ According to the paragraph one, article 31 of the “Agreement on the International Goods Transport by Rail”, based on the contract on railway shipment, right on presentation of reclamation or claim against railway is granted to sender or consignee; on the other hand, railway possesses right to present request or claim against sender or consignee regarding the payment of shipment fees, penalties or reimbursements for incurred losses.⁶⁹

In the event of transportation of cargo via sea, the following parties have right to present reclamation and claim: cargo consignor against vessel for delayed delivery or non-delivery; in the event of shortage in the cargo, damage or loss of goods – expeditor (forwarder), cargo consignee or consignor with the condition that he presents consignment, as well as written note or relevant document in line with

⁶⁴ *Gabichvadze Sh.*, Civil legal regulation of shipment of cargo and transportation of passengers via air transport, Thesis work, Tbilisi, 2012, 175.(in Georgian).

⁶⁵ (under the condition that he in the event of overdue delivery presents a bill of lading (original of cargo-baggage bill); in the event of delays in issuing cargo, originals of transportation receipt and general form act), Article 53 (2), the Railway Code (in Georgian).

⁶⁶ Article 367 (1), the Maritime Code (A consignor may transfer the right to make a claim or to bring an action to the consignee or vice versa, the consignee or consignor may transfer such right –to the owner of the cargo, to the freight forwarding organization or insurer, to authorized lawyers or agents)(in Georgian).

⁶⁷ Agreement on the International Goods Transport by Rail (SMGS), entered into force on 01 November 1951 with changes and amendments made on 01 July 2014 (in Russian). <http://www.railway.ge/files/sat/SMGS_01.07.pdf>.

⁶⁸ Article 53 (3), the Railway Code (in Georgian).

⁶⁹ Paragraph 1, Article 31 (Complaints and claims of sender or recipient against the railway related to the transportation contract, as well as requests and claims of railway against the sender or recipient on the payment of transportation fees, penalties and on the reimbursement of losses can be filed... ..); Agreement on the International Goods Transport by Rail (SMGS), entered into force on 01 November 1951 with changes and amendments made on 01 July 2014 (in Russian). <http://www.railway.ge/files/sat/SMGS_01.07.pdf>.

valid rules; in the event of exceeding the shipment costs – cargo sender or consignee if they present a consignment.⁷⁰

According to the Air Code, cargo sender or consignee enjoys the right for presentation of reclamation or claim against transportation agent; in the event of full loss of cargo – with the condition of presentation of shipment bill of lading issued for the cargo; partial loss or damage to the cargo – under the condition of presentation of cargo bill of lading and commercial act; delayed shipment of cargo – under the condition of presentation of cargo bill of lading;⁷¹

Based on the above discussed it is expedient to define the consignor as person authorized for the presentation of reclamations under the article 698 of CCG.

1.2. Term for Presentation of Reclamation

For the definition of term for the submission of reclamations, related to the shipment, it is important to separate from each other local and international shipments⁷² of cargos,⁷³ and in certain cases, externally observable and externally non-observable losses and damages.

For observable and non-observable losses and damages, the Maritime Code does not set different rules for local shipments; moreover the Air Code does not differentiate them for both local as well as international shipments. Therefore, for air shipments and local maritime shipments terms for the presentation of reclamations for observable as well as non-observable losses and damages are same.

Maritime Code defines terms for the submission of reclamations only for local shipments for the requirements envisaged under the contract of cargo transportation. Namely, the reclamation against cargo transportation agent can be made during the first six months of claim limitation period.⁷⁴

According to the article 87 of the Air Code, the reclamation against carrier shall be filed within six months' period. The different terms are envisaged for the filing of reclamations for international air shipments. According to the article 88 of the Air Code, for international shipments, in case of inflicting damage to the cargo, consignee has right to submit reclamation against carrier in a written form, but not later than fourteen days following the receipt of cargo; in the event of non-submission of written reclamation within the set period, beneficiary loses the right to file reclamation against the carrier.

According to the article 31 (2) of Montreal Convention on the Unification of Some Rules for Air Shipments, dated 28 May 1999 (hereinafter referred to as the Montreal Convention), in the event of

⁷⁰ Article 366 (1), the Maritime Code (in Georgian).

⁷¹ Sub-paragraphs “c”, “d”, “e”, article 86 (1), the Air Code (in Georgian).

⁷² Article 8 (25), the Tax Code of Georgian. International transportation – any type of transportation of passengers, goods (including post) between the destinations located in different States, out of which one is Georgia via auto-transport, railway transport, sea, river or air vessels. Moreover the following belongs to international transportation: a) transportation, which is carried out between the destinations located only out off the borders of Georgia or within the borders of Georgia; b) Movement of goods via pipelines and electric transmitter lines (in Georgian).

⁷³ See *Gran A.*, Die Rechtsprechung zum Transportrecht in den Jahren 2010 und 2011, NJW 2012, 34; *Gran A.*, Die Rechtsprechung zum Transportrecht in den Jahren 2010 und 2011, NJW 2014, 977.

⁷⁴ Article 369 (2), the Maritime Code (in Georgian).

damage inflicted to the cargo, authorized person shall submit claim immediately after discovery of such damage.

1.2.1 Submission of Reclamation for Externally Observable Loss and Damage

Consignee in the process of receipt of cargo shall check together with the carrier condition of cargo and in the event of loss or damage, present to the carrier reclamation of a general nature. Otherwise, until the proving of opposite, it is assumed, that consignee received the goods in the condition indicated in the relevant bill of lading (section one, article 698, CCG).

According to CCG, terms for submission of reclamations differ for externally observable and externally non-observable losses and damages.⁷⁵

If loss or damage is externally observable, then person authorized shall file reclamation on the day of delivery of cargo according to the article 698 of CCG.

Terms for submission of reclamation for international sea transportations are regulated under the “Hamburg Rules”.⁷⁶ It is clear from the section two, article 19 of “Hamburg Rules”, that section one of the same article discusses externally observable losses and damages.⁷⁷ According to the above, in the event of externally observable losses and damages, cargo consignee shall present to the carrier written reclamation no later than next working day. As according to the section one, article 2 of the mentioned convention,⁷⁸ convention provisions are applicable for the contracts on the sea transportation between different states, it is clear that convention regulates filing of claims for international sea shipments. Therefore, for the filing of reclamations related to the requirements set out in the contracts on local shipments of cargo via sea six month period shall be used (article 369 (2), the Maritime Code, and for other claims related to the shipment – terms envisaged under the CCG.

In the event of local railway transportations, the reclamations against railways on the externally observable losses and damages shall be presented on the day of cargo delivery, as according to the article 55 of the Railway Code, during the local shipment,⁷⁹ the reclamations against railway shall be filed within the terms envisaged under the Civil Code of Georgia. According to the article 464 (1) of the “Rules on the shipment of cargo via railway” approved under the order No 26 issued by the Minister of Transport and Communications on 17 April 2003, which regulates transportation of goods on the territory of Georgia, reclamations against railway are submitted within the time-frame envisaged under the legislation of Georgia.

⁷⁵ *Zambakhidze T., Comments to CCG, Book Four, Vol. I, 2001, 379; Akhvlediani, Liability Law, Tbilisi, 1999, 176 (in Georgian).*

⁷⁶ Article 114 (3), the Maritime Code (in Georgian).

⁷⁷ “United Nations’ 1978 year Convention on Carriage of Goods by Sea” <<http://nccl.ge/m/u/ck/files/Hamburg%20Rules.pdf>>, (in Georgian).

⁷⁸ “United Nations’ 1978 year Convention on Carriage of Goods by Sea”, <<http://nccl.ge/m/u/ck/files/Hamburg%20Rules.pdf>> (in Georgian).

⁷⁹ According to the sub-paragraph “a”, article 2 of the Railway Code, “local railway transit (transportation-carriage)” is transportation of passengers, cargo, baggage, cargo-baggage and post within the territory of Georgia.

According to the article 55 of the Railway Code, in the event of international shipments,⁸⁰ reclamations against the railway can be filed within the terms envisaged under the “Agreement on the International Goods Transport by Rail.”⁸¹ According to the paragraph one, article 31 of the “Agreement on the International Goods Transport by Rail”⁸⁴ ”submission of reclamation or claim against railway based on the contract on railway transportation shall be implemented by the cargo consignor or consignee during 9 months’ period...”⁸⁵

⁸⁰ According to the sub-paragraph “x”, article 2 of the Railway Code, international carriage is carries/ sending of cargo based on the single transportation document over the customs territories of destination and transit countries, via the crossing of borders of one or more countries, from any customs station of one country via passing one or several intermediary customs stations of another country (in Georgian).

⁸¹ Agreement on the International Goods Transport by Rail (SMGS), entered into force on 01 November 1951 with changes and amendments made on 01 July 2014 (in Russian) <http://www.railway.ge/files/sat/SMGS_01.07.pdf>.

International Agreement on the International Goods Transport by Rail (SMGS) of 1951 year is effective for Georgia since 18 June 1993 year ((See resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case No – as-119-114-2014, dated 07 July 2014) (in Georgian)

⁸² According to the article 5 of the order No 26, dated 17 April 2003 on the “approval of rules for the transportation of cargo via railway”, issued by the Minister of Transport and Communications international transportation of goods via railway is regulated under the Agreement on the International Goods Transport by Rail and other legal acts of Georgia.

⁸³ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case No – as-119-114-2014, dated 07 July 2014 (in Georgian).

⁸⁴ Paragraph 1, article 31 (Complaints and claims of sender or consignee against the railway related to the transportation contract as well as requests and claims of railway against sender or consignee on the payment of transportation fees, penalties and reimbursement of incurred loss can be submitted during 9 months’ period with the exception of complaints and claims related to the delays in delivery of goods for submission of which 2 months’ period is defined);

Agreement on the International Goods Transport by Rail (SMGS), entered into force on 01 November 1951 with changes and amendments made on 01 July 2014 (in Russian) <http://www.railway.ge/files/sat/SMGS_01.07.pdf>.

⁸⁵ The terms indicated in the paragraph 1, article 31 of Agreement on the International Goods Transport by Rail are calculated as follows: “ 1) for the complaints on the partial loss of cargo, reduction of weight or quality, damage or destroying of cargo due to other reasons – from the day of transfer of cargo to the consignee; 2) complaints presented due to the loss of cargo in full – in 30 days after the expiration of delivery term, which is calculated in accordance with the article 14; 3) complaints on the return of excessive payment or transportation fee, as a result of incorrect application of penalties and tariffs or related to the adjustments to the accounts – from the payment date or if payment was not made, from the date of cargo issuance; 4) for other remaining cases – from the date of identification of circumstances, which provide basis for the presentation of complaint (In Georgian).

(Статья 31, § 2. Указанные в § 1 настоящей статьи сроки исчисляются: 1) для претензий о возмещении частичную утрату груза, недостачу массы, повреждение, порчу или снижение качества груза по другим причинам, а также запрос рочку в доставке – со дня выдачи груза получателю; 2) для претензий о возмещении полную утрату груза – с 30-го дня после истечения срока доставки, исчисленного согласно статье 14;

3) для претензий о дополнительной уплате или для претензий о возврате провозной платы, дополнительных сборов, штрафов или для претензий, связанных с исправлением расчетов в следствие неправильного применения тарифов, а также ошибок при исчислении платежей, – со дня уплаты или, если уплата не была произведена, со дня выдачи груза; 4) для всех других претензий и требований – со дня установления обстоятельств, послуживших основанием для их предъявления.)

1.2.2. Terms for Filing Reclamations in Case of Non-Observable Loss and Damages

According to the article 698 of CCG, if the loss or damage is externally non-observable, then reclamation against the carrier shall be filed by the person authorized for the above action no later than seven days after the cargo delivery.

Reclamations related to the local railway shipments for non-observable damages or losses could be filed against railway in the period of seven days after the cargo delivery. As according to the article 55 of the Railway Code, in case of local shipments reclamations against the railway can be filed within the terms envisaged under the Civil Code of Georgia.⁸⁶

According to the paragraph 3, article 18 of the “Agreement on the International Goods Transport by Rail”, if internal railway regulations consider drafting the commercial act, then following the handing-over of cargo consignee has right to apply to the railway with the request to draft the commercial act if at the moment of cargo receipt it was impossible to detect the deficiencies via the external examination. Such application to the railway shall be submitted by the consignee immediately after the detection of deficiency, but no later than 3 days-nights after delivery of cargo.⁸⁷

For the definition of terms for the submission of reclamations in case of international sea shipments the section two, article 19 of “Hamburg Rules”⁸⁸ shall be used, according to which in the event of externally non-observable loss or damages, cargo consignee shall file written reclamation against carrier during 15 calendar days after the transfer of cargo to the consignee.

It is important to take into account the instructions on the calculation of terms provided in the section four of the article 698, CCG, according to which, in the process of calculation of terms the following times shall not be considered: days for cargo sending, days required for examination of cargo or transfer to the consignee; the above is contravening with the section one of the same article, according to which reclamations regarding the externally observable losses or damages shall be filed on the day of transfer of cargo. If for the purposes of calculation of terms the day of cargo transfer shall not be considered, it is clear that reclamation shall be made not on the very day of cargo transfer but on the

Agreement on the International Goods Transport by Rail (SMGS), entered into force on 01 November 1951 with changes and amendments made on 01 July 2014 (in Russian). <http://www.railway.ge/files/sat/SMGS_01.07.pdf>.

⁸⁶ See also Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case No 3k – 1495-02, dated 26 March 2003 (in Georgian) HGB GB

⁸⁷ Paragraph 3, article 18. If under the internal regulation valid for the destination railway, it is admitted to draft commercial act after the issuance of cargo to the consignee, then consignee has right to apply to the destination station with the request to prepare commercial act and after the transfer of cargo for any deficiencies indicated in the paragraph 1 of the given article which could not be detected by consignee via external examination, immediately after the identification of deficiency of cargo and no later than 3 days-nights after the issuance of cargo (in Russian).

⁸⁸ “United Nations’ 1978 year Convention on Carriage of Goods by Sea” <<http://nccl.ge/m/u/ck/files/Hamburg%20Rules.pdf>>- (in Georgian).

following day.⁸⁹ Therefore, in the section one, article 698 of CCG day for filing reclamation for the externally observable losses or damages shall be defined as the day following the cargo transfer.

Hence, in case of local sea shipments, reclamations regarding the requirements envisaged under the contract on cargo shipment can be filed against the carrier during the first six months of claim limitation period. The above term is common for externally observable losses and damages as well as externally non-observable losses and damages. In case of international sea shipment and for the externally observable losses and damages, cargo consignee shall file reclamation against the carrier no later than the day following the cargo transfer; as for externally non-observable losses and damages - cargo consignee shall file reclamation against the carrier no later than 15 (calendar) days after the transfer of cargo to the consignee.

In case of local air shipments, reclamations can be submitted during 6 months' period. In case of international air shipments, and in the event of infliction of damage to cargo, cargo consignee has right to present written reclamation to the carrier immediately after the identification of damage; however, such reclamation shall be filed no later than fourteen days following the receipt of cargo. The above terms are common for externally observable losses and damages as well as externally non-observable losses or damages.

In case of local railway shipments, the reclamations against railway on externally observable losses and damages shall be filed by the consignee on the day of cargo transfer; as for externally non-observable losses and damages – reclamations against railway shall be filed no later than seven days after the transfer of cargo. In case of international railway shipments, submission of reclamations or claims against railway concerning the contract on the railway transportation shall be filed by the consignor or consignee during 9 months' period. If internal railway regulations consider drafting the commercial act, then following the handing-over of cargo, consignee has right to apply to the railway with the request to draft the commercial act; for externally non-observable losses and damages immediately after detection of deficiencies but no later than 3 days following such detection consignee has right file reclamation against the railway.

The resolution No 32 issued by the Government of Georgia on 03 January 2014 on the approval of “rules for the transportation of cargo using auto-vehicle facilities” does not define the special terms for transportation; therefore terms envisaged under the CCG shall be used for transportations via vehicles.

2. Terms for the Right to Request Reimbursement for the Loss of Cargo or Overdue Delivery of Goods

For the calculation of terms for filing the reclamations concerning the reimbursement of incurred losses due to the overdue delivery of cargo, it is first of all important to define when is cargo considered as delivered, as the right to file claim against the carrier for the delayed delivery is generated for sender (consignee) at the moment of delays in the delivery of cargo.⁹⁰ Moreover, complaint shall be submitted within the terms envisaged for the above purpose.

⁸⁹ Compare *Gabichvadze Sh.*, Civil legal regulation of shipment of cargo and transportation of passengers via air transport, Thesis work, Tbilisi, 2012, 37-44 (in Georgian).

⁹⁰ On the definition of term for delivery: article 688 of CCG, article 25, the Railway Code(in Georgian).

According to the article 698 (3) of CCG, it is only possible to claim reimbursement of losses incurred due to the overdue delivery, if cargo consignee presents to the carrier the written claim during twenty one days after the transfer of cargo.

In case of international sea shipments, according to the section 5, article 19 of “Hamburg Rules”, written reclamation of cargo consignee against the carrier concerning the delayed delivery of cargo shall be submitted to the carrier during 60 (calendar) days following the planned delivery date. Otherwise, consignee loses right to request compensation from carrier for the delayed delivery of goods.

According to the paragraph one, article 31 of the Agreement on the International Goods Transport by Rail reclamations and claims concerning the delayed delivery of cargo shall be submitted during 2 months’ period.⁹¹

According to the article 88 of the Air Code, reclamation on the delayed delivery of cargo can be filed during twenty one days following the issuing of cargo.

According to the article 31 (2) of “Montreal Convention”, in case of cargo delivery delays the protest shall be expressed no later than 21 days after the transfer of cargo to the carrier.

Sometimes postponing the delivery of cargo may become the basis for consideration the cargo as lost.⁹² In case of cargo loss authorized person has right to request reimbursement of incurred loss;⁹³ Moreover, according to the article 689 (2) of CCG, for the lost cargo authorized person may request in writing to notify immediately if the lost item is identified during one year period after the reimbursement. If cargo is identified, authorized person is entitled to request transfer of cargo to him within 30 days after the receipt of notification on the identification of cargo; however he has to return the reimbursement received for the lost cargo. If authorized person does not use the above right of claim within the set period of time then carrier acquires the right to manage the cargo.

If the cargo considered as lost is delivered to the authorized person, he still retains the right to claim the reimbursement of loss incurred due to the delay in delivery.⁹⁴

The right to claim reimbursement of damage incurred due to the loss of cargo is generated for the authorized person if the cargo is not delivered to the destination during the thirty days after the expiry of delivery date, and if such term has not been defined, in sixty days after the carrier receives the cargo (article 689 (1) of CCG). According to the paragraph 424 of GCT, such term equals to at least twenty days; however, if the term was not agreed, then such term equals to the period which would be required for the diligent carrier for the delivery of goods with the consideration of all circumstances – 30 days.⁹⁵

⁹¹ Paragraph 1, Article 31 (with the exception of complaints and claims related to the delays in delivery of goods for submission of which 2 months’ period is defined); Agreement on the International Goods Transport by Rail (SMGS), entered into force on 01 November 1951 with changes and amendments made on 01 July 2014 (in Russian). <http://www.railway.ge/files/sat/SMGS_01.07.pdf>.

⁹² *Zambakhidze T., Comments to CCG*, Book Four, Vol. I, 2001, 365 (in Georgian).

⁹³ Jesser-Huß, *Münchener Kommentar zum HGB*, CMR Art. 13 [Rechte und Pflichten des Empfängers] 3. Auflage 2014, Rn. 18; *Zambakhidze T., Comments to CCG*, Book Four, Vol. I, 2001, 366 (in Georgian).

⁹⁴ *Zambakhidze T., Comments to CCG*, Book Four, Vol. I, 2001, 366 (in Georgian).

⁹⁵ (HGB), §424, Aufl. 55, Stand 13. September 2013 (mindestens aber zwanzig Tage, bei einer grenzüberschreitenden Beförderung dreißig Tage beträgt...); Hopt, Kumpan, Merkt, Roth, Baumbach, *HGB Kommentare*, B. 9, 36., Aufl., 2014, §424, Rn.1, 1527.

According to the article 88 of the Air Code, in case of full loss of cargo, it is allowed to submit reclamation against the carrier during 12 months' period after the arrival of vessel at the destination or termination of shipment. In case of non-submission of written reclamation during the above period, interested person loses right to submit claim against the carrier.

According to the section 3, article 5 of "Hamburg Rules" cargo can be considered as lost if it is not delivered to the authorized person in 60 days' period after the expiration of delivery term. If the sea transportation contract does not define delivery time, the reasonable time shall be considered as such.⁹⁶

According to the paragraph 5, article 17 of the Agreement on the International Goods Transport by Rail, "if during 30 days after the expiry of delivery period cargo is not issued to the consignee, then sender or consignee has right to apply to the railway with the request to search for the cargo".⁹⁷

IV. Importance of Submission of the Reclamation by the Consignee

When sender and recipient of cargo are different persons, whether the consignee realizes his rights against the carrier, influences the implementation of claim generated from the main contract concluded between the sender and consignee. For example, if sale-purchase contract is concluded between the sender and recipient and recipient has not used his right to file claim against the carrier, recipient may not be able to request from sender (seller) fulfillment of liabilities, assigned to the seller for the sale of deficient goods under the CCG. Submission of complaint serves this very purpose – to separate the basis for the responsibility of sender and recipient. Via the presentation of complaint against the carrier it has to be determined whether the carrier has damaged the item during the transportation or the item was deficient from the beginning. If the recipient accepts the cargo without comparing its condition with the one indicated in the bill of lading, it may turn out that the item is not of either agreed quality or agreed quantity.

As norms regulating transportation specifically define term for submission of complaint and following the expiry of the above term, recipient loses the right for claim against the carrier, recipient may present the claim to sender (seller) and request transfer of non-deficient item, however, in reality the item might be damaged due to the fault of carrier. Therefore, in order to appropriately protect the sender's right and not to assign responsibility for the items damaged by the carrier to the sender due to the carelessness of recipient, it is expedient to define the examination of cargo transferred by carrier to the recipient as the liability of recipient; otherwise, the recipient shall not be granted with the right to use main contract signed between sender and recipient as the basis for the submission of claim.

⁹⁶ Section two, article 5, "United Nations' 1978 year Convention on Carriage of Goods by Sea"; <<http://nccl.ge/m/u/ck/files/Hamburg%20Rules.pdf>>(in Georgian).

⁹⁷ Paragraph 5. If during § 5. "if during 30 days after expiry of delivery period the cargo is not issued to the consignee, then sender or consignee has right to apply to the railway with the request to search for the cargo"... <http://www.railway.ge/files/sat/SMGS_01.07.pdf>(in Russian).

V. Limitation Period of Right

1. General Limitation Period

“Terms considered under the article 698 of Civil Code (in case of hand-over of cargo without examination, for the externally observable damages – date of delivery, and for externally non-observable damages – seventh day after delivery) define the term for the expression of complaint towards the party to the agreement. On the other hand, article 699 of CCG defines term for the submission of claim to the court related to the transportation contract”;⁹⁸ according to the above article, limitation period for the rights proceeding from the transportations regulated under the chapter twelve of CCG is one year; and in case of intention or rough carelessness the above term equals to three years. According to the article 439 (1) of GCT, the claim limitation period is one year; and in case of intention or rough carelessness the above term equals to three years.^{99, 100}

According to the article 369 of the Maritime Code, for the legal entities of Georgia the limitation period for claims is defined as two years, for physical persons – three years.¹⁰¹ As for the claims, for which Code does not define limitation period, general terms envisaged under the Civil Code of Georgia are valid if other terms are not defined for such claims under the international treaties of Georgia.¹⁰²

For the claims related to the transportation of cargo via sea, according to the section one, article 20 of “Hamburg Rules”, such claims shall be filed with court or arbitrage during two year period. According to the section 5 of the same article, claim with the request to reimburse the incurred losses can be submitted after passing of two year limitation period, if such claim is presented within the terms determined under the legislation of country, where the litigation takes place.

According to the article 90 of the Air Code, claim related to the transportation can be filed at the bodies of relevant court in line with the regulations envisaged under the Georgian legislation, during (no later than) six months’ period after the arrival of air vessel at the destination or termination of transportation/ shipment.

According to the article 56 of the Railway Code, claims related to the relationships regulated under the Code shall be filed in terms envisaged under the legislation of Georgia. Moreover, according to

⁹⁸ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case №-as-1049-1074-2011, dated 03 October 2011, Compare *Gabichvadze Sh.*, Civil legal regulation of shipment of cargo and transportation of passengers via air transport, Thesis work, Tbilisi, 2012, 181 (in Georgian).

⁹⁹ „Leichtfertig”, „bewusste Leichtfertig” *об. Hopt K., Kumpan Ch., Merkt H., Roth M., Baumbach A.*, HGB Kommentare, B. 9, 36., Aufl., 2014, § 439, Rn.1, 1549.

¹⁰⁰ HGB, §407 (1), Aufl. 55, Stand 13.September 2013, 177 (Ansprüche aus einer Beförderung, die den Vorschriften dieses Unterabschnitts unterliegt, verjähren in einem Jahr. Bei Vorsatz oder bei einem dem Vorsatz nach § 435 gleichstehenden Verschulden beträgt die Verjährungsfrist drei Jahre.); See: *HoptK./Kumpan Ch., Merkt H., Roth M., Baumbach A.*, HGB Kommentare, B. 9, 36., Aufl., 2014, § 439, Rn.1, ff., 1549-1550; *Gran A.*, Die Rechtsprechung zum Transportrecht in den Jahren 2010 und 2011, NJW 2012, 36.

¹⁰¹ On the calculation of claim limitation term. Article 699, CCG and article 369, the maritime Code; article 439 (2), CCG(in Georgian).

¹⁰² Article 371, the Maritime Code (in Georgian).

the article 57 of the Code, claims related to the cargo shipment against the railway may be filed if railway fully or partially rejects to satisfy the claim or in the event if railway does not respond to the applicant during 2 months after the receipt of reclamation.

2. Limitation Period in Case of Intention or Rough Carelessness

In the process of definition of limitation period it has to be identified whether we are dealing with intention or rough carelessness.¹⁰³

What is to be considered as rough carelessness shall be determined with the consideration of circumstances for every specific case; for example, the Supreme Court of Georgia estimated as rough carelessness improper fulfillment of liabilities undertaken under the contract, namely, attaching bill of lading belonging to other cargo to specific cargo by mistake, resulting in loss and destroy of cargo under discussion.¹⁰⁴ In connection to non-payment of shipment fee, the Supreme Court of Georgia noted, that this was common intentional or careless action, except for the cases, when non-payment was caused by insurmountable power or by fault of opposing party. Therefore, for the given case, the Court applied 3 year limitation period envisaged under the article 699 of the Civil Code of Georgia.¹⁰⁵

The Supreme Court of Georgia assessed as rough carelessness the following behavior of consignee – the carriage was standing waiting unloading and cargo recipient did not accept cargo in a timely manner.¹⁰⁶ The court noted that carriages were delayed by fault of cargo recipient and that under the specific circumstances the limitation period of 3 years had to be applied, as the rough carelessness was demonstrated by the defendant. Hence, for the definition of limitation period, the court was not guided by the article 129 of CCG, under which three year limitation period is set for contractual claims; it was guided by the article 699 of CCG, according to which limitation period of claims in case of intentional and careless actions equals to three years.¹⁰⁷

In other case, where party was requesting to assign reimbursement of funds to the opposing party, the court decided that carriage was delayed by the faulty actions implemented by the opposing party and in the process of defining the limitation period for the claim was guided by the article 129 considering three year limitation period for claims; namely it is defined in the resolution of the Supreme Court of Georgia,¹⁰⁸ that “the article 699 of CCG is applied only in case of existence of conditions considered under the chapter 12 of the same Code. In the given case, appellant was not requesting fulfillment of

¹⁰³ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case № as-113-445-09, dated 10 July 2009 (in Georgian).

¹⁰⁴ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case № as-1049-1074-2011, dated 03 October 2011 (in Georgian).

¹⁰⁵ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case № as-509-481-2012, dated 04 June 2012 (in Georgian).

¹⁰⁶ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case № as-113-445-09, dated 10 July 2009 (in Georgian).

¹⁰⁷ Compare with: Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case № as-1014-950-2012, dated 30 August 2012 (in Georgian).

¹⁰⁸ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case № as-116-114-2011, dated 23 March 2011 (in Georgian).

liabilities proceeding from the transportation contract, but the reimbursement of loss incurred due to the delay of item; and the above relationship is regulated by chapter 12 of CCG.”¹⁰⁹

Hence, in relation to the issue of limitation period of claims generated from the transportation contract due to the faulty actions of party, the practice of the Supreme Court of Georgia is controversial. Although the second sentence of the article 699 of CCG as well as the first sentence of the article 129 of CCG set three year limitation periods, due to which estimation of limitation period issue by the courts does not generate different outcomes, and accordingly does not violate the terms for realization of right, still it is important to have common approach towards the discussed issue and legal basis shall be used correctly, especially by the court.

If cargo, insured by the sender or consignee, is damaged during the transportation, the issue related to the limitation period for the claim against the insurer shall be solved under such norms regulating liability-legal relationships, which regulate relationship between the insurer (sender/consignee) and party inflicting the damage.¹¹⁰ Accordingly, sender/consignee shall file claim against insurer for the reimbursement of incurred losses within the period defined under the article 699 of CCG. Although insurance relationship is established between sender/recipient and insurer, however, under the transportation contract, in the process of cargo insuring, the relationship between the sender (insured) and party inflicting the damage is proceeding from the transportation contract.¹¹¹ Therefore, for this type of cases general limitation period envisaged under the section three, article 128 of CCG shall be considered and disputable relationship between the sender and insurer¹¹² shall be regulated based on the article 699 of CCG.¹¹³

VI. Conclusion

Rights of consignor and consignee in relation to the management of cargo to be transported are closely linked and it can be stated that often realization of consignor's rights excludes possibility for realization of consignee's rights and vice versa.

Consignor has right to manage cargo until it has ownership right over the cargo. Terms for the validity of sender's right in relation to the cargo to be transported depends on the moment of transfer of cargo to be transported to the consignee. Handing over the second copy of bill of lading to consignee is considered as transfer of item; and if sender indicates in the bill of lading that right of consignee is generated at the moment of issuing of bill of lading then issuing of bill of lading will be considered as transfer of item to the recipient and for such case immediately after the issuing of bill of lading the

¹⁰⁹ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case № as-116-114-2011, dated 23 March 2011 (in Georgian).

¹¹⁰ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case № as-581-549-2011, dated 05 September 2011 (in Georgian).

¹¹¹ See Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case № as-581-549-2011, dated 05 September 2011 (in Georgian).

¹¹² When insurer reimburses the incurred loss to the sender (insured); then based on the article 832 of CCG (subrogation), then right to claim is transferred to insurer (in Georgian).

¹¹³ Resolution of the Chamber of Civil Cases, the Supreme Court of Georgia on the case № as-581-549-2011, dated 05 September 2011 (in Georgian).

sender loses right to manage cargo. When the sender assigns the right to manage cargo to consignee, sender becomes entitled to manage cargo only when consignee rejects to receive cargo. In certain cases for the identification of cargo transfer moment it is important to consider those main contractual relationships based on which the transportation contract was concluded.

Immediately after the issuing of bill of lading or handing over the second copy of bill of lading to consignee, the right of consignor to manage cargo terminates until the consignee receives the cargo. If consignee agrees to receive the cargo, then consignor does not anymore have right to manage cargo; and if consignee rejects to receive cargo, then acquiring the right to manage cargo by the sender depends on the time of realization of right; namely, it depends on whether the sender issues instructions to carrier on the management of cargo, or consignee again requests handing over the cargo to him, until the carrier does not receive opposite instructions from sender. Hence, the consignor's right to manage cargo ends at the point where the similar right of consignee starts.

Terms for the protection of rights of parties to the transportation contract differ for local and international shipments. And for the definition of term for the filing of reclamations related to the shipment it is important to separate local and international shipments of cargo, and in certain cases – externally observable and externally non-observable losses or damages.

The section one, article 698 of CCG shall indicate as term for the filing of reclamations for externally observable losses and damages the day following the handover of cargo.

It is expedient to define consignor as the person authorized to file the claim.

As all types of norms regulating transportation, consider presentation of reclamation as a precondition for the realization of right, and often require written form of complaint, it is important to add to the article 698 of CCG provision, indicating that prior to the submission of claim by the authorized person it is necessary to present reclamation to the carrier, with the exception for cases for which under the special norms regulating shipments, direct filing of claim without prior presentation of reclamation is admitted. Moreover, it is expedient to make indication that for all cases except for air transportations and international railway transportations submission of written reclamation is mandatory in order to provide relevant material legal norm for the real possibility of the right realization.

In relation to the definition of limitation period for the claims generating from the transportation contracts as a result of faulty actions of party, the practice of the Supreme Court of Georgia is controversial and different material norms are used as the basis for the resolution of similar disputes. It is important to have common approach to the above issue and to ensure correct application of legal base.

Solomon Menabdishvili*

For the Issue Related to the Definition of Key Terms of Provisions Prohibiting the Cartel Activities

1. Introduction

Following the declaration of independence of Georgia, in 1996 the Partnership and Cooperation Agreement has been concluded between Georgia and the European Community, which has become effective in 1999 following the ratification of the agreement by the legislative bodies of the parties to the above agreement. Under the Article 43 of the given agreement, Georgia is responsible for harmonization and approximation of its legislation with the relevant normative acts of the European Community, including the ones covered under the area of Competition Law.

In 1996 year, with the purpose to fulfill undertaken liability, the Parliament of Georgia has adopted the law on “Monopolistic activities and competition”.

The state body responsible for monitoring over the execution of adopted law was established – State Anti-monopoly Agency of Georgia, which initially was represented as the Legal Entity of Public Law under the Ministry of Economy, Industry and Trade. Since 1997, the above mentioned agency has been functioning independently.

It has to be also noted, that on 2 September 1997 the Parliament of Georgia adopted resolution No 828-Is, which for the purpose of development of processes related to the European integration, approximation and harmonization of legal systems, ensuring the relevance of Georgian legislation with the principles recognized under the European Community, was assigning the Parliament of Georgia to ensure the harmonization of all laws and normative acts adopted by the legislative body of Georgia since 1st September 1998, with the standards and norms defined by the European Community.

In terms of approximation of anti-monopoly legislation, Georgia has made one more step forward, demonstrated in the following – under the new “Criminal Law Code” of Georgia adopted in July 1999 by the Parliament of Georgia the violation of legal anti-monopoly norms has been criminalized. In particular, according to the article 195 of the Criminal Code - Monopolistic activity and exercising monopoly in setting high or low prices as well as restriction of competition by way of market division, retaining of influence on the market, expelling other subjects of economic activity from the market or establishing or retaining of common market price, - shall be punishable by fine or by jail sentence for up to a three-year term or by imprisonment for up to two years.

Paragraphs two and three of the mentioned article contained the same actions perpetrated under the aggravating circumstances, such crimes were punished via the imprisonment for the period of up to seven years.

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After so called “Rose revolution” of 2003 the Government in power had a view that the existing anti-monopoly legislation was facilitating corruption and hindering the entry of new economic agents into the market. On 3 June 2005 the Parliament has declared void existing anti-monopoly legislation and adopted new law on “Free Trade and Competition”. The Government considered as one of the basis for cancellation of the law the fact that Georgia was a small market and did not require market regulation via the competition norms. The body responsible for the execution of the law, Agency for Free Trade and Competition, has been also created. The above body was staffed by 7 persons.

The fact that newly adopted normative act did not cover such issues characteristic to the competition law as cartel agreements, abuse of dominant position, merger of enterprises, has to be also noted. The above law was only regulating issues related to the state aid.¹

Following the events of August 2008, active negotiations between Georgia and European Union have started on the conclusion of Deep and Comprehensive Free Trade Agreement between Georgia and the European Union. Above mentioned negotiation have been finalized on 27 June 2014 via the signing of Association Agreement between the European Union and Georgia, which will replace the Agreement on Partnership and Cooperation concluded earlier between the parties; the above agreement shall be ratified by Georgia and European Union, its member states. It has to be noted that agreement on Deep and Comprehensive Free Trade Area is part of the Association Agreement, which temporarily, prior to the full ratification of Association Agreement has been enacted on September 1, 2014.²

The signing of agreement on Free Trade Area and Association Agreement were preceded by the fulfillment of certain requirements by Georgia set by the European Union. One of the key requirements to be met for the conclusion of agreement on Free Trade with Europe was approximation of legal norms related to the competition to the European Union norms and institutional development of the body responsible for execution of the above mentioned norms.

On 8 May 2012 the Parliament of Georgia adopted law on “Free Trade and Competition”; this was a step forward compared with the law adopted in 2005. However, the above law was still characterized with the significant deficiencies.³ Unfortunately, in parallel with the adoption of above law Article 195 was removed from the Criminal Law Code of Georgia.

Work on further improvement of the law has started following the winning of Parliamentary elections by the coalition “Georgian Dream” in 2012. The above initiative was led by the Ministry of Economy as assigned by the Government of Georgia. The draft law on “Changes and amendments to the law on free trade and competition” initiated by the Government was adopted by the Parliament of Georgia on 21 March 2014. The changes and amendments to the law have significantly approximated

¹ See *Khaliani T.*, New Competition Policy, <<http://www.liberali.ge/ge/liberali/articles/112983/>>, [08.11.2014].

² See From September 80% of Association Agreement will come into force, <<http://www.interpressnews.ge/ge/politika/290321-seqtembridan-asocirebis-khelshekrulebis-80-amoqmedeba.html?ar=A>>, [08.11.2014].

³ See *Menabdishvili.*, Getting Closer Together: Georgian Competition Laws are Being Brought into Line with EU Rules, *Journal “Competition Insights”*, London, June Issue, 2013, 5-7.

the legislation on the competition valid in Georgia with the relevant legal norms of the European Union. The title of the law has been also changed and it was named as the “Law on Competition” of Georgia.

Signing of Association Agreement with the European Union placed Georgia in a new reality. It is interesting to understand how ready Georgia is for the new challenges. Article 204 of the Association Agreement makes Georgia liable to have comprehensive competition legislation, effectively regulating the anti-competition agreements, concerted practice and unilateral actions of companies holding the dominant market power and implementing effective control over the mergers of economic agents. Georgia is also obligated to establish body responsible for the effective execution of competition legislation, which is equipped with the relevant authority.

The objective of present article is to define whether Georgia is fulfilling the liabilities imposed under the Article 204 of the Association Agreement in the context of development of comprehensive legislation directed against the cartel activities and whether the Article 7 of the Law of Georgia on Competition contains the comprehensive terms.

For the study of raised issue the historical and comparison-legal methods are used. Via the use of historical method the development of norms of competition law are reviewed under the historical context.

Comparative analysis of law norms of the European Union and United States, as well as valid law of Georgia on Competition will enable us to better analyze the subject under the discussion and accordingly, to make correct decision.

2. Section 2 - Sherman Act

Regulation of cartel activities has attracted huge attention during the XXI century. Its regulation is still relevant nowadays. For fighting against cartel activities the cooperation is implemented at the international level, as often large, strong corporations, operating at the European or wider international level are involved. In the event of cartel activities, the concealed, intended, well organized cooperation is established between the companies; the objective of such cooperation is to fix prices, divide the markets and define production quotas, resulting in the profit increase or at least maintaining profit margin at the market.

The term „cartel“ (in Georgian) in French is referred to as cartel, in Italian – cartello and in German - kartell. The word means duel, conditions for challenging to a duel and then temporary suspension of duel between the fighting parties.⁴ Hence, it means suspension of war actions, conclusion of peace between the fighters similar to the American trusts. In modern language one shall consider cartel as conclusion of temporary peace, when the natural enemies are united in the alliance. So called conditions of peace consider termination of animosity and non-natural cooperation, which causes damage to others, more broadly – damage to the society.

The modern definition of business cartel is clearly defined by Christopher Harding and Julian Joshua in the book: “Regulating Cartels in Europe” – “This is an organization of such independent firms, which carry out same or similar economic activities. Their unification is aimed at protection of mutual

⁴ See *Christopher H., Joshua J., Regulating Cartels in Europe*, 2nd ed., Oxford University Press, 2010, 10-12.

economic interests and controlling the competition between the parties.⁵ Hence, cartel is the clandestine organization against the competition.

According to Debora Spa cartel is established in cases when the competitors realize that they could develop and protect their interests via the cooperation. They analyze that they can jointly dominate the market and dictate to market the prices paid by a consumer. To abstain themselves from entering the competition, the competitors make the market stable and generate high profits for long terms.⁶

Hence, the business cartel shall be understood as reasonable protective agreement, which supports stability especially in the period of economic destructions and crisis. The objective of business cartel is to regulate, stabilize conditions existing in one of the areas of industry, and based on the commercial or political circumstances, to avoid the industrial fluctuations.

It is simple to implement cartel activities in the market, characterized with relatively small number of large producers holding strong positions individually, with high market entry barriers, homogeneity product range, similar production costs and high natural inter-dependence between players at the market.

Such inter-dependence between economic agents at the market often leads to other parallel market activities with the supply of goods and services priced in parallel manner. In the context of cartel control, it is important to separate parallel behavior from anti-competition concealed agreements, as the first type of activity is not generally considered as punishable.

Part of economists criticizes cartels for the negative economic outcomes. In particular, according to their position, as a result of ineffective utilization of resources, the significant damage is incurred by the consumer, demonstrated in the reduction of production and increase in prices.

In the event of existence of cartel agreement, the consumer welfare is reduced as the benefits are transferred from the consumer to the seller.⁷

It is interesting to find out, for how high and for what period are the prices increased in case of cartel agreement. According to John Connor and Robert Lande, the price raise stands at a minimum 10 percent level. As for the period for price raise, it covers all period of cartel agreement, which, according to practice, may continue for decads of years. The research conducted by Verden in 1970s revealed that the price raises ranged between 6.5 percent to 36 percent, with the average price raise indicator of 18 to 21.3 percentages.⁸

Based on the data provided by the OECD – Organization for Economic Cooperation and Development – during 1996 -2000 years, the research conducted for 14 cases revealed that price raise ranged from 3 percentage to 65 percentage; including two cases where the price raise equaled up to 5 percent, in five cases – from 5 to 15 percents, in four cases – from 20 to 30 percents and in three cases - from 50 to 65 percents.⁹

⁵ Ibid, 12.

⁶ See *Spa D.*, *The Cooperative Edge, The International Politics of International Cartels*, Cornell University Press, 1994, 2.

⁷ See *William M. L.*, *Harm to Competition: Cartels, Mergers, and Joint Ventures*, *Antitrust Law Journal*, Issue 52, 1983, 625.

⁸ See *Connor M.J., Lande H.R.*, *American Institute Symposium: Thinking Creatively About Remedies, How High do Cartels Raise Prices? Implications for Optimal Cartel Fines*, *Law Review*, 513, 2005-2006, 530.

⁹ See OECD's Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws, <<http://www.oecd.org/competition/cartels/2081831.pdf>>, [20.11.2014].

In the second half of 19th century, cartel agreements were widely spread in the industry of United States. Cartel agreements covered the practices of fixation of sales quotas, prices, division of consumers and division of geographic markets, standardization of products, resolution of disputes related to the cartel agreements via arbitrage, establishment of investigation body and imposing penalties for the violation of cartel agreement conditions.¹⁰

With the purpose to fight against the above listed practices, in 1890 the Congress of the United States has adopted Sherman's Act, first section of which states the following:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. “

The Sherman Act prohibits any type of agreement between the competitors, which un-reasonably limits the trade. The above prohibition covers horizontal as well as vertical agreements.¹¹

3. Article 101 - Treaty on the Functioning of the European Union

The first competition law norms of European level were provided in the Treaty of Paris (1951), based on which the European Coal and Steel Community was established. Articles 65 and 66 of the above Treaty covered the competition issues. In 1958 year, based on Rome Treaty the European Economic Community was established. However, the norms on competition provided in the Treaty had not been executed by the European Community Institutions until 1962, until the adoption of Regulation No 17.

Article 3 of the Rome Treaty considered significant postulate related to the competition. It stated that “Activities of the European Union cover such system, which ensures that competition in the common market is not distorted“

At the initiative of the President of France, Sarcozy, following the enactment of Lisbon Treaty, the above mentioned provision, was transferred to the protocol No 27, Treaty on the Functioning of the European Union, which considered the text of the same contents. One can read in the protocol:

“The High Contracting Parties,

Considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,

Have agreed that:

To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.”¹²

¹⁰ See *Posner A R.*, *Antitrust Law*, 2nd ed., The University of Chicago Press, 2001,51.

¹¹ See *Ramires M.K.*, *Comparative Analysis of USA and Georgian Competition Law: Regulation of unilateral actions and horizontal agreements via the projectable rules and effective tools*, *Journal “Georgian Business Review”*, 3rd ed., 2014, 72.

¹² See full text of Treaty on the Functioning of the European Union, <<http://www.consilium.europa.eu/uedocs/cmsUpload/st06655-re01.en08.pdf>>, [10.12.2014], 395.

Hence, in the European Union fair and undistorted competition is the basis of market economy. The European Commission is equipped with the power required for the supervision over the execution of competition law norms and for ensuring the effective competition within the internal markets.

Moreover, Article 120 of the Treaty on the Functioning of the European Union also contains important provision on the competition law. Namely, “The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119”.

As of today, provisions prohibiting cartel activities are provided in the Article 101 of the Treaty on the Functioning of the European Union, the paragraph one of the above Article reads as follows:

“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- b) limit or control production, markets, technical development, or investment;
- c) share markets or sources of supply;
- d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”¹³

According to the second paragraph of the same article, the agreements and decisions prohibited under the paragraph one are automatically void.

Proceeding from the essence of the Article 101, it is interesting to determine the exact meaning of terms provided in the Article, such as *undertakings*, *associations of undertakings*, *agreement*, *decision*, *concerted practice*, *objective and effect*; the above is required for the correct qualification of the activity under Article 101.

The European Union courts needed years to define the meaning of terms considered by the European legislators.

3.1. Undertakings and Association of Undertakings

Norms of competition law cover only activity of undertaking and in the event of violation of the law the competition bodies are entitled to implement measures against the undertakings violating the law as considered under the law. The Treaty on the Functioning of the European Union does not provide definition of an undertaking. As stated by the European Court in its decision dated 8 July 2008 on the case T-99/04, definition of terms “agreement” and “undertaking” are key for the correct use of

¹³ See full text of Treaty on the Functioning of the European Union, <<http://www.consilium.europa.eu/uedocs/cmsUpload/st06655-re01.en08.pdf>>, [10.12.2014], 116.

competition norms in practice.¹⁴ If a behavior violates norms of competition law and such actions have not been implemented by an undertaking, the behavior cannot be subject to the investigation under the competition law.¹⁵

It is necessary to define the term of undertaking to determine the category of players at the market for whom the competition law must be applied. Its comprehensive definition is provided in one specific decision issued by the European Court. Therefore, it is important to get familiar with the relevant case law. For the case C-41/90 the European Court of Justice stated that “the term undertaking includes all undertakings, which are involved in the economic activities, despite their legal status and source of funding”.¹⁶ Hence, undertakings, involved in the economic activities shall respect the requirements set by the competition law; however, the activities of formations, which implement tasks for the public interest, generally, are not regulated under the competition law.

The decision made by the European Court of Justice for united cases C-180/98 and C-184/98 provides definitions for the types of activities to be considered as the economic activity. According to the ECJ, offering goods and services at the market is the economic activity.¹⁷ However, this does not cover procurements, with the exception for purchase of raw materials for the economic activities.¹⁸ According to the ECJ, the legal norms on the competition provided in the convention shall not be used for the activities, nature, objective and rules of which are not connected with the economic activity or are related to the implementation of authority/ functions of the state government.¹⁹

According to Richard Whish, the case law uses so called “functional approach” for the identification whether the undertaking implementing specific activity, is considered as the economic agent in line with the competition law. He states that it is necessary to separate activities carried out by one undertaking within the competence of public government and carried out economic activities. For example, LLC “City Park” operating in Tbilisi can: 1. define the places in Tbilisi where it is allowed or not allowed to park the car, and 2. own land plot, buildings which are operated as car parking facilities and have commercial purpose.

In case of first activity, the undertaking is acting within the authorities of state government and cannot be considered as an economic agent. As for the second activity, it has economic nature and the institution shall be considered as an undertaking.

¹⁴ See decision of the European Union court on the case № T-99/04, <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5f2484d87325e4610883180058b37c5d8.e34KaxiLc3eQc40LaxqMbN4Obh4Pe0?text=&docid=67382&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=619179>>, [22.11.2014], §144.

¹⁵ See full text of Treaty on the Functioning of the European Union *Whish R. and Bailey B.*, Competition Law, 7th Ed., Oxford University Press, 2012, 84.

¹⁶ See decision of the European Union court on the case № C-41/90, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61990CJ0041&from=EN>>, [22.11.2014], § 21.

¹⁷ See decision of the European Union court on the unified case № C-180/98 & C-184/98, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=45608&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=761469>>, [22.11.2014], §75.

¹⁸ See *Jones A., Sufirin B.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 132-133.

¹⁹ See decision of the European Union court on the case № C-309/99, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61999CJ0309&from=EN>>, [23.11.2014], §57.

According to the case law, provision of following services are considered as economic activities: courier services provided by the Spanish post office; services provided by the federal employment office – procurement of employment, which according to the German law on the employment development, occupied monopoly position at the market. Despite the fact that the state institution was assigned the activities of economic nature, the court regarded Federal Office of Employment of Germany as an economic agent;²⁰ Provision of emergency medical services for certain fees implemented by the medical assistance organization.²¹ Decision of the Court for the case T-99/04 is also important; the European Court stated that legal entity, acting as the cartel facilitator can be considered as an economic agent, despite the fact that the entity does not itself produce or provide cartel type services or goods.²²

According to the case law, for the qualification of undertaking, the objective of profit generation or economic nature of activities is not important. For example, during the 1990 World Championship activities for the sale of tours the FIFA and Italian Football Federation, responsible for the organization of championship were considered by the Commission as undertakings based on Article 101. For the case T-193/02, the Court confirmed its position that the activities carried out by the football clubs and related to football were considered as economic activities, as for the national association established by those clubs represented association of economic agents.²³ Moreover, General Court stated for the same case that the FIFA represented the association of economic agents.

In addition to the above mentioned, the European Court in its decision for the case C-41/90 stated that for the consideration of undertaking as an economic agent, its legal status and sources of its financing are not important.²⁴ Hence, companies and partnerships as well as agricultural cooperatives and trade associations may also be considered as undertakings. Agreements concluded between the latter entities may also be qualified as an agreement proceeding from the Article 101. Professional organization, for example association of lawyers and association of architects, may as well be considered as economic agent. Moreover, natural persons are also considered as economic agents – for example Opera singers, self-employed dentists, but not those natural persons, which are employed based on the labor agreement and individuals purchasing goods and services, who are the final consumers, as their behavior is not economic.²⁵

²⁰ See decision of the European Union court on the case № C-41/90, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61990CJ0041&from=EN>>, [23.11.2014], §21-22.

²¹ See decision of the European Union court on the case № C-475/99, <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d53499a9b46074408499ae9b086438641f.e34KaxiLc3qMb40Rch0SaxuOc310?text=&docid=46789&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7003>>, [23.11.2014].

²² See decision of the European Union court on the case № T-99/04, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=67382&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8277>>, [23.11.2014].

²³ See decision of the European Union court on the case № T-193/02, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=49878&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9550>>, [23.11.2014].

²⁴ See decision of the European Union court on the case № C-41/90, <<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97109&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=14217>>, [23.11.2014], §21.

²⁵ See *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 87.

Monopolist corporations established by the state, as well as bodies, granted by the state with the authority to implement certain activities and quazi-state bodies, may implement economic activities. For example, Federal Employment Office of Germany, airports in France and Portugal.²⁶

According to the case law, undertakings involved in the exclusively social functions, implementing activities based on the principle of solidarity and subject to the state supervision, are not considered as economic agents.²⁷ Fennel defined solidarity as “non-voluntary non-commercial type subsidization of one group by the other group.”²⁸ There were several cases in the European Union, when the incorporations implementing social protection, pensions, health insurance and health protection were not qualified as economic agents. For the united cases C-159/91 and C-160/91 the European Court declared that French Regional Social Protection Offices, which were administering mandatory social protection scheme, were not representing economic agents, as the pensions to be paid were identical for all recipients, the assistance to be received was not proportional to the paid donations and in case of excess financing the financing of one under financial difficulties was considered and hence, the above scheme was based on the principle of solidarity.²⁹ The Court considered actions implemented by INAIL as non-economic, as proceeding from the law the company was assigned to implement the insurance scheme for on the job accidents and professional diseases and it was implementing the above exclusively social function based on the principle of solidarity.³⁰

The Court made different decision for the case C-244/94, as the volume of pensions to be received depended on the donations paid by the beneficiaries and on the financial results of investments made by the management organization. Moreover, there was neither shared/inter-dependence between the beneficiaries nor the cross-subsidization. Manager of the above scheme was implementing economic activities under the competition with the life insurance companies.³¹ The preliminary decision made by the Court for the case C-67/96, referring to the additional pension fund is also interesting. As it becomes clear from the case materials, membership in the fund was mandatory in the textile industry. Company Albani, operating in the textile industry, was requesting exemption from the obligation for fund membership. According to the Court, the fund was implementing economic activities, despite the fact that membership of the fund was mandatory, the additional pension scheme was created for supplementing the extremely limited legal pension fund; the fund was not oriented towards the profit and the pension fund was liable to accept all employed persons without any medical examination. Moreover,

²⁶ See decision of the European Union court on the cases № Case C-82/01 and Case C-163/99, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=47826&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=18028>> and <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=45939&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=18091>>, [23.11.2014].

²⁷ See *Jones A. and Sufrin B.*, EU Competition Law Text, Cases, and Materials, 4thEd., Oxford University Press, 2011,130.

²⁸ See *Whish R. and Bailey D.*, Competition Law, 7th Ed., Oxford University Press, 2012, 88.

²⁹ See decision of the European Union court on the unified case № C-159/91 and C-160/91, <<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97109&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=14217>>, [23.11.2014], §18-19.

³⁰ See decision of the European Union court on the case № C-218/00, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=47024&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=25411>>, [23.11.2014], §71-82.

³¹ See decision of the European Union court on the case № C-244/94, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61994CJ0244&from=EN>>, [23.11.2014].

the pension fund itself was defining the volume of donations to be received and pensions to be paid out. The latter depended on the results of the investments made by the recipient.³²

According to the case law, activities related to the state government bodies do not represent economic activities and relevant bodies cannot be considered as economic agents.³³ The position of the European Court on the case 30/87 is interesting: the French law granted the local communes with the authority to provide funeral services. The communes then transferred the authority to provide the above services to the private companies. According to the definition provided by the Court, Article 101 does not cover the agreements, under which the communes as the public bodies within their authorities transferred the authority to provide services to the economic agents; as such activity is the important function of the state government.³⁴ For the case C-364/92, the European Court stated that organization EuroControl, which was established for the collection of fees from the beneficiaries of the air-navigation services provided by the State, did not represent the economic agent, based on the contents of norms of the competition law, as based on the public interests the company was implementing assigned tasks, expressed in the maintenance and development of safety of air navigation.³⁵ The Court made completely different decision for the case C-49/07, where the legal entity oriented on profit, organizing the motor-sport events, which entered the financing, advertizing and insurance contract relationships for the use of events for the commercial purposes, was considered as economic agent despite the fact that the state granted the company with the power to organize such events and it implemented the activities not bearing the economic nature.³⁶

It is interesting to review the Court's position regarding the consideration of the private company as an economic agent, if the company is implementing important state function delegated from the State. For the case C-343/95 the Court defined that private limited liability company operating in Genoa Port, implementing the supervision over the pollution of nature could not be regarded as the economic agent, as its activities were related to the public interests, as the sea environment protection was one of the key functions of the state.³⁷

According to the case law, representatives of various professions may be regarded as economic agents. For example, for the case C-35/96 the Court considered the customs agents implementing the reimbursable activities as the economic agents despite the fact that they were implementing activities

³² See *Jones A. and Sufirin S.*, EU Competition Law Text, Cases, and Materials, 4th ed., Oxford University Press, 2011, 131-132.

³³ See decision of the European Union court on the case № C-309/99, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61999CJ0309>>, [23.11.2014], §57.

³⁴ See decision of the European Union court on the case № C-30/87, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61987CJ0030&from=EN>>, [23.11.2014].

³⁵ See decision of the European Union court on the case № C-364/92, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61992CJ0364&from=EN>>, [23.11.2014], §17 and §27.

³⁶ See decision of the European Union court on the case № C-49/07, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=67060&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=108098>>, [23.11.2014].

³⁷ See decision of the European Union court on the case № C-343/95, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61995CJ0343&from=EN>>, [23.11.2014], §22.

authorized by the State.³⁸ Moreover, according to the Court, the lawyer, member of the Association of Lawyers, is implementing economic activities, as he/she provides legal services for fees and accordingly represents the economic agent.³⁹

The Article 101 of the Treaty on the Functions of the European Union is applicable directly for the coordinated actions of economic agents, as well as for the institutionalized cooperation of the above agents, despite the fact that trade professional associations do not have the objective to carry out commercial or economic activities. In general, the associations comprise of the enterprises functioning in the similar industries and it represents kind of forum, using such forum the members are able to organize meetings, coordinate activities of each other and enter the anti-competition agreements. It undertakes responsibility to protect the joint interest of the members against other economic operators, state structures and generally the State. Undertakings unions can be:

- Trade associations, and
- Professional associations (Association of Lawyers, association of accountants, association of architects and etc.).

General Court decided that the General Council of Lawyers' Association of Netherlands represented the association of economic agents.⁴⁰ However, according to the view of Richard Whish and David Bailey, the Court could have other position in the event if the Council Members had been appointed by the State and not elected by the members.⁴¹

Article 101 is also applicable for any agreements concluded between the associations and other economic agents. Moreover, this Article may be applied for the decisions made by associations. The latter cannot use the immunity even if approved or endorsed by the Government. Association cannot be exempted from the responsibility if its functions are defined under the law or its members are appointed by the government. For the case C-35/96 the Court has specially stated in the paragraph 40 of its judgment that the public status of the state body does not exempt economic agents (for example the association of customs agents) from the application of Article 101.⁴²

Article 101 is not applied for two or more legal persons if they represent one economic entity. The enterprises united in one corporate group, of course, can conclude agreement between each other. The Article 101 cannot be used against them as the companies represent one economic organization with its personnel, immovable and movable property. We can provide as an example, the parent and subsidiary company; Principle and its agent, if the latter is the support unit for the first unit and is integrated within the principal; contractor and sub-contractor. In this case, the attention is drawn to the fact that one party

³⁸ See decision of the European Union court on the case № C-35/96, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=43942&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=19229>>, [23.11.2014].

³⁹ See decision of the European Union court on the case № C-309/99, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61999CJ0309>>, [23.11.2014], §1.

⁴⁰ Ibid.

⁴¹ See *Whish R., Bailey D.*, Competition Law, 7th Ed., Oxford University Press, 2012, 92.

⁴² See decision of the European Union court on the case № C-35/96, <<http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30ddf56582947a704004acdfab85263ebc16.e34KaxiLc3qMb40Rch0SaxuPa3r0?text=&docid=43942&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=49258>>, [21.12.2014], §40.

of the agreement, for example, the parent company, has decisive influence over the activities of other, subsidiary company. And the latter does not possess the independence for the implementation of its activities at the market.

As for the commercial agent, generally, it is an independent economic operator and, hence, the economic agent as well according to the Article 101. However, in some cases, it acts on behalf of the principal and is liable to execute its instructions, and accordingly acts as a composing part of the principal as an economic agent. For the above reason it cannot be considered as an independent economic agent. In order to consider commercial agent as the independent economic agent, it has to undertake some commercial and financial risks, which is not intangible by nature. For example, renting of commercial area, after sale services, having some stock of the goods are regarded as material risks.⁴³

For the case T-102/92, the Court in its judgment stated that the company Parker Peny and its subsidiary company, distributing its goods in Germany, France, Belgium, Spain and Netherlands were united in the corporate group and the Article 101 could not be applied, as the subsidiary companies did not have real independence in making decisions on their activities and they were implementing the instructions set by the parent company.⁴⁴ The Article 101 would be used if instead of subsidiary companies we had the independent distributors in place.

As for the case, when the 50-50 percent shares of subsidiary company are owned jointly by two different parent companies and the subsidiary company is represented at the market as an independent player - Article 101 may be applicable for the agreements between the subsidiary company and one of the parent companies.⁴⁵

It is also important to note that the parent company may become responsible for the violation of norms of competition law by the subsidiary company; although the parent company may not prove that it could not make decisive impact over the decisions made by the subsidiary company. Generally, proving the above is tough even for the parent company holding 100 percent share in the subsidiary company.⁴⁶

It has to be also noted that change of name or legal form by the economic agent does not result in exemption from the responsibility. If the economic agent, after the violation of competition law norms is acquired by other economic agent, then naturally, the responsibility for the law violation will be imposed over the law violating as well as acquiring companies.

It is interesting to review the case when one economic agent violates the competition law norms and then sells the business responsible for the violation to other company – according to the commission and the Court, if the economic agent responsible for the above business still exists, the responsibility for the violation will be imposed over the latter and not the acquiring company. However, if the law violating economic agent terminated functioning at the market, then the responsibility for the violation is transferred to the acquiring company as an inheritance.⁴⁷

⁴³ See *Rose V., Bailey D.*, European Union Law of Competition, 2nd ed., Oxford University Press, 2013, 98.

⁴⁴ See decision of the European Union court on the case № T-102/92, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61992TJ0102>>, [23.11.2014], §1.

⁴⁵ See *Jones A. and Sufirin B.*, EU Competition Law Text, Cases, and Materials, 4thEd., Oxford University Press, 2011,137.

⁴⁶ See *Whish R. and Bailey D.*, Competition Law, 7th Ed., Oxford University Press, 2012, 94.

⁴⁷ *Ibid*, 98.

The European Court provides interesting definitions for the inheritance of responsibility for the law violations in the case C-280/06. The Autonomous Administration of State Monopolies in Italy represented the State body, was responsible for the management of tobacco monopoly. In 1999 its assets were transferred to the newly established state body – Italian Tobacco Institute (ITI). The latter has been later privatized and fell under the control of British-American Tobacco Enterprise. Later the Italian Competition Body accused the Phillip Morris business group for the implementation of cartel activities in Italy with the Autonomous Administration of State Monopoly of Italy (later the Stanner) and imposed the penalty on the companies. The ITI was penalized for the responsibility over the law violation committed by AASM, as its legal successor and penalty imposed equaled to EUR 20 million.⁴⁸

3.2. Agreement

Article 101 of the Treaty on the Functioning of the European Union envisages the requirement for each economic operator to independently define its policy and competition parameters, such as price, production, goods, markets, innovation, and investment. It prohibits joint and not individual actions implemented by the economic agents. The above mentioned Article requires existence of “clandestine deal” elements between the independent economic agents. Any type of cooperation or establishment of secret deal between them is prohibited if by such action the competition is significantly restricted. However, the economic agents can reasonably adjust to the existing or future market behavior of competitors, which is referred to as the parallel behavior. Such behavior is not prohibited if there are no direct or indirect contacts between the economic agents. Article 101 applies to the vertical agreements and limitations included in such agreements. Hence, the purpose of the Article is to eradicate the cartel agreements.

In general, in order to apply Article 101 for the agreement it is sufficient to have at least two economic agents expressing the joint intention to act at the market in the defined direction. The notion of agreement is concentrated on the coincidence of desire of parties; however the form for the expression of such desire is not important.⁴⁹

According to Goyder, we can state that the economic agents achieved the agreement, if there is sufficient consensus between such agents about certain issues and accordingly the economic agents take responsibility to act in certain direction on the market.⁵⁰

Application of Article 101 is not limited with only legal agreements. It is also used for the collaboration of economic agents achieved via the non-formal agreements, decisions of associations of economic agents or concerted practices. The case law of the European Union provides wide definition for the terms: “agreement, decision and concerted practice”.

⁴⁸ See decision of the European Union court on the case № C-280/06, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=71493&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=29570>>, [23.11.2014].

⁴⁹ See *Ezrachi A.*, *EU Competition Law: An Analytical Guide to the Leading Cases*, 3th Ed., Oxford Hart Publishing, 2012, 51.

⁵⁰ See *Goyder D.G., Goyder J., Albors-Ilorens A.*, *Goyder’s EC Competition Law*, 5th Ed., Oxford University Press, 2009, 83.

Court of First Instance of the European Communities for the case T-41/96 defined the term “agreement” based on the essence of the Article 101 as follows: “the concept of an agreement within the meaning of Article 101(1) of the Treaty centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.”⁵¹

Therefore, it is important that economic agents manifest their concurrent intention to act in the specific direction of the market; however, the form of manifestation is not important. The agreement can be concluded in written form as well as oral form.

Based on the contents of Article 101, so called gentlemen agreement⁵² as well as simple deal are also regarded as agreements, despite the fact that they do not have mandatory power in legal terms. Preliminary agreement, in the form of so called protocol also represents the type of agreement. According to the Commission standard contractual conditions provided in the agreement can also be considered as an agreement. Statutes/constitutions of trade associations and agreements concluded between the trade associations can also be regarded as an agreement. Guidelines and directives issues by one party and fulfilled by other party can also be qualified as an agreement.

Circulars and notifications, sent by the producer to its dealers or distributors can be considered as the part of the general agreement signed between these parties. Exchange of correspondence can also be regarded as an agreement.

Formal agreement, despite the fact that consent has not been received for all issues can also be considered as an agreement. Moreover, the meeting at which only one participant of the meeting demonstrates its will can be regarded as an agreement or concerted practice.⁵³

Statement of the economic agent that it was forced to participate in the anti-competition agreement by the behavior of other traders cannot be used as justification for the law violations. It may be the basis for the reduction of penalty imposed.

In case of complex law violations, the EU Commission for the cases concerning the violation of competition law norms applied *double classification*, which was later endorsed by the Court. According to the above definition, if the law violation includes elements of both the agreement and concerted practice, the Commission is not required to prove in detail that there was both the agreement and concerted practice in place during the law violation. In such cases the Commission may declare that there was “agreement and/or concerted practice” in place. The ECJ for the case No C-238/05 stated that Article 101 differentiates concerted practice between the economic agents, agreements and decisions of the associations of economic agents. The objective of the Article is to prohibit various types of

⁵¹ See decision of the European Union court on the case № T-41/96, §69, <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d561b12b3b65c148768c22ef69864cc1b8.e34KaxiLc3eQc40LaxqMbN4Obh8Le0?text=&docid=45755&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=120924>>, [26.11.2014].

⁵² See decision of the European Union court on the case № T-53/03, §82. <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=67378&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=126886>>, [26.11.2014].

⁵³ See decision of the European Union court on the case № T-53/03, §54, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=46523&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=134786>>, [26.11.2014].

coordination and secret agreement between the economic agents. Accordingly, exact description of collaboration in the given case cannot change a legal analysis which is based on the Article 101.”⁵⁴

On the Propylene Case the Commission stated that it was not necessary to prove that each economic agent participated in each manifestation of law violation. According to the Commission, it is sufficient to detect that economic agent has generally participated in the cartel activity. Later the Court agreed with the Commission and stated that for the long term and complex law violations aiming at the regulation of market conditions among the economic agents and involving many economic agents, it is not required for the Commission to exactly qualify the law violation and to define the level of participation of any economic agent in the law violation for the specific time period.⁵⁵

Cartel agreements are often complex and continue for the long period of time. Part of economic agents involved in the cartel agreement could be more active, others - more passive; some participants may leave the agreement for some period and then re-join it again; some agents may attend the meetings or have communication with others in order to obtain information, however, having no intention to fulfill the agreed plan.⁵⁶

According to the Commission and the Court inter-related agreements can be regarded as one agreement. Namely, the Commission since 1980's has developed the concept of “one single overall agreement”, based on which the responsibility was assigned to economic agents despite the fact whether they were involved in daily activities or playing relatively passive role in the cartel activities. For the Polypropylene case⁵⁷ the Commission decided that in the oil-chemical sector the economic agents for the several years was involved in the cartel activities and violated several requirements envisaged under Article 101, including the fixation of prices and definition of quotas. Cartel activities mainly covered various agreements, including mainly the deals of oral format. However, the Commission qualified them as one single overall agreement and punished all economic agents participating in the law violations despite the fact that some of the undertakings had not attended all meetings, had not participated in the daily management of cartel activities and in some cases violated the agreement conditions.

According to the European Union case law, simple attendance of meetings, which certainly bear anti-competition nature, raises the responsibility for participation in cartel activities even if the economic agent does not fulfill the decisions made at the meeting, with the exception of cases when the economic agent publicly distances from the decisions made at such meetings. However, the above shall not be interpreted in the way that economic agent participating in the law violating activities shall be required to provide information to the competition body. However, the economic agent should at least write to the

⁵⁴ See decision of the European Union court on the case № C-238/05, §32, <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5044a7acaa066431c8a36bce75d46c81f.e34KaxiLc3qMb40Rch0SaxuOc310?text=&docid=65421&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=406980>>,[26.11.2014].

⁵⁵ See *Ezrachi A.*, EU Competition Law: An Analytical Guide to the Leading Cases, 3th Ed., Oxford Hart Publishing, 2012, 70-71.

⁵⁶ See *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 101.

⁵⁷ See decision made by the Commission, §80-81, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31986D0398:EN:HTML>>,[26.11.2014].

meeting organizer or secretariat of the trade association that the agent does not desire to be considered as the member of cartel and participant of the meetings against the competition.⁵⁸

As mentioned above, Article 101 is also applied for the vertical relationships, if the behavior of two or more economic agents is agreed. There were several cases in the European Union case law, when according to the Commission, there was an agreement or concerted practice in place between the economic agents in the vertical relationship; however, the Court did not share the position of the Commission.

According to the European Union, Commission and the Court, if there is mutual consent on the implementation of certain market related actions between the companies and its independent distributors, whether implied or expressed, in such cases the existence of agreement or concerted practice between them can be determined. For example, if the producer sends to the distributor the circulars, by which the distributor is prohibited to export the goods from his/her country to other country and the distributor accepts and fulfills such requirement, then there is mutual agreement between the parties.⁵⁹

The Commission has imposed penalty over the Bayer and its distributors for the existence of agreement which restricted the parallel trade in the pharmaceutical sector. However, the Court cancelled the decision of the Commission as the Commission could not prove the existence of agreement between the parties. As it is clear from case materials, the company Bayer has reduced the supply of goods to its distributors in Spain and France, in order to restrict the import of the above goods by the distributors to the United Kingdom, where the medicines were sold at 40% higher prices. The distributors had to keep only the stocks required for the supply to local pharmaceutical companies. According to the Commission, there was a tacit agreement between the Buyers and its distributors on the prohibition of export of medicines to the United Kingdom. Based on the explanations provided by the Commission, the above was confirmed with the fact that distributors had stopped export of medicines to the United Kingdom following the reduction in supply from the Buyers. The Buyers were stating that it had actually reduced supply of medicines to France and Spain; however, such action was independent and there was no agreement in place. As a result of appeal the General Court cancelled decision made by the Commission⁶⁰ and stated that the agreement is in place when one person tacitly agrees with the practice and measures, which have been adopted by other person. According to the definition provided by the Court, the Commission was not able to prove that Buyers set prohibition for the export to the distributors and distributors had intention to follow the Buyers' policy on the reduced exports. Second instance Court for the cassation has upheld the decision made by the General Court.⁶¹

The Commission has accused JCB that it had entered into the vertical agreement with distributors, considering the fixation of discounts and sales prices. However, the Court did agree with the

⁵⁸ See *Bailey D.*, Publicly Distancing Oneself from a Cartel, *World Competition Journal*, 2008, 32, 177.

⁵⁹ See *Whish R., Bailey D.*, *Competition Law*, 7th ed., Oxford University Press, 2012, 105-107.

⁶⁰ See decision of the European Union court on the case № T-41/96, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5aa95d5c2395c4cdb8c34b9bb49a667e6.e34KaxiLc3eQc40LaxqMbN4Obh8Le0?text=&docid=45755&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=330333>, [28.11.2014].

⁶¹ See decision of the European Union court on the unified case № C-2/01 P & C-3/01 P, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=48819&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=330452>>, [28.11.2014].

Commission on the fact that the producer had recommendations on prices for its distributors and such recommendations had impact over the decisions made by distributors over the prices.⁶²

3.3. Decision

Coordination between the independent economic agents can be achieved through the trade association. The trade association may play important role if the cartel consists of large number of members and there is a need for the monitoring over the fulfillment of cartel rules. Article 101 of the Treaty on the Functioning of the European Union, based on its word-by-word meaning, is directly applicable for the associations of economic agents and there is a possibility for raising their responsibility and penalization.⁶³

In general, trade associations have written statutes/constitution and other regulations, covering the following:

- Association objectives;
- Requirements for the membership;
- Rules for association activities and management;
- Rules for terminating the membership.⁶⁴

Statutes/constitution of trade association is qualified as decision, similar to other rules regulating association activities.

Recommendations adopted by the association have been also considered as decisions, despite the fact that the recommendation does not have mandatory power for members or it is not adopted unanimously by all members. In case of recommendation, the following circumstances have to be taken into consideration: 1. Were its members fulfilling the recommendations in the past? 2. Whether the fulfillment of recommendations had significant impact over the competition.⁶⁵ For example, for the united cases 96-102, 104, 105, 108 and 110/82, association of economic agents involved in water supply provided recommendation to its members not to connect to the main system the dish-washers, which did not hold relevant certificate issued by the Belgian association of dish-washer equipment producers. The Commission and the Court stated that despite the fact that the recommendation was not mandatory, it could lead to the limitation of competition, as it would be followed by the discrimination of those producers of electric devices, which imported goods to Belgium.⁶⁶

⁶² See decision of the European Union court on the case № T-67/01, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=48838&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=334235>>, [28.11.2014].

⁶³ See *Whish R., Bailey D.*, Competition Law, 7th ed., Oxford University Press, 2012, 112-113.

⁶⁴ See *Goyder D.G., Goyder J., Albers-Ilorens A.*, Goyder's EC Competition Law, 5th ed., Oxford University Press, 2009, 97-98.

⁶⁵ See *Ezrachi A.*, EU Competition Law: An Analytical Guide to the Leading Cases, 3rd ed., Oxford Hart Publishing, 2012, 78.

⁶⁶ See decision of the European Union court on the unified case № 96-102, 104, 105, 108 and 110/82, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61982CJ0096&from=EN>>, [30.12.2014], §10.

3.4. Concerted Practice

Article 101 of the Treaty on the Functioning of the European Union applies to formal as well as informal agreements. Its objective is to prohibit such forms of collaboration between the economic agents, which based on the Article 101 contents, could not be qualified as agreement.

According to Ariel Ezrachi, concerted practice is not characterized with all elements of agreement/contract. It proceeds from the coordinated behavior of participants. According to his position, parallel behavior cannot be identified with concerted practice. However, it may become the strong evidence for the concerted practice, if it leads to creation of such competitive conditions which are against the normal market conditions with the consideration of product nature, number, size of economic agents and accordingly the market size.⁶⁷

On the Polypropylene case the General Court endorsed the decision of the Commission according to which the behavior of economic agents can be qualified as concerted practice in line with the Article 101 even if the parties have not clearly developed the unified plan defining their behavior at the market, however they willingly agree or are loyal to the secret deal, which simplifies/facilitates coordination of their commercial behavior.⁶⁸ During the appeal the Court stated that the concerted practice is in place, when:

- Two or more agents agree concurrently;
- Economic agents act at the market in accordance with the secret agreement; and
- There is cause-effect relationship between the concentration and actions implemented at the market.⁶⁹

The Court provided definition for concerted practice in its decision on the case 48-69 – several producers of paint were penalized for the fixation of prices via the concerted practice. The Commission based its decision on various evidences, including the similarity in volume of price raise and periods, times for sending the instructions to the subsidiary companies by the parent companies and contents of such instructions and the fact that there was informal link between the penalized agents. In the paragraph 64 of the decision the term “concerted practice” was defined as “a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been reached, knowingly substitutes practical cooperation between them for the risks of competition”⁷⁰.

In the decision for the united cases 40-48, 50, 54-56, 111, 113 and 114-73 the Court additionally stated that it was not necessary to establish inter-collaboration or direct or indirect contact or any material plan to regard the coordination between the economic agents as concerted practice.⁷¹ According

⁶⁷ See *Ezrachi A.*, *EU Competition Law: An Analytical Guide to the Leading Cases*, 3rd ed., Oxford Hart Publishing, 2012, 63.

⁶⁸ See decision of the European Union court on the case № T-7/89, <<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=102758&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13804>>, [18.12.2014], §255.

⁶⁹ See *RoseV and Bailey D.*, *European Union Law of Competition*, 2nd ed., Oxford University Press, 2013, 114.

⁷⁰ See decision of the European Union court on the case № 48-69, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61969CJ0048&from=E>>, [02.12.2014].

⁷¹ See decision of the European Union court on the case № 40-48, 50, 54-56, 111, 113 and 114-73, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61973CJ0040&from=EN>>, [02.12.2014], §4.

to the Court's position, Article 101 prohibits "any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market."⁷²

Agreement, as mentioned above, is the agreed action between the parties and it is possible to punish such agreement despite the fact whether it is actually implemented or not on the market. Unlike agreement, in case of concerted practice, it is necessary to present the evidences on concentration as well as to detect that the parties have actually implemented the agreed practice at the market.

According to the European Court, notion of concerted practice covers the concentration of economic operators on the market and their further conduct on the market, as well as relationship of cause and effect between the two.⁷³ However, it has to be also noted that based on the case law, concerted practice can be prohibited via Article 101 despite its anti-competition outcomes on the market.⁷⁴

It is important to define what level/frequency/intensity of collaboration between the economic operators is required for consideration of coordination as the concerted practice. The more often and the longer collaborate economic operators the higher is the probability of existence of concerted practice between them.⁷⁵ Moreover, it is interesting to clarify whether the concerted practice is a result of one meeting. If there are elements of concert and information received at the meeting influenced the behavior of economic operators present at the meeting, then the competition bodies may qualify the single meeting as the concerted practice as there is an assumption that economic operators participating in the meeting and still active at the market, take into account the information distributed during such meeting and accordingly define their activities at the market, with the exception for cases when the economic operator can prove the opposite.

The ECJ judgment on the case C-8/08 provided us with an important definition – the case covered one meeting of the mobile operators in Netherlands where the issue on the reduction of commissions to be paid to the dealers was discussed. According to the Court, the effect of the number, frequency and form of the meetings between the economic operators over agreement on the market conduct of the above economic operators, depends on the subject of the concerted actions and conditions of the relevant market. According to the position of the Court for the above mentioned case it was possible to define that single meeting of mobile operators enabled the economic operators to reduce prices at the market and therefore their behavior was qualified as concerted practice.⁷⁶

⁷² *ibid.*

⁷³ See decision of the European Union court on the case № C-199/92 P, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=44313&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=151317>>, [03.12.2014], §161.

⁷⁴ *ibid.*, §163.

⁷⁵ See decision of the European Union court on the case № T-587/08, <<http://curia.europa.eu/juris/document/document.jsf?docid=134982&doclang=EN>>, [03.12.2014], §565.

⁷⁶ See decision of the European Union court on the case № C-8/08, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=74817&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=155089>>, [02.12.2014], §59-61.

3.5. Objective

Agreement between the economic operators is prohibited only if its objective is to avoid, restrict or distort the competition. The terms “objective” and “effect” are read separately in Article 101 of the Treaty on the Functioning of the European Union. There is a link “or” between the above terms, which transforms them into the alternative requirements. According to the case law it can be noted that if it is clear from the agreement conditions that its objective is to avoid, restrict or distort competition at the market, then it is not required to check its outcomes for the prohibition of the agreement. In this case, analysis of agreement outcomes is required for the calculation of incurred loss for the purposes of claim and calculation of relevant penalties.⁷⁷

It has to be also noted that the parties may not have subjective intention for the competition restriction, and their objective might be to overcome crisis in the sector; however, the above factor does not exclude application of Article 101 for such agreement. On the case C-209/07 the ECJ declared that agreement might be considered as restrictive based on its objective despite the fact that its only objective is not the restriction of competition and it has other lawful objectives.⁷⁸

According to Ariel Ezrachi, prohibition of competition restricting agreement based on its objective is in place for the punishment of the law violations which have not been finalized. In this case, in addition to the agreement outcomes the important factor to be considered is the intention of parties to the agreement. According to him, objective of Article 101 is to avoid risky law violations. He provides as an example driving of car under the effect of alcohol or narcotics, which under the legislation of some countries represents the violation of administrative or criminal law. In this case, punishment of such action does not depend on the occurrence of car-accident.⁷⁹

On 25 June 2014 the European Commission adopted guidelines on the restriction of competition based on the “objective”,⁸⁰ which considers the detection of agreements characterized with the minor restriction status that are exempt from the prohibition. Mentioned guidelines provide so called “safe harbor” if the market share of economic operators participating in the agreement does not exceed the indicator set in the guidelines and does not contain hardcore restrictions.

Separation of competition restriction based on the “objective” and “effect” was implemented due to the fact that the restrictions considered under the certain agreements between the economic operators with their nature / essence are harmful for the normal competition conditions. Such restrictions have large potential of negative effect over the competition; therefore, it is not necessary to conduct analysis

⁷⁷ See *Ezrachi A.*, *EU Competition Law: An Analytical Guide to the Leading Cases*, 3rdEd., Oxford Hart Publishing, 2012, 88.

⁷⁸ See decision of the European Union court on the case № C-209/07, §21, <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130de8371436c4389470ca5d3e1ffb53d2a34.e34KaxiLc3eQc40LaxqMbN4ObhePe0?text=&docid=68784&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&id=460942>>, [20.12.2014].

⁷⁹ See *Ezrachi A.*, *EU Competition Law: An Analytical Guide to the Leading Cases*, 3rd ed., Oxford Hart Publishing, 2012, 89.

⁸⁰ See the European Union Commission guidelines for competition restriction “based on the objective”, <http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf>, [10.12.2014].

of real or probable anti-competition effect of such agreements over the market for the application of the Article 101.⁸¹

In the process of analysis of agreement based on its “objective”, various factors, such as contents of agreement provisions, agreement objectives in economic and legal context, shall be taken into consideration. According to the position of the Commission, it is also important to determine whether the agreement is concluded between the real potential competitors or between non-competitors. In case of agreement between competitors, in other words horizontal agreement, there are three classic categories of competition limitation based on the objective criteria. These categories are: fixation of selling or buying prices, restriction of production and sharing of markets. As for the vertical agreements between non-competitor economic operators, they may cover competition restriction based on agreement objectives such as fixation of sales (minimal) price and restrictions which limit sales on certain territory or sales of products to certain customers.⁸²

The above mentioned restrictions can be considered as restrictions based on the “objective” criteria, if they are considered in such a wide scale collaboration agreement between the competitors, which unify additional skills and assets. For example, if under the production agreement the parties agreed over the volume of production providing that other parameters of competition are not eradicated.⁸³

Agreed manipulative actions of economic operators in the public tenders, for example if one or several economic operators present their offer, withdraw offer or submit artificially high offer, are generally considered as competition restricting “based on the objective”. Such agreements include fixation of prices or/and division of markets.⁸⁴

Agreement over the collective boycott of economic agents are also considered as competition restriction “based on objective”, if the objective of such action is expelling of actual or potential competitors from the market;⁸⁵ similarly –sharing information about individual data between the competitors relating to the future pricing.⁸⁶

As for the restrictions, “based on the objective”, in the agreements between non-competitors, they might be related to the division of market in terms of territory and / or group of clients or restriction of buyer’s ability to determine the selling price. Hence, in vertical agreements, producer may set restrictions for the customer on where (which territory) or to whom (which consumer) to sell products considered under the agreement actively and/or passively. In general, mentioned above restrictions are considered as heavy restrictions and are regarded as restrictions “based on the objective”. However, if setting of restrictions for the customer is causing restriction of choice for the establishment location of an

⁸¹ See *ibid*, 3.

⁸² See *ibid*, 3-4.

⁸³ See *ibid*, 5.

⁸⁴ See *ibid*, 11.

⁸⁵ See *ibid*.

⁸⁶ See the guidelines issued by the Commission on the application of Article 101 of the Treaty on the Functioning of the European Union for the horizontal collaboration agreements, §74, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011XC0114%2804%29&from=EN>>, [10.12.2014].

economic operator, then such restriction is not considered as heavy.⁸⁷ If in vertical agreements the buyer is restricted to determine minimal value of selling price or the selling prices are fixed, the above represents restriction “based on the objective”. However, setting of maximal prices or offering the recommended prices does not represent violation of law providing such prices are not equal to fixed or minimal prices as a result of influence or offered incentives.⁸⁸ In vertical relationships, in particular, restriction considered under the agreement between the producer and distributor, which divide territories of member states are regarded as heavy violations, as the above hinders the achievement of one of the fundamental objectives of the European Union – united market; for example, prohibition of export, system of double prices and restriction of parallel trade.⁸⁹

3.6. Effect

If the agreement which is based on the objective does not restrict the competition, then it is necessary to check whether such agreement has the effect of competition restriction. The agreement must have possibility of anti-competition effect on competition. In order to qualify the agreement as restrictive based on its effect, it must impact actual or potential competition at such level, that the negative effect over the relevant market price, production, innovation, quality of product or service or diversity is anticipated under the reasonable assumption.⁹⁰

Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice),⁹¹ adopted on 25 June 2014, defines the conditions that have to be satisfied by the agreement in order not to have appreciable restrictive effect on the market competition. In accordance with the European Court, if the agreement causes minor restrictions in the trade between the member states, then Article 101 is not applied.⁹²

According to the Commission, there is an assumption that agreement between the economic operators has minor outcome on competition, hence Article 101 will not apply to such agreement if two cumulative conditions are fulfilled; in particular, if their:

- Market shares does not exceed 5 percent; and
- Joint annual turnover does not exceed 40 million.⁹³

⁸⁷ See the European Union Commission guidelines for competition restriction “based on the objective” <http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf>, [10.12.2014], 13.

⁸⁸ See *ibid*, 16.

⁸⁹ See *Ezrachi A.*, *EU Competition Law: An Analytical Guide to the Leading Cases*, 3rdEd., Oxford Hart Publishing, 2012, 80, 90.

⁹⁰ See *ibid*, 83.

⁹¹ See the note issued by the Commission, <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2014:291:FULL&from=EN>>, [10.12.2014].

⁹² See decision of the European Union court on the case № C-226/11, <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d557c07b650dc34cc8b4dd8abbbecc8b4b.e34KaxiLc3eQc40LaxqMbN4ObhaQe0?text=&docid=131804&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=299523>>, [10.12.2014], §16.

⁹³ See the guidelines issued by the Commission on the definition of outcome in relation to the trade concept provided in the Articles 81-82 (at present Articles 101-102) of the European Union treaty, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0081:0096:EN:PDF>>, [11.12.2014], §52.

In general, the above requirements are met by small and medium size economic operators.

According to the Commission's view, which has been presented in the paragraph 8, section two of the Notice, the agreement between actual or potential competitors if their joint market share does not exceed 10 percent, will not significantly restrict the competition. In the event of agreement between non-competitors, the market share of each economic operator shall not exceed 15 percent. In line with paragraph nine of the notice, if it is difficult to define whether the agreement is concluded between the competitor or non-competitors, then 10 percent maximum limit is applied. In line with the paragraph 10 of the Notice, the cumulative result of parallel network of agreements between the suppliers and distributors on the purchase or provision of service over the market must be also taken into consideration. In this case, the market share of the individual suppliers or distributors shall not exceed 5 percent; otherwise, the network of agreements will cumulatively have effect of market closure. The agreements will not have cumulatively closing impact over the market, if less than 30 percent of the market is covered by the parallel network of agreements with the similar effect.

The Notice considers concessional period for the following 2 calendar years and within such period, the above mentioned maximum level of the percentages should not be exceeded by 2 percent.⁹⁴

The paragraph 13 of the Commission's Notice states that if the agreement contains any of the following hardcore restrictions, then the above mentioned notification from the Commission will be applied. The hardcore restrictions are:

- Fixation of prices for the third parties;
- Restriction of sales or production;
- Division of markets or customers.

It has to be also noted that according to the Commission, the agreements between the economic operators, despite the fact that their market share exceeds the upper percentage indicator envisaged under the notification, may not significantly restrict the competition at the market with the consideration of other factors/conditions and therefore, the prohibition envisaged under Article 101 will not be applied.⁹⁵

1. The inter-relationship of terms used in the Article 7 of the Law of Georgia on Competition with the section one, Article 101 of the Treaty on the Functioning of the European Union

As it was already mentioned in the introduction, major changes and amendments have been made to the law of Georgia on Competition on 27 March 2014 in terms of approximation of Georgian law with the relevant standards valid in the European Union. As noted in the introduction, the changes to the Law of Georgia on Competition, namely articles 7 and 8, also covered norms on the cartel agreements. In accordance with the first article, it is prohibited to conclude such agreements between the economic operators, to make such decisions or implement concerted actions, objective or effect of which is result in inadmissibility, distortion or/and prohibition of competition in relevant market.

The term "contract" used in the article 7 differs from the term "agreement" used in the Article 101. Law on Competition does not provide definition of the term "contract". Due to the above it will be necessary to provide such definition under the Article 327 of the Civil Code of Georgia, the first

⁹⁴ See *ibid*, §11.

⁹⁵ See *ibid*, §3.

paragraph of which defines the following: “A contract is considered entered into if the parties have agreed on all of its essential terms in the form stipulated for such an agreement.” It was desirable for the legislator to use instead the term “transaction”, which under the article 50 of the Civil Code of Georgia is defined as “is a unilateral, bilateral or multilateral declaration of intent aimed at creating, changing or terminating legal relations.” It has to be also noted that in line with the Civil Code of Georgia, transaction is wider notion compared with the contract and it includes transactions too.

The Article 8 of the law considers qualification of contracts for minor restrictions of competition. It contains the same upper indicators for the market shares, as considered in the guidelines adopted by the Commission of the European Union for the restriction of competition “based on objective”. In line with the section two of the same law, the Article 8 does not cover the agreements envisaged under the sub-paragraphs “a”, “b” and “f”. Accordingly, the law of Georgia on Competition qualifies contracts, considering fixation of prices or other trade conditions, division of consumers or markets under the various signs and manipulative tenders as hardcore restrictions. The above list, unfortunately, does not contain restriction of production which is considered as one of the hardcore restrictions according to the European Union Competition Law.

Other terms provided in the section one of the article 7, such as “undertaking”, “decision”, “agreed action”, “objective and effect” are relevant to the terms used in the European Union.

4. Conclusion

Based on the above discussed, it can be stated that changes and amendments made to the law on Competition of Georgia in March 2014 approximated Georgia’s norms on competition with the valid European Union competition law; however, there are still some deficiencies in the law. It is especially important to use very precise/correct terms in the law, in order to avoid problems caused by their use. In this regard, one of the significant deficiencies is use of term “contract” in Article 7 of the Law of Georgia on Competition; Article 101 of the Treaty on the Functioning of the European Union uses instead the term “agreement”. Objective of the article 101, as the objective of its identical Article 7, is the prohibition of various forms of collaborations between the economic operators, which have as an object or effect of restriction of competition on the market. The Georgian legislator in the Article 3, providing definitions for the terms used in the law, could define the term “contract” or instead of this term it would be more reasonable for the Georgian legislation to use the term “transaction”, which under the Civil Code of Georgia is a wider term and covers contracts as well.

As for the term “undertaking”, paragraph “a”, Article 3 of the law provides its definition. Namely, economic agent is “a person, who notwithstanding his/her residency, legal form of enterprise, carries out entrepreneurial activities, as well as non-entrepreneurial (non-commercial) legal entity and other associations, which are market participants or/and carry out entrepreneurial activities.” Above mentioned definition also covers associations of economic agents, such as professional and trade associations. However, the above paragraph does not provide comprehensive legal definition of the economic agent, based on the case law of the European Union.

Neither Georgian law on Competition nor sub-normative acts adopted based on the above law provide definitions for other terms used in the Article 7, such as “decision”, “concerted practice”, “objective” and “effect”.

There is one irrelevance with the Case Law and so called “Soft” law of the European Union contained in the Georgian law. Namely, in the European Union fixation of prices, restriction of production and division of markets are considered as hardcore restrictions and they are not subject to the rule on so called “de minimis”. On the other hand, in line with the section two, Article 8 of the Georgian Law on Competition, the agreement cannot be granted the status of minor restriction if it only considers fixation of prices, division of markets and agreed participation of economic agents in tenders. The above list does not include restriction of production. Moreover, manipulative tenders are not considered as separate law violations under the European Union legislation and they are qualified as fixation of prices or division of markets / consumers.

Therefore, it has to be stated, that Georgian Competition Law has been approximated with the European legislation; however, there are still some deficiencies in place. For the correct definition of above mentioned terms, it would be better if the Competition Agency and Court bodies operating in Georgia would use European normative acts and relevant case law; however, Georgia does not have such obligation under the Association Agreement.

Termination of Employment Contract

1. Introduction

For termination of the agreement the most important thing is the basis and time for termination by the parties and the provisions regulating the mentioned relations, in many cases, determine the nature of labor relations as well.¹

The Labor Code was adopted in 2006 in Georgia and replaced the Code of Labor Laws of 1973 and substantially changed the system of labor relations' regulation.

In regulation of termination of labor agreement the most difficult is introducing of the simple and flexible regulations for the labor market so that the rights of the employee were not violated and the protection principle being the starting point of labor law was complied with.²

Georgian Labor Code of 2006 was regarded as the Code with liberal approach to contract termination. It set the regulations for termination of labor contracts to regulate the legal outcomes of contract termination and did not contain the legal bases presence of which would grant the employer the legal right of termination. Changes in Labor Code of Georgia of 2013 require detailed consideration as to whether it complies with EU legislation and whether balanced regulation of labor relations is possible on the basis of the changes made.

2. Lawful Termination of Employment

Initially, the necessity of protection of the parties' rights with respect of termination of labor agreements was internationally recognized by International Labor Organization recommendations.³ ILO Convention No: 158 dealt with the issues of termination of the labor contracts and on the basis thereof it was established that liberation may take place only in case of existence of the proper basis.⁴

On the other hand, where the labor relations exist, contract termination is acceptable as a legitimate instrument.⁵ According to the liberal approaches, a person shall not be forced to maintain the relations

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¹ *Earthman J.B.*, Illusory Protection: The Treatment of Severance Packages in Business Bankruptcies, PA.J, „Labor & Employment Law”, 2002, 3.

² *Silverstein M.O.*, Introduction to International Mediation and Arbitration: Resolving Labor Disputes in the United States and The European Union, „The Labour and Employment Law Forum”, 2011,102.

³ *Rasnic C. D.*, Die Kündigung, Licenciement, Recesso Dal Contrato, „Firing“, or „Sacking“: Comparing European and American Laws on Management Prerogatives and Discretion in Termination Decisions, „Indiana International And Comparative Law Review”, 2008, 3.

⁴ Though WLO Convention is binding for the ratifying countries, we should note that it is some kind of model for safeguarding of the parties' rights in termination of employment contracts. Ibid, 3.

⁵ *WeissM., Schmidt M.*, Labour Law and Industrial Relations in Germany, The Netherlands, 2008, 122.

which he/she desires to terminate.⁶ In many cases, the employers have to terminate the agreement for the reasons out of his control. Bases for contract termination may be different, like employee's ability to perform the work, enterprise reorganization, economic situation etc.⁷

In accordance with EU law, termination of labor contracts is not regulated by single directive or any other act. Issues related to labor contracts termination are provided in different legislative acts.⁸

According to Article 153 of the Treaty on Functioning of European Union, EU is entitled to develop directives for the purpose of protection of the employees in termination of labor contracts,⁹ Article 30 of EU Charter on Fundamental rights provides for the employee's right, to protection from unlawful dismissal.¹⁰ Certain issues of labor contract termination are dealt with in Council Directive of 2001 safeguarding the employees' rights in the event of transfer/reorganization of undertakings.¹¹

In the context of non-discrimination, the issues of labor contract termination are dealt with in Council Directive 76/207/EEC,¹² Directive on Equal Treatment 2000/43¹³ and the issues of sharing of the burden of proof in labor disputes related to discrimination are provided for by Directive 2000/78.¹⁴ Regulations restricting termination of labor contracts are established by Article 10 of Directive 92/85 and in addition, it protects the rights of pregnant workers and those who have recently given birth.¹⁵

In Georgian legislation, Subsection "d", Section 1, Article 37 of Georgian Labor Code of 2006, provides contract dissolution as the basis for contract termination and Article 38 of Georgian Labor Code specified that the contract may be dissolved by the incentive of one of the parties, though it did not provide the preconditions therefore.¹⁶ This gap was covered by application of the provisions of Civil Code on the basis of judicial practice, though, no uniform approach existed.

By amendments made to Georgian Labor Code, the legislator attempted to provide causes of contract dissolution in details, though the term contract dissolution was replaced and title of Article 37 of

⁶ *Weiss M., Schmidt M.*, Labour Law and Industrial Relations in Germany, The Netherlands, 2008, 122.

⁷ *Ibid*, 122.

⁸ *Voss G.H., Haar B.T.*, Common ground in European Dismissal Law, J. European Labor Law, №3, 2012, 215.

⁹ *Barnar Ch.*, Employment Law, Great Britain, 2013, 572.

¹⁰ Charter of Fundamental Rights of The European Union, 2000/C – 364/01.
<http://www.europarl.europa.eu/charter/pdf/text_en.pdf>

¹¹ Council Directive, 2001/23/EC, 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

¹² Council Directive, 76/207/EEC, 9 February 1976, 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.

¹³ Council Directive, 2000/43/EC, 29 June 2000, Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹⁴ Council Directive, 2000/78/EC, 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

¹⁵ Council Directive, 92/85/EEC, 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

¹⁶ *Chachava S.*, Recommendations for Improvement of the Legislation Applicable to Employment Contracts with Limited or Unlimited Term through Judicial Law, Collection of the Articles on Labor Law, I, *Zaalishvili V. (ed.)*, Tbilisi, 2011, 37.

Georgian Labor Code was Causes of Termination of Labor Contracts and title of Article 38 thereof – Labor Contract Termination Regulations.

In legal respect, contract termination implies completion of the contractual relations and basis of this may be contract dissolution.¹⁷ And contract dissolution is an unilateral, binding deal, carried out through notification of the other party in accordance with Article 355 of Georgian Civil Code. Contract dissolution right is a right provided for by the law and therefore, the law thoroughly specifies the bases and rules of contract dissolution.¹⁸

Supposedly, the legislators did not use term dissolution in articles 37 and 38 of Georgian Labor Code, as they attempted to change the possibility of termination of the contract by one of the parties without any reasons but in legal respect, the reasons provided for in Article 37 of Georgian Labor Code comprise the basis for contract dissolution, rather than termination. Therefore, in this work will provide discussion of the reasons for contract dissolution regulated by Georgian Labor Code using the term “contract termination.”

2.1 Dismissal on Economic Reasons

Subsection “a”, Section 1 of Article 37 of Georgian Labor Code provides for contract termination by the reason of economic reasons, technological or organizational changes, leading to reduction of the labor required for activities.

Dismissal on economic reasons legally comprises precondition for contract dissolution and shall be deemed lawful if it is clear that it is impossible for the employer to maintain the employee.

One of the significant aspects, to be taken into consideration, is the principle of social equality, implying that the workers impacted by reorganization to greatest extent should be dismissed the last and in extreme cases.¹⁹

The manufacturer’s economic interests shall be necessarily taken into consideration while discussing dismissal on economic reasons. Article 30 of Georgian Constitution establishes the rights of free entrepreneurs, including the employer’s right to hire the person and terminate employment relations with him, according to his own purposes.²⁰ Though the rights of the employees shall be taken into consideration as well and it would be better if, in case of termination for economic or production reasons, the employer will be obliged to make decision on contract termination not on the basis of production necessity but, rather, on the basis of necessity of contract dissolution with the specific worker.

Council Directive 2001/23 provides for special regulations for safeguarding of the employees at a time of transfer or reorganization of the undertaking and establishes three-step system for employees’ protection, providing transfer of the employment rights to the transferee without any changes.²¹

¹⁷ Chachava S., Recommendations for Improvement of the Legislation Applicable to Employment Contracts with Limited or Unlimited Term through Judicial Law, Collection of the Articles on Labor Law, I, Zaalishvili V. (ed.), Tbilisi, 2011, 37.

¹⁸ Chanturia L., Zoidze B., Shengelia R., Khetsuriani J., Comments to the Civil Code of Georgia, Book Three, Tbilisi, 2001, 231.

¹⁹ Weiss M., Schmidt M., Labour Law and Industrial relations in Germany, The Netherlands, 2008, 128.

²⁰ Department of Civil, Entrepreneurship and Bankruptcy Cases of Supreme Court of Georgia, Decision № AS- 680-1010-07, 2, 04, 2008 .

²¹ Barnar Ch., Employment Law, Great Britain, 2013, 602.

To comply with the requirements of the mentioned Directive, it is necessary to find out, what is implied under transfer/reorganization of the undertaking. Court of Justice of European Union, in its decisions, has developed the criteria for study of the issue of undertaking transfer,²² including so called employment law approach, covering functional analysis of undertakings, whether the new undertaking is engaged in the same activities as the previous one.²³ In transfer of the undertakings the Directive protects the employees of the part of undertaking subjected to transfer.²⁴ The substance of Directive is safeguarding of the employees and the obligations of undertaking to the employees shall be transferred to the transferee undertaking as well.²⁵

Analysis of Directive 2001/23 clearly shows that for its purposes, transfer/reorganization of the undertaking does not mean enterprise reorganization specified in Subsection “a”, Section 1, Article 37 of Georgian Labor Code, requiring reduction of labor.

Article 14⁴ of Georgian Law on Entrepreneurs regulates reorganization of enterprises, including transformation, merger, split.²⁶ And Council Directive 2001/23 deals with these issues but neither Georgian Law on Entrepreneurs and nor Georgian Labor Code provides for protection of the employees’ rights in case of reorganization.

This issue must be regulated by Georgian Labor Code, differentiate enterprise reorganization requiring labor reduction from the reorganization resulting in enterprise transformation and this could be achieved through due regard of Council Directive 2001/23 and practice of European Court of Justice.

2.2 The Reasons for Termination Relating to the Employee’s Conduct and Capacity

Employee’s conduct and capacity, according to GLC, is regarded as the reason for contract termination. This reason, as the acceptable reason for contract termination is provided for by Article 24 of European Social Charter as well. To ensure legality of contract termination for this reason, it is necessary to find out, what could be unsatisfactory conduct and whether there are any preconditions to be observed by the employee.

There is no definition of capacity or conduct at the legislative level, but logically, this is associated with the person’s knowledge and ability to perform his/her duties.²⁷ Though, it is hard to determine capacity of conduct, it is potential impossibility of performing of the work, or professional unsuitability revealed in fulfillment of the duties.²⁸

WLO recommendations provide that contract shall not be terminated for unsuccessful performance of duties, if the employee has no written notification and relevant instruction dealing with the improperly

²² *Barnar Ch.*, Employment Law, Great Britain, 2013, 603.

²³ *Ibid*, 603.

²⁴ *Ibid*, 604.

²⁵ Though the Member States are entitled to impose on the transferee undertakings only those obligations, which could be supposed at a time of transfer, by legislation *Ibid.*, 605.

²⁶ Georgian Law on Entrepreneurs. < <https://matsne.gov.ge/ka/document/view/28408>>

²⁷ *McCallum R. C., McCarry G. J., Ronfeldt P.*, Employment Security, Sydney, 1994, 30.

²⁸ *Ibid*, 30.

performed work, in addition, the employee shall be given opportunity to recover the error made by him/her.²⁹

Report of European Labor Law Network³⁰ for 2011 provides reasons for contract termination. The report specifies that EU Member States have formulated various principles not yet included into the international legal document.³¹ One of these principles is the principle of proportionality, comprising the key criterion for examination of contract termination. This principle is of particular significance in case of contract termination for economic reasons and employee's capacity and conduct.

In development of employment strategy, EU has formulated the principle of "flexible security" (flexicurity)³², providing simplification of contract termination regulations, possibility of making non-typical employment contracts³³ and social protection of the employees through training and re-training programs.³⁴

Care about improvement of the employees' conduct, in contemporary labor environment should be understood as alternation to termination. But Georgian Labor Code does not provide any additional provisions and directly sets employee's conduct unsuitability as the reason for termination. Necessary changes should be made to GLC to include the regulations contributing to improvement of the employees' conduct, e.g. before emergence of termination rights, the employee may be obligated to perform various measures allowing improvement of the employee's conduct.

2.3 Contract Termination for Serious Misconduct

Subsection "g", Section 1, Article 37 of Georgian Labor Code specifies serious misconduct of obligations by the employee as the reason for contract termination.

Georgian Civil Code states that in the long-term contractual relations, non-fulfillment of the obligations by any of the parties entitles the other party to termination. Article 405 of Georgian Civil Code provides preconditions for contract termination, these include providing additional term and loss of interest to the remained part of obligations. In addition, Article 405 of GCC states that additional term shall not be required if it is clear that it will provide no result and if, given particular reasons, with due regard of the mutual interests, contract termination is reasonable.

Analysis of GCC provisions clearly show that the main thing is fulfillment of obligations, maintaining of the contract, rather than responsibility for violation of contract. In case of non-fulfillment

²⁹ Recommendation Concerning Termination of Employment Recommendation, №166, <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312504:NO>

³⁰ European Labor Law Network (ELLN) –established in 2005, arranges annual seminars to discuss the significant issues of labor law. ELLN provides recommendations and offers the ways for regulation to the European Commission, with respect of issues of labor law.
< http://www.labourlawnetwork.eu/home/home_2014/prm/209/0/index.html>

³¹ *Voss G. H., Haar B. T.*, Common ground in European Dismissal Law, *J. European Labor Law*, №3, 2012, 227.

³² *Hinrichs K., Jessoula M.*, Labour Market Flexibility and Pension Reforms, Great Britain, 2012, 5.

³³ *Ibid.* Non-typical labor contracts imply the part-time, temporary contracts and those, made with the employed persons.

³⁴ *Ibid.*

of obligations by any of the parties the other party is bound with the obligation of setting additional term/ notification and only in exclusive cases the contract may be terminated.³⁵

GLC Subsection “g”, Section 1, Article 37 specifies serious misconduct as the basis for contract termination, but general regulations of termination in case of non-fulfillment provided for by Georgian Civil Code shall be taken into consideration and it shall be explained as the reason specified in Subsection, Section 2, Article 405 of Georgian Civil Code, where additional term and notification is excluded.

WLO Convention No: 158 Article 11 explains that the misconduct should be so serious, that it would be unreasonable to require the employer to continue his employment.³⁶

As for the practices of the foreign countries, e.g. in Germany, according to the Act Protecting from Dismissal³⁷, in case of contract termination by the reason of non-fulfillment of obligations by employee, 4 preconditions shall be taken into consideration: objective evidence that the employee has violated the undertaken obligation, the risk of violation in the future shall be high, the interests of the employer shall be greater than the employee’s interests³⁸ and finally, termination of agreement shall be the only way out of the existing situation. E.g. no possibility of moving of the employee to the other position shall exist.³⁹

Based on the analysis of the above mentioned acts, it is clear that contract violation by the employee must be sufficiently significant to actually exclude any further relations between the parties. And this is the approach to be accepted in Georgian judicial practice and serious misconduct should be understood as impossibility of further fulfillment of the contract.

2.4. Contract Termination for Repeated Violation of the Obligations

According to Subsection “h”, Section 1, Article 37 of Georgian Labor Code, reason of contract termination is violation of obligations by the employer, if the disciplinary measures provided for by the contract or internal regulations were already applied to him. This record requires consistent analysis.

According to Georgian Labor Code, serious misconduct and repeated violation of obligations are separated and this causes certain ambiguity, as if for contract termination serious misconduct by the employer is required, than Subsection “h”, Section 1, Article 37 of GLC stating that any repeated violation may provide basis for termination becomes senseless.

Department of Civil Cases of Supreme Court of Georgia, with regard of the issue of repeated violation of obligations by the employee, states that for the purpose of violation elimination and understanding of the possible legal outcomes, the employer has obligation of responding to each violation. Such response may include warning, or giving additional time for defect recovery. Nature of

³⁵ *Chanturia L., Zoidze B., Shengelia R., Khetsuriani J.*, Comments to the Civil Code of Georgia, Book 3, Tbilisi, 2001, 434.

³⁶ Termination of Employment, Convention №158, 1982, <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312303>

³⁷ The Protection Against Dismissal Act (Kündigungsschutzgesetz).

³⁸ Social status, age etc. of the employee are implied .

³⁹ *Kirchner J., Kremp P. R., Magotsh M.*, Key Aspects of German Employment and Labour Law, Heidelberg, Germany, 2010, 141.

employment relations imply application of warning notification, it is intended to make the employee aware of the existing circumstances, their elimination and possible legal outcomes.⁴⁰

It would be better to specify Subsection “h”, Section 1. Article 37 of GLC, as the basis for termination and clearly distinguish serious misconduct and violation of obligation where the employee is given additional time or warning notification.

In long-term contractual relations, the possibility of maintaining contract in case of non-fulfillment of obligations should be provided and this, regarding the specific nature of employment relations, is even more significant.

Georgian Supreme Court has properly emphasized the significance of warning notification, in the above mentioned decision. Warning is the instrument for maintaining of relations, in a form acceptable for both parties. The main purpose of warning/additional term is to provide proper explanations with respect of violation to the employee and provide him/her the opportunity to properly fulfill his/her obligations.⁴¹

Supposedly, the legislator desired to determine for the employer’s right of termination upon warning without any results/expiry of the additional term by Subsection “h”, Section 1. Article 37 of GLC, but existing formulation is ambiguous, and allows termination in case of two violations by the employee during one year and this contradicts to general rules of contract termination.

2.5 Other Objective Circumstances of Contract Termination

Subsection “n”, Section 1. Article 37 of GLC states that the objective circumstances may comprise the basis for employment contract termination. This basis is unclear and the will of legislator should be clarified to understand what is meant under objective circumstances.

According to general rules established for contract termination, where the contract is terminated not by the reason of violation, termination shall be caused by valid legal basis – where a party cannot be required to continue contractual relations.

Regarding international practice, the reasons regarded as valid basis for contract termination in general, are specified in Article 37 of GLC⁴² and hence, specifying other objective circumstances as the additional possibility of contract termination allows the employer to act arbitrarily, to certain extent.

Maybe, the legislator desired to entitle the employer to contract termination in case of valid reason, therefore, it would be better that the legislator specified that the contract may be terminated by the employer, for valid reason, where employment relations could not be continued, rather than objective circumstances.

Subsection “n”, Section 1. Article 37 of GLC contradicts to Section 2 thereof as well, as the legislator states that contract termination is inadmissible, with the exception of cases where preconditions

⁴⁰ Based on the materials to case, the basis for contract termination was the official letter stating that the employee was unable to fulfill his duties, he could not control his subordinates, in several cases he was drunk at his work place. Decision of the Department of Civil Cases of Georgian Supreme Court of 15 February 2013, № AS-93-88-2013.

⁴¹ *Kirchner J., Kremp P. R., Magotsh M.*, Key Aspects of German Employment and Labour Law, Heidelberg, Germany, 2010, 143.

⁴² *Ibid*, 143.

specified in Section 1 as termination reasons persist. Purpose of Section 2 is to set the preconditions which could become the reason of contract termination for the employer and this purpose would be achieved, unless Subsection “n”, Section 1, Article 37, an ambiguous one, lacking the mechanism of defining of the objective circumstances.

3. Grounds upon which Termination of Employment is Prohibited

Section 2, Article 37 of GLC specified the circumstances, presence of which makes contract termination unacceptable. Primarily, it was established that contracts shall not be terminated for any reason, with the exception of reasons specified in Section 1, Article 37 of GLC. In addition, it specifies different bases, in presence of which contract shall not be terminated, like discrimination, notification of the employer about pregnancy by women employee or conscription for obligatory military or reserve service.

Sections 1 and 2, Article 37 of GLC actually regulate one and the same legal situation, providing different legal bases, such double regulation, supposedly, was formed under the influence of WLO Convention 158 and EC directives, though, it should be noted that EC directives do not offer the uniform rules for employment contract termination, they merely regulate certain issues, like non-discrimination etc. while WLO Convention 158 regulates termination for valid reasons and Article 5 of the Convention specifies the base excluding termination and hence, none of these documents provide for double regulations of contract termination.

It would be better if GLC makes choice between the models of contract termination regulation and puts the contract termination reasons into order.

3.1 Discriminatory Grounds

According to Subsection “b”, Section 2, Article 37 GLC, contract termination for discriminative reasons shall be unacceptable. Type of discrimination, the concept thereof and the circumstances excluding discrimination are regulated by Article 2 of GLC, actually not affected by the amendments. Discrimination was prohibited in employment relations, and in termination of employment contracts among them.

According to Georgian Labor Code, contract termination for discriminative reasons was determined as circumstance excluding contact termination, though, it should be noted that the court unanimously recognized that contract termination for discriminative reasons is an invalid deal. The problem is consideration of discrimination composition, implying consideration of the facts evidencing discrimination and establishing, whether discrimination has taken place or not.

In its decision of 18 October 2012, Georgian Supreme Court explained that to regard dismissal as discriminative action, the relevant facts shall be specified and justified. The fact that order on dismissal was not properly grounded, or that employment relations were terminated with only one of 14 persons at similar positions, shall not be sufficient to make conclusion that the contract was terminated for discriminative reasons.⁴³

⁴³ Decision of the Department of Civil Cases of Supreme Court of Georgia of 18 October 2012, Verdict, № AS-952-895-2012.

On the other hand, according to explanation of Georgian Supreme Court, in examining contract termination, it is necessary to establish, whether dismissal reason was discriminative or not.⁴⁴ The Court explains also that the contract termination right is not and unlimited one, it is always limited by lawfulness of its exercising. According to Article 115 of Georgian Civil Code, the civil rights shall be exercised lawfully.⁴⁵ The issue of lawfulness of right exercising and obligation fulfillment shall be examined.

3.2 Burden of Proof in Considering of Discrimination Disputes

Labor disputes are considered by the courts in accordance with the rules established by Georgian procedural legislation. Articles 3 and 4 of Georgian Civil Procedure Code (GCPC) set the principles of disposition and competition, which could be regarded as the substantial characteristic of civil procedure law.⁴⁶ In addition, Art. 102 of GCPC determines the issue of burden of proof, stating: “each of the parties shall prove the circumstances whereon it bases its claims.”⁴⁷

Rights and obligations of the employer and employee, with respect of burden of proof, in termination of employment relations, were explained by the Department of Civil Cases of Supreme Court of Georgia, in its decision of 24 June 2011.⁴⁸

Cassation court regards that in case of employment contract termination by the employer’s incentive, the lawfulness of right exercising implies that expression of the employer’s will shall not violate the human rights and freedoms guaranteed by the Constitution of Georgia, as well as the principle of non-discrimination provided for by GLC. In case of person’s dismissal, it is necessary to examine, whether it relied upon one of bases, regarded as discriminative, in Art. 2 of GLC, in addition, the burden of proof shall be borne by the employer. In particular, if the employee states that termination of employment relations with him/her was discriminative action, the employer shall prove lawfulness of his/her actions and presence of dismissal reason, which is non-discriminative, otherwise, dismissal shall be deemed unlawful.⁴⁹

According to the court’s explanations, in termination of employment relations, the employee shall specify the discriminative facts of termination of employment relations and the burden of proof shall be borne by the employer, on this basis the most significant principle – the right to apply to the court – is

⁴⁴ Decision of the Department of Civil Cases of Supreme Court of Georgia of 24 June 2012, Verdict № AS-519-493-2011.

⁴⁵ Decision of the Department of Civil Cases of Supreme Court of Georgia of 14 January 2013/ Verdict № AS-1592-1495-2012.

⁴⁶ *Liluashvili T., Khrustal V.*, Comments to Georgian Civil Procedure Code, 2nd ed., Tbilisi, 2007, 200.

⁴⁷ Georgian Civil Procedure Code, Article 102, < <https://matsne.gov.ge/ka/document/view/29962>>.

⁴⁸ Decision of the Department of Civil Cases of Supreme Court of Georgia of 24 June 2012, Verdict № AS-519-493-2011.

⁴⁹ According to the materials to case, the employment relations with the plaintiff T., were terminated on the basis of Subsection “d”, Section 3, Article 37 and Subsection 3, Article 38 of Georgian Labor Code. According to Article 38.3, the plaintiff has received one-month compensation. The plaintiff appealed against the order on contract termination and stated that in the period of his employment he was subject to discrimination for his political views. In addition, the other employees were awarded for overtime work, while he was not. The plaintiff stated that he was dismissed unlawfully. Decision of the Department of Civil Cases of Supreme Court of Georgia of 24 June 2012, Verdict № AS-519-493-2011.

observed. According to the court's explanations, for lawful exercising of the right, it is necessary to properly distribute the burden of proof between the parties.

Such judicial practice is adopted, partly, as a result of amendments, according to Section 3, Art. 40² of Georgian Labor Code and in contract termination for the discriminative reasons the burden of proof is vested in the employer, if the employee specifies the circumstances providing the basis for reasonable belief that the employer's actions had discriminative basis.

Such distribution of burden of proof in case of termination of employment contracts for the discriminative reasons is in correspondence with the EC directives.⁵⁰ 2000/78/EC⁵¹ Directive establishes general regulations of equal treatment in employment relations. According to Article 10 of the Directive, in case of direct or indirect discrimination, the defendant shall prove that no discriminative action has taken place.

4. Procedural Fairness

Contract termination is the right granted to the parties, exercising of which depends on different legal preconditions. Contract termination is provided through expression of will of one of the parties and the legal bases are specified for exercising the contract termination rights by one of the parties.

Art. 37 of GLC specifies the bases, which may become the reason of contract termination but in case of existence of each reason, various material and procedural preconditions preceding contract termination shall be taken into consideration.

The employer's obligation to give warning notification to the employee in case of violation from his /her side shall be distinguished from the obligation of prior notification about contract termination. Informing of the employee about contract termination shall be independent from both preconditions. Each of them carries different contents, comprising different preconditions for termination.⁵²

Warning notification – in case of violation of obligations – is the precondition of contract termination, the employer shall provide additional term / warning notification and if no results are obtained, the right of contract termination shall emerge. Warning notification is intended for maintaining of the contract between the parties.⁵³

Right to prior notification about contract termination is provided by European Social Charter and implies informing of the employee about the decision already made. Prior notification right has the function of the employee's social protection.⁵⁴

For contract termination, it is necessary that the information about mentioned decision was delivered to the employee, contract termination, as expression of the will, cannot be exercised without delivery to the other party.

⁵⁰ *Barnard Ch.*, Employment law, Great Britain, 2013, 328.

⁵¹ Council Directive 2000/78/EC, 27 November 2000, Article 10, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:en:PDF>>

⁵² *Chachava S.*, Competition of Requirements and Requirement Bases in Private Law, Tbilisi, 2010, 106.

⁵³ *Ibid*, 106.

⁵⁴ *Kirchner J., Kremp P. R., Magotsh M.*, Key Aspects of German Employment and Labour Law, Heidelberg, Germany, 2010, 143.

4.1 Obligation of Prior Notification about Contract Termination

It is important to determine the process and procedures which are adopted by the employer preparing termination of contract.

In civil law relations, contract termination is provided by giving notification to the other party. Article 355 of Georgian Civil Code does not provide for the obligation of prior notification about contract termination after emergence of contract termination right, but one of the main characteristics of labor law relations – obligation of care about the employee is reflected in the contract termination rules and a party has the obligation to notify the other party about contract termination in advance.⁵⁵

Georgian Labor Code of 2006 did not provide the employer's obligation of employee's prior notification in case of contract termination by the employer, though Article 38 of GLC provided for the employer's obligation to pay one-month compensation to the employee in case of contract termination by the employer.

Obligation of employee's prior notification in case of contract termination is provided for by European Social Charter, obligating the employer to give prior notification about contract termination to the employee in reasonable time.⁵⁶ The main purpose of this institute is informing of the employee about made decision, in reasonable time before termination to allow the employee seeking of the other job.⁵⁷

According to the explanation of Georgian Court of Appeal, obligation of prior notification provided for by Section 4.4 of European Social Charter is the obligation equivalent to the obligation of payment of the one-month compensation provided for by Section 3, Article 38 of Georgian Labor code and the purpose of prior notification is to ensure payment of the salaries to the employee, for the period reasonably required for seeking of the other job.⁵⁸

Obligation of prior notification in contract termination is provided for by Convention 158 of World Labor Organization, though Article 11 of the Convention states that a party shall be given prior termination notification or the compensation shall be paid.⁵⁹

Right to prior notification provided for by Article 4 of European Social Charter, according to the doctrine, gives the employee the opportunity of seeking new job.⁶⁰ European Committee of Social Rights has considered the issue of compensation, in lieu of prior notification and it concluded that the main purpose is to provide reasonable time to the employee for seeking of the new employment and this purpose may be achieved either by prior notification in reasonable time or payment of the reasonable compensation.

As a result of changes, Section 38.1 of Georgian Labor Code provides for the employer's obligation to give 30-day prior written notification to the employee and in addition, pay no less than one-

⁵⁵ Chanturia L., Zoidze B., Shengelia R., Khetsuriani J., Comments to the Civil Code of Georgia, Book Three, Tbilisi, 2001, 231.

⁵⁶ Hepple B., European Rules on Dismissal Law? J. Comparative Labor Law, 1997, 8.

⁵⁷ C158 - Termination of Employment Convention, № 158.

⁵⁸ Decision of the Department of Civil Cases of Supreme Court of Georgia of 17 May 2012/ Verdict № AS-624-587-2012.

⁵⁹ Davies C.L., Perspectives On Labour Law, Cambridge, United Kingdom, 2004, 159.

⁶⁰ Conditions of Employment in the European Social Charter, Human Rights, Social Charter Monographs -№6.

month labor remuneration. Section 38.1¹ of Georgian Labor Code allows the employer to pay to the employee 2-month compensation and terminate the contract in 3 days from the date of notification.

In EU Member States, the term of prior notification depends on the contract term. Georgian Labor Code does not contain any such provisions, through, as mentioned above, the substance of prior notification and right to compensation is identical, both of them serve to the idea of employee's social protection in case of contract termination and Georgian Labor Code entitles the employee to 2-month compensation, independently from the contract term.⁶¹

4.2 Circumstances Excluding Prior Notification on Contract Termination

Right to prior notification on contract termination emerges only in cases provided for by the law. Article 38 of GLC states that contract termination by the economic reasons or employee's capacity and conduct or other objective circumstances, the employee shall have the right to be notified about decision made. In absence of the other bases specified in Article 37.1 of Georgian Labor Code, the employer shall have no obligation of prior notification.

As mentioned in the previous chapter, Article 4 of European Social Charter provides for the obligation of prior notification, but the annex to European Social Charter explains that prior notification obligation shall not be interpreted as restricting contract termination, in case of non-fulfillment.⁶²

As the basis equal to the circumstances excluding prior notification specified in the annex to European Social Charter, could be regarded Subsection "g", Section 1, Article 37 of Georgian Labor Code, which, as mentioned before, shall be interpreted as the violation of obligations preventing further continuation of the contract.

Right to prior notification on contract termination is the guarantee of employee's social protection and the mentioned preconditions shall be met. In addition, it should be taken into consideration that European Social Charter is ratified by the Parliament of Georgia. Law on Normative Acts and Article 1 of GLC sets the hierarchy of the legislative acts and the international agreements shall prevail over the national legislation. Consequently, the right to prior notification on contract termination provided for by European Social Charter shall emerge at a time of contract termination and exclusions include only violation of such obligations that arises necessity of immediate termination.

4.3 Obligation of Justification of the Contract Termination Decision

Right to contract termination is associated with different legal reasons to be specified in the decision on contract termination.

Article 38.3 of GLC grants to the employee the right to request justification of contract termination decision within 30 calendar days from the date of expression of the employer's will.

⁶¹ *Rasnic D.*, Die Kündigung, Licenciement, Recesso Dal Contrato, „Firing“, or „Sacking“: Comparing European and American Laws on Management Prerogatives and Discretion in Termination Decisions, J, „Indiana International And Comparative Law Review“, 2008, 3.

⁶² European Social Charter , <<http://www.ombudsman.ge/uploads/other/1/1199.pdf>>.

Within 7 calendar days from the date of employee's request, the employer shall provide written legal justification of contract termination to the employee and the employee shall have the right to apply to the court, within 30 calendar days from the delivery date.

Sections 5 and 6 of Article 38 of Georgian Labor Code are of great significance, as these sections regulate the terms of application to the court. The employee shall have the right to appeal against the decision on contract termination within 30 days from the date of delivery of contract termination justification, but if the employer fails to provide contract termination justification to the employee within 7 calendar days, the employee shall have the right to apply to the court within 30.

Article 38 of Georgian Labor Code does not regulate the case where the employee does not request contract termination justification. Certainly, the employee shall not be deprived of the right to apply to the court guaranteed by the Constitution and through explanation of Section 5, Article 38 of Georgian Labor Code, it should be established that the employee shall have the right to apply to the court within 30 calendar days from the date of contract termination decision.

Article 38 of Georgian Labor Code provides for exclusive right of distribution of burden of proof and states that if the employer fails to justify its decision, within 7 days from the date of termination, the burden of proof of the factual circumstances of case shall be borne by the employer.

Logically, if the employee fails to request justification of contract termination and directly exercises his/her right to apply to the court, distribution of burden of proof shall be provided in accordance with the provisions of Georgian Civil Procedure Code.

It is also significant to find out, what justification of contract termination means. As a result of considering of the legal nature of contract termination it is clear that justification of contract termination shall necessarily specify the reasons for which the employer has terminated the contract.

In this respect, example of France is of interest, where the employer shall give written notification on possible termination to the employee. By the same notification the employer appoints the meeting with the employee to discuss the reasons of termination and after this, the employer gives to the employee the written notification on the decision made.⁶³ Example of legal regulation in France clearly shows that the procedure of contract termination allows the parties to make informed decision.

To ensure achievement of legislator's real purpose – balanced protection of the employer's and employee's rights, it would be better to state that the employer shall act according to the proportionality principle and emphasize in justification of contract termination why there was no any other, more light means and why termination was necessary and this shall become the main part of contract termination justification.

5. Legal Outcomes of Noncompliance with the Contract Termination Procedures

Contract termination is based on material and procedural preconditions provided for by the law. Contract termination is unilateral binding expression of will to be deemed void if in breach of the rules

⁶³ *Rasnic C. D.*, Die Kündigung, Licenciement, Recesso Dal Contrato, „Firing“, or „Sacking“: Comparing European and American Laws on Management Prerogatives and Discretion in Termination Decisions, *Indiana International And Comparative Law Review*, 2008, 3.

established by the law.⁶⁴ According to Article 61 of Georgian Civil Code, the void contract is void from the moment of its execution and it shall have no any legal outcomes.⁶⁵ Hence, if in avoidance of the contract the preconditions provided for by the law are not met, the deal shall be void and does not provide the relevant outcome – termination of the contract.

According to Article 38.7 of Georgian Labor Code, if the decision on contract termination is void, the employer shall restore the person in his/her position or provide to him/her the equal job or pay compensation, in amount specified by the court.

Legal outcomes of contract termination shall not arise, if the employer fails to provide all preconditions for contract termination, e.g. if the violation is insignificant, or any other preconditions discussed in the previous chapters.

Procedural preconditions for contract termination are specified in Sections 1 and 1¹ of Article 38 of GLC, contract termination shall not be deemed valid if notification thereof is not given to the other party.

Employer's obligation to justify decision on contract termination is not a procedural precondition for contract termination. This would cause only transfer of burden of proof to the employer in case of dispute.

As mentioned before, invalidity of contract termination automatically results in restoration of the employee to his/her job, as contract termination has not taken place. According to GLC, if a person cannot be restored to the previous position, the employer shall ensure the other, equal employment to the employee. No legal definition of equal employment exists, it would be better if the definition of equal employment is provided on the basis of assessment of the substantial terms and conditions of employment contract.

6. Relations after Contract Termination

In employment relations, one of the obligations of the employee is not to compete with his/her employer.⁶⁶ Contract preventing the employee from making use of his/her knowledge and experience, in general, is against the principle of competition, but the legislation assumes possibility of such restriction in contractual terms and for this the legitimate purpose shall exist.⁶⁷

EU competition law provides 2-year term for competition restriction, in relation with the commercial agents.⁶⁸ In EU Member States competition restriction is regulated by the national legislation of each state, as well as the contracts made between the parties.

There are number of criteria for examination of lawfulness of restriction of employment right. The main criterion is the lawful interest and contract terms and conditions, implying that imposing of restriction should be reasonable in the area of employee's work,⁶⁹ restriction shall be imposed in the relevant time and space and the employee's interests shall be taken into consideration.⁷⁰

⁶⁴ *Chachava S.*, Competition of Requirements and Requirement Bases in Private Law, Tbilisi, 2010, 105.

⁶⁵ *Chanturia L., Akhvlediani Z., Soidze B.*, Comments to the Civil Code of Georgia, Book One, Tbilisi, 1999, 198.

⁶⁶ *Weiss M., Schmidt M.*, Labour Law and Industrial Relations in Germany, The Netherlands, 2008, 147.

⁶⁷ *Barnett D., Scrope H.*, Employment Law Handbook, London, United Kingdom, 2008, 47.

⁶⁸ EU Directive of December 18, 1986 (Abl. L382/17)

⁶⁹ *Holland J., Burnett S., Millington P.*, Employment law, Oxford, United Kingdom, 2015, 203-204.

⁷⁰ *Weiss M., Schmidt M.*, Labour law and Industrial Relations in Germany, The Netherlands, 2008, 147.

In general, it is hard to determine and establish, whether 1-year or 6-month restriction is the best, each case shall be subject to separate evaluation.⁷¹ For example, in Germany, the restriction term shall not exceed 2 years from the date of contract termination and the employer shall pay to the employee the amount equal to half of his/her salaries before contract termination, for the entire term of restriction.⁷²

Legislations of different countries set different preconditions for restriction of the right to labor, e.g. in the Netherlands such restriction shall be made in written.⁷³ Restriction of the right to be employed by the competitor enterprise may be associated with labor remuneration, e.g. in Belgium, the employee, whose annual remuneration does not exceed Euro 53.834, shall not be subject to restriction of employment right.⁷⁴

Article 46 of Georgian Labor Code of 2006 provided for imposition of restriction and explained that such restriction shall be reasonable and shall correspond to the interests and Part 3 of Article 46 of GLC stated that restriction may be imposed for 3-year period, it did not provide for any obligation of compensation or any other allowances to the employee in the period of restriction and this could cause hardships to the employee.

As a result of changes made to Georgian Labor Code, the restriction time limit was changed and was set to 6 months from the date of termination of employment relations, in addition, the employer was obligated to pay compensation, in proportion with the remuneration before termination of employment contract.

Though, as a result of changes Section 1, Article 46 of GLC stating the preconditions for restriction was cancelled. The reason of elimination of the mentioned provisions is unclear as these preconditions comprised the primary criterion for imposing of restriction on employee to work with the competitor enterprise. The mere facts that the term of restriction and compensation obligations were established, should not mean that the employer shall have the right to impose restrictions on the employee in any case.

Article 46 of Georgian Labor Code states that labor contract may provide restriction and this means that at a time of making employment contract or after emergence of employment relations the parties may agree upon certain restrictions, it is interesting, if no any such agreement exists before contract termination, is it acceptable to impose such restriction after termination thereof? IT would be better to specify in GLC, at what stage the restriction may be imposed.⁷⁵

It is also interesting, if the employer decides to make change to the contract, dealing with the restriction provided for by Article 46 of GLC, the employee's rejection to such restriction could be regarded as failure to agree upon substantial terms and conditions? And may rejection of this condition be regarded as the objective basis for contract termination?

Section 9, Article 6 of GLC sets the substantial contract terms and conditions and the list of such terms and conditions does not contain any provisions about further employment restrictions. Changes to the contracts are regulated by Article 11 of Georgian Labor Code, specifying which of the terms and

⁷¹ *Holland J., Burnett S.*, Employment law, Oxford, United Kingdom, 2015, 204.

⁷² *Weiss M., Schmidt M.*, Labour law and Industrial Relations in Germany, The Netherlands, 2008, 147.

⁷³ *Kontrimas A., Samsa M.*, International Expatriate Employment Handbook, 2006, 439.

⁷⁴ *Ibid*, 439.

⁷⁵ *Holland J., Burnett S.*, Employment Law, Oxford, United Kingdom, 2015, 203-204.

conditions are not substantial and which of them may be changed by the employer without prior agreement with the employee. By logical interpretation of article 11 it may be established that imposing of restrictions on further employment is a substantial condition, irrespective the fact that Section 6.9 of GLC does not include the issue of restrictions as the substantial contractual condition.

7. Conclusion

With respect of regulation of contract termination, changes made to GLC should be regarded as a step forward, as the reasons of contract termination were specified and analysis of changes clearly demonstrate the main goal of legislator – ensuring lawfulness of contract termination. But it should be taken into consideration that the concept of contract avoidance was removed from the Labor Code and this is the legal gap. Now the legal reasons specified in Article 37 of Labor Code comprise the avoidance reasons and hence, contract avoidance in GLC should be regulated as the form of contract termination and the reasons of contract avoidance shall be defined.

In determining the regulations for termination of employment contracts the goal of labor code to safeguard the employee's interests and provide various mechanisms for maintaining of the contract should be taken into consideration.

Regulations of employment contracts termination shall be based on the principle of proportionality and should allow the employee termination in presence of relevant reasons and on the other hand, it should set the standards for safeguarding of the employees, which could be achieved through providing mechanisms for caring about the employees' conduct in the labor regulations and through improvement of the employees' skills.

Salome Kerashvili*

Peculiarities of the Carrier's Responsibility for Transfer of Cargo without Production of Bill of Lading

1. Introduction

A bill of lading plays an important role in the sphere of international sea transportation. It is recognized as a shipment document of critical importance by a legislator, as well as by experts.¹ According to the international acts, as well as to the Georgian legislation, the cargo carrier must produce a bill of lading, so that the consignee will receive the cargo from him. However cargo is very often transferred by violating this general rule. The purpose of the work is to show the carrier's responsibility mechanism in case when he transfers cargo violating this rule.

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

Within the scope of the work there will be discussed a legal nature of a bill of lading, as a multifunctional shipping document, a rule of its production and the carrier's responsibility for transferring cargo without production of the bill of lading. These questions will be discussed from the point of view of the Georgian legislation, as well as of the international acts effective in Georgia and the corresponding international practice.

2. A legal Nature of the Bill of Lading

A bill of lading is one of the oldest commercial documents, which as a matter of fact was established in the 16th century as a negotiable instrument.² According to the "United Nations Convention on the Carriage of Goods by Sea, 1978" a bill of lading is a document, which evidences a contract of carriage by sea and taking over or loading of the goods by the carrier and by which the carrier undertakes to deliver goods in lieu of this document. A provision in the document that the goods are to be delivered to the order of a named person or to the order or to the possessor of this document constitutes such an obligation³

A bill of lading will be issued by the carrier after the goods have been placed on a ship.⁴ In practice the carrier issues the bill of lading in the form of two or three originals of the equal legal force. Considering a concrete transaction a seller, a consignor, consignee or a bank, issuing a transit credit, might have the right of possession of a bill of lading. Submission and delivery of one of the originals in lieu of the goods

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¹ *Murray D.E.*, History and Development of a Bill of Lading; "University of Miami Law Review", 1982 - 1983, 732 <www.heinonline.org>.

² *Ibid*, 170.

³ United Nations Convention on the Carriage of Goods by Sea, 1978, Article 1(7), <www.nccl.ge>.

⁴ *Lee B.M., Yang J.H.*, The Bill of Lading Functioning as the Contract of Carriage in English Law, "Journal of Korea Trade", Vol. 10, №2, August 2006, 170, <www.ccpshost.com>.

causes nullifying of the rest of the copies of originals.⁵ A bill of lading, as security, is a document of the stated form, which must be produced in order to receive the fulfillment of the obligation by the property right, expressed in it.⁶ Its main role is to deliver goods to the authorized person at the place of destination. It results from the rule of producing the bill of lading, which means production of the original of the bill of lading to the carrier in lieu of the goods.⁷ Before the consignor hands over the bill of lading to the third person, he can carry out the consignee's rights himself: can demand changing of the conditions of the bill of lading, if it is not the result of the false interpretation of the facts and name himself as a consignee.⁸ According to the common opinion the bill of lading is a symbol of "a warehouse key".⁹

In the international commercial law the bill of lading has three goals: it traditionally confirms the acceptance of goods, performs functions of contract of carriage and a document of title.¹⁰

2.1. The Bill of Lading as Evidence of Goods Receipt

First of all in the ownership of the carrier the bill of lading is the evidence of goods receipt. It contains the information about the quantity of goods, its characteristic features, volume, weight and visible condition; it determines identities of the consignor, carrier and consignee. The carrier must write in the bill of lading any damages of the goods, which were observed before transferring them. It saves the carrier from the compensation of the damage, which were not caused by him.¹¹

2.2. The Bill of Lading as a Document of Title

The bill of lading is functioning as a document of title.: a) it represents a property allowing a purchaser to dispose the goods in transit; b) it transfers to the consignee indirect possession of goods; c) the property ownership can be transferred by it, if the parties intend to do so;¹² d) the bill of lading provides its owner with the right to accept the goods in his direct ownership from the carrier.¹³

The successful use of the bill of lading in the international trade was due its negotiable character, as a security. As the shipment of goods was connected with quite big amount of money, a title bearing document became essential, so that the goods owner could receive credit for international shipment or sell goods in transit.

⁵ *Williams S.M.*, Something Old, Something New: The Bill of Lading in the Days of EDI, "Transnational Law & Contemporary Problems", Vol. 1555, 1991, 560, <www.heinonline.org>.

⁶ *Zarnadze E.*, Order Security Paper and Basic Aspects of its Lawful Regulation, the journal "Justice and Law", №2, Tbilisi, 2011, 51.

⁷ *Smeele G.M.*, Bill of Lading Contracts under European National Laws – civil law approaches to explaining the legal position of the consignee under bills of lading, "The Evolving Law and Practice of Voyage Charter Parties", *Rhidian Th.*, London, 2009, 251, <www.repub.eur.nl>.

⁸ *Chan L.S.*, Holder of Bill of Lading, "Singapore Academy of Law Journal", 1996, 358, <www.heinonline.org>.

⁹ *Ibid*, 355.

¹⁰ *Williams S. M.*, Something old, something new: The bill of lading in the Days of EDI, "Transnational Law & Contemporary Problems", Vol. 1555, 1991, 560, <www.heinonline.org>.

¹¹ *Ibid*, 560–561.

¹² *Ibid*, 561.

¹³ *Lee B.M., Yang J.H.*, The Bill of Lading Functioning as the Contract of Carriage in English Law, "Journal of Korea Trade", Vol.10, N.2, August 2006, 170 – 171, <www.ccpshost.com>.

Here it should also be noted, that the bill of lading has a negotiable character, if it is made up as an ordering or bearer security.¹⁴ But the legal character of the straight bill of lading is a subject of discussion in science. Some scholars think, that this is a case of the modified Waybill, for example, in American jurisprudence it is considered as a hybrid of the bill of lading and a waybill and a non-negotiable document, because it provides the right only for the named person.¹⁵

Caution is needed when discussing ordering and bearer bills of lading as negotiable securities. According to the predominant opinion in England's jurisprudence the bill of lading in spite of its endorsement rule is not of negotiable character, but is transferable document. The basis of such position is the fact, that the owner of the bill of lading does not get a better right, than its transferor has.¹⁶ Thus according to English law a bona fide purchaser of a lost or stolen bill of lading will not be able to get the right to the goods, while in case of other negotiable instruments he does not have obligations to check the legal relationships beyond this document. The reason of such approach is the fact that a bona fide purchaser will not be able to get the right to the cargo, as to the movable property, if it has been stolen or lost. Therefore the security, which merely represents a cargo, will not be subjected to a different rule.¹⁷ Generally a document of title provides the right to money or economic benefit, but the bill of lading, represents cargo as a symbol and its possession is equivalent only to the possession of the cargo defined by the bill of lading.¹⁸ As transfer of the indorsed bill of lading functions symbolically, as a transfer of a cargo, property rights to cargo are being transferred by the indorsed bill of lading only when the parties intend to do so.¹⁹ For example, in number of cases the bill of lading will not transfer the property right or other title, if the shipment payment is not paid.²⁰ Therefore the use of the bill of lading by bank, as the collateral, must be preceded by checking which property rights it provides.²¹ It should be noted, that the abstraction principle from the general shipment contract is the main characteristic feature, shared by the bill of lading and other negotiable security papers. It means that a bona fide receiver after getting the bill of lading might get better, different or worse rights, than it was foreseen by the shipment contract between the consignor and the carrier. Though unlike the negotiable securities the rights consolidated in the bill of lading can be protected by the legislative liability regime of the carrier. It means that the consignee's right to accept or raise a claim for compensation of the damage, might fail, if the loss or

¹⁴ Ibid,176. *Williams S. M.*, Something Old, Something New: The Bill of Lading in the Days of EDI, "Transnational Law & Contemporary Problems", Vol. 1555, 1991, 562, <www.heinonline.org>.

¹⁵ *Pejović, Č.*, Delivery of goods without a bill of lading: revival of an old problem in the Far East, "Journal of International Maritime Law", Vol. 9 (5), 2003, 461-462.

¹⁶ *Wai W.L.K.*, Non-delivery under Forged Bills and in the Absence of Original Bills and Exemption Clauses, Society of Maritime Arbitrators Inc. USA, Vol. 34, 2002, 1, <www.smany.org>.

¹⁷ *Lincoln, S. F.*, Bills of Lading, Cornell University, 1892, 17- 20, <www.scholarship.law.cornell.edu>.

¹⁸ *Lee B.M., Yang J.H.*, The Bill of Lading Functioning as the Contract of Carriage in English Law, "Journal of Korea Trade", Vol. 10, №2, August 2006, 176-177, <www.ccpshost.com>.

¹⁹ *Wai W.L.K.*, Non-delivery under Forged Bills and in the Absence of Original Bills and Exemption Clauses, Society of Maritime Arbitrators Inc. USA, Vol. 34, 2002, 1, <www.smany.org>.

²⁰ *Lee B.M., Yang J.H.*, The Bill of Lading Functioning as the Contract of Carriage in English Law, "Journal of Korea Trade", Vol. 10, №2, August 2006, 176-177, <www.ccpshost.com>.

²¹ *Chan L. S.*, Holder of Bill of Lading, "Singapore Academy of Law Journal",1996,357 <www.heinonline.org>.

damage of the cargo is caused by invincible (*Force Majeure*) or other circumstances excluding or restricting liabilities, foreseen by the law.²²

2.3. The Bill of Lading as a Contract

The bill of lading is functioning as a contract²³: after the carrier issues a bill of lading, he subjects the shipowner to contractual obligations to transfer cargo to the legal owner of the bill of lading.²⁴ In the relationship between the carrier and the consignee the bill of lading defines contractual obligations between the abovementioned parties.²⁵ By transferring the bill of lading to the bona fide third person the carrier loses the right to present a complaint regarding the conditions of the bill of lading, as the consignee trusts its content.²⁶

The bill of lading is also functioning as a contract of carriage between the consignor and the carrier, if there was no other shipment agreement concluded.²⁷ Moreover according to some scholars, considering the commercial reality, the bill of lading can be discussed without any precondition, as a contract itself between the consignor and the carrier, as it conducts the whole shipment process.²⁸ This position is also favored by Article 672 of civil code of Georgia, according to which the shipment contract must be made up in the form of a transportation document.²⁹

2.4. The Bill of Lading as *Prima Facie* Evidence

The bill of lading is functioning as prima facie evidence for those shipping agreements which were concluded between the initial parties.³⁰ Unlike Georgian legislation, not all jurisdictions demand a

²² *Smeele G.M.*, Bill of Lading Contracts under European National Laws -Civil Law Approaches to Explaining the Legal Position of the Consignee under Bills of Lading, "The Evolving Law and Practice of Voyage Charter Parties", *Rhidian Th.*, London, 2009, 255-256, <www.repub.eur.nl>.

²³ See Maritime Code of Georgia, Parliament Information, 25-26, 14/06/1997, Article 118. Part 1.

²⁴ *Wai W.L.K.*, Non-delivery under Forged Bills and in the Absence of Original Bills and Exemption Clauses, Society of Maritime Arbitrators Inc. USA, Vol. 34, 2002, 2, <www.smany.org>. See Maritime Code of Georgia, Parliament information, 25-26, 14/06/1997, Article 148.

²⁵ *Lee B.M., Yang J.H.*, The Bill of Lading Functioning as the Contract of Carriage in English Law, "Journal of Korea Trade", Vol.10, №2, August 2006, 175, <www.ccpshost.com>. See Maritime Code of Georgia, Parliament information, 25-26, 14/06/1997, Article 118. Part 2.

²⁶ *Murray D.E.*, History and Development of the Bill of Lading; "University of Miami Law Review", 1982-1983, 730, <www.heinonline.org>.

²⁷ *Williams S.M.*, Something Old, Something New: The Bill of Lading in the Days of EDI, "Transnational Law & Contemporary Problems", Vol. 1555, 1991, 561, <www.heinonline.org>.

²⁸ *Lee B.M., Yang J.H.*, The Bill of Lading Functioning as the Contract of Carriage in English Law, "Journal of Korea Trade", Vol. 10, №2, August 2006,170, <www.ccpshost.com>. *Debattista C.*, The Bill of Lading as the Contract of Carriage -A Reassessment of *Leduc v Ward*, "Modern Law Review", Vol. 45, Issue 6, 1982, 654, <www.onlinelibrary.wiley.com>.

²⁹ See The Georgian Civil Code, Parliament Information 31, 24/07/1997 Article 672, Sentence 1.

³⁰ *Williams S.M.*, Something Old, Something New: The Bill of Lading in the Days of EDI, "Transnational Law & Contemporary Problems", Vol.1555, 1991, 561, <www.heinonline.org >. See Maritime Code of Georgia, Parliament information, 25-26, 14/06/1997, Article 118. Part 120, Part 2, International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules"), Brussels, 1924, Article 3 (4), <www.asil.org >.

written form for the shipping agreement.³¹ Within the scope of the international trade a shipping agreement can be concluded in writing or as a result of exchanging letters, there is no objection to concluding this agreement orally, simply by means of exchanging offer and acceptance. Often, only the main regulations of the contract are envisaged by the parties by such an agreement, such as the place of sending/shipping/delivery of cargo and of payment for freight, but other issues are settled according to the applicable law and standard conditions of the carrier service. Later, when it is necessary to issue a bill of lading, further instructions of the consignor to the carrier are being drawn up.³² Besides, according to the civil code of Georgia, for the authenticity of the shipping agreement it is not necessary to form the agreement as a transportation document.³³ As the Supreme Court noted in one of its decisions “The main point in such a case is that the legal relationship between parties must point clearly to the conclusion of a shipping contract.”³⁴ For example, the document confirming the existence of a shipping agreement might be waybills of transfer or memorandums of the acceptance and delivery of cargo.³⁵

Thus the contents of the main agreement can be resulted from the carrier’s statements, freight tariffs, reservation conditions, billposter and the practice established between a consignor and a carrier and of course from the bill of lading itself.³⁶

The bill of lading is a strong evidence of the fact, that the cargo mentioned in it is transferred to a concrete person, but it is only the evidence and is open to objections and explanations.³⁷ Thus if the carrier has a complaint against the consignor about the quality of the cargo, he must overcome *Prima Facie* evidence existing in the bill of lading about the condition of the cargo.³⁸ If the conditions of the bill of lading oppose the conditions of the shipping agreement, it might lose the evidential value and become a document confirming only the acceptance of the cargo between the consignor and the carrier.³⁹

The goal of the principle of *Prima Facie* evidence is to protect interests of a bona fide (third person) consignee, who based on the contents of the bill of lading wants to get the rights described in the document of title.⁴⁰

³¹ See Maritime Code of Georgia, Parliament information, 25-26, 14/06/1997, Article 114. Part 1.

³² *Smeele G.M.*, Bill of Lading Contracts under European National Laws- Civil Law Approaches to Explaining the Legal Position of the Consignee under Bills of Lading, “The Evolving Law and Practice of Voyage Charter Parties”, *Rhidian Th.*, London, 2009, 252, <www.repub.eur.nl>.

³³ Civil Code of Georgia, Parliament’s Information, Parliament Information, 31, 24/07/1997 Article 672, Sentence2.

³⁴ See the decision of Supreme Court of Georgia, case №453-695 – 08, 21.01.2009, <<http://prg.supremecourt.ge/>>.

³⁵ See the decision of Supreme Court of Georgia, case № 923- 868 - 2012; 24.09.2012. See the decision of Supreme Court of Georgia, case № Tran 1806-1780-2011; 06.02.2012, <<http://prg.supremecourt.ge/>>.

³⁶ *Lee B.M., Yang J.H.*, The Bill of Lading Functioning as the Contract of Carriage in English Law, “Journal of Korea Trade”, Vol. 10, №2, August 2006, 170, <www.ccpshost.com>.

³⁷ *Cobbs T.H.*, Bills of Lading Given for Goods Not in Fact Shipped, *The Yale Law Journal*, Vol. 7, №4 (Jan. 1989), 172-173, <www.jstor.org>.

³⁸ *Murray D.E.*, History and Development of the Bill of Lading; “University of Miami Law Review”, 1982-1983, 708, <www.heinonline.org>.

³⁹ *Lee B.M., Yang J.H.*, The Bill of Lading Functioning as the Contract of Carriage in English Law, “Journal of Korea Trade”, Vol. 10, №2, August 2006, 171, <www.ccpshost.com>.

⁴⁰ *Smeele G.M.*, Bill of Lading Contracts under European National Laws -Civil Law Approaches to Explaining the Legal Position of the Consignee under Bills of Lading, “The Evolving Law and Practice of Voyage Charter Parties”, *Rhidian Th.*, London, 2009, 255, <www.repub.eur.nl>.

3. Carrier's Liabilities for Delivery of Cargo without Production of the Bill of Lading

Delivery of cargo without producing the bill of lading remains one of main problems in the international trade. Because of technological innovations ships move much faster and often arrive at the destination place earlier, than the bill of lading by air mail.⁴¹ In some countries a bill of lading, as a transaction part of a documentary credit, might "not become free" from a bank system for a long time. Sometimes the bill of lading gets lost on its way; but a consignee wants to get cargo in time. Subsequently, he puts a big pressure on the carrier, as well as on his agent, so that he can get cargo as fast as possible after unloading it, the ship owners and carriers, on their part, don't want deferment of the ship voyage while expecting of the arrival of such a document.⁴²

3.1. Delivery of Cargo

In order to define the results of infringement of the rule of producing the bill of lading by the carrier it is necessary to detect what a delivery of cargo means.

legislative acts, as well as the practice of cargo transportation point out, that a delivery of cargo is an essential segment of the shipping contract. As it is clear from the nature of shipping contract, the main duty of the carrier, is to transport goods from one place to another and make them accessible for the consignor or the third person. That's why some contemporary scholars explain "shipment" as "carriage of the accepted cargo to the destination and custody of this cargo from the day of its acceptance until its delivery at the place of destination". As a rule, by delivery of the cargo to the consignee the shipment agreement is considered as fulfilled. Thus, the carrier is discharged from liability stemming from the contract of carriage⁴³

As the carrier is acting according to the principal's instructions, he, as a direct (factual) possessor is obliged to return the goods to its indirect possessor. In short, delivery of cargo can be described as "voluntary transfer of the possession from one person to the other", and the delivery in the scope of the shipment agreement can be described as "a transfer of the complete possession of the goods from the carrier to the consignee".⁴⁴

At a glimpse, the concept of delivery does not need explanation, but we often face certain obscurity in practice, when interpreting the delivery of goods.⁴⁵

⁴¹ *Williams S. M.*, Something Old, Something New: The Bill of Lading in the Days of EDI, "Transnational Law & Contemporary Problems", Vol.1555, 1991, 564, <www.heinonline.org>.

⁴² *Tetley W.*, Letters of Indemnity at Shipment and Letters of Guarantee at Discharge, "European Transport Law", 2004, 312, <www.mcgill.ca>.

⁴³ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 30-32, <<http://repub.eur.nl>>.

⁴⁴ *Ibid*43-44.

⁴⁵ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 55, <<http://repub.eur.nl>>.

“The Hague-Visby Rules”⁴⁶ don’t explain what is meant under the term unloading or delivery of cargo.⁴⁷ “The Hamburg Rules”⁴⁸ was the first international act defining criteria of delivery of cargo: in the first place delivery is carried out “by handing over the cargo to the consignee”. By the traditional opinion, delivery is connected with physical transfer of the cargo. Consequently, according to some authors “delivery of cargo in physical (direct) possession ” is its delivery , but we must not forget, that technical means are often used in modern shipment and intermediates are also quite widely intervening in operations. Thus, physical handing of the cargo between persons is hardly ever carried out. Besides, if we support this position, in case of nonappearance of the consignee, the carrier will still be responsible for the cargo, which will not put him in an enviable position .⁴⁹ In such a case the cargo, as a rule, is kept in a warehouse of the place of destination, by which the carrier’s obligation – to deliver the cargo to the consignee – is terminated.⁵⁰

According to “The Hamburg Rules”, when the consignee does not accept the cargo, it is sufficient to place the cargo at his disposal taking into account conditions of the agreement, the law and the established customs.⁵¹ The positive side of this explanation is its judicial base, which does not depend on its physical manifestation, though the difficulty of this explanation is in determining the fact, when cargo comes under the disposal of the consignee’s. The authority of disposal of the cargo doesn’t always belong to carrier, but to the consignor, the consignee or the third person. Respectively, the carrier always acts under their instructions. So until the delivery of the cargo, it might stay at the consignee’s disposal. Besides if we use the judicial aspect of the delivery, the cargo can be counted to be delivered even while being in transit but the agreement of the parties for example, if the intention of the parties was, that the carrier’s rights and obligations to be ceased as soon as the ship arrived at the destination port. Such a mechanism contradicts legislative regulations of the carrier’s liabilities, according to which he is responsible to take care of the cargo at least until unloading it.

Therefore, the delivery of the cargo contains not only the factual delivery, but also its legal aspects. Its juridical basis might be revealed in the will of the parties, as well as in legislative regulations, which don’t always mean a physical process of delivery.⁵² Thus delivery is carried out not only when the consignee takes the cargo into possession physically, but also when he has the opportunity of doing so.⁵³

⁴⁶ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (“Hague Rules”). Brussels, 1924, <www.asil.org>.

⁴⁷ *Leung W.*, Non-delivery of Cargo without Production of Original Bill of Lading: Applicability of the Mandatory Legal Regime of Hague-Visby and the One Year Time Bar, “Journal of Maritime Law & Commerce”, Vol. 39, №2, April, 2008, 210-211, <www.jmlw.com>.

⁴⁸ United Nations Convention on the Carriage of Goods by Sea, 1978.

⁴⁹ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 55-56, <<http://repub.eur.nl>>.

⁵⁰ *Ibid.*, 59.

⁵¹ United Nations Convention on the Carriage of Goods by Sea, 1978, Article 4 (2 „b”), <www.ncll.ge>.

⁵² *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 56-58, <<http://repub.eur.nl>>.

⁵³ *Leung W.*, Non-delivery of Cargo without Production of Original Bill of Lading: Applicability of the Mandatory Legal Regime of Hague-Visby and the One Year Time Bar, “Journal of Maritime Law & Commerce”, Vol. 39, №2, April, 2008, 210-211, <www.jmlw.com>.

To avoid the abovementioned obscurity, it is desirable to identify delivery on the basis of the estimation of the performed shipment operations for each concrete case.⁵⁴

3.2. Period of the Carrier's Liabilities and Delivery of Cargo

Generally, in order to ensure the contractual freedom of parties international transportation conventions don't function in relation to the shipment agreements, but transferring the bill of lading to a bona fide third person is the basis of obligatory responsibilities envisaged by the international acts of carriage of the goods by sea.⁵⁵ The period of obligatory liabilities means a time segment, during which the goods are under the carrier's custody and accordingly, during this period, he is responsible for losing or damaging it, but for the obligations occurring beyond this period, carrier will only be responsible in case of acting with an intent or with gross negligence.⁵⁶

According to "The Hamburg Rules" the carrier is responsible for loss resulting from loss or damage to the goods, if the occurrence which caused the loss or damage took place while the goods were under his custody⁵⁷, but "goods being under the custody" is explained by the Convention as "period of time from acceptance of goods by the carrier until their delivery". Thus the period of obligatory liabilities envisaged by "The Hamburg Rules" contains also the obligation of delivery of goods.⁵⁸

Many scholars think, that unlike the "Hamburg Rules", "Hague-Visby's Rules" don't regulate relationships occurred after the unloading⁵⁹ and accordingly the mechanism of the obligatory liabilities of this Convention does not cover the case of delivery of goods without the bill of lading.⁶⁰ The reason of this is the fact, that the scope of "Hague-Visby's Rules" does not cover the process of delivery goods, because this Convention is more oriented on rights and obligations connected with transportation and safety of cargo.⁶¹ "Hague-Visby's Rules" explains shipment of goods as a period of time after the goods have been placed (loaded) on ship including time period of unloading them. Thus it is considered that the legal relationship existed before loading/unloading the goods is subjected to the agreement regulation and the

⁵⁴ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 58, <<http://repub.eur.nl>>.

⁵⁵ *Smeele G.M.*, Bill of Lading Contracts under European National Laws -Civil Law Approaches to Explaining the Legal Position of the Consignee under Bills of Lading, "The Evolving Law and Practice of Voyage Charter Parties", *Rhidian Th.*, London, 2009, 253-254, <www.repub.eur.nl>.

⁵⁶ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 34-35, <<http://repub.eur.nl>>.

⁵⁷ United Nations Convention on the Carriage of Goods by Sea, 1978, Article 5, <www.nccl.ge>.

⁵⁸ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 34, <<http://repub.eur.nl>>.

⁵⁹ *Tetley W.*, Letters of Indemnity at Shipment and Letters of Guarantee at Discharge, "European Transport Law", 2004, 312, <www.mcgill.ca>.

⁶⁰ *Leung W.*, Non-delivery of Cargo without Production of Original Bill of Lading: Applicability of the Mandatory Legal Regime of Hague-Visby and the One Year Time Bar, "Journal of Maritime Law & Commerce", Vol. 39, №2, April, 2008, 207-227, <www.jwllw.com>.

⁶¹ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 12, <<http://repub.eur.nl>>.

regime of obligatory liabilities stated by “Hague-Visby’s Rules” don’t cover these actions.⁶² Court precedents of different countries share this opinion and don’t apply “Hague-Visby’s Rules” to legal relations that occurred after unloading, so if the parties want to apply the carrier’s liabilities mechanism provided by “Hague-Visby’s Rules”, they must foresee the noted condition in the bill of lading.⁶³

Some scholars disapprove of such usage of “Hague-Visby’s Rules” and are saying, that the scope of the carrier’s liabilities foreseen by “Hague Rules” was modified by “Hague-Visby Rules” just for the purpose of covering the relations after the unloading, including obligations connected with delivery of goods.⁶⁴ Unlike the first edition, the period of the obligatory liabilities period of “Hague-Visby’s Rules” covers not only a case of loss and damage of goods, but “all the other obligations connected to cargo”.⁶⁵ Besides, in the opinion of the opponents, in 1924, when “Hague-Visby’s Rules” were adopted, there was not such a high level of globalization and the scenario, which was envisaged by the legislator is not effective today. Subsequently, as a result of carriage by sea, goods might cover 100 km from its unloading place to delivery point before the consignee really gets them.⁶⁶

In practice in order to eradicate the obscurity connected with the carrier’s liabilities many bills of lading contain so called “before and after clause”, which excludes carrier’s liabilities before loading and after unloading of cargo.⁶⁷ such condition can be foreseen under “Hamburg” and “Hague-Visby Rules”,⁶⁸ as well as under the Georgian Maritime Code.⁶⁹ If such agreement does not exist, according to the general provisions of Georgian legislation the carrier’s liability for the loss of goods will be prolonged until delivery of goods.⁷⁰

In case of exclusion of the carrier’s obligatory liabilities after unloading, some scholars characterizes the carrier’s obligation to take care of the goods until the delivery of them as *negotium gestio* (performing others affairs without assignment). English courts think, that exclusion of liabilities by means of “before and after clause” causes termination of the carrier’s obligatory liabilities regime for physical loss and damage of the goods, but the obligation of fulfillment of the shipping agreement will continue till the delivery of goods, so that, the carrier is still responsible for the cargo and it is hard to qualify his obligation as *negotium gestio*.⁷¹

⁶² Leung W., Non-delivery of Cargo without Production of Original Bill of Lading: Applicability of the Mandatory Legal Regime of Hague-Visby and the One Year Time Bar, “Journal of Maritime Law & Commerce”, Vol. 39, №2, April, 2008, 205-207, <www.jmlw.com>.

⁶³ Ibid, 207-227.

⁶⁴ Ibid.

⁶⁵ Ibid, 205-207.

⁶⁶ Ibid, 207-227.

⁶⁷ Yingying Z., Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 34, <<http://repub.eur.nl>>.

⁶⁸ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (“Hague Rules”), Brussels, 1924, Art. 7, <www.asil.org>.

⁶⁹ See Maritime Code of Georgia, Parliament News 25-26, 14/06/1997, Article 156, Part 3.

⁷⁰ See Maritime Code of Georgia, Parliament News 25-26, 14/06/1997, Article 156, Parts 1, 2. Civil Code of Georgia, Parliament News, 31, 24/07/1997, Article 686, Part 1.

⁷¹ Yingying Z., Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 39- 40, <<http://repub.eur.nl>>.

3.3. Legal Basis of the Carrier's Responsibility

In order to understand the legal nature of the responsibility for delivery of goods without producing the bill of lading, it is necessary to comprehend the contents of those rights, which are covered by the latter. Because of the fact, that a bill of lading is functioning as an agreement and according to its content the carrier is obliged to deliver goods to its owner, delivery of goods violating the rule of producing the bill of lading can be qualified as infringement of a contract committed before the authorized person. Besides, considering the theory that a bill of lading is a document of title, often by handing it to the owner of the bill of lading, the latter will get the ownership of the goods or other property right. In such a case delivery of goods the persons other than the owner of the bill of lading will be the violation of property rights of the owner i.e. delict. In spite of the fact, that in the shipping process the bill of lading might not be functioning as a document of title, it will not remedy the fact, that delivery of goods without producing the bill of lading might violate the authorized person's property rights. The existed contractual relationship between the carrier and the owner of the bill of lading is unable to diminish delictual character of the action.⁷² In some jurisdiction, there is a degree of obscurity in relation to the legal nature of the liabilities for delivery of the goods by mistake. For example, in China, at first such action was recognized as a delict. But later it was qualified as a contractual breach.⁷³ Besides in opinion of some authors in case of delivery of the goods without the bill of lading competitive claims - delictual, as well as contractual- are being raised.⁷⁴ One of the decisions the English court, clearly shows such approach: "The contract is to deliver, on the production of bill of lading, to the person entitled under the bill of lading. The shipping company did not deliver the goods to such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading to a person who is not entitled to receive them. They are therefore liable for the delictual act unless otherwise protected."⁷⁵ Sometimes, by delivery the bill of lading the consignee can only receive the right to accept the goods, while the consignor maintains the property rights of the goods. In such a case only contractual obligations are being infringed and not a delictual ones. Thus in each concrete case delivery of goods without producing the bill of lading might have different legal nature.⁷⁶

Many think, that the present problem is important only from the scientific point of view and is less actual in practice,⁷⁷ but from the practical point of view, in case of competitive demands, the correct identification of the claim and the choice of legal sphere of the claim can be of a crucial importance for

⁷² *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 186-188, <<http://repub.eur.nl>>..

⁷³ *Pejović Č.*, Delivery of Goods Without a Bill of Lading: Revival of an Old Problem in the Far East, "Journal of International Maritime Law", Vol. 9(5), 2003, 454.

⁷⁴ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 187, <<http://repub.eur.nl>>.

⁷⁵ *Sze Hai Tong Bank Ltd .v. Rambler Cycle Co. Ltd.*, (1959) 2 LLR, 114).

⁷⁶ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 188-189, <<http://repub.eur.nl>>.

⁷⁷ *Pejović, Č.*, Delivery of Goods Without a Bill of Lading: Revival of an Old Problem in the Far East, "Journal of International Maritime Law", Vol. 9(5), 2003, 454-455.

determination of the period of limitations, evidential burden and the liabilities.⁷⁸ But in some jurisdictions the basis of the claim can't be defined by the will, whether it will be delictual or contractual: the contract between the parties excludes delictual basis of the claim.⁷⁹

According to the modern tendencies connected with the competition of the claims, in special cases, contractual claim might exclude the delictual one. For example, if contractual terms are violated and the law envisages mitigation of contractual compensation, delictual responsibility will be excluded. Such approach expresses the growth of the value of the contractual law in modern society. Considering the fact, that the bill of lading might not have a function of title, to avoid the obscurity connected with the property rights foreseen by the bill of lading it is recommended to rely on the contractual responsibility, though if it is proved that the carrier's action is as forgery, a mechanism of contractual protection might not be used and he will be responsible under the delict law.⁸⁰

3.4. Results of Breaching of Delivery of Goods by the Carrier

When the carrier is breaching his obligation and delivers the Goods to an unauthorized person, the consignee can demand: 1)Fulfillment of the obligation 2)Compensation of losses inflicted to the owner of the bill of lading .⁸¹

3.4.1. Fulfillment of the Obligation by the Carrier

The obligation of the carrier to deliver goods to the owner of the bill of lading is not excluded by delivery of them to an unauthorized person. Subsequently, in order to fulfill the obligation the carrier must demand the goods from the unauthorized person. In such a case, the acceptance of the goods by the unauthorized person without the bill of lading must be qualified as an unjust enrichment which lacks contractual and legislative basis. As for the legal ground for reclaiming the goods by the carrier, in such a case, the carrier has the right of the possession of the goods resulting from the shipping agreement, which he maintains until the fulfillment of the agreement. Accordingly the carrier can raise a vindication claim against the unauthorized person about restoration of his direct (physical) possession .⁸² In its turn, the realization of the vindication claim of the carrier depends on, to what extent will the consignee be obliged to use the additional period of time for the fulfillment of the obligation determined by the Civil Code, when terminating the contract. .⁸³

⁷⁸ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 188-190, <<http://repub.eur.nl>>.

⁷⁹ *Pejović, Č.*, Delivery of Goods without a Bill of Lading: Revival of an Old Problem in the Far East, "Journal of International Maritime Law", Vol. 9(5), 2003, 455.

⁸⁰ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 191, <<http://repub.eur.nl>>.

⁸¹ *Ibid*, 192.

⁸² *Ibid*, 192.

⁸³ See the Georgian Civil Code, Parliament News, 31, 24/07/1997, Article 405.

3.4.2. Compensation for the Loss of Goods

The final responsibility of the carrier for the delivery of the goods by mistake, in most cases, is determined by the compensation of the inflicted loss. Therefore it is necessary to discuss the volume of compensation of such contractual infringement. Basically, when one party breaches the agreement, he/she is responsible for the loss envisaged or the expected at the time of concluding the agreement. The expected damage means the loss anticipated by the parties within the scope of good faith. As for special kind of loss, it can be compensated only if it is foreseen by the agreement or it must have been foreseen by the parties, when the agreement was being concluded.⁸⁴ Considering general principles of compensation of loss it is possible to demand the compensation only for the loss, which is perceived as a normal result of breaching the agreement. Article 412 of the Civil Code of Georgia liberates the carrier from those risks, which are not acceptable within the scope of ordinary principles of material accountability.⁸⁵ For defining the volume of compensation, a rule of “real loss” or “*restitutio ad integrum*”⁸⁶ rule is being used.⁸⁷

Delivery of goods to an unauthorized person by the carrier is considered by the owner of the bill of lading as the loss of the goods.⁸⁸ According to the maritime and civil codes, the price of the missing load is defined by the current exchange price at the destination port, in case of absence of such – by the market price, but if even this price can't be defined – by the analogous price of goods of similar kind and cost. If the given prices can't be determined, the loss will be defined by the prices analogous to the current prices valid at the consignor's port plus the shipment expenditures.⁸⁹ The similar rule of calculation of prices of the goods is offered by the “Hague-Visby” rules.⁹⁰

As for non-material losses, such as future business interests and the loss inflicted to the business reputation, the “Hague-Visby” rules excludes the compensation of such losses.⁹¹ The opportunity of compensation of non-material losses is not given by the Georgian legislation either: According to Part 1 of Article 413 of Civil Code compensation for non-material losses can be demanded only in cases expressly defined by law. As neither maritime code, nor civil code foresee compensation for non-material losses, in case of losing the goods, the consignee does not have the right to such demand.

⁸⁴ Yingying Z., Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 193-194, <<http://repub.eur.nl>>.

⁸⁵ Dzlierishvili Z., Tsertsvadze G., Robaqidze I., Svanadze G., Tsertsvadze L., Janashia L., Agreement Law, Tbilisi 2014, 652.

⁸⁶ Restoration of the Primary State.

⁸⁷ Yingying Z., Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 194, <<http://repub.eur.nl>>.

⁸⁸ Ibid, 196.

⁸⁹ See Maritime Code of Georgia, Parliament News, 25-26, 14/06/1997, Article 160, Part 1. See The Civil Code of Georgia, Parliament News, 31, 24/07/1997, Article 692, Part 2.

⁹⁰ Yingying Z., Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 195, <<http://repub.eur.nl>>.

⁹¹ Ibid, 197. International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (“Hague Rules”), Brussels, 1924, Art. 4(5), <www.asil.org>.

It must be noted, that according to the “Hamburg Rules”, the “carrier’s responsibility comprises the losses resulting from the inflicted damage and loss”.⁹² The abovementioned general rule enables consignee to demand compensation for material, as well as for non-material losses.⁹³

The consignee can also demand compensation for the income he did not receive, if it has direct connection with non-fulfillment the obligations by carrier.⁹⁴

4. The scope of Carrier Liabilities for Delivery of Goods without Producing the Bill of Lading

The scope of the carrier’s liabilities for delivery of goods without producing the bill of lading depends on a legislative as well as on a contractual restriction mechanism of his liabilities. It is interesting to know, in which cases can the carrier’s liability for delivery of goods by violating the rule of producing the bill of lading be excluded or restricted.

4.1. A Legislative Mechanism of Restriction of Carrier Liability

Restriction of the carrier’s liability is one of the main characteristics of maritime law.⁹⁵ One of the clear examples of it is restriction by tariffs defined by law in case of shipment of parcels and units of goods.⁹⁶ This mechanism, which represents a trade subject between parties, is used for balancing of interests of a consignor and a carrier. The aim of the restriction is limitation of compensation claims for the exaggerated damage caused by high-priced small parcels.⁹⁷ It should be noted, that this kind of restriction of responsibility does not take place, if the damage is caused by the carrier’s gross negligence carelessness or intentional action.⁹⁸ There has not been a unified approach concerning whether the present mechanism of responsibility restriction can be used in case of delivery goods violating the presentation rule of bill of lading. Some scholars think, that the carrier can use such restrictions, because he acts in a good faith and believes that the person, to whom he delivered goods violating the rule of

⁹² United Nations Convention on the Carriage of Goods by Sea, 1978, Article 5 (1), <www.nccl.ge>.

⁹³ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 197, <http://repub.eur.nl>.

⁹⁴ *Dzlierishvili Z., Tsertsvadze G., Robaqidze I., Svanadze G, Tsertsvadze L., Janashia L.*, Agreement Law, Tbilisi 2014, 653.

⁹⁵ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 198, <http://repub.eur.nl>.

⁹⁶ See Maritime Code of Georgia, Parliament News, 25-26, 14/06/1997, Article 161, Part 1./ United Nations Convention on the Carriage of Goods by Sea, 1978, Article 6 (1-3 ”), <www.nccl.ge>. International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (“Hague Rules”), Brussels, 1924, Art. 4(5 „a”), <www.asil.org>.

⁹⁷ *Tetley W.*, Per package Limitation and Containers under Hague Rules, Visby & UNCITRAL, “Dalhousie Law Journal” 1977-1978, 686, <www.heinonline.org>.

⁹⁸ See the Civil Code of Georgia, Parliament News, 31, 24/07/1997, Article 697./ United Nations Convention on the Carriage of Goods by Sea, 1978, Article, 8 (1), <www.nccl.ge>. International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (“Hague Rules”), Brussels, 1924, Art. 3(8), 4(5), <www.asil.org>.

producing the bill of lading, has the right to these goods. Apart from this, he is subjected to a commercial pressure, as well as the pressure of guarantees used by the consignee. So it is hard to imagine him intentionally or negligently inflicting any loss to the owner of the bill of lading.⁹⁹ In the opinion of their opponents, it is necessary for the carrier to take in account potential risk of the owner of the bill of lading. In addition it is quite hard to estimate the nature of the carrier's action – whether he acts within the scope of the intent or gross negligence. So it would be better to deprive the carrier of the means of limiting responsibility in order to maintain the safety of the rights protected by the bill of lading. However, it should be noted, that when the carrier delivers goods by violating the rule of the production of the bill of lading, he neglects important legal provisions, which speaks for at least gross negligence of his actions.¹⁰⁰ A case law of almost all the countries determine, that the carrier takes a great risk, when agrees on delivering the goods by violating the rule of production of the bill of lading.¹⁰¹

4.2. Restriction of the Carrier Liability for Production of the Forged Bill of Lading

The carrier's liability will not be mitigated even, if a forged bill of lading is submitted to him, in spite of the fact, that he could not have known anything about unauthorized person's fraudulent intention. In case *Motes Exports*¹⁰² English court remarked that "If we had granted the carrier the right to deliver goods instead of the forged bill of lading, the principle of integrity of the bill of lading, as a "key of swimming warehouse", would have been breached. Moreover, as between the consignor and the carrier, the form, signature and the issuance of the bill of lading are controlled by the carrier, and if one of these two innocent persons must incur losses due to the third person's fraud, it will be better if the gravity of losses falls on the carrier, which is responsible for the integrity of the bill of lading, the goods under his possession and delivery of the goods, than on the property owner, who owns valid bill of lading and is expecting delivery of the goods".¹⁰³

4.3. Restriction of the Carrier's Liability by Charter

Resulting from the principle of differentiation between the bill of lading and the shipping agreement, carrier can be subjected to two agreements in relation to the same goods - charter and the bill of lading, which may contain different conditions.¹⁰⁴ So it is not excluded, that the content of the bill of lading – incidentally or intentionally – contradicts the agreement concluded between the consignor and

⁹⁹ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 198, <<http://repub.eur.nl>>.

¹⁰⁰ *Ibid*, 199.

¹⁰¹ *Tetley W.*, Letters of Indemnity at Shipment and Letters of Guarantee at Discharge, "European Transport Law", 2004, 313, <www.mcgill.ca>.

¹⁰² *Motis Exports Ltd. v Dampskibsselskabet Af 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg*, LLod's Law Reports 1999, Vol. 1.

¹⁰³ *Tetley W.*, Letters of Indemnity at Shipment and Letters of Guarantee at Discharge, "European Transport Law", 2004, 316, <www.mcgill.ca>.

¹⁰⁴ *Soumyadipta C.*, A comparison of Rights and Liabilities under a Charter Party and a Bill of Lading, "University of San Francisco Maritime Law Journal", 24, 2011-2012, 73, <www.lexisnexis.com>.

the carrier.¹⁰⁵ Sometimes parties of charter come to an agreement about excluding the responsibility for delivery goods without producing the bill of lading.¹⁰⁶ In such cases, as a rule, they use a liability insurance contract - a *letter of indemnity*. These kind of guarantees allow the carrier to carry out delivery without producing the bill of lading, but not oblige him to do so.¹⁰⁷ In order to provide the compliance of the conditions of the charter agreement and the bill of lading we can use the following methods: we can include the conditions of the bill of lading into the charter agreement, or on the contrary, the conditions of the charter agreement into the bill of lading. The situation becomes more complicated, when the owner of the bill of lading is a third person. Therefore in order to foresee the shipment agreement in the conditions of the bill of lading, it is necessary to satisfy the following demands: 1) inclusion of the charter into the bill of lading can be carried out by means of a reference; 2) the owner of the bill of lading must have the factual and constructive notice about the incorporation of the shipment agreement. In the case of *Production Steel Co. of Illinois v SS Francois*, District Court of South New York remarked, that a mere declaration in the bill of lading about its subordination to all the conditions of the charter could not have had the influence on the consignee's rights,¹⁰⁸ though the same court in the case of *Midland Tar Distillers, Inc v M/T LOTOS* decided, that the consignee was subjected to using the arbitration conditions, incorporated in the bill of lading.¹⁰⁹ Besides, the bill of lading was only pointing to the condition, which was envisaging arbitrage for charter parties. The difference in relation to these two cases the court explained by the fact that unlike the case of *Midland* in the case of *Production Steel Co. of Illinois v SS Francois* the conditions of the bill of lading were stated in detail and they contained rights and obligations of the parties, which in their turn were acting against usage the of the shipment contract. When there is contradiction between the bill of lading and the conditions of the shipment contract, courts are refraining from using the incorporation principle.¹¹⁰ Subsequently, parties must be more attentive and define the rights and obligations in the context of the bill of lading in details. Otherwise, in spite of the fact, that both documents are very important in carriage by sea, the inconsistent conditions of charter can't be included in the content of the bill of lading.¹¹¹

4.4. Restriction of the Carrier's Liability by the Conditions of the Bill of Lading

At the end of the 19th century, along with the development of maritime trade, the forms of the bill of lading issued by the carriers got full of conditions restricting the carrier's liability for almost all

¹⁰⁵ *Smeele G.M.*, Bill of Lading Contracts under European National Laws-Civil Law Approaches to Explaining the Legal Position of the Consignee Under Bills of Lading, "The Evolving Law and Practice of Voyage Charter Parties", *Rhidian Th.*, London, 2009, 252-253, <www.repub.eur.nl>.

¹⁰⁶ See Meritime Code of Georgia, Parliament News; 25-26, 14/06/1997 Article 117.

¹⁰⁷ *Tetley W.*, Letters of Indemnity at Shipment and Letters of Guarantee at Discharge, "European Transport Law", 2004, 317, <www.mcgill.ca>.

¹⁰⁸ *Production Steel Co. of Illinois v SS Francois*, U.S. District Court for the Southern District of New York - 294 F. Supp. 200 (1968) December 31, 1968.

¹⁰⁹ *Midland Tar Distillers, Inc v M/T LOTOS*, U.S. District Court for the Southern District of New York - 362 F. Supp. 1311 (1973) September 5, 1973.

¹¹⁰ *Soumyadipta C.*, A comparison of Rights and Liabilities under a Charter Party and a Bill of Lading, "University of San Francisco Maritime Law Journal", 24, 2011-2012, 76-79, <www.lexisnexis.com>.

¹¹¹ *Ibid*, 82.

possible cases,¹¹² including exclusion of the liability for delivery of goods. International practice makes it clear, that for the effectiveness of such agreement, it must be formulated adequately and clearly.¹¹³ In the case of *Sze Hai Tong Bank Ltd v Rambler Cycle Ltd* the condition of the bill of lading, which was releasing the carrier from all the responsibilities after unloading goods could not be used as a protective measure for delivery goods without the bill of lading. British court stated, that such conditions must be explained in such a way, that will not hamper the fulfillment of the main subject of the contract and will not contradict the aim of the shipping contract.¹¹⁴

4.5. Restriction of the Carrier's Liability while Passing the Goods through the Customs Control

The carrier is not released from liability even in the case, when the destination port law and customs demand delivery and keeping goods for a certain period of time by the port administration. In such a case, the carrier is responsible for non-delivery of good, if the carrier had the opportunity to prevent delivery of the goods to an unauthorized person.¹¹⁵

4.6. Transferring of the Goods to the Authorized Person by Violating a Rule of Production of Bill of Lading

In case *Houda*¹¹⁶ the British court remarked, that delivery of goods without producing the bill of lading is violation of an agreement even if the goods are delivered to the authorized person. Besides the British court clearly expressed its opinion, that in case of the lost bill of lading for the legitimation of delivery a court order is needed. Later in case *Sucre Exports SA v Northern Shipping Ltd. (The Sormovskiy3068)*, the court mitigated its approach and remarked, that “the carrier and the ship owner don't have the right to deliver cargo without producing the original of the bill of lading, except the case, when there is a reasonable evidence, that the person has the right to own cargo and there is a reasonable explanation to what has happened to the bill of lading”.¹¹⁷ However, , *Houda* remains as an authoritative decision in English law and is often used by court for definition of the responsibility for breaching the rule of production of the bill of lading.

¹¹² *Lowe S. T.*, Carrier's Immunities Under Bill of Lading Clauses, *China Law Review*, 195 (1937-1940), 195-196, <www.heinonline.org>.

¹¹³ *Wai W. L. K.*, Non-delivery under forged Bills and in the Absence of Original Bills and Exemption Clauses, *Society of Maritime Arbitrators Inc. USA*, Vol. 34, 2002, Number 1, 3-5, <www.heinonline.org>.

¹¹⁴ *Tetley W.*, Letters of Indemnity at Shipment and Letters of Guarantee at Discharge, “European Transport Law”, 2004, 316, <www.mcgill.ca>. *Sze Hai Tong Bank Ltd. Appellants; v. Rambler Cycle Co. Ltd.* 1959 June 22).

¹¹⁵ *Tetley W.*, Letters of Indemnity at Shipment and Letters of Guarantee at Discharge, “European Transport Law”, 2004, 318 , <www.mcgill.ca>. *Allied Chemical Int'l Corp. v Companhia de Navegacao Lloyd Brasileiro*” United States Court of Appeal, 15.10.1985. №1125, Docket 85-7103,

¹¹⁶ ”*Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The Houda)*, *Lloyds Law Reports* 1994, 541.

¹¹⁷ *Tetley W.*, Letters of Indemnity at Shipment and Letters of Guarantee at Discharge, “European Transport Law” 2004, 314-316, <www.heinonline.org>. see case, *Sucre Exports SA v Northern Shipping Ltd. (The Sormovskiy3068)*, *Lloyd's Law Reports* (1994) 2, 266.

It should be noted that earlier court practice of England made it possible for a cargo to be delivered not to the person owning the bill of lading but to a person owning a better right to it. For example, in the case, when carriage is carried out without consent of the goods owner.¹¹⁸ In spite of the fact, that the delivery of goods is a contractual obligation, it may become the cause for legislative claims: If the carrier is warned or knows, that the owner of the bill of lading is not authorized to accept the goods, he must act within the scope of “*due diligence*” in order to abstain from infringement of other person’s property rights. Such approach is foreseen by the USA law as well.¹¹⁹ However, while using this principle the carrier must be very careful not to act beyond the scope of his/her rights.¹²⁰

5. Alternative Methods for Settling the Problem Related to the Delivery of Goods without Production of the Bill of Lading

In practice, one of the alternatives of the rule of producing the bill of lading is providing the carrier with a letter of indemnity by the consignee or the bank itself, which foresees annulment of the bill of lading at the moment of its acceptance ensuring compensation for any kinds of damage, which might be inflicted to the carrier for delivering goods without producing the bill of lading.¹²¹ However, the letter of indemnity can’t provide the perfect protection from liability, as the execution of such guarantee might become questionable or delayed, if the carrier (together with the unauthorized consignee) is accused of forgery against the legal owner.¹²²

For eradication of the problems connected with the rule of production of the bill of lading, following methods are being used in international commerce: standardization of the documents, sea waybill and EDI (electronic data exchange).

In international trade, as well as in the national trade arena, there is the tendency of working towards unitary standard of the trade documentation. Today, similar forms of the trade documentation have been drawn up, that simplifies activities of large shipping companies. The united standard of the form of the bill of lading enables carrier to distinguish between false and valid bills of lading.

A sea waybill is also an important transportation instrument in sea carriages. It can function as the evidence of goods acceptance and shipping agreement, but it can’t be used for the transfer of rights, because unlike the bill of lading, it is not a negotiable security. The simplicity of its usage is the fact, that for the acceptance of goods it’s enough for the consignee to confirm the identity of the person given in the sea waybill. Besides the late acceptance of the document does not hinder the goods delivery process, in this way, both - the consignee, as well as the carrier have an advantage. In some cases the sea waybill can substitute the bill of lading, for example, in internal corporate shipments, when a company is sending

¹¹⁸ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 102, <<http://repub.eur.nl>>.

¹¹⁹ *Ibid*, 138.

¹²⁰ *Ibid*, 102.

¹²¹ *Tetley W.*, Letters of Indemnity at Shipment and Letters of Guarantee at Discharge, “European Transport Law”, 2004, 312, <www.mcgill.ca>.

¹²² *Goldby M.*, Legislation to Facilitate the Use of Electronic Transferable Records: A Case Study, Reforming the Law to Facilitate the Use of Electronic Bills of Lading in the United Kingdom, UNICITRAL Colloquium on Electronic Commerce, New York, 14th to 16th February 2011, 2, <www.uncitral.org>.

goods to its daughter enterprise.¹²³ According to the recommendations of International Chamber of Commerce and the International Maritime Committee, if the consignor wants to use non-negotiable documents, it's better for the parties to choose a sea waybill as a transportation document,¹²⁴ though the sea waybill can't replace the bill of lading, when for certain bargain it is necessary to use a document of title. For example, in trade of oil tankers, corn, ore or coal, the goods being in transit are subject of repeated negotiations and might be sold several times before it gets to the destination. Apart from it, the sea waybill will not be an appropriate collateral for the bank.¹²⁵

One of the means of substitution of the bill of lading is the usage of the electronic data exchange, which has become a subject of discussion in recent scholarship.¹²⁶ On one hand, the electronic bill of lading will avoid us problems connected with document paper exchange and provide significant savings regarding preparation and procession of paper documentation; it also eradicates the period of time necessary for the bill of lading to reach the port of the delivery of goods, though in the opinion of some scholars, there are some problems hindering the establishment of the electronic bill of lading. One of the main problems is its negotiable character, that was not a problem, while working on the electronic sea waybill (Electronic sea waybill is already intensively used in maritime commerce).¹²⁷ The function of the bill of lading of confirmation of the goods acceptance and as the evidence of the a shipping agreement will be successfully substituted by the electronic bill of lading. According to the opponents of the electronic bill of lading, the problem is its function as a title document. In their opinion, we should distinguish between a paper document as an information bearer and a paper document as a symbol. It is easy to turn the information containing document into an electronic document, but it is considerably more difficult to turn a document used in commerce as a symbol of a certain property into the electronic document. In case of negotiable instruments its, uniqueness as a symbol must be preserved. . The uniqueness of electronic messages is difficult to protect, because of the easiness of copying them. In spite of the fact, that it is technically possible to identify differences between electronic messages, by electronization of the bill of lading, danger of its duplication is still being increased.¹²⁸

Notwithstanding the above mentioned arguments, the tendencies of electronization of the bill of lading are being observed in the commercial regulations, for example, "Hamburg Rules" foresees a compromised version and offers to use the written form of the bill of lading – telegram and telex.¹²⁹ Also, in case of mutual consent of the parties, the issuance of electronic bill of lading is provided by the

¹²³ *Williams S.M.*, Something Old, Something New: The Bill of Lading in the Days of EDI, "Transnational Law & Contemporary Problems", Vol.1555, 1991, 565-566, <www.heinonline.org>.

¹²⁴ *Yingying Z.*, Delivery of Goods by the Carrier under the Contract of Carriage by Sea, a Focus on China, Rotterdam 2005, 115, <<http://repub.eur.nl>>. *Low R.*, Replacing the Paper Bill of Lading with an Electronic Bill of Lading: Problems and Possible Solutions, "International Trade and Business Law Annual 5, 2000, 159, <www.heinonline.org>.

¹²⁵ *Williams S. M.*, Something Old, Something New: The Bill of Lading in the Days of EDI, "Transnational Law & Contemporary Problems", Vol.1555, 1991, 566-567, <www.heinonline.org>.

¹²⁶ *Low R.*, Replacing the Paper Bill of Lading with an Electronic Bill of Lading: Problems and Possible Solutions, "International Trade and Business Law" Annual 5, 2000, 159, <www.heinonline.org>.

¹²⁷ *Ibid*, 166-168.

¹²⁸ *Ibid*, 170.

¹²⁹ *Ibid*, 194. United Nations Convention on the Carriage of Goods by Sea, 1978, Article 1 (8), <www.ncccl.ge>.

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008, which is the newest legislative instrument in the international sea commerce.¹³⁰

6. Conclusion

From all the abovementioned, we can conclude, that the bill of lading, as a multifunctional transport document maintains its role in shipping, but delivery of goods, complying with the rule of producing it, remains as an important contractual obligation of the carrier. For failure of the fulfillment of this obligation the carrier has very few protective measures against compensation of the losses, which he/she caused no matter, if liability is insured by letter of indemnity or if the goods are delivered to a person having a better right. The importance of this contractual obligation is also stressed by the fact, that the carrier is not insured from compensation of losses even in the case, when the goods are being delivered to an unauthorized person against forged bill of lading. The most effective means of excluding carrier liability for delivery of goods are conditions of the bill of lading themselves or the content of charter incorporating these conditions. Apart from this, the legislative mechanism of exclusion and restriction of responsibility, basically, does not work in favor of the carrier. So the carrier, which delivers goods without production of the bill of lading, is acting at his own risk. Besides, it is not excluded, that problems connected with the rules of producing the bill of lading will be solved in the future, if the electronic bill of lading establishes itself in maritime commerce.

¹³⁰ United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by the Sea, 2008, Art. 8 (a) .

Marika Tsuladze*

**Basis for Release of Person Owning the Source of Increased
Danger from the Responsibility
(Research Based on the Georgian and French Laws)**

I. Introduction

Damage is not always inflicted by human being, its origination might be also caused by the item, which is moving or started by human being's hand (for example motor transport facility, driven by person), or it is started spontaneously.¹ Technical progress and resulted increased number of accidents, for which it is difficult to identify the "role" of human being in the infliction of damage, raised the need for the protection of persons incurring damage. Such need for protection determined the introduction of objective (strict) liability regime in the civil-legal liability area, defined under the simple causal fact and it was impossible to release liable person from the liability even in case of proving innocence of such person.²

Under the strict liability conditions, presumption for the owner's responsibility is based on the risk, according to which there is some probability for the infliction of damage by the item owned by the person.³ In such cases reimbursement of losses is not related to the appraisal of actions implemented by the responsible person.⁴ This very characteristic differentiates it from other forms of civil-legal responsibility.

During the recent period, confrontation of guilt and strict liability has moved the fault liability principle to the background.⁵ At present, they try to justify introduction of strict responsibility with the risks, which are related to the use of items with increased (especially) danger or implementation of actions characterized with such danger.⁶ It is natural that there are questions raised in relation to the above issue; for example, it is important to clarify whether it is possible to assign strict responsibility over the person for cases, which are proceeding from the industry development or technological prog-

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¹ *Bénabent A.*, *Droit Civil, Les Obligations*, 11 éd., Paris, 2007, 423.

² *Guegan A.*, *La place de la responsabilité objective Fait de chose/Fait des activités dangereuses*, 1, <http://grerca.univ-rennes1.fr/digitalAssets/268/268670_aguegan.pdf>, [24.11.2013].

³ *Bénabent A.*, *Droit Civil, Les Obligations*, 11 éd., Paris, 2007, 436.

⁴ *Pierre P.*, *La place de la responsabilité objective: Notion et rôle de la faute en droit français*, 1, <http://grerca.univ-rennes1.fr/digitalAssets/268/268674_ppierre.pdf>, [24.11.2013].

⁵ *Ibid.*

⁶ The following terms are used with the identical meaning in the work: "containing the special danger", "containing the increased danger", as in the French legal sources these terms are mentioned differently, for example: "Anormalement dangereuse", or "Excessivement dangereuse". or, for example: *Borghetti J.S.*, *La responsabilité du fait des choses et/ou du fait activités dangereuses, Synthèse comparative*, 4, <http://grerca.univ-rennes1.fr/digitalAssets/268/268671_jsborghetti.pdf>, [29.12.2013].

ress, or number of risks related to the above,⁷ namely how justified is to assign responsibility to the person for the damage under the condition of absence of person's guilt?

The subject of present research is not to answer raised questions, namely to clarify whether it is correct or incorrect to have strict responsibility regime in place for the damages inflicted by the sources of increased danger. In this specific case, the objective of present work is to identify bases for full or partial release of owner from the responsibility under condition of liability for the damage inflicted via the source of increased danger; correct definition of essence of the above; to evaluate number of problematic issues in this area.

Correct definition of bases for the release of owner of increased danger source from the responsibility requires proper evaluation of mentioned bases. The research attempts to achieve the above objective based on the examples from the Georgian and French law systems. Interest to the French law was conditioned by the rich theoretical material existing in the French legal literature devoted to the above subject, as well as existence of diverse court practice, long-term experience of working on the resolution of the issue and approaches, which are established there; the above discussed distinguishes the French law from the other European laws. Moreover, in relation to force majeure (which is considered as one of the bases for the release of owner of source of increased danger from the responsibility) circumstances, French law is distinguished with its original approach.⁸

In relation to the above, the circumstance that the general regime for the responsibility for the damage inflicted by the item is valid for the French law, namely, in the paragraph one, article 1384 of the Civil Code of France (which defines the responsibility for the damage inflicted by item) it is defined as norm of absolutely general nature; it is related to the item causing the damage, and damage containing items and items not containing such damage are not differentiated.⁹ As the present research is devoted to the bases excluding the responsibility of owner for the damage inflicted by the source of increased danger, which is reviewed by the French law within the general regime of responsibility for the damage inflicted by the item, accordingly, the approaches existing in the French literature and court practice will be interesting for the Georgian law system.

Hence, the work has naturally covered the following questions and answers to those questions: how the French law regulates bases for the release from responsibility the owner of item (including those containing the source for increased danger)? What are the differences and similarities of the above with the Georgian laws? How the Georgian law resolves the issues related to the release of owner of source of increased danger from the liability? And how the Georgian court practice resolves the issues related to the disputability of the above releases from liability in specific cases?

Study of the above mentioned issues shall support the correct regulation of issues related to the release of owner of source containing increased danger from the liability; elaboration of the above at legislative and court levels; relevant definition of basis for the owner's responsibility. Moreover, review

⁷ *Pierre P.*, La place de la responsabilité objective: Notion et rôle de la faute en droit français, 1, <http://grerca.univ-rennes1.fr/digitalAssets/268/268674_ppierre.pdf>, [24.11.2013].

⁸ See below discussion of originality of the French law in relation to the research topic.

⁹ *Durez C.*, Cas pratique: la responsabilité du fait des choses, 29.11.2011, 5-6, <http://fdv.univ-lyon3.fr/moodle/file.php/1/FPV2/Droit%20civil/Droit_des_obligations_Responsabilite_civile/cas_pratique_la_responsabilite_du_fait_des_choses.pdf>, [26.11.2013].

of the approaches towards the bases of exemption of owner existing in the French law, getting familiar with the legal experience in this area is also important for the identification of « shortcomings » and « merits » of the Georgian Law, for the identification of such deficiencies and ways for their eradication.

2. General Review – Bases for the Release from Liability of Owner of the Source of Increased Danger

2.1. French Law

In the French law, bases for the release of item owner from responsibility, aiming at exclusion of unlawful nature of actions causing the damage, is followed by any result only in case if it is confirmed that person implementing the above action was fully depending on “external confronting factors” and could not act according to his/her own will. In addition, it has to be confirmed that indicated circumstances were unforeseen and insurmountable for the person conducting the relevant action.¹⁰

Bases generated from the “external forces” imply such facts and circumstances, which caused the damage; however, they were not coming from the person, whose responsibility was raised. Actions implemented by such person do not represent the basis for damage, or it is not sufficient for the generation of person’s responsibility.¹¹

“External forces” imply the following: “unforeseen circumstances” (in other words (“force majeure”), “guilt of third person” and “guilt of victim”. In such case, for the release from liability, owner shall prove existence of “external force”. Otherwise, namely, if owner is not able to prove existence of relevant circumstances and reasons causing damage are not known, item owner remains as a responsible person.¹²

Hence “external force” can be represented by:

1. Circumstances, which are unforeseen and generated from the external basis, which is otherwise regarded as “force majeure”.¹³ The following are considered as signs of “force majeure” in the French law: “externality”, “being improvident” and “being insurmountable”;^{14,15}

2. “The guilt of third party”, characterized with signs of “force majeure”;

3. “The guilt of person incurring damage: who is again characterized with signs of “force majeure”.¹⁶

¹⁰ *Dubuisson B.*, Les causes exonératoires de la responsabilité (Causes de justification et causes étrangères), 3, <http://grerca.univ-rennes1.fr/digitalAssets/267/267955_dubuissongeneve.pdf>, [26.11.2013].

¹¹ *Ibid*, 2.

¹² *Starck B.*, Droit Civil, Obligations, Responsabilité délictuelle, 2 éd., Paris, 257.

¹³ The difference between two indicated notions (“external force” and “force majeure”) could not be discovered. See La cause étrangère, Dernière modification le: 19.07.1997, <<http://jurisfac.free.fr/fiche.php?type=&id=174>>, [26.11.2013].

¹⁴ *Sabard O.*, Les causes d’exonération en droit français et dans d’autres ordres juridiques nationaux, 3-4, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [26.11.2013].

¹⁵ *Ibid*, 4.

¹⁶ La cause étrangère, Dernière modification le: 19.07.1997, <<http://jurisfac.free.fr/fiche.php?type=&id=174>>, [26.11.2013].

In this regard following questions may arise: whether it is necessary to have “external force”, which is unforeseen as well as insurmountable or on the contrary – can we have circumstances which are unforeseen or insurmountable, but not proceeding from the “external forces”? What is the implication of each named basis? How precise are approaches developed up to date and existing approaches in relation to the above? Discussions around the above questions are provided in the following chapters of the present work.

2.2. Georgian Law

In the Georgian Law the main basis for release of owner of source of increased danger from liability is referred to as “insurmountable force”, which is approximately analogical to the “force majeure” valid in the French law and is represented in various forms for various types of damage inflicted by the source of increased danger.

What are the differences and similarities between the terms “force majeure” valid in the French law and “insurmountable force” - valid in the Georgian law? In this case, are we dealing with number of contextual differences or terminology differences? First of all, we must note that when talking about “force majeure” valid in the French law, it is natural, that such term implies all features characteristic to the mentioned law. It will be demonstrated in the next chapters of the present work that these features are mainly different from the Georgian law; however, it is still evident that the mandatory feature of “force majeure” in French law is only its “insurmountability”. It is likely that for this very reason, force majeure circumstances and accordingly, above mentioned basis for the release of owner of increased danger source from the responsibility in the Georgian law is referred to as the “insurmountable force”.

If there is a question raised regarding the selection of which term is more justified for the expression of above mentioned basis for the release of owner of the increased danger source from the responsibility – “insurmountable force” or “force majeure”, the answer would be the following:

“Insurmountable force” in the Georgian law does not precisely reflect the basis for release from the responsibility, which is implied under the mentioned notion; for example, in the Georgian court practice “insurmountable force” is defined as such obstacle, which was not under the control of owner of the source of increased danger (specifically, transportation mean owner) and he/she could not reasonably foresee it in advance and could not avoid or overcome obstacle or its outcomes; in other words, person did not have possibility to influence the obstacle.¹⁷ It is evident from the above that notion of “insurmountable force” unites two types of features: “insurmountable” and “unforeseen”; in particular, in order to have event, which can cause release of owner of increased danger source from the responsibility, it must be, on the one hand, insurmountable and, on the other hand, unforeseen for the owner. Accordingly, expression of discussed event with the term “insurmountable force” is not expedient.

What one could say about the term established in the French law – “force majeure”? As it is demonstrated in the next chapters of present work, “insurmountability” is the mandatory feature of “force majeure” in the French law; however, it also implies “unforeseen” and “external”. Hence, in the French law, term “insurmountable force” (if such is applicable) would not sufficiently describe

¹⁷ See the resolution of the Supreme Court of Georgia (RSCG), 09 November 2010, case № as-494-463-2010.

mentioned basis for the release of person from responsibility; therefore it was correctly named as “force majeure”.

As for the possible question regarding the issue whether it is justified to unify under the notion of “force majeure” all three features mentioned above, attention must be drawn to the following:

It will be clearly demonstrated below that “insurmountability” is mandatory feature of force majeure, as the insurmountability of event represents the necessary component, which might cause release of person owning the source of increased danger from responsibility. Existence of “unforeseen” and “external” features is not always necessary for the release of person from responsibility, i.e. one cannot rule out the chance to have a case, when person can foresee the event or such event is not external for the person, however, it still turns out to be insurmountable and, due to the above, person owning the source of increased danger is released from liability. Such examples will be presented below in the chapter of the work discussing each feature of force majeure separately.

Despite the position expressed above, as at present in Georgian law force majeure circumstances are referred to with the term “insurmountable force” and in the French law – with the term “force majeure”, in the present work term “force majeure” is used in relation to the French law and wherever regulations existing in the Georgian law are discussed, the term “insurmountable force” is used.

In general, idea implied in the article 999, as well as articles 1000, 1003 and 1004 of the Civil Code of Georgia is that third (non-participating) parties are damaged: on the one side are those, who see themselves as ones, which perceive themselves subjected to the danger, which is outside of their control (outside of their control), and on the other side – those, who use the source of such danger. According to one position, as the latter creates the danger factor and facilitates it, then probably, it is fair to assign the liability to prove that implementation of risk was not their fault. Generally, such persons are: car users (article 999), user and owner of dangerous item (article 1000), owner of animal (article 1003) and owner of building (article 1004)¹⁸

In the mentioned cases (with the exception of injury inflicted by the animal) Georgian legislator indicates as a basis for release of owner of the relevant item from the liability the insurmountable force. For example, according to the section 3, article 999 of the Civil Code of Georgia (which defines rules for reimbursement of damage incurred as a result of maintenance of transportation means), obligation for reimbursement of incurred loss by the owner of transportation mean is not applied, when the damage is caused by insurmountable force, except for cases, when the damage was created during the operation of aviation transport.¹⁹ Therefore it is clear that in all other cases, with the exception of operation of aviation transport, the law releases owner from liability if it is determined that damage was generated due to the insurmountable force.

The same solution is considered under the section 3, article 1000 and section 2, article 1004 of the Civil Code of Georgia. In the first case, liability for the reimbursement of damage caused by the increased danger from building is released, if damage is caused by insurmountable force, with the exception of cases, when the damage was caused by the breakdown of electricity transmission lines, or damage to the oil, gas, and water or oil product supply devices. Hence, in the above mentioned cases, law excludes release of

¹⁸ *Luttringhaus P.*, *Delict Law* (brief synopsis), Tbilisi, 2011, 32 (in Georgian).

¹⁹ The Civil Code of Georgia as of 28 October 2014, Tbilisi, 337 (in Georgian).

person owning the source of increased danger from liability even in the event of confirmation of existence of “insurmountable force”. As for the throwing, falling or pouring the item from the building, according to the section 2, article 1004 of the Civil Code of Georgia, in such cases, the person occupying area is not liable if damage was caused by the insurmountable force or by fault of victim.²⁰

Based on the above, it is evident that in the Georgian norms regulating damage inflicted by the source of increased danger the term “insurmountable force” is mainly named as a basis for release of owner from liability. “Guilt of victim” is not indicated in the norms regulating damage inflicted by the source of increased danger generated as a result of operation of transportation facility or building. The Georgian court practice attempted to compensate for such shortcoming (if one could refer to the above in this way) via the application of article 415 of the Civil Code of Georgia; namely, the Supreme Court of Georgia in the process of review of specific case related to the damage inflicted by the source of increased damage, noted that although norms regulating delict liabilities - articles 992 -1008 of the Civil Code – do not consider issue of counter guilt, however according to the article 326 of the same Civil Code, rules related to the contractual liabilities are also used for other non-contractual liabilities, if not otherwise considered based on the nature of liability. According to the article 415 of the same Code, if actions of victim have also facilitated generation of damage, then liability for the reimbursement of loss and volume of such reimbursement depends on who proves to be guiltier for the inflicted damage. Hence, cassation court concluded that in the process of making decision related to the damage caused by the source of increased danger, “insurmountable force” as well as “guilt of victim” shall be considered as circumstances for full or partial release from liability.²¹

The following view is valid in this case: although it is admissible to apply article 415 of the Civil Code of Georgia for the regulation of delict liabilities, this must be expedient if there is a joint guilt of victim and damage inflicting person in place, as mentioned norm of the law regulates such situation, when both of them – damage inflictor and victim – are acting guiltily; namely, according to the norm, if actions of victim facilitated the generation of damage, then liability for the reimbursement of losses and volume of such reimbursement depends on who proves to be guiltier for the inflicted damage.²² In such case, liability for the reimbursement of loss and volume of such reimbursement is determined according to the level of guiltiness of parties, by the fact who was guiltier for the damage.²³ Damage in place is the integral outcome of joint action of creditor and victim.²⁴

Hence, based on the contents of article 415 of the Civil Code of Georgia, it becomes clear that it covers guiltiness of victim as well as damage inflictor. Accordingly, the following question is raised: how will the law regulate case, when only the guilty action of victim becomes reason for the damage; as mentioned above, the liability for the damage inflicted by the source of increased danger could be assigned even under the absence of guilt.^{25,26} Georgian legislation does not provide response to this question.

²⁰ Ibid, 339 (in Georgian).

²¹ See the resolution of the Supreme Court of Georgia (RSCG) dated 09 November 2010, on the case № as-494-463-2010; RSCG, 14 June 2013, case № as-95-90-2013 (in Georgian).

²² The Civil Code of Georgia as of 28 October 2014, Tbilisi, 163 (in Georgian).

²³ Zoidze B., Comments to the Civil Code of Georgia, Book 3, Edited by Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J., Tbilisi, 2001, 481 (in Georgian).

²⁴ Ibid, 480-481 (in Georgian).

²⁵ Chikvashvili Sh., Comments to the Civil Code of Georgia, Book IV, Vol. 2, Edited by Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J., Tbilisi, 2001(in Georgian).

Based on the above, it is expedient, similar to the “insurmountable force” to establish other basis for the full or partial release of owner of increased danger source from liability in the Civil Code of Georgia – “guilt of victim”. In specific cases of resolution of damages inflicted by the source of increased damage, this would create correct legislative basis for the release of owner from liability.

3. Force Majeure and Insurmountable Force – Attempt to Convey their Essence

3.1 Definition of Insurmountable Force in the Georgian Law

As already mentioned, the force majeure circumstances in the Georgian law are implied under the term – “insurmountable force”. How is the notion of “insurmountable force” defined in the Georgian law? It can be said, that given issue is characterized with scarcity in the Georgian legal literature and court practice. There are number of works and court decisions (resolutions), which somehow discuss specific basis for release of owner of increased danger source from the liability; however, such discussions are not sufficient for making conclusions on the problematic issues related to the topic under review.

According to the definition provided by the Supreme Court of Georgia, “insurmountable force” implies that, for example – despite the careful driving of car it is impossible to avoid damage. In such case, it has to be determined whether the damage is caused by obstacle which was not under the control of vehicle owner and he/she could not reasonably foresee it or avoid obstacle or its outcomes, or overcome it, in other words, person did not have possibility to influence the obstacle.²⁷

3.2. Definition of Force Majeure in the French Law

Many French authors tried to define notion of force majeure, which is confirmed by numerous definitions provided in the French legal literature. According to these definitions: force majeure means circumstances generated from external, unforeseen and insurmountable force;^{28, 29} It implies inevitable, insurmountable and unavoidable event, which generally has no link with the item causing the damage;³⁰ Force majeure is unforeseen and insurmountable situation, which is independent from the will of the person conducting a specific action.^{31, 32}

²⁶ *Akhvlediani Z.*, Liability Law, Vol. 2, Tbilisi, 1999, 271 (in Georgian).

²⁷ See RSCG, resolution of 09 November 2010, case № as-494-463-2010.

²⁸ *Sabard O.*, Les causes d'exonération en droit français et dans d'autres ordres juridiques nationaux, 3-4, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [26.11.2013].

²⁹ In the French law similar to German, English, Belgian, Spanish and Swiss laws, tradition of triple nature is present: external force, unforeseen nature and insurmountability. *Ibid*, 4 (in Georgian).

³⁰ *Starck B.*, Droit Civil, Obligations, Responsabilité délictuelle, 2 éd., Paris, 258.

³¹ *Dubuisson B.*, Les causes exonératoires de la responsabilité (Causes de justification et causes étrangères), 5, <http://grerca.univ-rennes1.fr/digitalAssets/267/267955_dubuissongeneve.pdf>, [26.11.2013].

³² For example, according to the German law, force majeure event is such case proceeding from the external force, preventing of which was impossible and which belongs to rare (special) events. *Droit privé allemand, Dalloz*, 1997, 414.

There is one important feature of the French law observed; this very feature determines its originality, which was mentioned above. Force majeure in the French law may acquire differing forms, as it could be caused by natural events as well as guilty actions of stranger, third person or a victim.³³ Hence, in the French Law force majeure includes all those circumstances, which are reasonably out of the control of person committing the action causing damage unlike, for example, English law, according to which Force majeure might be caused by natural events.³⁴

In relation to the above mentioned issue, approach existing in the French law is not rather groundless; furthermore, it can be stated that indicated approach is even logical, as if owner, as in case of natural event, is not able to avoid actions of victim or third person, then such circumstances become unforeseen and insurmountable for him/her; in the way similar to natural events, why should not such circumstances cause release of owner from liability? Why should not we consider circumstances, which although are not related to natural events, however, are produced by the external forces, are unforeseen and insurmountable for owner, as factors excluding person's liability?

According to the definition provided, by one of the French authors, we can think that wide understanding of force majeure notion simplifies its detection; however, this is not a case. Meaning of circumstances constituting the force majeure is so limited, that they are only the theoretical means for release from liability.³⁵ Next chapters of present work attempt to clarify what was mentioned author implying and whether such evaluation of issue is correct.

According to one view, terminology used by the courts lack accuracy; the courts refer to simple natural event as force majeure; in reality, such event does not bear force majeure signs.³⁶

Probably due to the above, for the correct understanding of force majeure definition of its notion is not sufficient. It is important to discuss-assess features characteristic to force majeure; the above would be better managed following the French sources dedicated to the issue.

4. Force Majeure Features

4.1 Externality

In order to consider situation as force majeure, first of all, it must be caused by the external force; however, notion of external force is not accurately defined in the law.³⁷ According to one definition, external force implies that for release from liability defendant cannot present such facts, which were caused due to his/her guiltiness or for which, according to law, at other time he/she would be assigned

³³ *Sabard O.*, Les causes d'exonération en droit français et dans d'autres ordres juridiques nationaux,3, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [26.11.2013].

³⁴ *Dubuisson B.*, Les causes exonératoires de la responsabilité (Causes de justification et causes étrangères), 5, <http://grerca.univ-rennes1.fr/digitalAssets/267/267955_dubuissongeneve.pdf>, [26.11.2013].

³⁵ *Sabard O.*, Les causes d'exonération en droit français et dans d'autres ordres juridiques nationaux, 3, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [26.11.2013].

³⁶ *Cabrillac R.*, Droit des obligations, 7^e éd., Paris, 2006, 200.

³⁷ *Sabard O.*, Les causes d'exonération en droit français et dans d'autres ordres juridiques nationaux, 4, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [26.11.2013].

liability to reimburse losses inflicted to the third persons.³⁸ In other words, this is a case, when, for example, person authorized to represent a victim, due to the infliction of damage by the fault of victim, cannot use the damage in favor of the latter.³⁹

Accident caused by mechanical deficiency (for example, pneumatic defect, causing breakage) does not generate release of owner from liability despite the fact that owner did not have any chance to foresee or avoid it. The French cassation court has established such practice as early as in 1896.⁴⁰ Hence, according to the French law, it is not considered as external factor if, for example, damage was a result of internal defect.⁴¹

By the way, requirement for having the external force as a cause for force majeure still subject of dispute. It is assumed that “externality” is not feature integrally characteristic to force majeure and it represents negative form of expression of civil legal liability principle; for example, person is not able to indicate that guiltiness of juvenile person residing with him/her was unforeseen and insurmountable for him/her for release from liability, as in such case external factor is excluded.⁴²

Moreover, it can be stated that requirement for external factor reduces the number of cases, that could be considered as force majeure. In such case, “externality” can be considered as the mean for protection of victim than force majeure.⁴³

Author of one French source used in the work, Boris Stark is of the view that any obstacle created on the road, notwithstanding its type, is never “external” in relation to movement of car. There must be 3 elements for such movement: car, driver and road. In the same work, author raises the following question: If internal defect of car (including unforeseen and unavoidable defects) has never represented basis for release from liability and furthermore the health condition of car driver does not result in release from liability (for example heart attack or epileptic attack), as such reasons lack “externality” sign, then why the circumstances created on the road should cause release from liability?⁴⁴ Such approach to the issue shall not be justified, identification of “defects” of car and its driver (if one could refer to worsening of driver’s physical condition by the above word) with the obstacle created on the road, and as a result, to have the liability of owner under the existence of each condition, is not correct. In such case liability is determined by the operation of car by owner. Therefore it would be understandable not to consider “defects” of car or driver as “external”, however the obstacle created on the road, where the car

³⁸ VINEY (G.) et JOURDAIN (P.), *Traité de droit civil, Les conditions de la responsabilité*, op. cit., n° 385, 254, *ibid.*

³⁹ Cass. civ., 16 juin 1896 : S. 1897. 1. 17, note ESMEIN (A.), D. 1897. 1. 433, note SALEILLES (R.); Cass. 2e civ., 6 mars 1959: Bull. civ. II, n° 243, 20 nov. 1968: Bull. civ. II, n° 275; *Sabard O.*, *Les causes d’exonération en droit français et dans d’autres ordres juridiques nationaux*, 4, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [26.11.2013].

⁴⁰ *Starck B.*, *Droit Civil, Obligations, Responsabilité délictuelle*, 2^e éd., Paris, 258.

⁴¹ Cass. civ., 16 juin 1896 : S. 1897. 1. 17, note ESMEIN (A.), D. 1897. 1. 433, note SALEILLES (R.) ; Cass. 2^e civ., 6 mars 1959: Bull. civ. II, n° 243, 20 nov. 1968: Bull. civ. II, n° 275, reference: *Sabard O.*, *Les causes d’exonération en droit français et dans d’autres ordres juridiques nationaux*, 4, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [26.11.2013].

⁴² *Sabard O.*, *Les causes d’exonération en droit français et dans d’autres ordres juridiques nationaux*, 4-5, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [26.11.2013].

⁴³ *Ibid.*, 5.

⁴⁴ *Starck B.*, *Droit Civil, Obligations, Responsabilité délictuelle*, 2^e éd., Paris, 259.

is moving, cannot be considered as a case similar to above. Although, road is the necessary element for the movement of car, the element determining liability is a fact of using the car by driver and connecting “road” to the above will more than necessary reduce the number of cases of release from the liability for damage caused by the car. The other issue is, if there is (or will be) a desire to sharply reduce, or even reduce to minimum bases for release of car owner from liability. It seems that French author is guided by this very desire, as he notes later that in relation to the car movement the law dated 31 May 1924 (at present articles 141-2 and 141-3 of the Aviation code) should be taken into consideration; according to which, airplane user is not released from liability due to the risks existing in the air, despite the fact that seldom natural event was the reason for accident. The author then concludes that if there is an air risk, then there must be road risk too.⁴⁵

Author of above provided view considers as mistake to argue that liability of owner in the discussed cases is connected with the ownership of car, as, according to his view, in reality liability is connected with movement, and all incidents taking place during the movement do not represent internal factors, despite the fact that person implementing action causing damage was not able to consider or avoid such factors.⁴⁶

As a result the following situation is created: on the one hand, circumstances, despite their unforeseen and insurmountable nature, do not cause release from liability, as they do not represent external factors; on the other hand, owner cannot be released from liability if he/she proves that acted with caution possible for the “normal” person and has taken all measures, which could be considered by “normal” person. By the way, in this regard, the French law is somewhat controversial. In this regard, the special attention shall be directed to decisions made on accidents (more often accidents caused by the auto transport), where damage was caused during the driving of car such by driver, who acted based on the need. We can name as an example cases, when driver for avoiding crash with bicycler or pedestrian damages other item or person. In such cases, person is released from every type of liability, as in reality, his maneuver was caused with necessity. Despite the above, this does prevent from assigning liability to the person based on the paragraph one, article 1384 of the Civil Code of France civil code.⁴⁷

There must be simple way to resolve raised issue: if there is real will to release owner of transportation facility from liability in case of existence of insurmountable force, then obstacle created on the road shall be considered as an “external factor”, otherwise, cases of release of owners of transportation means for the damage caused in the process of operation of the transportation mean will be reduced significantly or will be almost excluded and owner will be liable even in the cases when obstacle created on the road is unforeseen and insurmountable for the owner. Such approach will increase number of liabilities under the absence of guilt even more. Existence of similar form of liability can be relatively fair (also this issue is still subject of disputes), when there is not insurmountable force, guilt of victim or third party in place; under the condition of existence of one of the above, assigning liability would not be correct.

We have to mention one more detail for cases when any defect or obstacle on the road is caused by the third party and the personality of such party is identified; then victim can request reimbursement of

⁴⁵ *Starck B.*, *Droit Civil, Obligations, Responsabilité délictuelle*, 2 éd., Paris, 259.

⁴⁶ *Ibid*, 260.

⁴⁷ *Ibid*, 262.

damage from such person. Exception could be cases, where body of the victim represents the obstacle on the road under the condition of absence of victim's guilt (for example, this is young child; mentally disable person or person who had suffered heart attack). Issue on whether to consider such accidents as related to the road risks will be discussed below.⁴⁸

4.2 Unforeseen

The second condition for consideration of some circumstances as force majeure is "unforeseen" nature. The circumstances are considered as unforeseen if there is no basis for assumption that they could occur. In general, in the process of evaluation of such condition, courts are based on the probability of creation of such circumstances. Moreover, courts consider the inexpectancy, frequency and intensity of circumstances.⁴⁹ Such evaluation is made based on the external circumstances (time, place),⁵⁰ as well as the personal features (his/her skills, knowledge).⁵¹

Based on the above, even such external factor, which is not in any way connected with the item, but could be considered, does not release person from liability, as in such case victim may indicate that measures required for avoiding the damage were not implemented.⁵²

According to the established position, there is nothing fully unforeseen, including natural calamities.⁵³ Based on this very position, for years, the French court practice has been of the view that for the existence of unforeseen circumstances or force majeure it is sufficient to have circumstances which are unforeseen and insurmountable at a normal level.^{54,55} It is obvious that if person possessing medium capabilities could realize and normally avoid circumstances causing damage, then such circumstances would not bear force majeure signs. In such case it turns out that mentioned person was acting carelessly or inconsiderably; therefore he should have kept off from such unforeseen and inconsiderable behavior. For example, when the thunder rolls at specific moment and specific place, the above will be considered as unforeseen condition, however, if thunder rolls over the roof of the house which is not equipped with the anti-thunder⁵⁶ device, then such case will not be considered as force majeure, as use of such a simple mean

⁴⁸ *Starck B.*, Droit Civil, Obligations, Responsabilité délictuelle, 2 éd., Paris, 260.

⁴⁹ *Sabard O.*, Les causes d'exonération en droit français et dans d'autres ordres juridiques nationaux, 5, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [30.11.2013].

⁵⁰ En droit français, Cass. 2^e civ., 13 juil. 2000: Bull. civ. II, n° 126, 24 oct. 2002: Juripro, pourvoi n° 01-03920, 22 mai 2003: Bull. civ. II, n° 155, see the same.

⁵¹ Ibid.

⁵² *Bénabent A.*, Droit Civil, Les Obligations, 11 éd., Paris, 2007, 436.

⁵³ *Starck B.*, Droit Civil, Obligations, Responsabilité délictuelle, 2 éd., Paris, 260.

⁵⁴ Cour de cassation, Chambre civile 2, 6 avril 1965, Publié au bulletin, <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006970015&fastReqId=342726734&fastPos=3>>, [30.11.2013].

⁵⁵ Cour de cassation, Chambre civile 2, 29 juin 1966, Publié au bulletin, <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006973875&fastReqId=1355898435&fastPos=1>>, [30.11.2013].

⁵⁶ Anti-thunder device – special equipment designed for the protection against the thunder (steel stem), which is installed on the building roof and connected to the earth by the wiring; Reference: explanatory dictionary, <<http://ena.ge/explanatory-online>>, [30.11.2013] (in Georgian).

of protection would be quite easy and hence, it would be simple to avoid outcomes⁵⁷ or wind or storm does not bear unforeseen signs if for relevant regions such events do not exceed the acceptable norm level.⁵⁸

Despite the above, generally it is quite difficult to find out what should be the limit of caution and imagination of each person. In the above discussed case, term “normal” implies the safety measures followed by person with “medium capabilities”, which could be implemented by such person. If person could not consider and avoid relevant circumstances, then such circumstances are unforeseen and insurmountable.⁵⁹

In this regard French law enforcement bodies follow the established approaches in an extremely diligent manner.⁶⁰ According to the explanations provided by the French cassation court, definition of the term “unforeseen” depends on the estimations made by the judge, which are based on the specific case circumstances; for example, cassation court did not assign liability to the owner of transportation facility for the case, where the person with suicide objective fell under the transportation mean, as it was considered that owner of mentioned vehicle could not be aware of the victim’s intention. Such evaluation enables us to significantly lighten the condition of being “unforeseen”. In the earlier decisions of the court similar position was encountered at a lower level and in general, there were discussions on whether it was possible to avoid similar circumstances.⁶¹

Cassation court of France in its resolution made on 14 April 2006 acknowledged as determined the fact that corpse of Mrs. X was found between the platform of the train and railway road, served by the Paris transportation service. The case commenced for the basis of murder under carelessness. Accident followed the start of train movement. Spouse of deceased person, Mr. X requested reimbursement of losses according to the civil regulations; he was acting on his behalf and on behalf of two juvenile children. The cassation court, like the appeal court decided, that falling down of Ms. X could only be result of her voluntary action, and it was impossible to consider such action; none of the employees of transportation service could be aware of the intention of the deceased person to fall under the train. Accordingly, court could not request answer from the defendant for not taking measures to prevent infliction of damage to the victim, which was the outcome of her intention.⁶²

Above mentioned resolution became subject of criticism in the French legal literature. According to one of the French authors, it did not comprehensively evaluate signs of force majeure, namely it did not discuss issue of existence of external factor, representing necessary condition for force majeure. Although, in the given case, it could be decided that the second condition of force majeure was in place – insurmountability, however the question on whether the similar action was unforeseen for the employees of Transportation Company was raised. In general, relevant employees of mentioned service should have considered probability of implementation of such actions by the passengers using transport. Author notes

⁵⁷ *Starck B.*, Droit Civil, Obligations, Responsabilité délictuelle, 2 éd., Paris, 261.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Cour de cassation, Chambre civile 2, 12 février 1970, reference: *Starck B.*, Droit Civil, Obligations, Responsabilité délictuelle, 2 éd., Paris, 261.

⁶¹ *Sabard O.*, Les causes d’exonération en droit français et dans d’autres ordres juridiques nationaux, 5, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [30.11.2013].

⁶² Cour de cassation, Assemblée plénière, 14 avril, 2006, Publié au bulletin, <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007051642&fastReqId=422878401&fastPos=1>>, [30.11.2013].

that resolution is strict for the victim and is different from other resolutions made against the French transportation units.⁶³

Author of the indicated position correctly notes that force majeure signs shall be comprehensively assessed for each specific case. It must be also true that in the mentioned case employees of transportation service should have considered probability of action implementation.

By the way, the Supreme Court of Georgia has provided approximately same evaluation in one of its resolutions.⁶⁴

Cassation court in the review of given case noted, that need for fulfillment of rules by the passenger in the subway is not under doubt. In particular, passenger should not enter prohibited zone, more so if the zone is physically restricted, however in this case the issue under dispute is the following: if the passenger violates rules and enters the prohibited zone, is the subway liable to have control over such cases. The Supreme Court considered the fact that metropolitan is one of the strategic transportation institutions in the country, where it is necessary to have special attention and control for the eradication of forbidden actions implemented by passengers and for ensuring the safety of commuters. One of the articles of instruction valid for the defendant organization directly considers that heads of metropolitan services and divisions are liable to exclude the possibility of entry of outsiders onto the rail-tracks and tunnels and by this way, ensure safe movement of trains. Otherwise, we would get lack of control over the crossing the restricted zones by passengers, access to tunnel and implementation of prohibited actions; which is disastrous for the functioning of metropolitan and transportation safety. In the given case, metropolitan has violated this very liability; namely, metropolitan could not ensure creation of safe working environment for K.N., safe movement of train, driven by K.N., which caused damage to K.N.'s health.

It must be noted that release from the liability based on the force majeure circumstances under the condition of inflicting damage in the process of operation of the transportation facility, was subject of severe criticism. Existence of frozen sections or sudden appearance of child or dog on the road can be assessed or not assessed as the unforeseen condition.⁶⁵ There were cases of release of the car driver from the liability in the French court practice, when, for example, the driver slipped on the unexpectedly created ice (due to the unexpected froze of the road)^{66,67} or car slipped on the oil leaking from the car.⁶⁸ Despite the

⁶³ *Lucas-Dubourc O.*, (Arrêt – Cass. Ass. Plén). Force majeure exonératoire (art. 1384, al. 1): la faute de la victime doit être imprévisible et irresistible, <<http://www.jurisdixit.fr/?controller=news&action=detail&id=42>>, [30.11.2013].

⁶⁴ RSCG, 07 October 2008, Case № as-407-653-08, (in Georgian).

⁶⁵ *Bénabent A.*, *Droit Civil, Les Obligations*, 11^e édition, Paris, 2007, 437.

⁶⁶ Cour de cassation, Chambre civile 2, 29 juin 1966, Publié au bulletin, <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006973875&fastReqId=1231564706&fastPos=1>>, [1.12.2013].

⁶⁷ Cour de cassation, Chambre civile 2, 6 février 1980, Publié au bulletin, <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007004698&fastReqId=130485761&fastPos=1>>, [1.12.2013]. Mentioned resolution concerns the release of owner from the liability for the reason that prior to the infliction of damage by the transportation mean the warning sign on the ice was not installed at the prominent place; moreover, weather was good and the obstacle created on the road turned out to be unforeseen and unavoidable for the owner (in Georgian).

⁶⁸ Cour de cassation, Chambre civile 2, 28 octobre 1965, Publié au bulletin, <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006970606&fastReqId=1842130206&fastPos=1>>, [1.12.2013].

above, in some other court decisions under the existence of similar conditions owner has not been released from the liability.^{69,70} Different ways of solution of the issue was caused by the fact that according to the view of judges, ice or leaked oil could be noticed and accordingly, it was possible to avoid the damage. As mentioned above, other part of judges made opposite conclusion. Assessment of specific issue depends on the reflexes of car driver, namely, on the identification of what falls in the area of his/her sight and what was the faith of the judge reviewing case.⁷¹ Although, based on the 1985 year law the approach changed, however it still continues to exist in the form of assumption; and assumption depends on the subjective assessment and is based on the first paragraph, article 1384 of the French civil code.⁷²

According to the view of some authors, requirement for “unforeseen” shall be put aside, if the consideration of event would not prevent the damage and would not prevent the outcomes. They are of the view that “unforeseen” is not autonomous condition of force majeure, it only indicates to “insurmountability”. During such argumentation authors are based on the view that there are circumstances consideration of which is possible, however such circumstances are insurmountable.⁷³

Above mentioned approaches must be considerable, as if under the condition of possibility to foresee the event the avoiding of event would not be possible, then “role” of “unforeseen” feature (as the condition for force majeure) decays.

The similar case was reviewed by the second chamber for the civil cases, cassation court of France, date of resolution – 02 April 2009; in its resolution cassation court defined that for consideration of the natural event as force majeure it must have unforeseen and insurmountable nature. In the specific case, according to the Meteorology Service of France the storm was forecasted, i.e. the condition of “unforeseen” was excluded. Following the above court started clarifying whether the specific condition was insurmountable.⁷⁴ As determined, the unforeseen nature had no impact over the damage, as its consideration would not result in the avoiding of outcome. Based on the above, cassation court decided that absence of sign of “unforeseen” could not become the factor preventing the release from liability.⁷⁵

⁶⁹ Cour de cassation, Chambre civile 2, 22 avril 1971, 70-11.271, Publié au bulletin, <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006985039&fastReqId=77329988&fastPos=2>>, [1.12.2013].

⁷⁰ Cour de cassation, Chambre civile 2, 2 juillet 1980, 78-14.873, Publié au bulletin, <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007006574&fastReqId=1774293704&fastPos=1>>, [1.12.2013].

⁷¹ Starck B., Droit Civil, Obligations, Responsabilité délictuelle, 2 éd., Paris, 261.

⁷² Bénabent A., Droit Civil, Les Obligations, 11 éd., Paris, 2007, 437.

⁷³ Antonmattei (P.H.), Contribution à l'étude de la force majeure, op. cit., n° 64 et s. ; JOURDAIN (P.), Droit à réparation (lien de causalité, cause étrangère), JurisClasseur Civil, art. 1382 à 1386, fasc. 161, n° 62-64, reference: Sabard O., Les causes d'exonération en droit français et dans d'autres ordres juridiques nationaux, 6, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [2.12.2013].

⁷⁴ Cour de cassation, Chambre civile 2, 2 avril 2009, 07-22.005, <<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020485067&fastReqId=953470051&fastPos=1>>, [2.12.2013].

⁷⁵ Sabard O., Les causes d'exonération en droit français et dans d'autres ordres juridiques nationaux, 6, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [2.12.2013].

4.3 Insurmountability

Even if the circumstances have no connection with the item and it is unforeseen, the owner will not be released from liability if such circumstances, in general, are insurmountable, as the owner within his/her capabilities must have done everything to avoid the damage.⁷⁶

Insurmountability, on its own, includes 2 elements: non-missability (unavoidability) and insurmountability. Such assessments are mainly used for certain natural events. In such cases it is assumed that specific event was unavoidable. Accordingly, we have to clarify the following issue: was it possible for the defendant to avoid the outcomes.⁷⁷

According to the interpretation provided by one of the French authors, if the external event is insurmountable in normal sense, then we are dealing with the force majeure, and it results in the release of owner from liability. For example, tearing off of 50 cubic meter land, which is then falling with the speed exceeding 180 km/hour, releases owner from the liability. In such case, we are talking about natural event, which could not be avoided even under the application of normal safety measures.⁷⁸

5. Guilt of the Victim

Despite the fact that main objective of the Civil-legal responsibility is the reimbursement of loss, the French law also considers prevention of damage as important. In this case, it is not considered expedient to reimburse the loss fully to the person, guilt of which is one of the reasons for the damage occurrence.⁷⁹ For example, pedestrian was considered as guilty even when the damage occurred in the process of crossing the area belonging to the pedestrians, as he/she did not pay attention to the fact of existence of car in the vicinity; moreover at that moment the yellow light was switched on the traffic lights. With the consideration of indicated facts, in the specific case, liability of the car owner was halved.⁸⁰

5.1 Guilt of the Victim as the Basis for Full Release of the Owner from the Liability

It was indicated above that in the French law “external force” is considered as the basis for release of item owner from liability; the “external force” implies the following:

1. External circumstances generated from unforeseen basis and referred to as “force majeure”;
2. Guilt of the victim, bearing the force majeure signs;

⁷⁶ *Bénabent A.*, *Droit Civil, Les Obligations*, 11 éd., Paris, 2007, 437.

⁷⁷ En droit français, Cass. 2^e civ., 7 oct. 1987: *Juripro*, pourvoi n° 86-13328, 18 mars 1998: *Bull. civ. II*, n° 97, 12 déc. 2002: *Bull. civ. II*, n° 287, 5 fév. 2004: *Juripro*, pourvoi n° 02-15206, 1er déc. 2005: *Resp. civ. ass.* 2006, comm. 50. Reference: *O.Sabard*, *Les causes d'exonération en droit français et dans d'autres ordres juridiques nationaux*, 5, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [30.11.2013].

⁷⁸ *Starck B.*, *Droit Civil, Obligations, Responsabilité délictuelle*, 2 éd., Paris, 260-261.

⁷⁹ *Ibid*, 265.

⁸⁰ *Ibid*.

3. Guilt of the third party, again bearing the force majeure signs.⁸¹

Here, guiltiness of the victim causes full or partial release from the liability. Full release from the liability takes place if damage occurrence was caused by the force majeure condition for the one conducting damage inflicting action and it is not necessary to have the guilt of the victim bearing the force majeure signs. This sign differentiates it from other external factors,⁸² for example, guiltiness of the victim is characterized with the force majeure signs, if the hunter without any caution becomes the target of others or the victim goes very close to the wheel of the helicopter and not when he stands very close to the edge of platform or tries to leave the lift which is out of order. Moreover, we have to note that action of the juvenile is never reviewed as unforeseen action (which, as noted above, is the sign of force majeure).⁸³

5.2. Issue of Liability of Owner of Increased Danger Source under the Absence of his/her Guilt and Presence of Guilt of the Victim Interesting Example from the Georgian Court Practice

One example from the Georgian court practice is related to the determination of basis for the full release of owner of the increased danger source under the presence of victim guiltiness. For the discussed case⁸⁴ it was identified that car owner, R.E. was not guilty for the road-transportation accident, and that victim was acting with rough carelessness. The cassation court decided that in the given case there were no conditions considered for the liability under the article 999 of the Civil Code, as this norm did not consider reimbursement of damage for cases, where the owner of transportation facility was operating car lawfully, in other words, he/she has not violating rules for car operation. The owner of transportation mean is assigned the liability to reimburse inflicted damage if the damage is generated for the reason for which it is considered as a source of increased danger, in other words the outcome, without effect of any external factors, shall be in direct connection with the reason for the increased danger. The above mentioned special norm, which considers reimbursement of losses inflicted by the source of increased danger, is used for cases where damage is caused by the feature of item, for which the item belongs to the source of increased danger. If the damage is inflicted even in the process of item maintenance, but not proceeding from the features of increased danger source, and by fault of the victim, then liability is assigned via the general basis.

One of the judges did not agree with the provided dispute resolution, who in his/her differing opinion⁸⁵ stressed the contents of the section one, article 999 of the Civil Code; namely according to the above norm, owner of transportation facility designed for transportation of passengers and shipment of

⁸¹ La cause étrangère, Dernière modification le: 19.07.1997, <<http://jurisfac.free.fr/fiche.php?type=&id=174>>[1.12.2013].

⁸² *Dubuisson B.*, Les causes exonératoires de la responsabilité (Causes de justification et causes étrangères), 8, <http://grerca.univ-rennes1.fr/digitalAssets/267/267955_dubuissongeneve.pdf>, [26.11.2013].

⁸³ *Bénabent A.*, Droit Civil, Les Obligations, 11 éd., Paris, 2007, 437.

⁸⁴ See RSCG, 28 July 2009, Case No as-290-612-09 (in Georgian).

⁸⁵ Different position on RSCG, dated 28 July 2009; see court archive including the resolution of the Tbilisi City Court, Collegial Body for Administrative cases, dated 04 November 2005 (in Georgian).

goods, if operation of such facility was followed by the death, mutilation or destroy of health, or damage to the item, is liable to reimburse to the victim damage generated from the above. According to the view of author having different position, in the specific case, there was no basis to prove that accident did not follow the operation of transportation mean. In this case we were dealing with accident, which was a result of operation of the transportation mean and rough carelessness of the victim. We shall differentiate two conditions for the generation of liability: liability due to the infliction of damage and liability from the damage infliction. The basis of liability is represented not only by the level of guilt but also by the negative outcome. The owner of increased danger source is responsible for the inflicted damage despite his/her guiltiness. He/she is liable not only for the guilt, but also for the event. Source of increased danger includes any activity, implementation of which creates increased probability for the infliction of damage, due to the impossibility to have full control over such damage from the human being. This action must be related to the operation or utilization of material objects in any form; the object must be characterized with special qualitative or quantitative features. Increased danger is an objective category, meaning that there is relatively higher level of probability for the occurrence of damaging results compared with the probability for such damage existing in case of ordinary activities. Incurred loss is reimbursed if the damage is caused by such dangerous features of the object, due to which the object is considered as source of increased danger. Car in motion is considered as a source of such increased danger.

What can be said about interpretations provided on the mentioned dispute by the majority of court composition (on the one hand) and the judge presenting different view (on the other hand)?

Differing view contains correct attitude in the part where the author explains, that car in motion is itself considered as the source of increased danger and that one could consider any activity, related to the increased probability for infliction of damage as such due to the impossibility for human being to have full control over it. Based on the above, we should not share the part from the Cassation Court decision, which defines that article 999 of the Civil Code (reimbursement for the damage incurred as a result of operation of transportation facility) does not consider such case of loss reimbursement, when the owner of transportation mean was implementing operation of transportation mean in a diligent manner, in other words he/she has not violated maintenance rules. Under the condition of car movement the possibility for occurrence of damaging result, control over which is not possible for the human being is not out of order; therefore, damage occurred in the process of car operation, which is the result of its operation (use), based on the features of the source of increased danger must be assessed as damage. For such case, as defined above, the liability is assigned to the owner of transportation mean even under the absence of guilt.

However, in the process of assessing the above discussed case, it is the most important to clarify one more issue: whether the owner of car (who was not guilty for the occurrence of damage) had to be released from the civil-legal liability?

In this regard, we cannot share the position of author with different view, according to which based on the section one, article 999 of the Civil Code, the liability had to be assigned to the owner of above discussed car despite his guiltiness or innocence. Then, it turns out that “guiltiness of the victim” as basis for full or partial release of owner from the liability cannot play any role even under the absence of guilt of the owner of the increased damage source. Even in such case, this would not have any impact over the liability of car owner. Such approach must not be right. Moreover, it would not be right too to have full release of the owner of increased danger source in case of non-guiltiness of the owner of increased danger

source and guilty behavior of the victim (in the discussed case – rough carelessness). For similar cases the correct “way out” would be to assess the force majeure “nature” of victim’s behavior in the way similar to the French law, in other words, it must be clarified whether the guilty conduct of the victim represented unforeseen and insurmountable circumstances for the item owner. Otherwise, presence of victim’s guilt would never condition full release of owner from the liability and the above norm would only have formal nature. Moreover, guiltiness of the victim, if such guiltiness has force majeure signs, in general, should cause release of owner from liability in the same way as it is admissible under existence of “insurmountable force”. If the owner’s liability is not generated by such natural events, avoiding of which is not under the control of owner, as such event is unforeseen and insurmountable for the owner, then why under the similar conditions the owner is not released from the liability in case of guilty behavior of the victim, which although is not connected with the natural events, but it is “unforeseen” and “insurmountable”? Such resolution of problem would be much easier if the Civil Code of Georgia introduced relevant norms for the full or partial release of owner of the increased danger source under the presence of victim’s guilt. Such norm would create correct legislative basis for the resolution of similar disputes.

As it is clear from the discussed resolution issued by the Supreme Court, in the above case the guilty behavior of victim must have been unforeseen and insurmountable for the owner of transportation mean, as due to the short time and distance the driver R.E. would not be able to avoid crash with the pedestrian. Auto transport accident was caused by the victim himself due to the violation of safety rules, namely, he ran in front of the car so fast and unexpectedly that the car driver did not manage to put on the brakes; however, above issue (force majeure nature of victim’s behavior for the owner and accordingly, existence of basis for full release of owner from liability) shall be determined based on the complex assessment of case circumstances and then relevant decision must be made.

It has to be also noted that for other case⁸⁶ the Supreme Court of Georgia, did not consider the case as related to the damage inflicted via the source of increased damage situation, where the person during his/her travel by transportation facility, namely by train incurred the body damage due to the stone thrown from outside and lost the capability to work, due to which he was later dismissed from work. The Cassation Court defined that if damage was caused even in the period of operation of increased damage source, but not due to the features of the increased damage source, then assigning of liability must be made via the general bases. In this case, the court’s definition is in line with the law. Article 999 of the Civil Code of Georgia discusses cases, where damage follows the operation of transportation mean and it does not imply circumstances generated from other “external basis”, including the thrown stone. Otherwise, any damage occurring during the operation of transportation mean would cause the liability of owner of the transportation facility, which would not be correct.

As mentioned above, the Georgian norms regulating damage inflicted by the increased damage source mainly name the insurmountable force as the basis for release of owner from responsibility. Indication on the guilt of victim as a basis is not included in the norms neither regulating the damage generated from the increased damage source as a result of operation of transportation facility nor the building. It has been also noted that for similar cases article 415 of the Civil Code is applied in the court practice; the above must not be always correct, as this article discusses the damage caused under the

⁸⁶ See RSCG, 30 March 2006, Case № as-860-1132-05 (in Georgian).

guiltiness of victim as well as damage inflictor. Accordingly, it cannot be used for the regulation of cases, where the reason causing the damage is only the guilty action of victim and the guilt of owner of increased danger source is not present. Under such circumstances, it is expedient to define in the Civil Code of Georgia such bases for full or partial release of owner of increased danger source from liability as guiltiness of victim.

6. Guilt of the Third Party

Often involvement of third party plays certain role in the occurrence of damage.⁸⁷ It seems that this was considered in the French law and indicated “guilt of third party” as one of the bases for the release of item owner from liability. Mentioned approach must be agreeable for the Georgian law, as guiltiness of third party could cause damaging result in the same way as guiltiness of victim. Accordingly, in such case, the item owner shall be fully or partially released from liability in the same way as in case of confirmation of victim’s guiltiness.

Guilt of third party, for example, is demonstrated when the car is stopped in a normal situation, but other car crashed it from behind, and as a result of crash stopped car crashed the pedestrian.⁸⁸

The French law, in the process of evaluation of third party’s guilt stresses the following issues: if the third party’s guiltiness bears the signs of force majeure for the item owner, then the owner is fully released from liability. Moreover, if the third party’s guiltiness is not unforeseen or insurmountable, but third party’s action is guilty, then item owner remains fully responsible against the victim.⁸⁹

The Georgian law, neither at legislative nor at court levels, considers third party’s guilt among the bases for release of owner of increased damage source from the liability. The only case, which discusses the cases of damage inflicted by the third party actions and which, in principle, excludes the owner’s responsibility is provided in the first and second sentences, section 4, article 999 of the Civil Code of Georgia. According to the mentioned norm of the law, if person uses transportation mean without permission from the owner, he/she is liable to reimburse damage instead of owner. Moreover, owner is liable to reimburse incurred loss, if use of transportation mean has become possible due to his/her fault.⁹⁰ The Court practice considers as cases of use of transportation mean without owner’s permission, for example, case when transportation facility owner has not transferred it to user, or user used transferred transportation mean against the will of owner. As for the fact of transportation mean use due to the owner’s fault (when the liability is assigned to the owner), according to the instructions provided by the Supreme Court of Georgia, the above can take place if owner leaves the transportation facility door open, or leaves keys in the car. The above indicates that owner was not able to ensure proper protection of transportation facility in his possession, which became the basis for appropriation of transportation facility by other persons.⁹¹

⁸⁷ *Bénabent A.*, *Droit Civil, Les Obligations*, 11 éd., Paris, 2007, 438.

⁸⁸ *Starck B.*, *Droit Civil, Obligations, Responsabilité délictuelle*, 2 éd., Paris, 263.

⁸⁹ *Bénabent A.*, *Droit Civil, Les Obligations*, 11 éd., Paris, 2007, 438-439.

⁹⁰ The Civil Code of Georgia, as of 28 October 2014, Tbilisi, 337 (in Georgian).

⁹¹ See RSCG, 15 July 2010, Case No as-39 -38- 10 (in Georgian).

It will be expedient, if the Georgian law (like the French law) considers the guiltiness of third party as one of the bases for release of owner of increased danger source from liability. Under the above condition, exclusion or reduction of owner's liability shall be expedient in the same way as it is possible in case of guiltiness of victim. The reason, why is in such cases full or partial release of owner from liability expedient, was discussed above.

7. Conclusion

What are the main characteristics of the French law in relation to the full or partial release of owner of the increased danger source from the liability? How similar or different is Georgian legislation from the French law in this regard? Does the Georgian legislation require some changes? What were the specific views identified in the process of working on the present article? Present section of the work is devoted to answers to above listed questions and other problematic issues identified in the process of research.

As it was clarified, "insurmountable force" is named as a main basis for the release of owner of the increased damage source from the liability in the Georgian norms regulating damage inflicted by the source of increased damage. Indication on "the guilt of victim" as a basis is not included in the norms neither regulating the damage generated from the increased damage source as a result of operation of transportation facility nor the building. Georgian law attempted to compensate for this shortcoming (if one could refer to created situation in such way) via the application of article 415 of the Civil Code of Georgia.

The following view is valid in this case : although it is admissible to apply article 415 of the Civil Code of Georgia for regulation of delict liabilities, however, its application must be expedient, if joint guilt of victim and damage inflictor is in place, as named law norm regulates the situation when both of them – damage inflictor and victim – are acting guiltily; namely, according to the norm, if behavior of victim also facilitated generation of damage, then liability for the reimbursement of incurred losses and volume of such reimbursement depends on the following – which party is guiltier in the infliction of damage.⁹² In such cases, liability for the reimbursement of incurred losses and volume of such reimbursement is determined based on the level of guiltiness of parties, based on which party is guiltier in the infliction of damage,⁹³ damage in place is the integrated result of debtor's and victim's joint action.⁹⁴

Hence, based on the contents of article 415 of the Civil Code of Georgia, it is evident that it discusses the guiltiness of victim as well as damage inflictor. Accordingly, the following question is raised: how will the case, where the guilty action of victim becomes the only reason for the damage, be regulated? As liability for the damage inflicted by the source of increased danger might be assigned even in the event of absence of guilt.^{95,96} Georgian legislation does not provide an answer to the above question.

To summarize the above, it is expedient to define in the Civil Code of Georgia other basis – "guilt of the victim" -for the full or partial release of owner of the increased danger source from the liability in

⁹² The Civil Code of Georgia, as of 28 October 2014, Tbilisi, 163 (in Georgian).

⁹³ Zoidze B., Comments to the Civil Code of Georgia, Book 3, Edited by Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J., Tbilisi, 2001, 481 (in Georgian).

⁹⁴ Ibid, 480-481.

⁹⁵ Chikvashvili Sh., Comments to the Civil Code of Georgia, Book IV, volume II, Edited by Chanturia L., Zoidze B., Ninidze T., Shengelia R., Khetsuriani J., Tbilisi, 2001, 412, 408 (in Georgian).

⁹⁶ Akhvlediani Z., Liability Law, 2nd edition, Tbilisi, 1999, 271(in Georgian).

addition and similar to the “insurmountable force”. In specific cases related to the damage inflicted by the increased danger source (such examples are provided above in the article), the above will create correct basis for the release of owner from liability.

Moreover, it would be expedient, to define in the Civil Code of Georgia “guilt of the third party” – as a basis for full or partial release of owner of the increased danger source from the liability. Often involvement of the third party plays certain role in the occurrence of damage.⁹⁷ It seems that this was considered in the French law and indicated “guilt of third party” as one of the bases for the release of item owner from the liability. Mentioned approach must be agreeable for the Georgian law, as guiltiness of third party could cause damaging result in the same way as guiltiness of victim. Accordingly, in such case, the item owner shall be fully or partially released from the liability in the same way as in case of confirmation of victim’s guiltiness.

At the beginning of the research following questions were raised: What are the differences and similarities between the terms “force majeure” valid in the French law and “insurmountable force” - valid in the Georgian law? In this case, are we dealing with number of contextual differences or terminology differences?

In the process of working on the article it was clarified that force majeure valid in the French law is quite different from the “insurmountable force” applied in the Georgian law, which is almost analogical basis for the release of owner of the increased danger source from the liability. Despite the above, it is evident that in the French law the mandatory sign of force majeure is only its “insurmountability”. Probably for this reason force majeure circumstances and, accordingly, above indicated basis for the release of owner of increased danger source from the liability in the Georgian Law is referred to with the name “insurmountable force”.

Another question is – which term would be more appropriate for the expression of mentioned basis for the release of owner of increased danger source from the liability – “insurmountable force”, or “force majeure” – the following answer was provided in the article:

“Insurmountable force” in the Georgian law does not precisely reflect the basis for release from the responsibility, which is implied under the mentioned notion; for example, in the Georgian court practice “insurmountable force” is defined as such obstacle, which was not under the control of owner of the source of increased danger (specifically, transport) and he/she could not reasonably foresee in advance and avoid or overcome obstacle or its outcomes; in other words, person did not have possibility to influence the obstacle.⁹⁸ It is evident from the above that notion of “insurmountable force” unites two types of features: “insurmountable” and “unforeseen”; in particular, in order to have event, which can cause release of owner of increased danger source from the responsibility, it must be, on the one hand, insurmountable and, on the other hand, unforeseen for the owner. Accordingly, expression of discussed event with the term “insurmountable force” must not be expedient.⁹⁹

As for the term “force majeure” established in the French law, as it was identified in the process of research, “insurmountability” is the mandatory feature of “force majeure” in the French law; however, it also implies “unforeseen” and “external”. Hence, in the French law, term “insurmountable force” (if such

⁹⁷ *Bénabent A.*, Droit Civil, Les Obligations, 11 éd., Paris, 2007, 438.

⁹⁸ See RSCG, 09 November 2010, Case № as- 494- 463-2010 (in Georgian).

⁹⁹ See RSCG, 09 November 2010, Case № –as -494 -463 -2010 (in Georgian).

was applicable) would not sufficiently describe mentioned basis for the release of person from the responsibility; therefore it was correctly named as “force majeure”.

The view on the issue of mandatory nature of force majeure signs (“externality”, “unforeseen nature”, “insurmountability”) was expressed in the present work.

It turned out that requirement for the “externality” sign sometimes becomes disputable. According to some authors “externality” is not integral characteristic feature of force majeure and it represents negative form of expression of civil-legal responsibility principle.¹⁰⁰

According to the view of some authors, condition for “unforeseen” shall be always put aside, if the consideration of event would not prevent the damage and would not avoid the outcomes. They are of the view that “unforeseen” is not autonomous condition of force majeure; it is only the indicator of “insurmountability”. Authors base their arguments on the view that there are circumstances consideration of which was possible, however such circumstances were insurmountable.¹⁰¹

The following question was also naturally raised in the article: whether it is justified to unify under the notion of “force majeure” all three features mentioned above, attention must be drawn to the following:

The research demonstrated that “insurmountability” is mandatory feature of force majeure, as the insurmountability of event represents the necessary component, which might cause release of person owning the source of increased danger from the liability. Existence of other - “unforeseen” and “external” -features of force majeure is not always necessary for the release of person from the responsibility, i.e. one cannot rule out the chance to have a case, when person can foresee the event or such event is not external for the person, however, it still turns out to be insurmountable and due to the above, person owning the source of increased danger is released from the liability.

Despite the above expressed positions, as at present the force majeure circumstances are referred to as “insurmountable force” in the Georgian law and as “force majeure” –in the French law, the term “force majeure” in the present work is used in relation to the French law and in case of discussion of regulations effective in the Georgian law – the term “insurmountable force” is used.

In the process of research important characteristic of the French law was identified, which defines the originality of the French law. In the French law force majeure may acquire different forms, as it might be caused by natural event as well as by the guilty actions implemented by stranger, third party or victim.¹⁰² Hence, in the French law force majeure unifies all circumstances which are over the area of control of the person implementing the damage inflicting action.¹⁰³

Above mentioned approach is not groundless, furthermore, it can be stated that indicated approach is even logical, as if owner is released from the liability in case of natural event, he is not able to avoid,

¹⁰⁰ Sabard O., Les causes d'exonération en droit français et dans d'autres ordres juridiques nationaux,4-5, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [26.11.2013].

¹⁰¹ Antonmattei P.H., Contribution à l'étude de la force majeure, op. cit., n° 64 et s.; JOURDAIN (P.), Droit à réparation (lien de causalité, cause étrangère), JurisClasseur Civil, art. 1382 à 1386, fasc. 161, n° 62-64, miTiTebulia: Sabard O., Les causes d'exonération en droit français et dans d'autres ordres juridiques nationaux, 6, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [2.12.2013].

¹⁰² Sabard O., Les causes d'exonération en droit français et dans d'autres ordres juridiques nationaux,3, <http://grerca.univ-rennes1.fr/digitalAssets/267/267960_osabard.pdf>, [26.11.2013].

¹⁰³ Dubuisson B., Les causes exonératoires de la responsabilité (Causes de justification et causes étrangères), 5, <http://grerca.univ-rennes1.fr/digitalAssets/267/267955_dubuissongeneve.pdf>, [26.11.2013].

then why actions of victim or third person, which caused damage under the similar circumstance, should not cause release of owner from the liability? Why should not we consider circumstances which although are not related to natural events, but are produced by the “external forces”, are “unforeseen” and “insurmountable” for owner, as factors excluding person’s liability?

The author in the present work attempted within the present possibilities to research, evaluate the bases for the full or partial release of owner of the increased danger source from the liability and to review the application of such norms in practice. And the objective of the present research was exactly the above: definition of bases for the full or partial release of owner of increased danger source from the liability at some level of accuracy; identification of positive and negative aspects of norms developed in the legislation in this regard; if applicable, identification of ways for the eradication of deficiencies in the law; correct evaluation of circumstances excluding the liability of owner of increased danger source in the court practice; development of correct views related to the research topic in the Georgian legal science. If the above objectives are achieved at even a small scale, then the article has fulfilled its function.

Salome Jibuti*

**Brief and Simple Information, as a “European Panacea” for Protection of
Retail Investors and Improvement of Investment Related Decisions
(According to Prospectus Directive)**

1. Introduction

Italian philosopher Niccolo Machiavelli in his “Prince” gives advice: “Never waste the opportunities offered by a good crisis”.¹ The world has just suffered the worst financial crisis. The financial crisis of 2007-2008 also known as „Economic 11 September”² embraced the whole world. In general, it is the result of political and economic decisions.³ However, in particular, American mortgage credits have been considered as the cause of the crisis.⁴ Goal of so-called “*Asset Backed Securities*” was to separate the loan risk and loan, declare the risk as ‘value’ and sell it to the investors around the world. Such a model of activity allows for the issuance of an unlimited number of loans. Apparently, it was believed in the United States (the US) that it is possible to become rich with debts.⁵ To avoid the risk of returning the loan, banks were selling the requests to the societies founded specially for this purpose,⁶ which then placed these requests together with many other requests in one folder, where the risks were hidden as if they did not exist anymore. The illusion of limitless growth arose, and banks have begun to emit and/or sell doubtful financial products⁷. Drawback of the system was that the funding innovations allowed issuing credits without limitation due to lack of demand for equity investment. Market participants had incredible confidence in constant development of the American real estate market.⁸

Since August 2007, financial system suffered a number of major setbacks. In March 2008, it became necessary to save - *Bear Stearns*, six months later - on September 15, Lehman Brothers went bankrupt. By end of September, entire financial system appeared on the verge of collapse⁹. The cause of the crisis was false expectations rather than false incentives (at least not market’s false incentives).

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¹ „Never Waste the Opportunities Offered by a Good crisis” (*Machiavelli N.*), *George B.*, 7 Lessons for leading in Crisis, Jossey-Bass, San Francisco, 2009, 75.

² *Buachidze B.*, Anatomy of Global Economic Crisis, Globalization, Global Crisis and South Caucasus, International scientific-practical conference, Kutaisi, May 16-17 2009, 19.

³ *Hoppenstedt D.H.*, Konsequenzen nach der Finanzkrise, Zeitschrift für das gesamte Kreditwesen, 8/2010, 387-392, 387.

⁴ *Forkel H.W.*, Rechtsfragen zur Krise an den Finanzmärkten: Zur Systematik möglicher Schadenersatzansprüche, BKR 2008, 183-188, 183.

⁵ *Möschel W.*, Die Finanzkrise - Wie soll es weitergehen?, ZRP 5/2009, 129-133, 129.

⁶ „Zweckgesellschaften“.

⁷ *Märker K., Hillesheim R.*, Brennpunkt Finanzkrise: Anlegerschutz in Deutschland, ZRP 2009, 65-69, 66.

⁸ *Möschel W.*, Die Finanzkrise Wie soll es weitergehen?, ZRP 5/2009, 129-133, 130.

⁹ Bank for International Settlements, 79th Annual Report, Basel, 29 June 2009, 3f.

Bankers were not looking for risks, they under-estimated them.¹⁰ By declaring bankruptcy of US investment bank Lehman Brothers, the financial crisis became the global crisis, leading to the destruction of billions in capital throughout the world.¹¹ System collapsed in the fastest way - from Thursday to Sunday. Banks no longer trusted each other, because a partner might face challenges due to unknown risks. Shock, that followed the state's refusal to rescue *Lehman Brother* – the systemically important bank, played a pivotal role.¹² By doing so the responsible bodies gave a sign to the markets in the US, that they could no longer rely on the „*too big to fail*“¹³- doctrine and that this doctrine did not function in an unlimited way.¹⁴ This doctrine contributed to the fact that banks cherishing hopes for the government and emission banks' support, took risks in a carefree fashion. According to the new motto, none of the banks is so large that it cannot go bankrupt. A new reality has been created, when even the size of the bank did not provide a guarantee of avoiding bankruptcy.

Ruthless crisis and the extraordinary events developed on the financial market forced the regulators to change their so-called “Light touch regulation position”¹⁵ towards the markets and deviate from liberal approach, which they “preached” for a long time. The crisis highlighted the fact that the theory of Efficient Market hypothesis¹⁶ is unreliable during the strong stress period. It turned out also that the development of financial system in many ways left behind the financial regulation which was formed for its support and the economic system to which it should serve.¹⁷ Due to globalization and permanent financial innovations, the last global financial crisis unlike previous crises, was completely different leading to the creation of a new reality. The need for change of financial architecture and starting thinking of global reforms has emerged. This issue has become a major challenge for regulators. It was recognized, that the regulators should immediately start action according to the new altered rules of game.¹⁸

As a result of financial crisis, retail investors suffered huge losses in the capital market. Neither national nor international regulatory and supervisory bodies managed to avoid the losses.¹⁹ Financial markets are based on trust.²⁰ Lack of adequate norms of investor protection caused “confidence crisis”. It

¹⁰ *Vaubel R.* in *Grundmann, Hofmann, Möslein*, Finanzkrise und Wirtschaftsordnung, Berlin 2009, 123.

¹¹ *Märker K., Hillesheim R.*, Brennpunkt Finanzkrise: Anlegerschutz in Deutschland, ZRP 2009, 65-69, 65.

¹² *Schneider U. H.*, Zwischenruf, Was ist eine systemische relevante Bank, ZRP 4/2009, 119-121, 120.

¹³ According to this doctrine some financial institutions are so large and intertwined with each other that a failure of one of them could become the basis for economic disaster. Therefore, such institutions should be saved by the government during the crisis. The global financial crisis revealed the risks associated with the use of such approach, as this doctrine highly contributed to the excessive risk taking activities of the banks.

¹⁴ *Möschel W.*, Die Finanzkrise- Wie soll es weitergehen?, ZRP 5/2009, 129-133, 130.

¹⁵ „Light touch regulatory approach”.

¹⁶ „Efficient market hypothesis”.

¹⁷ *Wymeersch E.*, The Institutional Reforms of the European Financial Supervisory System, An Interim Report, Belgium, 2010, 1.

¹⁸ „I don't play according to a given set of rules, I look for changes in the rules of the game”, *Soros G.*, Soros on Soros, USA, 1995, 10.

¹⁹ However, it is believed that the crisis could have been foreseen and avoided, See *Halm-Addo A.*, The 2008 Financial Crisis, Dorrance Publishing, USA, 2010, 1.

²⁰ *Statman M.*, Regulating Financial Markets: Protecting Us from Ourselves and Others, Santa Clara, January 28, 2009, 1.

is very difficult to return lost investor confidence.²¹ According to the study presented in *Optem Report 2008* of the European Commission, financial services are least trusted by customers, compared to other business sectors.²² Investors have lost confidence in the markets. Reduction of retail investors' involvement led to the decrease in demand and production, unemployment and other negative consequences. Generally, securities markets experience a crisis and shock sooner or later causing the loss of investor confidence and destruction of reputation of market institutions.²³ Historically, crisis and scandal were the major stimulating factor for EU legislation and reforms.²⁴ It is no coincidence that the law of the European capital market, in the form as it exists today, owes a financial crisis. However, it is notable that reform stimulus created by crisis cannot be maintained for a long time.²⁵

This observation is closely linked to the latest crisis and the reform of retail investors' protection system. Global financial crisis provided opportunities for European regulators to reconsider their approach to investor protection to ensure more efficiency and better results. Ongoing reforms of legal framework are a good chance for putting forward the issue concerning the improvement of retail investor protection not only in words, but in deeds.²⁶ In this case, the first thing to find out is whether the regulators in the European Union have used this chance.

Reforms undertaken in the EU following the financial crisis showed that although regulators in Europe did not "waste the crisis", the opportunity for revolutionary reforms has not been used fully. At the initial stage of reforms, retail investors sector was completely forgotten. European markets of retail investors are highly fragmented and there is a problem concerning the clarity in regulations.²⁷ Besides, due to permanent difficulties and problems in European markets for retail investors, it was problematic for them to find a place in post-crisis reform program, because a quick response was required. Despite the delay in the beginning, the political focus has changed at the final stage of crisis and retail investors' protection (RIP) and confidence building became a topical issue.

Taking account of the above context, present article provides discussion of disclosure as one of the leading European instrument of RIP according to Prospectus Directive (PD) in the historical context before and after 2007 global financial crisis. The goal of the article is to present changes introduced to PD after global financial crisis regarding the disclosure regime and critical analysis and assessment of potential for success. The article highlights the problem related to the definition of category European Retail Investor, informational disclosure regime provided in PD before the global financial crisis, reform undertaken after the global financial crisis regarding the disclosure regime as well as the critical analysis of main directions of this reform and relevant conclusions.

²¹ Open Hearing on Retail Investment Products -Record-, Brussels, 15th July 2008, 21.

²² European Commission, *Optem Report*, January 2008, 8.

²³ *Hopt K., Wymeersch E. (ed.), Capital Markets and Company Law*, Oxford, 2003, 65.

²⁴ *Hopt K., Wymeersch E. (ed.), Capital Markets and Company Law*, Oxford, 2003, 66.

²⁵ *Coffee J., The political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, The Center for Law and Economic Studies Columbia University School of Law, Working Paper No. 414, January 9 2012, 14.

²⁶ *Cherednychenko O.O., The Regulation of Retail Investment Services in the EU: Towards the Improvement of Investor Rights?*, 33 *J Consum Policy*, 2010, 403–424, 423.

²⁷ See BME Report 2007.

2. European Retail Investor Definition

For analyzing PD, it is necessary to ask some preemptive questions: Who is Investor? Who is Retail Investor? Who is European Retail Investor? What should be the definition of this term?

Although the answer seems to be simple at the first glance, there is no single, generally accepted answer for some of these questions.

According to common definition, the word „invest“ is derived from Latin „investire“ meaning *clothe* or *cover with a garment*. According to Pocket Oxford English Dictionary, by 1613 the verb „to invest“ means the act of committing money to an endeavor with the expectation of obtaining an additional income or profit²⁸. Key characteristic of the investment is obtaining income or profit.²⁹ According to lawyers, investor is someone who provides money, while the economists consider that investor is the user of capital; consumed capital, or investment is a contribution to the productive process.³⁰ There are two types of investors: Institutional and private, or retail. Institutional investors include insurance companies, investment companies, pension funds, international organizations etc.³¹ Retail investor is an individual who invests his savings or inherited property for maintaining his lifestyle, for pension, sickness or transmission to their children etc.³² These two groups of investors have significantly different interests and protection requirements. This difference is related to not only their respective investment volume, but also the quality and depth of their knowledge and experience.

Not much is known about who is European Retail Investor. Definition of the category of European Small Investor is a very difficult task. European legislation, regulations and policy documents do not include any general definition. We can assume that the main cause of this is a fragmented nature of European retail investor markets and significant differences in the behavior of retail investors in different European countries. Such a conclusion stems from 2007BME Report.³³ Subject to the above, it is to be determined, whether it is reasonable to talk about European Retail Investor or about very unclear and obscure term “European average Retail Investor” in present reality, during the ongoing RIP reforms in the post-crisis period. Neither Markets in Financial Instruments Directive (MiFID)³⁴ provides clarity with respect to the term definition, though it is the only European legislative act that includes definition of “Retail Investor”. MiFID provides very obscure and incomplete definition, such as: Any Clients not falling within the list of professional clients, are, by default, Retail Clients. Complication of the term Retail Investor with territorial generalization (European Retail Investor), or averaging (average retail) is unproductive, just as well the classification of investors by professional grounds. As was mentioned above, the term “retail investor” should imply private investor operating alongside institutional investor.

²⁸ Fisher J., Bewsey J., Waters M., Ovey E., *The law of investor protection*, 2nd ed., Sweet & Maxwell, London, 2003, 5.

²⁹ Ibid, 5.

³⁰ Page A., Ferguson R., *Investor Protection*, London 1992, 3.

³¹ Loss L., Seligman J., *Fundamentals of Securities Regulation*, Gaithersburg, 2001, 5.

³² Van Randenborgh W., *Zertifikate gehören nicht in die Hand privater Anleger!*, ZRP 3/2010, 76.

³³ BME Report, 15 November 2007.

³⁴ „Markets in Financial Instruments Directive (MiFID)“.

3. Prospectus Directive – before 2007 Global Financial Crisis

Prospectus Directive basically applies to stocks and bonds instruments being the most popular product among retail investors. Vital importance of these products for investment markets of retail investors determines the essential character of the instrument in the light of protection of the interests of retail investors.

In the 1990s it became clear that the European Union was still far from achieving a goal of the unified capital market. The lack of significant indicators of emitting abroad was regarded as one of the main reasons for this. The latter was caused by the fact that a recipient state had the right to impose additional requirements on the issuer on their territory and to demand translation of PD. To remedy the situation, two important directives have been adopted – Prospectus Directive (PD)³⁵ and Transparency Directive.³⁶ The main value of the PD is that it has introduced the so-called Passport System for issuers. Accordingly, after the approval of prospectus by one member state, it should be accepted by another member state as “valid” for offering the securities or admission of securities to regulated markets. A recipient state no longer has the right to impose additional requirements.³⁷

The European regime for prospectus consists of PD (*Directive 2003/71/EC*) and the European Commission second level regulation (*Commission Regulation 809/2004*), which includes the details of disclosure regime. Directive regulates the initial disclosure regime during the public offering of securities or admitting the securities to securities market for trading.³⁸ According to its first article, Directive aims at harmonization of the requirements related to preparation, approval and distribution of prospectus, which should be accessible to public on the securities market of public offering or regulated markets within the member state. As was mentioned above, one of the great achievements of the Directive is introduction of the Passport System: prospectus recognized by a competent authority of one of the Member States is valid across the entire European Union for public offering of securities or for admission to trading.

Prospectus is a disclosure document, which includes all the necessary information allowing investors to assess properly the securities-related assets and liabilities, financial position, profits and losses, issuer and the rights.³⁹ One of the principles the Directive is based on, is introduction of obligations related to wide disclosure regime, which comply with international standards for public offering of securities and or admission to securities market for trading.⁴⁰

³⁵ „Prospectus Directive”.

³⁶ „Transparency Directive”.

³⁷ Welch J., *European Financial Services*, in Blair M. QC and G. Walker G. ed., *Financial Services Law*, OUP, Oxford, 2006, 778-779.

³⁸ Ferran E., *Building an EU Securities Market*, Cambridge, 2004, 314.

³⁹ Kanarek D.A., *Legislative Development: Directive 2001/107/EC on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS) with a View to Regulating Management Companies and Simplified Prospectuses*, 2002, 8 Colum. J. Eur. L. 557, 2.

⁴⁰ Van Gerven D., *Prospectus for the public offering of securities in Europe*, Vol. I, Cambridge, 2008, 6.

Therefore, the PD establishes a very broad disclosure standard.⁴¹ The key disclosure obligation is provided in article 5 of PD, which demands that all information in PD must be provided in an understandable manner that will allow investor to make qualified assessment of assets and liabilities, financial position, profits and losses, issuer and guarantor, as well as of the rights related to the securities. It is worth noting that the initial version of PD had already included a requirement concerning the availability of prospectus resume. According to article 5(2) of the Directive, prospectus also shall include a resume,⁴² which is a short notice on main characteristics and risks of securities. It is important a resume be executed in original prospectus language, in non-technical form.

Besides, disclosure requirements are detailed in extensional regulation of Prospectus adopted by the European Commission which is a level two implementation measure according to Lamfalussy Process.⁴³

Prospectus Directive is a "maximum harmonization" directive, meaning that it creates a uniform, highly detailed disclosure regime within the European Union leaving no room for imposing additional requirements to issuers by the member states. Disclosure norms are completely established and member states have no possibility for additions. Maximal harmonization regime has become an important subject for criticism, and is often considered as an overreaction to problems arising.⁴⁴ Even when offering of securities or listing occur in one member state only, and it does not contain the element of transferring across borders, regulation of disclosure regime-related requirements is observed at the EU level and there is no national discretion right to impose additional requirements. It is believed that maximum harmonization goes beyond the purpose for which it is needed and means a disproportionate response, or solution.⁴⁵ However, standardization of prospectus information through maximum harmonization may be favorable. Having the uniform standards for entire European Union can eliminate the threat of national bias when taking investment decision through the simplification of the comparison of prospectus information. Besides, standardization through maximum harmonization is effected at the expense of possible profitable initiatives of member states that might contribute to the development and refinement of prospectus requirements related to the disclosure regime. PD maximum harmonization reduces the competition area between member states in the light of disclosure standards.⁴⁶

Question arises: How appropriate and justified is having the harmonized rules in the reality of highly fragmented European retail investors' markets. A significant difference between the culture, taxes, local products and distribution networks in the EU countries causes a very different retail investor behavior. Retail investors show different nature of investing and competence level in different EU states. Accordingly, it may become controversial whether these peculiarities require greater flexibility, and

⁴¹ *Panasar R., Boeckman P.*, European Securities Law, Oxford University Press, Oxford, 2010, 25.

⁴² „Prospectus summary”.

⁴³ The Lamfalussy Process is an approach to the development of financial service industry regulations used by the European Union. It is composed of four "levels," each focusing on a specific stage of the implementation of legislation.

⁴⁴ *Ferran E.*, Building an EU Securities Market, Cambridge, 2004, 141.

⁴⁵ *Ferran E.*, Building an EU Securities Market, Cambridge, 2004, 142.

⁴⁶ *Ferran E.*, Building an EU Securities Market, Cambridge, 2004, 159.

whether the harmonization of rules create a risk that the differences between national needs and advantages will not be taken into consideration.⁴⁷

PD entered into force on 31 December 2003 and member states were obliged to implement it within their jurisdiction no later than 1 July 2005. Article 31 of the original directive (*Directive 2003/71/EC*) committed the European Commission to assessment of the application of the Directive five years after its entry into force and submit proposals for revising the Directive if necessary. In January 2007, European Commission launched a program aiming at reduction of administrative burden and cost related to the EU acts. PD was included in the list of the acts containing the regulation with extra administrative burden for companies and which should be alleviated.

The main shortcoming of PD was improper functioning of the prospectus resume, which lacked simplicity and was not readable.⁴⁸ PD was criticized because it failed to reach its initial goal – aimed level of investor protection, consumer confidence, effectiveness, clarity and legal security.⁴⁹ Although the PD is regarded as investment market instrument for retail investors, some believe that it is more focused on issuer, than financial product. Therefore, it is designed neither for the support of retail investor products on markets nor for reflection of the specific risks that arise from complex investment products of retail investors.⁵⁰

4. Prospectus Directive after Global Financial Crisis

In September 2009, the European Commission put forward a proposal concerning the revision of the PD. Amendments to the PD were introduced in November 2010. Directive *2003/71/EC* was replaced with *2010/73/EU* Directive, to ensure strengthening of investor protection, alleviation of administrative burden for small companies related to capital attraction at the European securities market and increase of the effectiveness of prospectus regime. Therefore, Directive *2010/73/EU* has three main objectives: increase the effectiveness of prospectus regime; alleviate the administrative burden for small companies related to capital attraction at the European securities market and strengthen investor protection.

Changes undertaken in relation to disclosure regulation aim at improving the prospectus resume. According to the EC, prospectus resume must be a key source of information for making investment decision for retail investors. As a result of the changes, the concept of key information was introduced into the framework of prospectus resume to ensure establishment of effective standard of investor

⁴⁷ Roland V. in Grundmann S., Hofmann C., Möslein F., *Finanzkrise und Wirtschaftsordnung*, Berlin, 2009, 127.

⁴⁸ European Commission, Commission's Proposal for a Directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, COM(2009) 491 final, 23.9.2009, 3-4.

⁴⁹ European Commission, Commission's Proposal for a Directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, COM(2009) 491 final, 23.9.2009, 3-4.

⁵⁰ Moloney N., *How to Protect Investor, Lessons from the EC and the UK*, CUP, Cambridge, 2010, 322.

protection and to support efficient investment decisions. 'Key information' concept means brief, non-technical information about the product's essential characteristics and risks. Form and content of resume shall provide key information, to allow investors make an informed investment decision and compare the securities with other investment products.⁵¹ The abovementioned changes are in compliance with the approach, which is derived from EC document on complex products for retail investors (*PRIIPs KIID*).⁵² However, some believe, that prospectus resume reform will have to be revised again after completion of the work on *PRIIPs KIID*, in order to avoid discrepancies between the two documents. Some securities that are subject to prospectus regime will fall under *PRIIPs* regulation. Therefore, these two initiatives need to develop in a coordinated manner to ensure equalization of requirements, creation of unified harmonized approach to investors' perspectives and avoid unwanted duplication of provisions.⁵³

There is skepticism about whether the issuer's disclosure regime can contribute to the retail investor protection. Some people believe that EU Issuer Disclosure Regime is focused on / aims at ensuring access to capital market for issuers, while action towards this goal is not always consistent with investor protection objective.⁵⁴ The EC has never presented any proof that EU Issuer Disclosure Regime contributes to the increase of protection of ill-informed investors.⁵⁵ It is also doubtful whether any real results can be achieved by the changes made in prospectus resume as they give the impression of changing the word order only.

It is worth noting that the 2010 Directive has granted specific authorities to a new European Securities and Market Authority (ESMA).⁵⁶ According to new provisions related to prospectus regime (article 7 of Directive), ESMA has power to set Binding Technical Standards regarding the detailed disclosure requirements. The modified directive provides for the implementation of a new regulatory frame through adoption of regulations delegated by the European Commission. Key principles of a new directive need to be reflected in the delegated acts. Accordingly, while drafting the delegated acts, on 25

⁵¹ European Commission, Commission's Proposal for a Directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, COM(2009) 491 final, 23.9.2009, 7.

⁵² On 3 July, 2012, the EC issued a proposal regarding the regulation of new key information. The proposal includes unified norms on the form and content of key information. It introduces KIID regime for any other products of small investors. The goal of regulation is to provide European small investor with brief, comparable and standardized disclosure known as Key Investor Information Document regardless which product is purchased. Packaged Retail Investment Products (PRIIPs); Key Investor Information Document (KIID). European Commission, Commission's Proposal for a Directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, COM (2009) 491 final, 23.9.2009, 2.

⁵³ Commission Communication, Communication from the Commission to the European Parliament and to the Council of 30 April 2009 - Packaged retail investment products, 55.

⁵⁴ *Willemaers G.S.*, The EU Issuer Disclosure Regime: Objectives and Proposals for Reform, Kluwer Law International, Brussels, 2011, 29.

⁵⁵ *Willemaers G.S.*, The EU Issuer Disclosure Regime: Objectives and Proposals for Reform, Kluwer Law International, Brussels, 2011, 34.

⁵⁶ „European Securities and Market Authority – ESMA”.

January 2011, the EC sent formal request to ESMA to present technical advice on possible delegated acts concerning the PD. ESMA was authorized to elaborate unified format of prospectus summary and key information in order to facilitate comparison between the summaries of similar products. In 2011, ESMA produced the first draft on PD Binding Technical Standards,⁵⁷ which inter alia includes the standards for the development of prospectus summary, format of the summary and detailed content and specific format of key information provided in the summary.

ESMA Consultation Document provides for a modular approach to the prospectus summary. Statutory key information to be presented within the prospectus summary is categorized by five sections (A, B,C,D,E,) to be included in each prospectus summary. These sections shall be presented in the sequence set by ESMA and it is not permitted to add a new section. Summary should be read as an introduction to basic prospectus. In addition, issuers are entitled to introduce additional information.⁵⁸ As for the document volume, according to ESMA, in general the summary shall not exceed 7% of prospectus size, or 15 pages, whichever is shorter.⁵⁹

Amendments to PD are also interesting in light of the liability in case of inaccuracy of prospectus summary. Old version of Directive tried to exclude such responsibility. Such approach was changed as amended by 2010 Directive in parallel with changing the summary into Key Investor Information document. EU member states are required to ensure that no one be responsible only on the basis of resume including its translation, except the cases when the summary is misleading, inaccurate or contains contradictory provisions regarding other parts of prospectus, or when read together with its other parts, it does not deliver all the key information that would help investor's decision-making on investing in specific securities.⁶⁰ PD article 6(2) directly requires that member states include in the national law the responsibility under private law regarding the statements on the accuracy and completeness of prospectus information. Significant drawback of the amendment is that PD does not specify whom the responsibility concerns, who the responsible person is – issuer or prospectus summary distributor, or who has the right to complain in case of incorrect prospectus summary.⁶¹

According to the critics of prospectus summary reform, new provisions will cause serious problems. Amendment requires that summary meet a standard set for the prospectus itself, namely, allow informed investment decision. It is not clear how the disclosure document (which consists of hundreds of pages) can be reduced in a brief document without breaking the set standard.⁶² Moreover, requirement concerning the submission of key information that “will allow investor to compare the securities with other investment products” is very vague to be practical.⁶³

⁵⁷ ESMA, ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU, Final Report, 4 October 2011.

⁵⁸ ESMA, ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU, Final Report, 4 October 2011, ESMA/2011/323, 67.

⁵⁹ ESMA, ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU, Final Report, 4 October 2011, ESMA/2011/323, 61.

⁶⁰ *Veil R.*, *Europäisches Kapitalmarktrecht*, 2. Auflage, Mohr Siebeck, Tübingen, 2014, 326-327.

⁶¹ *Willemaers G.S.*, *The EU Issuer Disclosure Regime: Objectives and Proposals for Reform*, Kluwer Law International, Brussels, 2011, 253.

⁶² *Panasar R., Boeckman P.*, *European Securities Law*, Oxford University Press, Oxford, 2010, 31.

⁶³ *Panasar R., Boeckman P.*, *European Securities Law*, Oxford University Press, Oxford, 2010, 32.

5. Conclusion

Therefore, reforms undertaken by EU regulators after global financial crisis for retail investor protection focused on simplification and standardization of the information. EU regulators are slowly distancing from rational investor principle, according to which investor must be equipped with comprehensive information, as retail investors in most cases never read the long prospectuses. The bounded cognition of retail investors also was recognized in the field of securities market. Subject to the above, so called Key Information has been introduced in prospectus summary.

This change was based on the fact that following the global financial crisis, lengthy and complex disclosure document had become one of the main issues of criticism because it complicated the discovery of key information. As a result, the EC left the disclosure document as a main mechanism of significant improvement of investor decision with an alteration – that it should be brief, understandable, complete, simple and standardized.

Although the EU regulators have likely acknowledged the borders of disclosure mechanism, the trend of regarding the information disclosure as a main regulating mechanism for investor protection and giving political preference to disclosure regime in reforms undertaken after the global financial crisis has been maintained.⁶⁴ Unfortunately, political attractiveness of the measures does not always reflect the feasibility level of its importance and relevance. Simplification and standardization of information as well as reduction of its volume is not a panacea for improved investment decision.

Disclosure mechanism reached the end of its potential and need to be supplemented with additional measures, such as investors' financial education. It will not suffice if regulation requires just equipping the retail investors with all the information. The delivered information needs to be understood. Retail investors do not have time, desire and sometimes ability to read, to process and to use properly the information they have received.⁶⁵ The reforms mostly are focused on the amount of delivered information rather than on building capacities for investors to perceive the information adequately. In such cases, provisions regarding the information disclosure do not succeed due to the insufficient consideration of the limited cognitive capacity of investors.

The information requires ability to read it, which the retail investors are usually lacking. Certainly, increasing the financial education level does not provide a guarantee that investors will never make a bad investment decisions. However, no proper investment decisions might be made unless sufficient level of education is reached by investors.

Successful RIP implementation will be possible through ensuring information disclosure and raising awareness for small investors. The first step has already been taken in Europe by reflecting the key information in the summary in standardized manner. However, this is not sufficient to achieve success. Another step is also required to start implementation of reforms in relation to investor education. Otherwise the EU will fail to prevent losses and damages for retail investors in case of new crisis.

⁶⁴ *O'brien J.*, Accounting and Finance, AFAANZ 2012, 3.

⁶⁵ *Willemaers G.S.*, The EU Issuer Disclosure Regime: Objectives and Proposals for Reform, Kluwer Law International, Brussels, 2011, 284.

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Harmonization of Legal Systems: EU and Georgia

I. Introduction

There still is not the united position amongst the law scientists and practitioner lawyers on pros and cons of co-existence of various legal systems. The classic example of unconformity of opinions is convergence of the families of the Continental European and Anglo-American Laws.¹ If some support sharp dissociation between these two legal systems, there are others, who logically consider accumulation of separate elements of the Continental European and Anglo-American Laws into one legal system. For example, the modernized Roman-Dutch law is the natural bridge between the English and Continental laws,² when a particular group of the countries is strictly attributed to one legal system.³ Against the background of Trans-national approaches, jurisprudence has gone far beyond internal national borders. Difference between the Continental and Anglo-American law systems is gradually disappearing. Anglo-American Law is no longer the pure precedent legal system. In their turn, judges of the Continental Europe often apply prejudices.⁴ Today, “co-habitation” of the legal systems is no longer unaccepted phenomena. We can often come across the legal pluralism as well, when one jurisdiction accumulates aggregation of various legal systems. For example, in South Africa Roman and Common Law co-exist.⁵ It presumably is mostly conditioned with colonial history of the country. Historical-cultural backgrounds of each country, political or social factors sometimes are of crucial importance for development of law.

In this term, Georgia is no exception at all, for which harmonization of law has never been an unordinary event. At various stages of development, various legal streams had an ultimately high impact on modern Georgian law. In contemporary era, Georgian jurisdiction encounters new challenges, entailed with Western orbit chosen by the state as now the agenda of modernization thereof is conditioned with Georgia-EU relations and approximation to European law standards. Evaluation of this process is the primary objective of hereby work. We will try to define legislative harmonization process against the background of drastically intensified relations between Georgia and EU.

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¹ *Tamm D.*, Convergence of Legal Systems? Legal Historians in a Changing World, Law in Africa: New Perspectives on Origins, Foundations and Transition, 1999, 242.

² *Zoidze B.*, Repetition of European Private Law in Georgia, Training Center of Publishing Business, Tbilisi, 2005, 37.

³ For Illustration we can have English and German Laws. If the First is the Part of Severe Anglo-American Law, the Latter is the Member of the Continental European System.

⁴ *Khubua G.*, Theory of Law, “Meridiani”, Tbilisi, 2004, 218.

⁵ *Tamm D.*, Convergence of Legal Systems? Legal Historians in a Changing World, Law in Africa: New Perspectives on Origins, Foundations and Transition, 1999, 242.

For better understanding of the issue, the present article is divided into two structural main chapters and five sub-chapters. The first part is dedicated to the essence of legal harmonization and study of general basis for modernization of Georgian law in view to determine the role of harmonization in legal context and the degree of impact on Georgian legal reform. The chapter two is dedicated to the conditions of harmonization of Georgian law with European standards. In this section we will consider potential of spread of European law beyond its borders. And finally, the article studies mechanisms and practical aspects thereof of harmonization of Georgian legislation with EU law.

1. Basis of Harmonization of Law

1.1. Essence of Harmonization

Harmonization, with its wide concept, can be interpreted as a process, aspiring to unification or maximal approximation of two or more different elements.⁶ In other words, whole process of harmonization aims at more harmony and comprises the combination and compatibility of various parts, elements or “somehow associated” subjects. Ultimately it makes the feeling of consecutive unity.⁷

Harmonization shall not be interpreted as an attempt of transmission from individualism to common. True, harmonization provides aggregation of unity formed with two or more objects, though it, at the same time, does not hamper individuality of separate elements.

Outcome of a particular harmonization almost totally depends on properties and composition of separate integral elements thereof.⁸ Ideal harmonization is the mechanism for grouping the different parts and not rude unity obtained with unification of these elements at the account of loss of individuality.

According to English etymology, the initial rudiment of harmony, as of the idea, is related to music, the process when combination of sundry different sounds creates a pleasant sonority. According to Boodman logics, the fundamental features of law harmonization can be found in comparison with musical harmony.⁹ With analysis of similarity to music, harmony is integration of independent, separate notes and simultaneous voicing thereof, which is directed to creation of one unity – melody.

The main characteristic of harmonization is unification in one object of diversity. The outcome depends on identity of separate components. Correspondingly, the nature of harmonization is mostly conditioned with the different elements, on the basis of which the sum total of harmonization product is being formed.

At that, we need to provide due order in view to achieve harmonization. Different notes, disorderly sounding simultaneously, will inevitably entail cacophony, and sounds expressed in order – a

⁶ *Fox E.M.*, Harmonization of Law and Procedures in a Globalized World: Why, What and How? Vol. 60 Antitrust Law Journal, 1992, 594.

⁷ *Boodman M.*, The Myth of Harmonization of Laws, Vol. 39, The American Journal of Comparative Law, 1991, 699.

⁸ *Leebron D.*, Claims for Harmonization: A Theoretical Framework, Canadian Business Law Journal, 1996, 65.

⁹ *Boodman M.*, The Myth of Harmonization of Laws, Vol. 39, The American Journal of Comparative Law, 1991, 700.

pleasant melody. Thus, upon joining two different components, it is important to observe the criterion, providing order. Order is crucial in harmonization of law when we deal with inter-amalgamation of law systems in some form.

1.2. What does Harmonization of Law Mean?

Harmonization of law implies co-existence of different legal systems on the basis of implementation of legislative activity.¹⁰ The Professor Renee David considers it as the united unification of various legal alternatives.¹¹ In any case, harmonization of law does not comprise peaceful interaction with the external world solely but it aims at creation of organically uniform legal system within the country. The quality of harmonized law depends as on legislative technique so on the nature of the law itself and elements thereof. That's why the specifics of harmonization in some cases, are attached to property of the legal sphere.¹²

Harmonization is normative assertion when difference between two various legal systems is reduced, though this process is not that easy and smooth.

In this situation, incompatibility or legal collision may occur. Besides, the process of harmonization of law shall not be interpreted as complete but continuous action, which has direct impact on the relation between the state on the one hand and the citizens of this state and other persons under its jurisdiction on the other. Law is not static in time and space. It is a dynamic event, which under the background of variability of some socio-political situation, constantly undergoes the changes itself. Correspondingly, variability of harmonization process is inevitable as it shall be adapted to the existing arrangement.

Modern understanding of harmonization of law is a relatively new phenomenon, which emerged in the era of "lawful modernization". It can be never found in feudalism era. Feudal insularity was a hindering factor for unification and harmonization of laws of various nations, the main impediment of which was the title, hierarchical factor of law.¹³ It was manifested in differential approach to human rights and different attitude thereof to property. Besides, under the conditions of low technical progress emerged mutual estrangement of the states. "Each state was in its own shell and lived only with own law. Under these conditions, internationalization of the law was possible only on the basis of the experience of developed countries and not in the current manner on the level of the unions and agreements between the states"¹⁴

Harmonization of law of early period was more coercive than voluntary. The idea of uniform law has being formed in the countries of developed culture and was further distributed with "fire and sword".

¹⁰ The Parliament of the Commonwealth of Australia, *Harmonization of the Legal Systems within Australia*, Canberra, 2006, 7.

¹¹ *Polach G.*, *Harmonization of Laws in Western Europe*, Vol. 8, *American Journal of Comparative Law*, 1959, 154.

¹² *Boodman M.*, *The Myth of Harmonization of Laws*, Vol. 39, *The American Journal of Comparative Law*, 1991, 702.

¹³ *Zoidze B.*, *Repetition of European Private Law in Georgia*. Training Center of Publishing Business. Tbilisi, 2005, 35.

¹⁴ *Ibid.*

Uppermost, such was the law of the state of Rome, which still is the core for unified-harmonized law.¹⁵ The same principles serve as the basis for current European-German and French laws.

The basis of harmonization of modern law emerged in the second half of the XIX century when impacts of European¹⁶ codification covered almost all the continents, including the countries, which never had a colonial past.¹⁷ The initial object of harmonization of law was a private law, to which the greatest facilitation was establishment of International Institution of Unification of Private Law¹⁸ in 1926.

Pioneering of the institution in harmonization sphere soon was followed with emergence of the agencies with similar profile.¹⁹ Such unions facilitated to unification and harmonization process of law in various spheres.

It is noteworthy that modern challenges for harmonization of law significantly differ from the challenges existent centuries ago at the stage of origin thereof. Today, harmonization of law has quite different tasks as in contextual term so with methods and by means of technical implementation. In modern era, harmonization of law mostly depends on the will of international organizations or other inter-Governmental unions. The clear example is recently activated EU in terms of harmonization of law, the supranational feature of which significantly defines the process of legislation of 28 member states. Nowadays, the main function of harmonization of law on European continent and in some cases beyond, is exercised by EU law.

The fact can be named as one of the pre-conditions for increased need of harmonization of law in international cooperation sphere that international law deviated from its traditional basics and has gone beyond inter-state relations solely. The matter is that the states, in modern international law, no longer represent the only subjects of this sphere. International organizations, multinational companies and individuals are independent actors inasmuch as they have international legal capacity.²⁰ It is confirmed with the International Court of Justice (ICJ) in one of its orders.²¹ The fact that the states are no longer the sole actors of international arena, affects development of their national law. Namely, membership of international organizations imposes obligation thereto for supranational order. Considering the example of EU, according to the absolute competence of union, it is independent in making decisions in various spheres, to which the member states obey, resulting in obligation thereof

¹⁵ *Zoidze B.*, Repetition of European Private Law in Georgia. Training Center of Publishing Business. Tbilisi, 2005, 35.

¹⁶ Here we mean French Civil Code: Code Civil (1804) and German Bürgerliches Gesetzbuch (1896, entered into force in 1900).

¹⁷ *Faria J. A.*, Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?, *Uniform Law Review*, 2009, 6.

¹⁸ The International Institute for the Unification of Private Law (UNIDROIT) is an Independent Inter-Governmental Agency, Studying Modernization and Harmonization Methods of Law in Private Law. The outcomes of study are used by various states. According to Lord Justice Kennedy, the organization contributed the greatest merit for mankind in legal harmonization. For additional information see Justice Kennedy, *The Unification of Law*, 10 *Journal of the Society of Comparative Legislation*, 1909.

¹⁹ For example, we can name 1955 Hague Conference on Private International Law and 1966 UN Commission on International Trade Sphere (UNCITRAL).

²⁰ *McCorquodale R.*, *The Individual and International Legal System* in Evans D. M. *International Law*, Oxford University Press, 284.

²¹ *Reparation for Injuries Suffered in the Service of the Nations*, Advisory Opinion, April, 1949, ICJ Rep 174, ICGJ 232, International Court of Justice.

to bring their legislation into compliance and prevent conflict with European law.²² Quite the different situation is when approximation process to EU law is implemented by non-member, so-called the “third” state, though we will further discuss it in the later chapter where hereof discussion is considered in the angle of practical analysis.

1.3. At the Origins of Harmonization of Georgian Law

As noted in the introduction, EU integration is the main direction defining foreign policy of Georgia. Toleration with the European course puts Georgian jurisdiction to face the massive challenges, as one of the main pre-conditions for enhancement of cooperation with EU is compliance of Georgian legislation with European. Although, harmonization with European law is not the first test for legislative reforming of Georgia.

Georgia has never been the country locked in the narrow national values. It has always expressed interest to progressive cultures and thus, improving own culture and law.²³ The example is the Book of Law²⁴ by the King Vakhtang VI in the XVII century, Ceremonies and Laws of 1649 and translation of the “Military Articles” of the Peter I.²⁵ Vakhtang VI collected foreign and Georgian legal monuments and he was the first to declare that Georgian law was the synthetic project of the national and law common spirit.

Georgia constantly used to undergo impact of inter-relation of Eastern and Western cultures, which naturally affected development of its law. According to the scientist, Guram Gabunia, “a country itself, if considered separately – Georgia was attributed to “East”, i.e. Asia when East was dominating and was attributed to the “West”, i.e. Europe when West was “leading” the civilized mankind”.²⁶ According to observation of the researcher of Georgian-European relations, Janri Kashia, “Georgia and Georgian culture are Europeans with nature and are as well Asians with the same nature. Historical basics of this origin can be Greek (European-Western) and Mesopotamian-Iranian (Asian-Eastern) civilizations and their epochal influences”.²⁷ Thus, the conclusion is that historically, Georgian law was being developed against the background of various impacts tailing the foreign priorities of the country.

Despite of this fact, the mirror repetition of the law of a foreign country has never occurred in Georgia. Transmission of the norm is a legislative activity and it cannot be identified as a translation of the work. “The translator is not limited in this process and supplements, extends when necessary

²² Event under the condition of EU and member states’ national law conflict, EU law shall prevail. It is confirmed with the order by ICJ Flaminio Costa v ENEL, [1964] ECR 585 (6/64).

²³ Zoidze B., Repetition of European Private Law in Georgia, Training Center of Publishing Business, Tbilisi, 2005, 19.

²⁴ It includes the monuments of law of foreign origin: the Law of Moses, Greek law, Armenian law, Syrian-Roman law, “Mkhitar Gosh law book”.

²⁵ Zoidze B., Repetition of European Private Law in Georgia, Training Center of Publishing Business, Tbilisi, 2005, 19.

²⁶ Gabunia G., Georgia in Euro-Asian geo-political space (X-XIII cent.) compendium: Georgian heritage, Kutaisi, 2001, 75.

²⁷ Zoidze B., Repetition of European Private Law in Georgia, Training Center of Publishing Business, Tbilisi, 2005, 19.

and reduces and shortens if necessary and the most important is that in many cases, he/she translates not literally but analyzes the article to translate”.²⁸

It is noteworthy that “harmonization” in Georgian law is a relatively new term, though it is not at all unfamiliar for Georgia the concept of the repetition of a foreign law. The greatest part of the Civil Code of Georgia is a result of the repetition of German civil law. It is interesting to discover contextual and terminological similarities between the repetition of law and harmonization.

In pure linguistic terms, “repetition” means “share-transmission”. If look through the world dictionary, the legal repetition is described as “borrow and toleration of legal terms of any of the countries, which is developed in other country or in preceding historical era”.²⁹ As to “harmonization”, it shall be interpreted not as a direct “transmission” but “bringing into compliance”. Taking this fact into account, there is an immense difference between two terms contextually, though it is to be noted that there are exact matching words of “repetition” in English legal terms, which are as well shared by European law. Deriving from the fact that EU does not recognize the concept of repetition, it considers approximation of different legal systems as “harmonization”. The hereby article studies approximation process of Georgian law with European standards. Due to this fact, the work grants preference to “harmonization” in terminological terms.

2. Approximation of Georgian Legislation with EU Standards

2.1. EU Law Beyond the Formal Borders of Unification

The principle of approximation with European standards originates from EU and is spread beyond its borders. Spread of European law and so-called *Acqui Communautarie*³⁰ of legislation beyond the formal frontiers of EU is a primary datum for foreign policy of the Union. This process can be as well considered as the process of approximation to EU values, which is associated to the extremely active status of the organization on international theatre. If in the past, EU was busy with stimulating internal integration of member states solely, today it realizes that it is no longer “the only planet in the galaxy” and it shall be actively involved in foreign relations as well.³¹ Here we shall mention the civilized nature of EU,³² which is conditioned with the fact that the organization on the voluntary basis solely, without application of coercion mechanisms, distributes the methods and instruments, successfully applied thereby. Relevantly, transformation of European law by the countries not being the EU member states, can be evaluated as voluntary harmonization on the basis of

²⁸ Zoidze B., *Repetition of European Private Law in Georgia*, Training Center of Publishing Business, Tbilisi, 2005, 21.

²⁹ Chabashvili M., *World Dictionary*, third Amended and Completed Edition, Tbilisi, Georgia, 1989, 440.

³⁰ The Term “Acqui Communautarie” is Applied to Mention any Right and Obligation, Aggregation of Norms Existent in the Legal System of EU.

³¹ Dragneva R., Wolczuk K., *EU Law Export to the Eastern Neighbourhood in P. J. Cardwell, EU External Relations Law and Policy in Post-Lisbon Era*, TMC Asser Press, The Hague, 2012, 225.

³² Here we mean that EU, Beyond its Borders, Distributes Own Rules and Models only Voluntarily without Coercion. See Lavenex S., Schimmelfennig F., *EU Rules Beyond EU Borders: Theorizing External Governance in European Politics*, *Journal of European Public Policy* 16/6, 2009.

contractual or non-contractual relations.³³ At that, distribution of EU rules and regulations facilitate to establishment of liberal-friendly legal environ amongst EU and third countries, which in its turn, facilitates to enhancement of sector cooperation and political and economic association between two subjects.

Interesting that EU possesses sundry mechanisms for “export” of own law. One of the main forms of distribution of European law is the contractual relation, which directly or indirectly, calls on the signatory country for legal harmonization.³⁴ It implies international agreements, signed by EU with non-member states. The most intensive form on EU integration path is so-called “accession agreement”, signing of which allows the country for EU membership and scopes it within the internal regulations sphere. Relevantly, on the basis of the principle of the prevailing legal force of the European law for such countries, mandatory nature of EU law is no longer put under doubt.³⁵ The agreements (for instance, Association Agreement), signed by EU with non-member states are of less intensive character.

Such agreements define the dynamics of distribution of norms to the third countries. They often become the integral parts of the legislations of these countries, though the legal force of the agreement with EU in a specific country depends on the Constitutional arrangement of the country itself. In line with the part three of the Article 7 of the Law of Georgia on “Normative Acts”, the international agreement or contract of Georgia takes the third place in the hierarchy of normative acts. It is confirmed with the paragraph two of the Article 6 of the Constitution of Georgia, according to which the international agreement or contract is effective at the extent as it does not contradict with the Constitution of Georgia, the Constitutional Law and the Constitutional Agreement. In all other events, the international agreement is of the prevailing legal force to the national normative acts, which is naturally high enough legal standard for international legal acts. It means that attitude of Georgian legislation to the consecutive harmonization of law with foreign standards is positive.

At the same time, it is noteworthy that typical understanding of harmonization with EU law is more characteristic for the developed state, which for the purpose of recovery of own law, requires approximation to other European legal systems. We deal with such event in approximation process of Georgian law to EU standards, though inculcation of EU law by other country with developed legal system is less presumable. However, such countries cooperate with EU in relatively different forms. Existence of so-called agreement on “mutual understanding” is interesting,³⁶ when the state, instead of change and approximation of own law with European, solely shares the principle of adjacent legal system. For example, USA, Canada, Australia, Japan, Switzerland, Israel and New Zealand do not need inculcation of European legal standards in their legislation, though often they understand

³³ *Gabrichidze G.*, Legal Approximation and Application of EU Law in Georgia, in *Roman Petrov, Peter Van Elsuwege* (eds.), *The Application of EU Law in the Eastern Neighbourhood of the European Union – Towards a Common Regulatory Space?*, Routledge, London, 2014, 180.

³⁴ *Gabrichidze G.*, Legal Approximation to the EU Acquis – a Georgian Perspective in: *Andreas Kellerhals, Tobias Baumgartner* (eds.), *EU Neighbourhood Policy – Survey and Perspectives*, Zürich, 2014, 30.

³⁵ As mentioned, the European Court of Justice (CJEU) in its order *Flaminio Costa v ENEL* [1964] ECR 585 (6/64) confirmed the primacy of European law towards national court.

³⁶ Mutual Recognition Agreement (MRA) – the mainly concluded in trade relations between EU and non-member state, on the basis of which the parties agree on common legal principles and standards.

European standards, which is expressed in share of common standards.³⁷ This principle differs from harmonization as in this event we do not deal with establishment of elements of other legal systems.

2.2. Mechanism of Harmonization of Georgia Law with European

2.2.1. Rudiments of Georgia-EU Cooperation

Georgia-EU relations count decades, the first signs of which appeared in 90s, simultaneously with declaration of independence of Georgia. The fundamental transformations of Georgian law are associated with this period.

And the mechanism of approximation to EU law also originates from this point. The first legal form of relations between the parties, signed in 1996 was the Partnership and Cooperation Agreement, the Article 43 of which directly stipulated the legislative harmonization, though with nature, it was not the binding document mandatory to implement. Correspondingly, the partnership agreement did not provide the specific terms, prescribed for legislative approximation and was limited with general reservations and was lack of legal precision.

However, we shall mention the positive outcomes resulted on the basis of the agreement. Within the Partnership Agreement itself, the Parliament of Georgia adopted the resolution³⁸ in 1997, requiring approximation of Georgian legislation with European and logically, it was the first attempt to “acknowledge Georgian law in European mirror”.

Although, the hereof resolution was far from the desirable political and Constitutional reality,³⁹ it entailed the first strong precedent of “partnership” between EU and Georgian law. With this resolution, Georgia manifested the political will of approximation to European standards.

The second phase of cooperation between EU and Georgia started with accession of Georgia to European Neighborhood Policy (ENP), within the scopes of which emerged even stronger promises for legislative harmonization.⁴⁰ The ENP Action Plan, endorsed in 2006, directly requires legislative harmonization.⁴¹ On the basis of the hereof action plan, in 2009 the changes have been adopted to the Law of Georgia “On Normative Acts”. Nowadays, the Article 17 of the law is imperative in the sphere of legislative activity on mandatory nature of compliance with European directives.⁴²

³⁷ *Petrov R.*, Exporting the Acquis Communautaire into the Legal Systems of Third Countries, *European Foreign Affairs Review*, Vol. 13, *Kluwer Law International*, 2008, 43.

³⁸ The Resolution of the Parliament of Georgia №828 “On Harmonization of Georgian Legislation with the EU Law”, 1997.

³⁹ *Gabrichidze G.*, Legal Approximation and Application of EU Law in Georgia, in: *Roman Petrov, Peter Van Elsuwege* (eds.), *The Application of EU Law in the Eastern Neighbourhood of the European Union – Towards a Common Regulatory Space?*, Routledge, London, 2014, 183.

⁴⁰ *Wider Europe - Neighborhood: A New Framework for Relations with our Eastern and Southern Neighbours*, Communication from the Commission to the Council and European Parliament, COM (2003) 104, 11 March, 2003.

⁴¹ *Ibid.*

⁴² The Law of Georgia on Normative Acts, sub-paragraph “c”, part one of the Article 17.

Harmonization of Georgian and EU laws was even further stimulated with EaP⁴³, initiated between Poland and Sweden and endorsed in 2009. Doubtless that the initiative is one of the most progressive instruments in Eastern neighbourhood Europeanization, though there are non-homogenous views about it in the scientific literature and amongst the political circles.⁴⁴

In any case, when discussing the initiative, the “promise” on signing the Association Agreement between EU and EaP states should be noted.

It is crystal clear that all the documents of the hereof policy have played their roles in modernization, economic reforms and formation state institutions of European Eastern Neighborhood, in this particular case – of Georgia. Despite of this fact, the greatest practical importance in terms of mechanisms of legislative harmonization is still to be granted to the Association Agreement, recently signed and ratified, which finds the juridical legitimation in the Article 217 of the Treaty on Functioning of the European Union (TFEU).

2.2.2. Association Agreement – New Standard for Law Reforming?

The Association Agreement is the latest ambitious form of union between the EU and European Atomic Energy and the member states thereof on the one hand, and on the other hand Georgia (hereinafter referred to as “Association Agreement” or “Agreement”) for Georgia-EU relations, which may be even equalized with the fact of declared independence of Georgia sundry decades ago.⁴⁵ The matter is that the Association Agreement evidences onset of the brand new phase of development of Georgian legislation, which is conditioned with the legally mandatory nature thereof.⁴⁶

The international agreements, signed with the cooperator states by EU, are to be mandatorily implemented in the event, when the agreement turns the third country into the part of the unified economic zone of Europe.⁴⁷ The Georgia-EU Association Agreement provides none of the pre-condition for membership of the Union.⁴⁸ Instead, it envisages opportunity of Georgia to penetrate in internal economic zone of Europe – uniform market. Providing prospects for deep and comprehensive free trade, the Articles 26 and 29 of the Agreement annul customs tax on export and import between EU and Georgia. That is, on the basis of implementation of the relevant obligations, Georgia is to become the part of the uniform trade system of Europe. It means that according to the EU law, the Association Agreement is the document bearing the legal nature mandatory to be implemented.

⁴³ Eastern Partnership, Communication from the Commission to the European Parliament and the Council, Brussels, 3.12.2008 COM (2008).

⁴⁴ *Korosteleva E.*, Change or Continuity: Is the Eastern Partnership an Adequate Tool for the European Neighbourhood? SAGE International Relations Publications, Vol. 25, № 2011, 2.

⁴⁵ Independence gained in 1918 is noteworthy, though the then independence of Georgia lasted for a short period and independence Georgia had no time enough to hold significant reforms in the legal sphere. That's why we mean declaration of independence of Georgia in 1991 in this context.

⁴⁶ Guideline for “Georgia-EU Association Agreement”, February, 2014, <<http://www.mfa.gov.ge>>, [17.01.2015].

⁴⁷ *Petrov R.*, Exporting the Acquis Communautaire into the Legal Systems of Third Countries, European Foreign Affairs Review, Vol. 13, Kluwer Law International, 2008, 41.

⁴⁸ On terms and perspectives of EU membership, see Cremona M., Accession to the European Union: Membership Conditionality and Accession Criteria, Vol. 25, Polish Yearbook of International Law, 2001.

As we defined the mandatory nature of the legal act of Georgia-EU Association Agreement, it is even more interesting to define attitude thereof to the obligation of legislative harmonization. The preamble of the Agreement provides four times the term “legislative approximation”, which reveals the objective of the Agreement. The same preamble provides direct call on fundamental juridical reforms on the basis of approximation to European standards, which is recognized as the most important pre-condition for EU political association and economic integration. The obligation assumed on legislative harmonization does not include solely sundry main aspects of cooperation but covers practically all the spheres, where partnership between EU and Georgia is at least theoretically admissible.

The Association Agreement saliently aims at “promotion” of European law, which in itself, includes maximal approximation of national legislation with European law.⁴⁹ It, unlike the preceding policy documents, is not limited with general reservations solely but provides specifications as well. When the main body-text of the Agreement, in capacity of the principle solely, requires loyalty to European standards, annexes to sundry chapters thereof are more precise and indicate to export of the detailed list and the terms of European legal acts in various spheres,⁵⁰ implying that the legislative approximation shall be implemented gradually taking the communicated terms into account.

The mechanisms of legislative harmonization are diverse and mainly depend on the will of the state, implementing harmonization. Generally, each country, without any legislative coercion, is entitled to voluntarily import any of the legal standards or norms from any adjacent system, which requires not preliminary permit by the state “issuing norm” or organization. The example is that prior to concluding the Association Agreement, Georgian jurisdiction used to apply, in the decisions, the approaches and principles of CJEU, though it might have voluntarily nature solely and never the coercive nature as Georgia is not the signatory country on EU Constituent Document and nor the European law is the main source for jurisdiction thereof.⁵¹

The pecuniary mechanism of harmonization, applied by EU within Association Agreement with Georgia, is of two kinds. On the one hand, EU obliges Georgia to inculcate the normative acts (regulations, directives) adopted thereby, and on the other hand, it requires of Georgia to respect obligations, assumed with accession to the international agreements in various spheres. For example, the Association Agreement in trade sphere needs to be brought in compliance with the legislation of Georgia on the basis of the legal principles of the World Trade Organization.⁵² Correspondingly, the procedural norms related to enforcement, authorities of judicial bodies and measures to provide implementation act on the basis of the terms, prescribed under the membership of WTO.

⁴⁹ *Muraviov V.*, The Impact of the EU Aquis and Values on the Internal Legal Order of Ukraine, Max Weber Programme/Law Department Conference: “Integration without EU membership”, San Domenico di Fiesole, 2008, 2.

⁵⁰ Under the conditions of sector (field) cooperation, Georgia shall, within the specific term (often 3-5 years), adopt the relevant European regulations.

⁵¹ This issue can be globally considered in Europeanization angle, though the detailed discussion will go beyond the main topic of the hereby work. See *Radaelli C.*, Whither Europeanization? Concept Stretching and Substantive Change, European Integration Online Papers (EIoP), Vol. 4, № 8, 2000, *Dragneva R.*, *Wolczuk K.*, EU Law Export to the Eastern Neighbourhood in *Cardwell P. J.*, EU External Relations Law and Policy in Post-Lisbon Era, TMC Asser Press, The Hague, 2012.

⁵² Part 2, Article 1 of the EU-Georgia Association Agreement.

Similar is with intellectual property protection sphere. The Association Agreement requires loyalty to the international agreements, administered by the World Intellectual Property Organization, the obligation of adequate and effective implementation⁵³ of TRIPS is particularly noteworthy amongst of which. Similar is with the obligations, assumed by Georgia on the basis of the frame conventions in the sphere of UNCED and UNFCCC. The ambition of Association Agreement is even higher on challenges in the energy sphere. Namely, it “confirms” perspective of membership of Georgia in European Energy Union,⁵⁴ which implies accession of Georgia thereto with full obligations and mechanisms.

The hereof examples confirm that one of the strongest mechanisms, prescribed under the Association Agreement, is implementation of international obligations assumed by Georgia. It implies that EU calls on Georgia to undertake the relevant measures (changes to the legislation, adoption of the relevant national normative acts), providing compliance with international agreements and full implementation of requirements thereof.⁵⁵

Despite of the fact that in formal terms, Georgia-EU Association Agreement is the relation based on the priority origin, prescribing the rights and duties of the parties, the legislative harmonization process bears the nature of unilaterally binding treaty and it is implemented totally dictated by EU. The harmonization process, stipulated under the agreement does not require obligation of both parties to bring own legislation in compliance with each other’s laws. It obliges solely Georgia to have own legislation loyal to European standards. It means that Georgia has to make concession of the positions as it, as the non-EU member state, does not possess any leverage to affect legislative process of EU.

Despite of the imperative tone, as mentioned above, transformation of European law to Georgian legislation is a voluntary process, serving for rearrangement of Georgian legislation to Western standards. True, that some normative acts of EU completely or partially become the integral part of the Georgian legislative system, though this process is dictated under the Georgian legal logics solely.

We shall take the principle of mutual trust of the parties into account. Thus, instead of putting this issue under doubt, the state would better to at maximal extent strive to implement assumed obligations. It, first of all, needs involvement of legal coercion mechanisms but it is not enough.

Naturally, the state is the primary political body, responsible for adoption of the relevant legislation in view of harmonization of law, though civil society as well shall necessarily be actively involved in this process. The state, as an institutional mechanism, shall properly inform the society about the idea of legislative harmonization. Otherwise, the process of approximation to European standards would be artificial and it will fail to provide health legal reform.

⁵³ Article 153 of EU Georgia Association Agreement.

⁵⁴ Negotiations on membership of Georgia to EEU started in February, 2014, though exact forecasting of membership of Georgia is hard so far.

⁵⁵ *Muraviov V.*, The Impact of the EU Aquis and Values on the Internal Legal Order of Ukraine, Max Weber Programme Law Department Conference: “Integration without EU membership”, San Domenico di Fiesole, 2008, 2.

3. Conclusion

The countries, distinguished with neither rich history, nor large area and world strategic location, still manage to maintain national identity and achieve high level of social development. Consensus and good governance, respect to human rights and rule of law make it possible.⁵⁶ Formation of these values can be achieved with establishment of healthy legal system first of all. This idea is shared in the hereby work, which against the background of current challenges for harmonization of Georgian law, studied the process of EU association.

Namely, this paper concludes that the idea of legal harmonization of Georgia has never been a strange event at any stage of development thereof, though the modern standard of its modernization is approximation to EU law. In its turn, wide distribution of own law for Europe is the mechanism, with which it facilitates to creation of stabile and healthy environ in partner states. The agenda of these relations is maximal approximation of legislation for the very first day of partnership. At that, all political or legal tools, applied by the organization in this process, are somehow different, though the ultimate goal is unified – more European integration of Georgia.

In this term, the last chapter of cooperation between the parties – Association Agreement is of particular importance, which is the legally binding document, provides specific mechanisms of harmonization and sets more precise and more severe standards for legislative approximation. True, the Association Agreement does not provide the prospects for EU membership, though the agreement defines the high level with EU and approximation to the legislation thereto at the extent that effective implementation thereof in fact makes high level of Europeanization of the country irreversible. It is noteworthy that the agreement supports continuation of reformative path of Georgia and modern, Western values-oriented transformation thereof.

⁵⁶ *Mirzashvili M., Chkhikvadze I., Guideline: EU and Georgia, Netherlands Institute for Multiparty Democracy (NIMD), Tbilisi, 2014, 6.*

Tamar Avaliani*

***Ex ante* Importance of the Effectiveness of Financial Control in the Budgetary Process**

1. Introduction

The competence and a real role of parliament in a financial sphere are defined first of all by the constitution of the country. As the Parliament represents an important organ defining a financial policy of the country, its role in relation to finances must be seriously shown in the constitution.

By partaking in the discussion of the state budget project parliament is carrying out its financial competence. Hence it is not casual that in the constitution and other legislation acts there has been shown the tendency of the perfect regulation of the parliament's financial competence.

The strong financial competence of parliament depends on different factors. From this aspect the role and functions of the parliamentary committees are of special interest. Strong financial competence demonstrated by parliament greatly depends on the competencies of the financial budgeting and public accountability committees, including formation of effective cooperation mechanisms. Other parliamentary committees, which have expert knowledge in their own fields, should also be properly integrated in the budget process.

From the point of view of the control of the debate and execution of the budget a considerable role is assigned to the public accountability committee, the main competence of which is the control of the government expenditures and the budget execution.

In the article there have been discussed the roles of the public audit service and the national bank in the process of discussion and approval of the budget; it is also important the budgetary office of the Parliament.

A significant place in the article is given to the analysis of the international practice of the discussion and approval of the budget and studying of the best models.

In the conclusion the research results will be summarized.

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2. The Role of Parliamentary Committees and Other Organs in the Discussion and Adoption of the Public Budget

2.1. The Role of the Financial-budgetary Committee in the Process of Discussion and Adoption of the Public Budget

The procedure of discussion and adoption of the budgetary draft law in parliaments is characterized by certain peculiarities, which is expressed in the special procedure of adoption it.

Under the peculiarity of discussion and adoption of the budgetary draft law is meant the flexibility of the procedure and adoption of the budgetary draft law in optimal terms, by one hearing.

Owing to the influence on the discussion and adoption of the budget parliaments are divided into three categories: legislative organs working out a budget¹, legislative organs influencing on the budget² and high legislative organs with or without minor budgetary authorization³.

The authorization of parliament for making amendments to the draft budget depends on the budgetary authorization terms of reference granted to it and the effective role of the committees in the budget process.⁴ Before the adoption of the public budget the effective mechanism of the state supervision and control is discussion of the budget by permanent commissions at plenary session of parliament.⁵

The role of the financial-budgetary committee of the Parliament in the budget process is defined by the following factors: the competence of making amendments to the budget draft law, time allowed for committee debates, a choice of the committees involved in the budget process, their competence of carrying out research of budget issues independently and relations of the financial budgetary committee with the organs of executive authority⁶.

¹ Parliament is authorized to make amendments to the draft public budget, not to share the opinions concerning the budget proposed by the government or to substitute the government's budget by its own version of the draft budget (Sweden the USA); *Posner P., Park C.K.*, Role of the Legislature in the Budget Process: Recent Trends and Innovations; ISSN 1608-7143; OECD Journal on Budgeting, Vol. 7, №3, 2007, 10.

² They can either make amendments or disprove the budget proposals of the government, though parliaments are not authorized to work out independently their own budgets. Such ties of high legislative organs can decrease budget expenditures and not increase (Italy, Holland); *Posner P., and Park C.K.*, Role of the Legislature in the Budget Process: Recent Trends and Innovations; ISSN 1608-7143; OECD Journal on Budgeting, Vol. 7, № 3, 2007, 10.

³ Parliaments have symbolic competence concerning making amendments to the draft public budget (The UNited Kingdom); *Posner P., Park C.K.*, Role of the Legislature in the Budget Process: Recent Trends and Innovations; ISSN 1608-7143; OECD Journal on Budgeting, Vol. 7, №3, 2007, 10.

⁴ *Warren K., Wehner J.*, Institute for Democracy in South Africa: Budget Information Service, The Role of Parliament in the Budget Process, 5-6, <<http://www.europarl.europa.eu>>.

⁵ *A Burman A.*, Financial Oversight by Parliament, Background Note for the Conference of Effective Legislatures, PRS Legislative Research, November 15, 2010, 1, <<http://www.prsindia.org>>.

⁶ *Krafchik W., Wehner J.*, The Role of Parliament in the Budget Process, 1999, 9-13, <<http://www.resdal.org>>.

The financial-budgetary committee is a legislative organ, “engine”. In parliamentary system, where committee system is weakly developed and debates connected with the budget are mainly held in parliament chambers, the budgetary authorization of the legislative organ is weak.⁷

A strong committee system has certain features: it is capable of making influence on the budget process and supervising the government activities. It is important a number of parliamentary committees and their proper division by branches, interrelation of the government structures and the committees; the more adequate is the committee system to the ministers’ activities spheres, the more opportunities they will have to partake in the policy process and assure accountability of government members to parliament. The active involvement of the committee in the legislative process is very important; the earlier the committee will be involved in the legislative process, the more will be its influence on legislation. The existence of subcommittees should be also taken into consideration. Subcommittees are providing the committees with the mechanism to carry out more specialization and delegate the committee activities.⁸

The role of the parliamentary committees depends on the following factors: who can offer amendments, who can vote and where, which committees are involved in the discussion of the draft budget and what interrelations are between the committees on discussing budget issues, what empowerment have the committees for making amendments to the draft budget, what time is fixed for discussion of the budget, is it possible to hire experts of budgetary research, relation of the financial-budgetary committee of the Parliament with the organs responsible for public budget and political will.⁹

When the parliamentary budgetary committee is functioning significantly, strengthening of political parties, the audit service and parliamentary structures can have a strong effect on government accountability to parliament.¹⁰

The draft law of the public budget is accepted by the Parliament by a special procedure because of its importance.

According to the first sentence of Article 92 of the Georgian constitution the Parliament of Georgia every year adopts a budget law by the parliamentary majority, which is signed by the president of Georgia. So the Georgian constitution grants general authorization to the Parliament.

The merit of the budgetary process is its wide representation. Along with the parliamentary structures in the discussion of the draft law of the budget the public audit agency and the national bank are taking part.

⁷ *Wehner J.*, Effective Financial Scrutiny: The Role of Parliament in Public Finance, World Bank Parliamentary Staff Training Program, 37.

⁸ *Shane M.*, The Committee System, School of Law & Government, Dublin City University, 3-5, <<https://www2.le.ac.uk>>.

⁹ *Bratic V.*, The Role of parliament in the Budgetary Process – The Example of the Croatian Parliament (2000-2003), Occasional Paper No. 19, October 2004, 11-12, <<http://www.ijf.hr/OPS/19.pdf>>.

⁹ See *Wehner J.*, Effective Financial Scrutiny: The Role of Parliament in Public Finance, World Bank Parliamentary Staff Training Program, 37.

¹⁰ Unit 6, Government Accountability and Parliamentary Committees, Learning Objectives what role the parliamentary committees play in assuring government accountability? <<http://siteresources.worldbank.org>>.

It should be noted that despite the representation feature of the budgetary process the role of the financial-budgetary committee of the Parliament of Georgia in the discussion and approval process of the budget is mainly coordination function.

According to part 3 of article 181 of the parliamentary practice of Georgia the discussion and agreement of the information about the basic macroeconomic prognosis and main lines of the ministries of Georgia is organized by the financial-budgetary committee of parliament. At the same time the first part of article 183 of parliamentary practice of Georgia states that “the financial-budgetary committee of parliament of Georgia is working out the discussion schedule of the draft law of the state budget, Georgian government’s report and main data and lines of the country”.

The financial-budgetary committee of parliament of Georgia because of adoption of the budget by one hearing and its coordinating role cannot effectively carry out preliminary and subsequent financial control upon the government’s activities. In case of adopting of public budget by the ordinary procedure the role of the financial-budgetary committee and its controlling power are significantly increasing. The practical work connected with budget must be performed in the financial-budgetary committee. The adoption of the draft law of budget by the ordinary procedure - by three hearings - will sharply raise the law making function of the financial-budgetary committee.

The issue of state expenditures and the fulfillment of the budget by the government are studied in detail and investigated by financial committees of parliament of India. They also assure accountability of the government to parliament.¹¹

In the Knesset of Israel a financial committee is the most considerable committee in parliament. After the first hearing the draft budget is referred to the financial committee. According to article 19 of the parliament practice of Knesset the financial committee is entitled to make amendments to the draft budget, which must not contradict the essence of the draft budget. The Prime Minister and Minister of Finance of Israel are personally attending sittings of the budgetary committee and answering the committee members to the questions connected with the draft budget. When the parliamentary financial committee has finished its work, the draft budget goes to the plenary session for the adoption by the second and third hearings.¹²

Quite strong authorization has the financial-budgetary committee of the representative chamber of the United States of America, namely the resolution, amendment, report, connected with the competence issues of the budgetary committee must not be discussed in the representative chamber until it is not represented in the chamber as a draft law”.¹³

When the effective financial-budgetary committee is carrying out control upon the government’s budgetary activities, it should provide the transparency connected with the budget by means of committee hearings, the government’s financial accountability to the supreme legislative organ and supremacy of law.

¹¹ Budget and Budgetary Process in the Parliament of India, Background Paper, Pakistan Institute of Legislative Development and Transparency, Parliamentary Centre, May 2010, 13, <<http://www.cbgaindia.org>>.

¹² Swirski S., Fraenkel A. in Cooperation with Shapiro I., Falk S., Elkin S., The Role of the Knesset in the Budget-Making Process: A Critical Analysis and Proposal for Reform, October 2000, 9, <<http://www.adva.org>>.

¹³ House of Representative, Committee on Budget, <<http://budget.house.gov>>.

The efficient financial-budgetary committee is desirable to become a main place, where there will be discussed and worked out the public budget project and report of its fulfillment; the implementation of the financial-budgetary committee's decisions must become obligatory for the government, the chairman of the financial-budgetary committee should be a representative of the opposition party; at the beginning of each election term the financial-budgetary committee must appoint speakers by the budget of each field, which will be responsible for their fields during the whole election term. It is desirable that their responsibility should be defined not only for a concrete budgetary period, but for the whole election term. The speakers of the financial-budgetary committee must work in the spheres of their curatorial budget in order to be better informed about the plans and programs of the appropriate Ministries and departments.

Three hearings of the budget project in the financial-budgetary committee will enable the Parliament of Georgia to improve the work quality. The discussion of the budget project in the financial-budgetary committee will be done in more detail and qualitatively, than in plenary sessions. In committee discussions members of the parliament are more actively involved in the consideration of the budget, the financial-budgetary committee's hearings enable the society, interested persons to attend committee hearings and express their opinions before the parliament members that is often complicated in plenary sessions. The effective financial-budgetary committee assists the parliament to control the government activities.

The committee system can strengthen the government by studying its activities; provide the parliament with strong and effective supervision means, restore balance from the point of view of legislative, consulting and representative responsibilities.¹⁴

The strong financial-budgetary committee of the Parliament enables the Parliament to carry out such functions of financial control, as committee investigations, putting questions to the government members, discussion of petitions, to establish organs of parliamentary hearings and special control and supervision.

2.2. The Role of Other Parliamentary Committees in Discussion and Adoption of the Public Budget

In some countries budgetary issues are only curated by financial-budgetary committees, other committees don't have the financial competence, but in number of countries there are other committees with the financial competence. In Germany, Greece, Japan, Spain and Turkey there are only financial-budgetary committees with the exclusive competence connected with the discussion of financial issues; other committees don't have the authority of discussing such issues.

In some countries, such as in Czech Republic, Hungary, Poland and New Zealand, there is an intermediate model. In these countries a financial-budgetary committee is granted a complete authority to carry out allocation of finances by different spheres, though other committees are granted the right to define details in their jurisdiction and sphere.

¹⁴ Budget and Budgetary Process in the Parliament of India, Background Paper, Pakistan Institute of Legislative Development and Transparency, Parliamentary Centre, May 2010, 18, <<http://www.cbgaindia.org>>.

For example, the parliament of Australia instead of using a central budgetary committee, it sends parts of the budget to proper branch committees.¹⁵

Though there are countries, which have a hybrid system. For example, the budgetary committee of Mexico has main authority in relation to budgetary issues, but different specialized committees are attending the budgetary committee's sittings, when financial issues, connected with the issues existed in their jurisdiction, are being resolved. For example, in Nigeria specialized committees from the both Houses of the Parliament are becoming subcommittees of the property committees in order to discuss the parts of the budget, which belong to their branch.¹⁶

An important factor of the effectiveness of parliamentary committees is their ability to make amendments to the budget project or in the name of the whole parliament to offer to discuss the amendments to the budget project. For example, in the United Kingdom branch committees of the parliament are comparatively powerless, their authority to make amendments to the budget project is restricted or generally does not exist. In India branch committees does not even have the right to offer amendments; only individual members of the parliament have the right to offer amendments, who offer the parliament amendments in plenary session.¹⁷

There are several ways of including parliamentary committees in the process of discussion and adoption of the budget. The most national parliaments have financial or budgetary committees, which are discussing legislative offers in relation to budgetary issues. Branch committees are giving recommendations but within the frame of centralized committee model. It is not obligatory to perform these recommendations. The mentioned type of structure helps to defend the budget from increased costs, the initiation of which might e coming from branch committees. The branch committees are always trying to increase costs to finance their sectors. On the other hand it is very important to use the knowledge of the branch committees in relation to budgetary issues in specific spheres. In some countries, for example, in Sweden, there is a two-stage committee structure, namely a financial committee assigns a maximal limit on different expending spheres, and the branch committees work out a budget connected with their spheres.¹⁸

Such a two-stage system is successful, because on the one hand a role of branch committees is not lost in the discussing process of the budget and on the other hand their wishes are balanced with the authority of the strong budgetary committee.¹⁹

According to part 4 of Article 181 of the Parliament Regulations of Georgia parliamentary committees by the spheres under their management are discussing the information about the main macroeconomic prognoses and main courses of Ministries of Georgia and prepare the proper conclusions. Part 4 of Article 183 of the Parliament Regulations of Georgia states, that the Georgian government's account about the course of fulfillment of the current year's budget and the appropriate to

¹⁵ *Johnson N.*, Financial Oversight, a Handbook for Parliamentarians, World Bank Institute, 12, <<http://gopacnetwork.org>>.

¹⁶ *Ibid*, 12.

¹⁷ *Ibid*, 12.

¹⁸ *Wehner J.*, Effective Financial Scrutiny: The Role of Parliament in Public Finance, World Bank Parliamentary Staff Training Program, 37.

¹⁹ *Ibid*, 38.

the draft budget the document implying main data and lines of the country are discussed by the branch committees of parliament.

According to subparagraph “c” of part 5 of Article 184 of the Parliament Regulations of Georgia the representatives of parliamentary committees will submit committees’ conclusions connected with the public budget draft at plenary sessions.

In case of the usual discussion of the budget the branch committees will be more actively engaged in the budget process, in which they will be able to use the expert knowledge accumulated in their branches in the process of discussion and adoption of the public budget.

2.3 Public Accounts Committee of the Parliament – Effective Organ of Financial Control

A public accounts committee is one of the instruments, which the Parliament uses to control the government’s activities. The first such committee was established in the United Kingdom in 1861 on the basis of the resolution of the Houses of Commons.

Public accounts committees are mainly characteristic for the countries of the British Commonwealth of Nations.

Generally public accounts committees are the committees of the Lower Chamber of Parliament, though there are some exceptions. For example, in Australia and India the public accounts committees are two-chamber committees. In Nigeria both Chambers of the Parliament have public accounts committees. As for the number of public accounts committees, it is different for different countries. In the public accounts committee of the Malta parliament there are seven members, in the public accounts committee of Canada – seventeen and in the public accounts committee of India there are twenty-two members.

The public accounts committee has the competence to investigate and study all financial issues within the competence granted to it by the Parliament. The public accounts committee is authorized to investigate concrete issues, connected with the accountability of the government to the Parliament from the angle of rationality of financial administration. To perform its role the public accounts committee has an additional and more specific authority, such as to audit public finances and to revise and discuss the issue, connected with the public accounts report done by the general auditor and his office.

The public accounts committee is authorized to carry out investigation and get all the necessary documentation. The committee is authorized to invite government members to its sessions and get answers from them to the questions connected with legality of spending public finances. The public accounts committee will work out the proper recommendations and send them to the government members and adequate institutions.²⁰

The operating efficiency of the parliamentary public accounts committee is defined by its staff, the balanced representation of main political parties in the committee and exclusion of government ministers

²⁰ *Stapenhurst R., Pelizzo R., Olson D.M., Trapp L.V., Legislative Oversight and Budgeting, A World Perspective, The World Bank, Washington DC, 2008, 118-120.*

from the committee staff. The public accounts committee must be independent in its activities and protected from intervention by the government.²¹

Among important competences of the public accounts committee are: working out recommendations and conclusions on issues connected with public finances, carrying out investigation concerning current and applied costs, independently without intervention by the government choosing subjects, on which it will make investigation, emphasizing accountability of the government to the Parliament concerning spending finances, demanding from the government members to answer the committee's questions.²²

The main function of the public accounts committee is to assist the legislative organ to provide accountability of the government to the Parliament from the point of using public finances and resources. The committee checks the issue of spending public finances and controls it. In the leadership model of Westminster type committees are not busy with policy issues; they are busy with issues connected with finding efficient ways of carrying out policy.²³

The influence of the public accounts is tested not by what extent its recommendations are admissible to the government, but how they are performed by the executive government.²⁴

A financial-budget committee of parliament and a public accounts committee play an important positive role in a budgetary process. The main role of the financial-budget committee is to prove incomes and costs, while the public accounts committee's function is parliamentary control on the purposiveness of the budget costs disposal.²⁵

The close interrelation between the financial-budget committee and the public accounts committee is important from the angle that the public accounts committee is mainly supervising the fulfillment of the budget, including monitoring of general auditor's activities. For example, in Germany the public accounts committee is a subcommittee of the budgetary committee. In the United Kingdom and Australia the public accounts committee does not really take part in the budgetary process; it does not participate directly in the debates held during the discussion of the budget, it does not have close interrelation with the financial-budget committee and other branch committees.²⁶

Effective co-operation of the financial-budget committee and a public accounts committee will promote the financial competence of parliament and its supervising function.

The members of the Parliament should pay serious attention to finding ways of promotion the role of the public accounts committee and focusing on the following issues: maintenance the integrity of the public sector of the country, increasing the Parliament's opportunities of proceeding the growing auditory information.²⁷

²¹ *Stapenhurst R., Pelizzo R., Olson D.M, Trapp L.V.*, Legislative Oversight and Budgeting, A World Perspective, The World Bank, Washington DC, 2008, 121.

²² *Ibid*, 123.

²³ *Johnson N.*, Financial Oversight, a Handbook for Parliamentarians, World Bank Institute, 14-16, <<http://gopacnetwork.org>>.

²⁴ *Ibid*, 17.

²⁵ *Krafchik W., Joachim W.*, The Role of Parliament in the Budget Process, 1999, 11, <<http://www.resdal.org>>.

²⁶ *Ibid*, 11-12.

²⁷ Commonwealth Parliamentary Association, World Bank Institute, Parliamentary Financial Scrutiny: The Role of Public Accounts Committees, 7, <<http://dev.cpahq.org>>.

The effective public accounts committee must carry out the following functions: the public account committee must not be large; the chairman of the committee should be a representative of the opposition party, the chairman of the public account committee must be an alderman parliament member, the committee members must be appointed for the full term and provided with the proper resources, the committee's role should be defined precisely, the committee members should be often gathered, discussions of the public accounts committee should be open for the society, the Auditor General's report should be automatically sent to the public accounts committee, the general auditor should meet the committee members to discuss important issues of the report with them, the committee must work out official, well-grounded reports for the parliament at least once.²⁸

The important principles of the public accounts committee are accountability and transparency. The committee starts work with discussion of the Auditor General's report. After having received the report from the audit service, committee hearings is the main mechanism, which are attended by state departments, the proper organs to answer committee members' questions. Committee hearings are attended by public officials called by the public accounts committee. In most public accounts committees questions are given not only to ministers of a concrete ministry, but also to an accountability officer, who is a civil officer in the department and accountable to parliament from the angle of financial management. As a rule he/she is an administrative chairman of the department. The draft report of the audit service is discussed at the committee hearing.²⁹

It should be also mentioned that apart from the public accounts committee the inclusion of the other branch committees in the discussion of the report about the audit account will significantly increase the controlling competence of the Parliament.³⁰

The public accounts committee is a general auditor's partner. It carries out the controlling and investigating competences basing on the information supplied by the general auditor.

The function of the strong public accounts committee in the Parliament should be controlling of the performance of the budget by the executive authority and preliminary controlling of the budget.³¹

The public accounts committee is an important mechanism for the Parliament to control the government activities, from the angle of the legal and rational disposal of finances.

It is desirable for the public accounts committee to have the competence of studying the public finances administered by the government after having been submitted the account by the Auditor General.

The main function of the public accounts committee should be in the name of the Parliament the estimation of the financial administering performed by the government. The main purpose of the public accounts committee's activities must be stimulation of efficient usage of public sector's resources, publicity of the finance spending process, access to the information for interested individuals and provision of accountability of the government to the Parliament.

²⁸ Commonwealth Parliamentary Association, World Bank Institute, Parliamentary Financial Scrutiny: The Role of Public Accounts Committees, 10, <<http://dev.cpahq.org>>.

²⁹ *Wehner J.*, Effective Financial Scrutiny: The Role of Parliament in Public Finance, World Bank Parliamentary Staff Training program, 54, <<http://siteresources.worldbank.org>>.

³⁰ *Ibid*, 55.

³¹ At discussion and Adoption of the Budget.

It is desirable to organize the public accounts committee in the parliamentary system of Georgia, which will control the government's activities, including those connected with financial issues.

2.4 The role of the Budgetary Office in Carrying out the Financial Competence by the Parliament Efficiently

The Budgetary Office of the Parliament of Georgia is an Independent Fiscal Institution the Priority Purpose of which is to Support the Parliamentary supervision of the management of public finances by independent and impartial analysis, study, and estimation and, in case of need, recommendations, of fiscal policy and accordingly sound, transparent management of public finances and fiscal stability for a medium/long term period. The mentioned mandate of the budgetary office points out a unique role of the office in fiscal architecture and furtherance of preliminary or subsequent financial control in a quality manner.

In 2014 considerable steps were made to improve a legislative base regulating the activities of the budgetary office of the Parliament of Georgia and to bring its activities to the international standards.

By the executed changes the legislative base regulating the budgetary office significantly approached the basic principles declared by the Organization for Economic Cooperation and Development (OECD) for independent fiscal institutions. According to the executed changes the financial-budgetary office is accountable to the supervisory board guided by the chairman of the Parliament of Georgia.

The main purpose of activities of the budgetary office of the Parliament is to support the parliamentary supervision of the management of public finances by independent and impartial analysis, study, and estimation of fiscal policy and accordingly sound, transparent management of public finances and fiscal stability for a medium/long term period.³²

According to part one of Article 279 of the Regulations of the Parliament of Georgia in the structure of the parliament apparatus a budgetary office is created for providing members of the Parliament, the Parliament committees, fractions, the independent parliament and the Parliament apparatus with financial, budgetary and other analytical information of economic character.

The mandate of the budgetary office of the Parliament includes all the main functions for independent fiscal institutions received by the international practice. It prepares macroeconomic and fiscal environment, periodical analysis of main tendencies in the development of the financial management system of a public sector and estimates the validity of official macroeconomic assumptions (prognostic indicators) used as a basis for budgetary aggregates at the stage of planning the budget. It is authorized to prepare independent macroeconomic/fiscal prognoses for medium/long term periods, estimates the conformity of the fiscal policy of the government with the fiscal limits defined on the legislative level, estimates the conformity of the fiscal policy of the executive authority with the medium and long-term fiscal stability course and the existed fiscal risks. It is also authorized to prepare recommendations about correcting fiscal measures in order to provide medium and long-term fiscal stability and short-term macro-economic stability of the country.³³

³² The Role and Mandate of the Budgetary Office, Georgian Parliament, 2014, 1, <<http://www.parliament.ge>>.

³³ The Role and Mandate of the Budgetary Office, Georgian Parliament, 2014, 2, <<http://www.parliament.ge>>.

The expectancy of the individuals interested in the improvement of the activities quality of the budgetary office of the Parliament requires refining the internal procedures of the management and strengthening of professional opportunities of the institution.

Strategic aims of the budgetary office reflect steps for growing efficiency of activities, particularly for strengthening parliamentary supervision on the fiscal management process by measures of refining the analysis of fiscal policy and macro-economic environment, and supporting the legislative process.³⁴

The strategic aims and tasks of the budgetary office of the Parliament of Georgia are oriented towards increasing the role of the Parliament in the budgetary process, particularly supervising the government expenditure.

From this point of view according to the strategy of 2015-2018 the first aim of the budgetary office is to improve budgetary control from the Parliament by the independent analysis of fiscal policy and macroeconomic environment and accordingly to promote the transparency and accountability in the fiscal management process.

The second strategic aim of the budgetary office is to support the efficiency of the budgetary resources management by means of increasing the role of the budgetary office of the Parliament in the legislative activity.

Considering the international mechanisms the budgetary office of the Parliament must timely and effectively inform the Parliament with independent and impartial analysis of the budgetary process, fiscal policy and financial offers.

The main activity of the Parliament must be the financial and fiscal policy analysis and informing members of the Parliament and parliamentary committees about it.³⁵

A very interesting budgetary model is in Uganda. This office has been functioning since 2001. It is functioning efficiently and strengthening a supervising role of the Parliament in the budgetary process. It assists the Parliament to analyze macroeconomic policy adequately, to get independent information connected with the poverty tendencies and to define more precisely the figures connected with the economic growth, which are submitted by the government to the Parliament. The Parliament is given the opportunity of debating the Parliament and in case of need to give alternative offers to the Parliament. As a result of it the supervising functions of the parliament, the accountability of the government to the parliament and the accountability of the parliamentarians to their own voters are increasing.³⁶

The budgetary office of the Parliament significantly stipulates the supervision authority of the Parliament on finances. The budgetary office is an independent department, including independent from the executive authority, which by analytical support from a legislative organ provides, helps the parliament to be efficient in discussing budgetary issues and gives the government its own offers for the effective formation of the draft budget. The main function of the budgetary office is to create objective, budgetary, fiscal and programmatic information for the parliamentarians, so that they will study and analyze this information from the point of view of supervision and control on the government's activities.³⁷

³⁴ The Budgetary Office of the Parliament of Georgia, a New Institution for Supporting Fiscal Stability, , Strategic Development Plan for 2015–2018, 2–6, <<http://pbo.parliament.ge>>.

³⁵ Parliamentary Budget Office of Australia, the Charter of Budget honesty Policy – Policy Costing Guidelines, Australia, 2012, 1, <<http://www.treasury.gov.au>>.

³⁶ Ibid, 1.

³⁷ Strengthening Parliament's Budgetary Oversight Function: The Case for a Budget Office, 1-3, <<http://www.policyforum-tz.org>>.

Effective functioning of the budgetary office provides the openness and accountability of the budgetary process; it also strengthens technical and analytical opportunities of the Parliament in negotiations with the government about budgetary issues.³⁸

Inclusion of the members of the Parliament in budgetary issues makes the budget more convincing. With the effective budgetary office the Parliament can timely and ably answer facing challenges. Accordingly the government makes more effort to spend budgetary resources rationally.

The independent budgetary office helps the members of the Parliament to comprehend the essence of budgeting, fiscal challenges facing the government and government expenditures. At the same time as the state budget is mainly directed by the government, the budgetary office provides the members of the Parliament with proper opportunities so that they will support the budget process, budgetary supervision and accountability of the government on expenditures and policy initiatives. The budget office helps the Parliament to carry out its constitutional authority.³⁹

The main functions of the efficient budgetary office are the following: it must offer the corresponding individuals the preliminary economic prognosis, which will be independent from the executive authority; it must work out basic estimations on incomes and expenditures according to legislation, it must analyze the draft budget presented by the executive authority and workout draft budgets for the term period more than one year,⁴⁰

The budgetary office of the Parliament is desirable not to be only associated with a financial-budgetary office; it should give the analytical and informative help to all the parliamentary committees. The budgetary office should serve to the whole parliamentary system and support its analytical, investigative activities. The budgetary office should carry out analytical and scientific study in order to carry out the financial competence efficiently.

3. The Role of the State Audit Service and the National Bank in the Discussion and Approval Process of the Budget

3.1 The Role of the State Audit Service in the Discussion and Approval Process of the Budget

In the sphere of public finances strengthening of the transparency and accountability is a main challenge in the developing economical systems from the view point of the fiscal responsibility and corruption promotion.⁴¹

From this angle a special financial control is of particular interest. It is a kind of parliamentary control.

³⁸ Strengthening Parliament's Budgetary Oversight Function: The Case for a Budget Office, 3, <<http://www.policyforum-tz.org>>.

³⁹ *Straussman J.D., Renoni A.*, Establishing a Parliamentary Budget Office as an Element of Good Governance, Comparative Assessment of Parliaments (CAP) Note Series, September 2009,3 <<http://cid.suny.edu>>.

⁴⁰ *Ibid*, 3.

⁴¹ *Santiso C.*, Auditing, accountability and anti-corruption: how relevant are autonomous audit agencies?, GCR, 2007, 358, <www.transparency.org>.

A basing function of the independent controlling organs traditionally is supervision on the management of finances conducted by the government in order to provide the integrity of state finances and check the authenticity of the government's financial information.

According to the general classification there are two types of the highest controlling institutions: a court model and an Auditor General's model. The auditor general's model is distinguished with its closer interrelation with the Parliament than the court model. The court model is emphasizing the legality of expenditures, while the auditor general's model is emphasizing the importance of the performance audit.⁴²

Some scientists offer the following classification of the state audit: independent controlling departments, which are carrying out accountability towards Parliament (the United Kingdom's Audit Service, the Government's Accountability Service of the United States of America), independent departments with justice functions (Accountability Court of Italy) and independent departments under the executive authority (Board of Audit of Japan).⁴³

Independent controlling organs as standard types are classified by their institutional characteristics and functions. From this point of view there are distinguished three types of controlling organs: a monocratic model, a court model and a Board or a collegiate model.

In the monocratic model the main emphasis is done on ex post audit rather than on ex ante control.

The court model has the quasi-judicial authorization and is often acting in the form of administrative tribunals.

The Board model is distinguished with taking decisions by the auditors' board on a collegiate basis.⁴⁴

Although it is hard to refer a controlling organ of any country to any of these three models, however it should be noted that the State Audit Office of Georgia can be referred to the monocratic model. Its mission is to support democratic administration and efficient spending of state finances.

State Audit Office is essentially independent from the executive authority, though it has close connection with the highest representative organ from the angle of the formation of this institution, as well as of the accountability.

According to the law "About State Audit" the whole activities of the state audit are subjected to the parliamentary control and include those accounts, which by the international standards must be protected against outer control and influence.⁴⁵

By financial, functional and organizational status the State Audit Office of Georgia is the highest controlling institution adequate to the international standard, the main function of which is to support the parliament to carry out the parliamentary control on the activities of the executive organs.

As for the participation of the state audit in ex ante control and ex post audit, it should be noted that the State Audit Office of Georgia is actively participating in the process of discussion and adoption of the state budget by the Parliament (ex ante control).

⁴² *Wehner J.*, Effective Financial Scrutiny: The Role of Parliament in Public Finance, World Bank Parliamentary Staff, Training Program, 48; <<http://siteresources.worldbank.org>>.

⁴³ *Pausner P. L.*, George Mason University, Legislatures and Budgeting, 24, <<http://www.oecd.org>>.

⁴⁴ *Santiso C.*, Eyes Wide Shut? The Politics of Autonomous Audit Agencies in Emerging Economies, CIPPEC, 31 de mayo de 2007, 8-9, <www.papers.ssrn.com> .

⁴⁵ *Mering M.*, *Management of State Finances in South Caucasus - Outer and Parliamentary Finance Control*, Analysis of Constitutional-Legal Frameworks, GIZ Program, Bonn, 1 November, 2014, 18, <<http://sao.ge>>.

According to part 3 of Article 183 of the Parliament Regulations of Georgia the State Audit Office will submit the conclusions about the soundness and legality of the incomes and expenditures envisaged by the draft bill of the state budget and this project to the Parliament of Georgia, it will also submit the report of the government about the course of the budget fulfillment.

According to Article 184 of the Parliament Regulations of Georgia “On one day before the plenary sitting the State Audit Office will submit the Parliament a report about the soundness and legality of the revised version of the draft budget and incomes and expenditures foreseen by this project”.

According to a subparagraph “b” of part 5 of Article 184 of the Parliament Regulations of Georgia “Auditor General is delivering a report on a draft law of the budget, which represents the conclusion on the draft law of the budget”.

According to paragraph 3 of Article 97 of the Constitution of Georgia on submitting the preliminary and a complete account of the budget fulfillment twice a year the State Audit Office also submits a report concerning the account of the government to the Parliament. It is a neutral, professional estimation of budget expenditures from the standpoint of legality, as well as of efficiency. Such conclusion may cause a negative influence of the parliament in relation to the government and initiate mistrust towards it.⁴⁶

The State Audit Office of Georgia carries out as a preliminary control, as well as a further one, because of which its activities become more efficient.

The characteristic feature of the budgetary control carried out by the Parliament is that the competence of the parliament in ex ante and ex post phases of its activities are very closely related with each other and on adopting the budget are carried out nearly at the same time.⁴⁷

The Parliament of Georgia at the same time discusses the draft law of the budget and a report about the progress of execution of the state budget of the current year.

The State Audit Office prepares the conclusion about the soundness and legality of the incomes and expenditures foreseen by the state draft budget for the next year presented by the government. For carrying out the above mentioned obligations the State Audit Office is relying on the following principles: whether the important macroeconomic and other admissions, on which the financial information presented by the draft budget is relied, provide a proper basis of the above mentioned information; whether the financial information presented by the draft budget is prepared properly basing on the existed admissions, considering the well-grounded and lawful current legislation; whether the information presented by the draft budget is submitted according to the existed principles of the financial accountability and all the essential admissions are adequately explained in the attached materials.

⁴⁶ *Jibgashvili Z.*, Controlling Authorization of Parliament in the Budget Sphere, Tbilisi, 2005, 2, <<http://emc.org.ge>>.

⁴⁷ Ex ante phase in the Parliament’s activities means granting the authority of making expenditures to the government by the parliament. It includes the role of the parliament in planning the budget and making expenditures. The control on ex post phase is done in discussing the financial account, when carrying out the outer audit – at estimating stage of the budget process. The Parliament role becomes distinctive at ex ante phase, when it participates in granting the government the authority of making expenditures. It is carried out in adopting the legislative budget. At ex post phase the financial account is proved and the role of the outer audit becomes prominent.

According to the strategic development plan for 204-2017 of the State Audit Office of Georgia the emphasis is done on the accountability of the Audit Office to the Georgian Parliament.

According to the strategic plan the State Audit Office submits the Parliament the information connected with purposeful spending of the budget resources. The State Audit Office submits the Parliament accounts about the activities of public departments, by means of which supports the observance of the accountability and transparency principles to the parliament and society.

In the strategic development plan for 204-2017 of the State Audit Office of Georgia there is clearly written that the aim of the State Audit Office is to assist the Parliament to carry out parliamentary control over the government, and also to assist the accountability and lawful and efficient disposal of public finances in a public sector.⁴⁸

As for the international experience from the angle of interrelation of the State Audit Office and the Parliament, it differs according to European countries.

For example, the Parliament of Austria has the right to instruct the audit office to carry out the audit activity; the audit office in its turn is obliged to obey the Parliament's instructions connected with carrying out the audit. In Denmark members of the Audit Office don't attend committees meetings; in Latvia the parliament is not authorized to obligate the Audit Office to conduct audit, in Spain only a leader of the audit office attends the committee sessions, when the audit account is discussed.⁴⁹

The State Audit Office is so called an external parliamentary institution of financial-budgeting and economical control, by means of which the Parliament is conducting control. It's a kind of parliamentary "tentacle", created for the compensation of the impossibility of everyday controlling activities. Accordingly this institution has the accountability only to the Parliament. The institutional nature and purpose of the state audit office formally and legally excludes its relation to a certain political will. Accordingly Auditor General is not politically responsible to the Parliament.⁵⁰

The independence standard of the highest controlling organ includes its institutional, personal and financial independence.⁵¹

The uppermost moment of carrying out of the budget control is that by means of it best of all can be seen the effectiveness of the conducted state and fiscal policy.⁵²

In a parliamentary democratic country an independent, outer financial controlling organ can strengthen its own influence by the parliament. At the same time it can give the Parliament the impartial, neutral and professionally obtained information about the real activities of the executive authority. The Parliament can't receive the information of such quality and free from political influence from any other independent organization. Accordingly on the basis of the cooperation established on the confidence between the Parliament and outer financial controlling organ a mutually beneficial, so called "win-win"

⁴⁸ The strategic development plan for 204-2017 of the State Audit Office, Tbilisi, October, 2014, 6-7

⁴⁹ Directorate - General for Internal Policies, Policy Department Budgetary Affairs, Parliamentary Control of Budget Implementation, Study, 2012, 29, <<http://www.ab.gov.tr>>.

⁵⁰ *Jibgashvili Z.*, Controlling Authorization of Parliament in the Budget Sphere, Tbilisi, 2015, 2, <<http://emc.org.ge>>.

⁵¹ *Santiso C.*, Eyes Wide Shut? The Politics of Autonomous Audit Agencies in Emerging Economies, CIPPEC, 31 de mayo de 2007, 12, <www.papers.ssrn.com>.

⁵² *Matiashvili M.*, Thesis work on: Direct and Representative Management in State Control, *G. Robakidze* State University, Tbilisi, 2010, 109-110, <<http://www.nplg.gov.ge>>.

situation is created, which in the end will bring an institutional benefit for citizens of the country and create a significant additional value.⁵³

3.2 The Role of the National Bank in the Discussion and Approval Process of the Budget

The main defining features of the status of the central bank best of all are reflected in its functions. Apart from pure bank functions the central bank is carrying out issuing transactions and legal drafting.

By legislation the central bank is granted broad authorities. It is authorized to carry out money emission, to regulate and control money circulation, credits, payments and exchange rate; it works out and adopts money-and-credit policy, provides firm rate of the national currency at the international financial market and is trying to maintain a low level of inflation, is performing a role of a fiscal agent of the bank of banks and the government.⁵⁴

In leading countries of the world a central bank has two main functions: on the one side supporting and regulating inflation and on the other side regulating the economic growth and unemployment. In every country the central bank remains as a bank of the banks by its juridical function and a regulating organ is separate. Such situation is in the United States of America, England, Russia, though according to the main tendency the regulating function of the commercial banks is differentiated from the functions of the central bank.⁵⁵

According to Article 3 of the organic law “About the National Bank of Georgia” the main task of the National Bank is provision of prices stability. The National Bank must provide stability and transparency of the financial system and support the stable economic growth.

Democratic accountability of central banks to the parliament appears from the legislative nature of the central banks and its place in the democratic system.⁵⁶

In the estimation of the central banks’ independence the main role must be played by the relationship between the central bank and the parliament. The central banks are obliged to submit a report about the monetary policy performed by them to the parliament.⁵⁷

The main principle defining the successful activities of the central bank is its independence. Institutional independence of national banks is a basis and precondition of its successful and efficient functioning.⁵⁸

⁵³ *Mering M.*, Public Finances Management in South Caucasus – Outer and Parliamentary Financial Control, Analysis of Constitutional-Legal Frameworks, GIZ Program, Bonn, 1 November, 2014, 6, <<http://sao.ge>>.

⁵⁴ *Shengelia R.*, Financial Law in Foreign Countries, Tbilisi, 2004, 170-171.

⁵⁵ *Jgerenaia E.*, National Bank at the World Market can’t be a Citizen of Full Value Yet! Business-herald, 2008, #2 (4), 2, <www.nplg.gov.ge>.

⁵⁶ *Antenbrink F.*, The Three Pillars of Central Bank Governance – Towards a Model Central Bank Law or a Code of Good Governance, 4, <www.imf.org>.

⁵⁷ *Eijffinger S. C.W., Goeberichts M. M.*, Central Bank Accountability and Transparency, Theory and Some Evidence, Discussion paper 6/00, Economic Research Centre of the Deutsche Bundesbank, November 2000, 4, <www.bundesbank.de>.

⁵⁸ *Meqvabishvili E.*, “Reforming” of the National Bank- Corporative or State Interest?, Business and Legislation, №3 (2008), 2-3, <www.nplg.gov.ge>.

The dependence of the national bank on the parliament is largely strengthened by its active role in the budgetary process.

The National Bank of Georgia is actively participating in the budgetary process, as at ex ante, as well as at ex post control stage.

According to part 2 of Article 183 of the Regulations of the Georgian Parliament a draft budget, a report of the government about the performance of the state budget for the current year and a document containing main data and directions of the country appropriate to the draft budget and a schedule for their discussion will be sent to the National Bank.

According to part 3 of Article 183 of the Regulations of the Georgian Parliament the National Bank must submit the Parliament the conclusion about the main parameters of the state draft budget two days earlier before the final meeting of the financial-budgetary committee.

Part 3 of Article 184 of the Regulations of the Georgian Parliament defines that one day earlier before the plenary session of the Parliament the National Bank must submit the Parliament the conclusion about the main parameters of the revised version of the draft budget.

The National Bank of Georgia participates in the discussion of the state draft budget as at its preliminary stage, as well as in its further discussion process. The participation of the National Bank in the budgetary process is emphasizing the strong competence of the Parliament of Georgia in the monetary-credit sphere.

As for the international experience, it should be noted that for example, according to Article 106 of the Constitution of Portugal a legislative budget is worked out, discussed and performed according to its appropriate frame, which includes rules of planning and performing autonomous funds and offices budgets. To the draft budget there are attached reports about evolution prognosis of the main macroeconomic indicators, which influence on the budget, also on money stock and other factors, about the expected changes in incomes and expenditures prognoses compared with the previous budget, about public debt, treasury operations and accounts, about the circumstances in autonomous funds and offices, about sending budgetary funds to self-governments of autonomous and local regions and about financial transfers in Portugal and to other countries, implied in the draft budget.⁵⁹

Article 220 of the Constitution of Poland defines that the budget law might foresee cover the budgetary deficit by taking obligations to the state Central Bank. According to Article 227 of the Constitution of Poland the organ of the Central Bank - the Board of Exchange Rate Policy - every year sets main regulations of exchange rate policy and together with the draft law about the budget submits them to the Seim (the Parliament of Poland) for consideration. Five months earlier before the end of the budgetary year the Board of Exchange Rate Policy will submit the Seim a report about the performance of the main regulations of exchange rate policy.⁶⁰

The Central Bank management can be explained by several main concepts or cornerstones, which in the combination are forming a legislative basis of the bank management. These guarantees are: independence, democratic accountability and transparency.⁶¹

⁵⁹ Constitutions of Foreign Countries, Part V, edited by *V. Gonashvili*, Tbilisi, 2007, 664.

⁶⁰ Constitutions of Foreign Countries, Part 2, edited by *V. Gonashvili*, Tbilisi, 2008, 677.

⁶¹ *Antenbrink F.*, The Three Pillars of Central Bank Governance – Towards a Model Central Bank Law or a Code of Good Governance, 2, <www.imf.org>.

The above mentioned guarantees are a conditioning factor of the strong competence of the national bank in the financial sphere.

4. Recommendations Connected with the Improvement of the Discussion and Approval Procedure of the State Budget

Efficient Parliament concerning financial issues must perform three main functions: it must be involved in the budgetary process, as a chosen representative organ, expressing people's interests; it must have an active function at every budgetary process, which first of all is expressed in adopting a budget law and by this way in granting a certain legitimation to the state budget and, the what is the most important, the Parliament must carry out efficient supervising and controlling functions on state finances in both ex ante and ex post phases.

In order to be performed the above mentioned three functions by the Parliament in the future it is necessary to state the following ways of its strengthening:

1. It is desirable to increase the role of the financial-budgetary committee, to expand the budgetary process itself as in the Parliament, as well as in the financial-budgetary committee;

2. It is desirable to conduct additional educational work, so that the members of the Parliament and the staff of the apparatus will increase their knowledge connected with budgetary issues;

3. It is desirable to improve communications between the Ministry of finances, the Parliament and the budgetary committee;

4. The secretariat of the Parliament should increase resources to hire additional consultants in the Parliament and the financial committee and also to enhance the knowledge of the Parliament staff;

5. It is desirable to provide Parliament members with special education connected with budgetary issues;

6. It is desirable to set some financial sanctions in relation to those representatives of the financial-budgetary committee in case they miss the committee sessions;⁶²

7. The budgetary process must become widely representative. Here it is meant the involvement not only of the main participants, but the active participation of the civil society in this process.

As some scientists remark, the Parliament has accessibility to the alternative information, analysis and public groups and organizations of civil society.

Such experience exists in parliamentary practice of foreign countries. For example, in Canada and Holland Parliaments are actively working with different business groups and the personnel in order to provide universal consensus and maximal involvement of the society in the main political issues.

In number of countries, such as for example, South Africa, Ghana and Ukraine, analytical functions of their parliaments are strengthened by participation of independent nongovernmental organizations in the political process⁶³.

⁶² *Bratic V.*, The Role of parliament in the Budgetary Process – The Example of the Croatian Parliament (2000-2003), Occasional Paper № 19, October 2004, 18, <<http://www.ijf.hr>>.

⁶³ *Staphenhurst R.*, Accountability and transparency in the Budget Process: Tools and Mechanisms, World Bank Institute, Beirut, 22-24 June, 2004, 4.

The budgetary process must be widely representative and the state budget must be a result of consensus.

8. In the budgetary process there must be provided a concept of authority subdivision, namely a principle of control and balancing and obligation of cooperation of the authority branches.

In the opinion of some scientists the management of the budget (guidance of the budget) implies a certain balance between the legislative and executive prerogatives. To reach and maintain such a balance is an important challenge for the state authority. For this purpose it is necessary to study properly the relationship between the legislative and executive authorities at different stages of the budgetary process.⁶⁴

9. Carrying out efficient control on state finances.

Some scientists remark that budget is an instrument for the government to provide accountability to the Parliament.⁶⁵

In order to work out an efficient model of carrying out the financial competence of the Georgian Parliament it is desirable to consider the following issues:

At which stage of the budgetary process should be the Parliament included; Whether the Parliament should be at the same time a player and an arbiter of the budgetary process; what period should be given to the Parliament to discuss the budget; what kind and amount of information is needed for the Parliament and at which stage for the efficient budgetary discussion; whether the parliament is authorized to introduce alterations in the budget and what kind of authorization te Parliament must have⁶⁶;

For adequate constitutional regulatory actions of the budgetary process it is necessary to consider the following factors:

- It is desirable to work out a sound legal framework for regulating the budgetary process.

Here it is meant the adequate constitutional regulatory actions of the budgetary process and fixing it properly in other legislative acts.

- In regulation of the budgetary process the participants' rights-obligations must be clearly fixed. Here it is meant that the competences must be transparent and everybody must have analyzed their rights-obligations;

- In the budgetary process the Parliament must be provided with the necessary information concerning the budgetary issues, which will cause the effective involvement of the legislative organ into the discussion of the budgetary issues. Keeping the Parliament in the informative vacuum will hinder it to carry out its financial competence properly;

- It is desirable to provide carrying out an open and transparent budgetary process that will favor conducting the process efficiently; the open and transparent budgetary process will increase the society's confidence and involvement in the budgetary process. The civil society helps the Parliament and

⁶⁴ *Santiso C.*, Parliaments and Budgeting: Understanding the Politics of the budget, December 18, 2005, 5, <www.papers.ssrn.com>.

⁶⁵ *Streck M., & Bauckaert G.*, The impact of performance budgeting on the role of parliament: a four country study, Public management Institute, Leuven, Belgium, June 1-3, 2006, 1.

⁶⁶ *Draman R.*, Overview of the Budget Process – Government/Legislative Relations and the Role of Information, Parliamentary Centre, 19, <<http://siteresources.worldbank.org>>.

provides it with the information about those challenges, in which the society is and the Parliament turns the society's needs into a part of a public policy, which on the whole will favor planning and carrying out the effective budgetary police. Besides, public organizations will also help the parliament with monitoring the performance of the budget by the Parliament in order to unmask, in case of need, some members of the government in corruption and performing duties improperly.

- In order the role of the Parliament to be performed in the budgetary process properly an effective system of balance and equalization must be provided in the budgetary process. It is desirable to take legislative measures to guarantee accountability of the government to the Parliament and the controlling competence of the legislative organ to the Parliament. At the same time the Parliament's controlling competence must be strengthened as by an effective committee system, as well as by an independent controlling mechanism.

- It is desirable to write out at a constitution level collective as well as individual responsibility of the executive authority to the Parliament in connection with performance of the budgetary authorities by them;

- The Parliament must work out mechanisms to provide accountability of executive agencies and their control;

- The Parliament must influence on the budget drafting by means of interaction with the executive authorities, as-yet at the consultancy stage, what is done during a year before budgeting;

- The Parliament can influence on the budget at the end of the process by making amendments to the budget;

- The Parliament can influence on spending budgetary resources by carrying out supervision in order to provide goal-oriented spending of money according to priorities;

At the same time it is desirable to conduct more active result-oriented budgetary work.

Despite the difficulties of estimation of results of the result-oriented budgetary work the international experience (basing on OECD questioning) is basing on those positive results, which were reached by means of the influence of the results oriented budgetary reforms. They are:

- **Better setting of priorities** – The result-oriented budgeting is considered to be a useful instrument for setting priorities in a short and middle-term period and imaging clearly the expected results of a public sector. At the same time it enables to estimate the correspondence of a certain program and its role for achieving goals of the government's wide policy and expected results.

- **Increasing of the transparency** – Integration of the information about the results/effectiveness in the budgetary process is considered to be an improving instrument of accountability to legislators and the society. In 24 from 30 countries of OECD the information about the results of spending institutions is accessible for the society. Such information can be available in kind of reports about the achieved results either of an individual spending institution or at a government level. As for increasing the transparency it is very important an issue of the substantiation and impartiality of the above mentioned information, which in its turn is emphasizing the importance of the independent audit agency.

- **Emphasizing planning process** – Estimation system of results/effectiveness provides additional focusing on the planning process for middle-term period, because only by means of a middle-term plan is possible to define measures to be taken every year and resources to finance these measures.

- **Monitoring of attained results** – The information about the effectiveness of the results, as a signaling instrument – The information about the results/effectiveness is a kind of signaling instrument, which is emphasizing problems connected with implementation of government's programs and service delivering. Showing the problem or low economical efficiency/productivity in proper time enables to make correcting steps to solve this problem and increase efficiency/productivity.

- **Favoring the citizens' informed choice** – While delivering state service (for example, education, health care), the information about the results is an important component for citizens in the process of making decision, though this information is reasonable to be comprising not only quantitative indicators, but also additional information about factors conditioning a low or high level of the achieved efficiency/productivity, that will enable a citizen to make the right choice..⁶⁷

5. Conclusion

In connection with the issue under discussion the following conclusion can be made:

The analysis of the financial competence of the Georgian Parliament presented in this work does not completely cover all the detailed aspects of the financial competence of the Parliament, though there are discussed all the main issues conditioning the limits of the financial competence of the Parliament.

In the present work each aspect of the financial competence of the Parliament is discussed from the comparative-legal analysis angle.

Basing on the results of the research in connection with each chapter of the present work there was emerged tendencies and planned the ways for correction of legislative and systematic defects.

In the chapter of the constitution of Georgia about state finances and control it is desirable to make more emphasis on all the important aspects of the controlling competence of the Parliament and at a principle level to fix those persons, by means of which the Parliament is carrying out the financing competence.

As a result of research there were stated political, economic and legal aspects of the state budget.

On the basis of studying of examples of different countries it was stated that the procedure of discussion and approval of the state budget in parliaments is characterized by certain peculiarities, because the state budget is an important component of the economic system.

From this angle the following tendencies were seen: in some countries the budget is adopted by a simple rule, one hearing, but in many countries the budget is adopted by a rule characteristic for adoption of a traditional law - by three hearings.

Considering the influence on the discussion and adoption process of the budget three categories of parliament are distinguished:

Legislative organs working out the budget – The parliament has the right to make amendments to the draft budget, not to share the government's ideas connected with the budget or to substitute the government's budget for its own version of the state draft budget (Sweden, the United States of America);

⁶⁷ Result-oriented Budgeting, Manual of Better Practice, State Audit Office, Tbilisi, 2014, 27-28

Legislative organs influencing on the budget – They are able to make amendments or deny the budgetary proposals of the government, though they are not authorized to work out their own budgets independently (Italy, the Netherlands), their competence of making amendments to the budget is also limited – they can decrease budget expenditures but not increase.

Legislative organs with a small role in the budget process or without the competence - They have a small competence of making amendments to the draft budget or denying the budget proposed by the government (the United Kingdom).

Within the scope of the work the role of the financial-budgetary committees in the process of consideration and approval of the budget was studied.

As a result of the research different models of involvement of the financial committee in the budgetary process were observed.

The committee system enables private members of Parliament to carry out a parliamentary and legislative role, which is important for them.

As a result of the research it was stated that the public accounting committee must have stable and experienced members. Changing of members has a particular influence on the public accounting committee due to its broad spectrum of interests, sensitivity and complexity.

Political parties must take measures in order to be survived and support members of the public accounting committee during a long period of time. It will enable the public accounting committee to acquire the expert knowledge and integration in the whole process that will decrease the tension and increase the depth and strength of committee's accounts.

It is desirable to fix properly by a legislative act the interrelation of the public accounting committee and the State Audit Office that will favor the Parliament to carry out the financial control.

It is desirable to fix properly by a legislative act the interrelation of the public accounting committee and the executive authorities that will emphasize accountability of the executive authority to the Parliament.

Following the reforms carried out in Georgia and after studying international models in the work was clearly stated the necessity of real analytical and research activities to be performed by the parliamentary budget office.

As a result of the research in the work was stated that the budgetary office of the parliament must not only be associated with a financial-budgetary committee, it must give the analytical and informative assistance to all committees and must be oriented thoroughly towards improving the work quality of the parliament.

Besides the budgetary office must not carry out orders of a concrete party or fraction, it must serve thoroughly to the parliamentary system and support its analytical activities.

The budgetary office must not be confined only by the financial analysis of draft laws, as it used to be in the previous years. The above mentioned structure must carry out analytical and scientific study of the financial system in order to perform the financial competence of parliament efficiently.

In those countries where strong budgetary offices of parliaments are functioning, independence and transparency in the decision making process are emphasized.

In the present work there is studied the role of the State Audit Office in ex ante and ex post control of the budget execution by the government.

In the work there are discussed the ways of enhancing the financial competence of the Georgian Parliament.

As it is clear from the work, lots of things must be done for enhancing the financial competence of the Georgian Parliament, but first of all it is necessary to provide a control and balancing system and cooperating obligations between the branches of the authorities in the state finances management.

Otherwise unsettling the above mentioned question may cause a negative result on the development of a parliament, as an institution and the development of Georgian state.

Strengthening of the financial competence of the Georgian Parliament will support the promotion of the Parliament, as an institute, considering also the fact that the financial competence is the oldest competence of the Parliament.

Dimitry Gegenava*

Recognition of the Religious Marriage in Georgian Legislative Reality

1. Introduction

In the millennial history of development of law, there are sundry institutions dignified, which despite of time and era, were always in the spotlight, which was conditioned with the essential importance of the institution itself. The most proven and applied legal formations are being created for human co-existence, to provide improved conditions of life and to kill the spiritual thirst of a person.

One of the most ancient and primary social institutions from the history of conscious existence of mankind is the family, where an individual is being nursed and formed into a person. The family unifies social, economic, psychological, biological and moral relations.¹ The family and family relations make the modern people feel that they are attributed to *Homo Sapiens* and *Homo Moralis* category as well. The crucial point for any family is the wedding, which always occupied the particular place in the theological, legal and social sciences. The wedding is the trigger for the family and serves as the basis for enlargement, family amalgamation, and creation of new relativity lines. Thus, it is no surprise that it had sacral meaning even in the ancient religious, though the situation drastically changed after spread of Christianity. If other religions considered it as sanctity, Christianity granted quite a different meaning to it and recognized it as the starting institution of the canon law, due to which it is one of the most developed and considered event nowadays in religious dogmatics and law.

Georgian understanding of the family and the wedding is a peculiar phenomenon, combining as Christian, so the ancient pagan approaches and customs. Conversion of Georgia to Christianity established a brand new concept of marriage, which Georgian society has absorbed during the centuries and reflected it to the social, family behavior rules from the religious norms. Thus, it is quite natural that upon concluding the Constitutional Agreement between Georgian State and Georgian Apostolic Autocephalous Orthodox Church, the norm on religious marriage has been reflected thereto. According to the provisions, the State recognizes the religious marriage conducted by the Church in order, established under the law.² Despite of the fact that the State has declared the will and set up the joint ad hoc Commission of the State and Church on Recognition of the Legal Consequences of the Religious Marriage, no effective measures have been undertaken in this direction yet.

12 years passed since the Constitutional Agreement has been signed, though no “order, established under the law” exists yet, and legal recognition of the religious marriage remains a declaration instead of being the norm.

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¹ *Nadareishvili G.*, History of Georgian State and Law, Tbilisi, 2005, 150.

² Constitutional Agreement between Georgian State and the Georgian Apostolic Autonomous Orthodox Church, the 1st sentence of the Article 3.

The objective of the hereof norm is to review the secular and canonic legal understanding of marriage, their interaction, the institute of recognition of the religious marriage, distribution thereof in the world and Europe taking the specifications of the confessions and the states into account; the work reviews the ancient Georgian practice of recognition of the religious marriage, analyzes the problems and complexities impeding the state and the church to onset the recognition process and reflection thereof to the legislation. The recommendations and the legislative initiatives shall be developed as a result of consideration and analysis of the problems in order to implement the provision of the Constitutional Agreement into practice and legislation.

II. Legal Understanding of Marriage

1. Civil-Legal Understanding of Marriage

The family law is not *Les Mercatoria* and despite of the cultural differences, has never been. It is still one of the diverse, and according to the systems, the different field of law, which is conditioned with the cultural, mental and historical factors of the society.³ Despite of the fact that the secular and celestial family law have distanced quite a lot, the latter is still relevant and one of the most important sources of the modern matrimonial law.⁴ The Christian view has generated the idea of marriage, now accepted and recognized in the modern developed countries, the essence and integral elements thereof.

Modestinus gives one of the qualified definitions of marriage, according to which, marriage is the link between a man and a woman, “unity of the whole life, unity of the divine and human law”.⁵ The similar concept was provided in the Roman Law during the period of reign of Emperor Justinian. According to the institutions of Justinian, marriage is the union of a man and a woman, the essence of which lays in co-existence.⁶ The approach of Roman Law of various periods is important in view to create the clear picture of the modern legal concept of marriage, inasmuch as modern family law is the result of the ancient Roman Law, especially of *Corpus Juris Civilis* by Justinian and lawful context of most of the institutions remain unchanged.

Marriage, under the civil law, means civil relations, based on the agreement of the parties and implies the legal implication, rights and duties.⁷ Deriving from the functions of the state, as a result of internationalization of legal relations, extension of national borders of law and constant inter-relation of the legal systems, registration of marriage in state or local municipal bodies has become a mandatory element therefor. Lots of duties are related to marriage, serving as the basis for the significant part of civil relations and disorder of which or instability will entail disorganization and unsustainability of the total legal system, including the civil circulation.

³ *Tsoukala Ph.*, *Marrying Family Law to the Nation*, *The American Journal of Comparative Law*, Vol.58, 2010, 905.

⁴ *Hofman Fr.J.*, *The Development of the Canon Law of Marriage*, *Acta Juridica*, 1983, 23.

⁵ “*Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio*”, *Digesta Iustiniani*, 23.2.1.

⁶ “*Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuam consuetudinem vitae continens*”, *Institutiones Iustiniani*, 1.9.1.

⁷ *Stathopoulos M.P.*, *Secularization of Family Law in Greece*, *Israel Law Review*, Vol.22, №.3, 1998, 371.

Georgian Law considers marriage in the angle of main directions and aspects of modern law. In compliance with the Civil Code of Georgia, marriage in view to form the family, is the voluntary union of a man and a woman, which is registered in the relevant body of the Ministry of Justice of Georgia.⁸ The main aspects for marriage is age⁹ of the parties, which is established as to be 18 in Georgia,¹⁰ and in the exceptional events – 16,¹¹ as well as consent of the parties for the marriage¹². The consent, the will of the person is of utmost importance upon marriage. The consent to marriage shall be given independently, without any pressure so that the persons shall realize all pros and cons of marriage and family life.¹³

From the view of the state, marriage envisages a man and a woman, as well as the state.¹⁴ So, other than hereof two mandatory elements, there is the third cumulative term – registration of marriage. Despite of implementation of the first two terms, marriage is not recognized by the state (with the relevant legal consequences of course) without registration, as under the law, it is registration of the civil acts that is necessary for emergence of marriage.¹⁵

Emergence of duties of the spouses, their property rights and relations under the family law as towards each other so towards the other family members, are related to civil marriage. State registration turns marriage into the legal institution, as the basis for emergence of the rights and duties and into the legal fact. Otherwise, co-existence of the individuals shall be considered as mere “co-habitation”,¹⁶ which is mentioned by Romanians as Concubinage.¹⁷

2. Canonical-Legal Understanding of Marriage

Marriage is one of the most ancient institutions of the divine law,¹⁸ the Christian essence thereof and the idea are rooted in the biblical origins.

The God is considered to create a woman as the basis of co-existence of a woman and a man.¹⁹ The woman was supposed to become the integral part of a man.²⁰ Correspondingly, full cognition and realization of a human is solely impossible in marriage.²¹

⁸ See the Article 1106 of the Civil Code of Georgia (CCG).

⁹ Ibid, sub-paragraph “a”, Article 1107.

¹⁰ Ibid, part 1, Article 1108.

¹¹ Ibid, part 2.

¹² Ibid, sub-paragraph “b”, Article 1107.

¹³ *Bernard J.*, The Evolution of Matrimonial Jurisprudence: The Opinion of a French Canonist, *The Jurist*, #41, 1981, 107-108.

¹⁴ *Gori-Montanelli R., Botwinik D.A.*, Mexican Divorces: Italy, *International Lawyer*, #1, 1966-1967, 210.

¹⁵ Article 48 of the Law of Georgia on Civil Acts.

¹⁶ Cohabitation is the Term of the Roman Family Law, which Implies Co-existence of a Wife and a Husband. It obtained the Constitutional-legal meaning in the second half of the XX cent.

¹⁷ See *Metreveli V.*, *Roman Law, Basics*, Tbilisi, 2005, 101.

¹⁸ *Rodopoulos P.*, *An Overview of Orthodox Canon Law*, translated by *W.J. Lillie*, Rollinsford, 2007, 185.

¹⁹ “And God made man, in God’s icon created him; male and female he created them”. *Birth*, 1, 27; “and And God blessed them, saying, Be fruitful and multiply, and fill the earth and subdue it and the fish of the sea and sky imtavret Bird and all the cattle, and over all the earth, and all the earth, that creep on the ground”, *Birth*, 1.²⁸

²⁰ *Saint Paisios of Mount Athos*, *Words*, Book IV, *Family Life*, Tbilisi, 2006, 33.

²¹ *Reference Book of a Clergyman*, Vol. IV, *Family Life*, Tbilisi, 2006, 33.

According to St. Grigol the Theologian, marriage, based on offspring of descendants and matrimony, is approved by the God.²² Though, the objective of marriage of course, as initial so consecutive, does not only envisage offspring but provision of better and happy life of a wife and a husband.²³ Love shall be the basis for marriage, sent by God to people, thus making them “cling to each other with the stronger links than habit”.²⁴ According to Clement of Alexandria, the God itself unifies people, links them with each other and arts with them”.²⁵

Establishment of the canon law of marriage has been conditioned with sacral essence of marriage itself and particular religious importance thereof, the basis for which was the teachings of Jesus about ecclesiastic mysteries.²⁶ According to the Bible, marriage is the mystery by the God,²⁷ which in view to achieve moral perfection, unifies a man and a woman not only physically but spiritually as well.²⁸ Marriage, as the Christian mystery, has three primary objectives: human reproduction and offspring; inter-aid of the spouses, friendship and support; satisfaction of fleshly lust,²⁹ overcome of inclination to sin.³⁰

Tertullian was one of the first who compared marriage with holy communion,³¹ which underlines its importance, inasmuch as Eucharist is considered as the basis for Christian Church in general and it is the initial idea of the Church of Christ. Thus, it is no surprise that the significant part of the New Testament, the most of the Epistles of St. Paul the Apostle, concern the essence of marriage, destination thereof, family relations and inter-relations between a wife and a husband.³² Divine positive law, provided in the Gospel, regulates domestic issues, it peculiarly prohibits bigamy, polygamy and divorce.³³

In Canon Law, especially in the Western church, the Christian concept of marriage has been established as a result of synthesis of the traditional legal institutions, recognized in the Roman Law and the religious approach to the family. The classic monogamous Roman marriage has been penetrated with the ideas of permanency and devotion characterized for the Christian concept, on the basis of which the Canonic order has been established.³⁴ Christian approach to marriage and law has for the first time being merged during the reign of the Emperor Justinian.³⁵ Afterwards, the lawyers of

²² *Viscuso P.*, Orthodox Canon Law, Second Edition, Brookline, Massachusetts, 2011, 33.

²³ Encyclical Letter “Arcanum” of Pope Leo XIII on Christian Marriage to the Patriarchs, Primate, Archbishops, and Bishops of the Catholic World in Grace and Communion with the Apostolic See 10th of 1880, 26.

²⁴ *St. John Chrysostom*, Sermons, translation by *N. Beltadze*, Book: the Gate of Holiness, Tbilisi, 2008, 244-245.

²⁵ Reference Book of a Clergyman, Vol. IV, Publication of Moscow Patriarchy, Moscow, 1983, 293.

²⁶ *Hofman Fr.J.*, The Development of the Canon Law of Marriage, *Acta Juridica*, 1983, 24.

²⁷ The Epistle of Paul the Apostle to Ephesus, 5, 32.

²⁸ *Rodopoulos P.*, An Overview of Orthodox Canon Law, translated by *W.J. Lillie*, Rollinsford, 2007, 186.

²⁹ *Viscuso P.*, Orthodox Canon Law, Second Edition, Brookline, Massachusetts, 2011, 34.

³⁰ *Nadareishvili G.*, History of Georgian State and Law, Tbilisi, 2005, 151.

³¹ *Rodopoulos P.*, An Overview of Orthodox Canon Law, translated by *W.J. Lillie*, Rollinsford, 2007, 187.

³² See Epistles by Paul the Apostle to Corinthians 1, 7, 7-10; to Ephesus 5, 22-23; to Jews 13, 4.

³³ *Hayes P.J.*, Impediments to Marriage in the Catholic Church, *The North American Review*, Vol.180, 1905, 766.

³⁴ *Hofman Fr.J.*, The Development of the Canon Law of Marriage, *Acta Juridica*, 1983, 28.

³⁵ *Rodopoulos P.*, An Overview of Orthodox Canon Law, translated by *W.J. Lillie*, Rollinsford, 2007, 188.

the medieval age actively applied the model of law, formed by Justinian and has adopted the idea of the classic consensual agreement of the Roman law for the concept of canon law and wedding agreement.³⁶ As a result, marriage is now being considered as the agreement between two persons, requiring the consent of the persons and is directly based by the God,³⁷ it cannot be disordered or terminated, other than the exceptions.³⁸ As to the Eastern (Orthodox) Church, it considered marriage in capacity of a mere deal or agreement, and wedding ceremony in the Church was always considered as a blessed, particular social institution,³⁹ though it still could not avoid influence of Roman law and quite naturally, the relevant canonic approach to the religious marriage followed development of Byzantine legal system.

III. Legal Practice of Recognition of the Religious Marriage

1. Religious Marriage, as the Legal Fact and Recognition Thereof

Inter-relation between the religion and the state, as well as regulation of the secular and ecclesiastic institutions differ according to the countries and confession-denominations.⁴⁰ Most of the modern countries support secularism, though the significant part of the democratic states still practice the state or privileged religious system. Despite of the dose and intensity of development of relations between the state and the church, historically, family law⁴¹ always was the sphere of regulation in which the state was most actively interfering.

The canon law has unified the religious and legal concept of marriage, which inculcated the double nature of divine mystery and legal fact to the religious marriage.⁴²

Due to the similar status, the canon law has developed the system of the norms, related to the religious marriage and divorce, with the matrimonial law in general, which is still actively applied. In line with the ecclesiastic rules, three main characteristics of marriage have been outlined: a) special ritual, ceremony; b) internal law and norms, regulating marriage; c) the person authorized to wed, who is responsible on enforcement of hereof norms.⁴³ All three integral elements are mandatory to exist, otherwise discussions on the religious marriage, as of the legal fact, are ridiculous.

In theory, there are sundry models of religious marriage recognition by the state and the difference between them is conditioned mainly with the ideology, recognized in the country.⁴⁴

³⁶ Orsy L., Marriage in the Code of Canon Law, Law and Justice, 1988-1989, 11.

³⁷ Cahil E., Notes on Christian Sociology, The Irish Monthly, Vol. LI-LVI, 1923, 478.

³⁸ Meyendorff J., Christian Marriage in Byzantium: The Canonical and Liturgical Tradition, Dumbarton Oaks Papers, № 44, 1990, 101.

³⁹ Orsy L., Marriage in the Code of Canon Law, Law and Justice, 1988-1989, 10.

⁴⁰ Schanda B., Religion and State in the Candidate Countries to the European Union – Issues Concerning Religion and State in Hungary, Sociology of Religion, Vol. 64, № 3, 2003, 335.

⁴¹ Stathopoulos M.P., Secularization of Family Law in Greece, Israel Law Review, Vol. 22, № 3, 1998, 367.

⁴² Chikvaidze D., Ecclesiastic Law, Tbilisi, 2008, 115.

⁴³ Sapir G., Staatman D., Religious Marriage in a Liberal State, Cardozo Law Review, Vol. 30, № 6, 2009, 2857.

⁴⁴ Ibid, 2855-2856.

According to the most general classification, in line with the legal recognition of the religious marriage, two main models can be emphasized: 1. the system, where the legal consequences emerge to the civil marriage solely; and 2) the system, which gives the choice between the civil and religious forms of marriage under the condition that both forms will have equal legal consequences.⁴⁵ The latest is often called as alternative.⁴⁶ In its turn, there may be generated two sub-systems in the first one, when a) the state does not recognize religious marriage and does not link it to the legal consequences, though religious marriage is not prohibited and it depends on the will of the wedding parties; b) the state prohibits religious marriage and only civil marriage is permitted; and in the second system – a) the system, when the state recognizes the religious marriage, though not towards all religious unions; and the system, in which b) the state recognizes the legal consequences of marriage conducted by all religious unions.⁴⁷

The model of the civil marriage has emerged during the Revolution in France, when the church and the ecclesiastic institutions underwent the drastic assaults.⁴⁸ Nowadays, this model is valid in Central Europe, in most of the States of South America, Asia and several countries of Africa, where the civil marriage solely bears the legal force.⁴⁹

Often, when canonic marriage is recognized under the norms of the secular law, legal regulation thereof is pledged to the canon law, though in other issues of family law (e.g. adoption, foster care and guardianship, relations between the parent and a child), there is totally state legislation monopoly.⁵⁰

Similar alternative system is applied in Israel, where regulation of the family law exists on the secular level, though the state recognizes the right of every religious union to define the family law for their members on their own, within the scopes of which they will act in the future. It concerns as Jews, so Muslims, Christians and others.⁵¹

The alternative system as well is applied in Greece, which in 80s managed secularization of the family law and managed to take the intermediate position by means that maintained legal recognition of the religious marriage but considered it as a mere legal fact instead of the divine mystery.⁵² The religious-dogmatic and legal aspects of the religious marriage shall be strictly dissociated in view of recognition of the religious marriage, otherwise, the religious union itself will not stand for recognition inasmuch as for any religion, it is of utmost importance to observe own rules, than granting of legal force to marriage by the state. The canon law for the Church is attributed to the divine category, which without doubt, is much more excellent than human law.⁵³

⁴⁵ Rodopoulos P., *An Overview of Orthodox Canon Law*, translated by W.J. Lillie, Rollinsford, 2007, 189.

⁴⁶ Stathopoulos M.P., *Secularization of Family Law in Greece*, *Israel Law Review*, Vol. 22, № 3, 1998, 369.

⁴⁷ See Sapir G., Staatman D., *Religious Marriage in a Liberal State*, *Cardozo Law Review*, Vol. 30, № 6, 2009, 2855-2856.

⁴⁸ Rodopoulos P., *An Overview of Orthodox Canon Law*, translated by W.J. Lillie, Rollinsford, 2007, 189.

⁴⁹ Ibid.

⁵⁰ Scharffs B.G., Disparte S., *Comparative Models for Transitioning from Religious to Civil Marriage Systems*, *Journal of Law and Family Studies*, Vol.12, 2010, 415.

⁵¹ Sapir G., Staatman D., *Religious Marriage in a Liberal State*, *Cardozo Law Review*, Vol. 30, № 6, 2009, 2868.

⁵² Stathopoulos M.P., *Secularization of Family Law in Greece*, *Israel Law Review*, Vol. 22, № 3, 1998, 371.

⁵³ Elineki G., *Fight of the Old Law with the New*, translation by Z. Nanoshvili, edited by B. Zoidze. Tbilisi, 2006, 37.

2. Legal Practice of Recognition of the Religious Marriage

Paradoxical but the historical fact is that in the nearest past (approximately a century ago), the Pope Pius IX cursed any preaching, which is considered as existence of state legislation justified in the spheres, which the church recognized as attributed thereto.⁵⁴ The family relations of course were amongst them. Currently, the situation has drastically changed and it concerns not only the Roman-Catholic but Orthodox Church as well. As to the Protestant Church, unlike the Orthodox and Roman Churches, it was always of more “civil” nature and was more harmonized with the legislation of the country.

Nowadays, religious marriage and the religious wedding ceremony are recognized in many countries throughout the world, including Italy, Finland, Norway, Denmark, UK, Greece, Australia, most of the US States etc.⁵⁵

2.1. Recognition of the Religious Marriage and Uniqueness of Civil Marriage

The part of the European states with hard history full of confrontations, abstain from close relations with the Church and with religious unions in general, particularly in the sphere of family law. Germany, France, Austria, Romania and others do not recognize the legal consequences of the religious marriage.

Marriage and the matrimonial law in Germany are totally subordinated to the civil-legal sphere and none of the Churches in this term have competence.⁵⁶

None of the legal consequences are related to the religious marriage, as marriage is considered as a secular institution and is being enforced in the state registration body.⁵⁷ However, it does not prohibit conduct of the religious marriage by the Church. Germany allows any religious union to conduct the religious wedding ritual, though with the reservation that it shall follow the civil marriage (violation of this provision does not entail sanctions).⁵⁸

France, as a follower of the laicistic model of dissociation of the Church and the State, differentiates the canonic and secular marriages.⁵⁹ In line with the law of July 11, 1975, religious marriage and religious matrimonial law are absolutely ignored, marriage is considered as the civil-legal institution solely.⁶⁰

⁵⁴ See Encyclical Letter “Syllabus Errorum” of Pope Pius IX to the Venerable Brethren, all Patriarchs, Primate, Archbishops, and Bishops having Favor and Communion of the Holy See, 8th of December of 1864.

⁵⁵ <<http://www.orthodoxy.ge/samartali/jvristsera.htm>>, [01.06.2014].

⁵⁶ *Robers G.*, State and Church in Germany, Book: State and Church in EU Member states, edited by *G. Robers*, translation of the second publication, Tbilisi, 2011, 106.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Basdevan-Godeme B.*, State and Church in France. Book: State and Church in EU member states. Edited by *G. Robers*, translation of the 2nd ed., Tbilisi, 2011, 209.

⁶⁰ *Ibid.*, 210.

In Austria, canonic marriage does not bear the status of the civil marriage. It is often practiced deriving from the economic purposes, as the children, for the state, born within the religious marriage, are considered as the children of a single mother, who are granted with quite a high social allowance by the state.⁶¹ In the event of divorce, Austria permits conduct of the settlement procedure by the clergyman and holding of the relevant consultations in view to maintain marriage, though it is voluntary.⁶²

In Romania, religious marriage is permitted, though after civil marriage solely. It is regulated under the Article 259 of the Civil Code of Romania.⁶³ Religious wedding ceremony requires submission of the certificate of civil marriage to the clergyman authorized to conduct the religious marriage.⁶⁴

2.2. Recognition of the Religious Marriage – Alternative Model

2.2.1. Practice of Recognition of the Religious Marriage in General

The issue of recognition of the religious marriage is most relevant in the states with the state Churches. In this event, even conduct of the wedding ceremony, despite of the religious nature thereof, is regulated under the state legislation.

In Denmark, religious marriage is permitted and is regulated under the Acts on “Marriage” and on “Foreigners”.⁶⁵

Religious marriage may be conducted as in the Danish state church, so in other recognized religious unions, which requires one of the party to be the member of the hereof union and the religious unity itself shall have the clergyman authorized to conduct the marriage ritual.⁶⁶

In UK, the legal consequences of the religious marriage are recognized. The Kingdom allows religions, in line with their rules, to conduct the religious marriage, though obliges them to observe the pre-conditions prescribed under the civil legislation and basically along with the procedures, stipulated under the law, establishes the necessity of submission of the certificate on citizenship to the clergyman, authorized to conduct the ceremony.⁶⁷

According to Israeli matrimonial law, the issues of marriage and divorce of the citizens of Israel or of Jews, residing on the territory of Israel shall be subordinated to the exclusive jurisdiction of the

⁶¹ *Pozti R.*, State and Church in Austria, Book: State and Church in EU Member States, edited by *G. Robers*, translation of the 2nd ed., Tbilisi, 2011, 453.

⁶² *Ibid.*

⁶³ *Catean-Voiculescu L., Hurbean A.*, Legal Marriage Versus Religious Marriage Act in Light of the New Regulations of the Civil Code, *Agora International Journal of Juridical Studies*, №2, 2011, 2.

⁶⁴ *Ibid.*

⁶⁵ *Dubek I.*, State and Church in Denmark, Book: State and Church in EU Member States, edited by *G. Robers*, translation of the 2nd ed., Tbilisi, 2011, 82.

⁶⁶ *Ibid.*

⁶⁷ See *McClin D.*, State and Church in UK, Book: State and Church in EU Member States. ed., by *Robers G.* translation of the 2nd ed., Tbilisi, 2011, 656-657.

Rabbi courts⁶⁸ and shall be solved in line with Torah.⁶⁹ Israel permits any religious union to regulate marriage relations in accordance with their canon law and norms.⁷⁰

2.2.2. Recognition of the Religious Marriage Conducted by the Orthodox Church

Recognition of the religious marriage, conducted by the Orthodox Church, counts the long-term practice, which was facilitated by Byzantium and the Byzantine law. Since 893, in the Eastern Roman Empire (Byzantium), the religious marriage conducted by the Orthodox Church was declared as one of the official and legal forms of marriage under the Novel N89 of the Emperor Leo VI the Wise.⁷¹ Similar regulations were valid in all historically Orthodox countries, including Georgia, Russia, Serbia etc.

Till 1982, canonic marriage in Greece was the only permitted form.⁷² In 1982 the special law has been adopted on Civil Marriage, which recognized the act of marriage by non-Orthodox churches as well and established civil marriage.⁷³ For one and the same relations in Greece, as civil so canonic marriage legal form can be applied as permitted under the Greek legislation.⁷⁴

Under the Civil law of Greece, marriage requires consent by the Mayor or the Head of the Community,⁷⁵ though it does not mean that marriage conducted with the canonic rules without similar permit, shall be declared void,⁷⁶ as the law of Greece on Church envisages necessity to issue preliminary consent by the Bishop on marriage.⁷⁷

The Church permits the clergyman to conduct the marriage ceremony in the event solely, if in line with the Greek legislation, there is the preliminary consent by the Bishop.⁷⁸ Civil marriage, registered in the state bodies and which has not been abolished under the law, is considered by the Church as well as a valid marriage and is the impediment for the wedding ceremony.⁷⁹

Simultaneously with the religious marriage, in Cyprus the civil marriage is valid as well, which is at the discretion of the persons.⁸⁰ The old edition of the Article 111 of the Constitution of Cyprus is related to regulation of the marital and family legal relations, as well as to the law of religious unions relevant to the legal status of their institutions, and in the events of the religious disputes – the relevant

⁶⁸ Marriage and Divorce Law of Israel, 1953, Section 1.

⁶⁹ Ibid, section 2.

⁷⁰ *Sapir G., Staatman D.*, Religious Marriage in a Liberal State, *Cardozo Law Review*, Vol. 30, № 6, 2009, 2868.

⁷¹ *Rodopoulos P.*, An Overview of Orthodox Canon Law, translated by *W.J. Lillie*, Rollinsford, 2007, 188.

⁷² *Papastathis K.*, State and Church in Greece, Book: State and Church in EU Member States, edited by *Roberts G.* translation of the 2nd ed., Tbilisi, 2011, 152.

⁷³ *Papastathis C.K.*, The Hellenic Republic and the Prevailing Religion, *Brigham Young University Law Review*, №4, 1996, 825.

⁷⁴ Civil Code of the Hellenic Republic, Art, 1367.

⁷⁵ Ibid, Art, 1370.

⁷⁶ *Rodopoulos P.*, An Overview of Orthodox Canon Law, translated by *W.J. Lillie*, Rollinsford, 2007, 193.

⁷⁷ Law 590/77 of Greece “Concerning the Charter of the Church of Greece”, art. 49.

⁷⁸ Encyclical 2329/20-10-82 of the Holy Synod of the Church of Greece.

⁷⁹ Civil Code of the Hellenic Republic, Art. 1354.

⁸⁰ *Emilianides A.*, State and Church in Cyprus, Book: State and Church in EU Member States, edited by *Roberts G.* translation of the 2nd ed., Tbilisi, 2011, 286.

canon law was authorized to consider and solve the issues on marriage and divorce.⁸¹ As a result of the Constitutional changes of 1989, marriage and divorce have been attributed to the jurisdiction of the family law and have been reflected in details in the civil law.⁸²

In the event of Orthodoxy, the issue on divorce shall be considered by the ad hoc family court, composed of one clergyman and two secular persons, equipped with the functions of the judge.⁸³ Similar family courts are valid in Cyprus since 1990. Since 1994, the jurisdiction of the family courts has applied to the issues of divorce of other main religious representatives as well. Nowadays, all religious unions of all main directions of Christianity have their own canonic courts,⁸⁴ provided under the Constitution of Cyprus.⁸⁵

2.2.3. Recognition of the Religious Marriage Conducted by the Roman Catholic Church

In line with the practice of the Holy See, according to the concordats and agreements concluded thereby, the spouses shall meet canonic and secular law criterions to wed.⁸⁶ Thus, Roman Church tries to approximate the pre-conditions of the canonic and secular law at maximal extent.

According to the Lateran Treaty, the religious marriage conducted by the Roman Church, was universally recognized in Italy and moreover, it actually became one of the valid legal mechanisms.⁸⁷

Prior to the family law reform in Italy, abolishment of the religious marriage conducted with the rule of the Roman Church was inadmissible, in this event, the state legislation exclusively granted the authority to abolish the canonic marriage to the canonic court.⁸⁸ In 1984, the state of Italy and Roman Church concluded the Vila Madama Agreement, establishing the brand new regulation and changing the principles of Lateran Treaty.⁸⁹ Along with the concordat changes, establishment of divorce and legalization of abortions drastically changed the positions of the Holy See and of the society of Italy in total.⁹⁰

In Spain, the marriage conducted with religious rules, bears the legal effect.⁹¹ Marriage conducted by the Roman Church has civil legal consequence and it is recognized by the state.⁹² It is provided under the Civil Code of Spain.⁹³

⁸¹ *Emilianides A.*, State and Church in Cyprus, Book: State and Church in EU Member States, edited by *Robers G.* translation of the 2nd ed., Tbilisi, 2011, 285.

⁸² *Ibid.*

⁸³ *Ibid.*, 286.

⁸⁴ *Ibid.*, 284.

⁸⁵ Constitution of Cyprus, Art,111.

⁸⁶ *Tsatsanashvili M.*, State and Religion, Tbilisi, 2001, 38.

⁸⁷ *Gori-Montanelli R., Botwinik D.A.*, Mexican Divorces, Italy, *International Lawyer*, №1, 1996-1967, 211.

⁸⁸ *Ibid.*, 216.

⁸⁹ *Ferrari S.*, State and Church in Italy, Book: State and Church in EU Member States, edited by *Robers G.* translation of the 2nd ed., Tbilisi, 2011, 246.

⁹⁰ *Ibid.*, 244.

⁹¹ *Ibani I.S.*, State and Church in Spain, Book: State and Church in EU Member States, edited by *Robers G.* translation of the 2nd ed., Tbilisi, 2011, 172.

3. Georgian Experience of Recognition of the Canonic Marriage

Georgian family is one of the most dignified and original phenomenon in the history of family law.⁹⁴ Historically, family relations and law in Georgia were under the significant influence by Christianity, though it maintained the features, individually characterizing thereof and received from the Roman law.⁹⁵ Georgian Church completely observed the provision under the Bible⁹⁶ and never established any legal restrictions on marriage of different persons in terms of social state.⁹⁷

The late medieval Georgian legislation recognized the double meaning of marriage – religious and legal.⁹⁸ During centuries, registration of marriage and of many other legal acts was implemented by the Orthodox Church in Georgia and similarly in Russian Empire and other Christian countries.⁹⁹

The role and the function of Georgian Church, including in terms of registration of civil acts, were extremely declined during the period of democratic Republic of Georgia. With assignment of the Patriarchal Council of Georgia, the provision developed by Deacon Korneli Kekelidze on “Canonic Marriage and Divorce” in 1918 was submitted to the Government of the first Republic of Georgia.¹⁰⁰

In 1920, the Georgian Ecumenical Council adopted the changes to the draft and passed it as two separate provisions.¹⁰¹ As a result of the aggressive actions by the Social-Democratic Government, the significant damage has been inflicted to the Georgian Apostolic Church,¹⁰² simultaneously with the fragile secularization process, the Church has been deprived of the authority to register marriage, and the religious marriage conducted thereby was deprived of the force of legal recognition under the Law on Registration of the Acts on Citizenship State of December 3, 1920.¹⁰³

After forceful Sovietization of Georgia, the measures directed against the Church became even more aggressive. Of course, the issue of religious marriage was less relevant in Soviet Union, inasmuch as the religion itself was considered as the state problem starting from the very period of Lenin.¹⁰⁴

⁹² *Moran G.M.*, The Spanish System of Church and State, Brigham Young University Law Review, №2, 1995, 543.

⁹³ Civil Code of Spain, Article 60.

⁹⁴ See *Zoidze B.*, Ancient Georgian Heritage Law, Tbilisi, 2000, 31.

⁹⁵ *Ibid.*

⁹⁶ Epistle by Paul the Apostle to Galatians, 3, 28.

⁹⁷ *Javakhishvili Iv.*, History of Georgian People, Vol.VII, 1984, 267.

⁹⁸ *Nadareishvili G.*, History of Georgian State and Law, Tbilisi, 2005, 154.

⁹⁹ *Chikvaidze D.*, Canon Law, Tbilisi, 2008, 116.

¹⁰⁰ The Comment to the Constitution of Georgia, Chapter II, Citizenship of Georgia, Fundamental Human Rights and Freedom, edited by *Turava P.*, Tbilisi, 2013, 439.

¹⁰¹ *Ibid.*

¹⁰² See *Gegenava D.*, Main Legal Aspects of the Relations Between the Church and the State (1917-1921) and the first Constitution of Georgia, Book: Democratic Republic of Georgia and the Constitution of 1921, ed., by *D. Gegenava* and *P. Javakhishvili*, Tbilisi, 2013, 179-181.

¹⁰³ See *Chikvaidze D.*, Comments to the Constitutional Agreement, Tbilisi, 2005, 18.

¹⁰⁴ *Curtiss J.Sh.*, Religion as a Soviet Social Problem, Social Problems, №7, 1959-1960, 328.

After restoration of independence, no one had a minute for the issue of legal recognition of the religious marriage, correspondingly the Civil Code of 1997 reflected solely the norms regulating civil marriage.¹⁰⁵ If it were not the Constitutional Agreement, uniform approach to recognition of the religious marriage would exist, though it is noteworthy that despite of the relevant provisions of the Constitutional Agreement, currently it is quite difficult to define systemic affiliation of the Georgian legislation. Civil legislation, as specific in this event, does not recognize legal consequences of the religious marriage.

IV. Difficulties Related to Recognition of the Religious Marriage

1. Legal Regulation of Recognition of Marriage

1.1. Georgian Legislative System

Religious and civil legal norms in regards with the family and matrimonial relations, can be inter-filling, simultaneous or frequently even contradictive.¹⁰⁶ In this regards, uniform approach would, of course, exist, as the traditional Christian dogmatics and the value system often differs from the modern liberal state concept. It is clear that the Orthodox Church has much more conservative approach to marriage than the state.

The Constitutional Agreement was made in 2002 and the legal provision on recognition of the religious marriage exists ever since. Despite of this fact, the Civil Code of Georgia provides none of the words about recognition of the canonic marriage.¹⁰⁷ In this regards, the legislation is in total vacuum. It is followed by “silence” of the Law of Georgia on Civil Acts.

The approach is wrong that currently Georgia recognizes the legal consequences of the religious marriage if it is registered in the National Agency of Civil Register,¹⁰⁸ inasmuch as the body, authorized to register marriage is unable to register marriage on the basis of the certificate of the wedding. There are sundry reasons to this: first of all, there is no rule on implementation of the similar procedure, due to collision of canonic and civil legal norms, the act of the wedding peculiarly contradicts with the current legislation of Georgia etc.

The legislation of Georgia does not provide legal definition of the religious marriage, does not prescribe capacities and authority of implementation thereof, does not stipulate the term of registration of the religious marriage, the basics for abolishment thereof etc. Without the legal reform, under the conditions of current regulations, the current legislation is absolutely inadequate for recognition of the legal consequences of the religious marriage.

¹⁰⁵ See the Chapter I of the Book 5 of the Civil Code of Georgia.

¹⁰⁶ *Scharffs B.G., Disparte S.*, Comparative Models for Transitioning from Religious to Civil Marriage Systems, *Journal of Law and Family Studies*, Vol.12, 2010, 411.

¹⁰⁷ *Tsintsadze Kh.*, Legal Aspects of Church-State Relations in Post-Revolutionary Georgia, *Brigham Young University Law Review*, №3, 2007, 766.

¹⁰⁸ Compare *Tsatsanashvili M.*, *State and Religion*, Tbilisi, 2001, 72.

1.2. The Georgian Canon Law

Even the most severe regulations, established by the Church, are being changed. If we deal with the most accurate and most severe dogmatics, the modern Church, as a rule, tolerates many actual circumstances and institution with the rule of *ikonomia*. The “civil marriage”, recognized by the state, is a mere co-existence, concubinage but not marriage.¹⁰⁹ It is similar with the Orthodox Church, which does not recognize civil marriage but cannot avoid it in practice.¹¹⁰

Speaking of implementation of the legal norms, prescribed under the Constitutional Agreement, we cannot unilaterally acknowledge and consider the issue. Despite of existence of the declarative norm on legal recognition of the religious marriage, when it is not actually applied in practice and reflected in the relevant laws, it is not the problem of the state solely. In this direction, the Church as well is the source of the grave problems.

The family law, in the sphere of the family law, is the most wide-scale law, inasmuch as it covers as practical, so theoretical-dogmatic issues, failure to attract attention to which is inadmissible. True, the issues on the marriage in liturgical holy religious terms, are defined, there still exist significant impediments regarding acknowledgment of the canonic marriage as the legal fact by the Church.

Unfortunately, Georgian church does not have systematized document to regulate the issues of marriage and divorce, relevant legal consequences and the rights of the persons in the sphere of family law. True, in 1920 the Church adopted two provisions on “Marriage” and on “Divorce”,¹¹¹ but they are actually out of application nowadays, inasmuch as the basics thereof – the provision of 1920 on management of the Apostolic Church of Georgia, is annulled. The current provision on management of the church is totally faulty and non-systematized, most of its norms are chaotically amended and non-codified.

The hereof provision only twice mentions marriage and divorce. According to the first norm, the High Priest of the Diocese, the Bishop is authorized to solve the issues of marriage and divorce,¹¹² though at his total discretion. In the second event, the provision authorizes the Diocesan Council, headed by the Bishop, to consider the issues on marriage and divorce.¹¹³

Unfortunately, the acts of the Georgian Apostolic Church reveal that the canonic matrimonial law is basically of verbal, expressive nature in Georgian church and is regulated with practice. It has not any form of official document or the basis expressed in legal act. In this term, the canon law is full of imponderability, namely, there is no strictly defined and detailed: the age of the wedding parties and the pre-conditions, necessary for marriage, impediments to the wedding, the status of the person authorized to wed and the legal procedure of implementation of the canonic marriage, basics and principle of divorce, the legal aspects of consideration of the legal dispute of marital nature, canonic legal consequences of marriage and divorce, the legal status of the second and the third marriage, inter-relation between canonic and civil marriages etc.

¹⁰⁹ *Cahil E.*, Notes on Christian Sociology, The Irish Mothly, Vol.LI-LVI, 1923, 480.

¹¹⁰ Reference Book of the Clergyman, Vol. IV, Publication of the Patriarchy of Moscow, Moscow, 1983, 297.

¹¹¹ The Comment to the Constitution of Georgia, Chapter II, Citizenship of Georgia, Fundamental Human Rights and Freedom, edited by *P. Turava*. Tbilisi, 2013, 439.

¹¹² The Provision on Management of the Georgian Autonomous Orthodox Church, 1995, § 4 of the Chapter VII.

¹¹³ *Ibid*, part 3 of the § 12 of the Chapter VIII.

Unlike Georgian church, the Greek church is quite detailed organized as under own canon law, so under the norms of the civil law, defining the issues on divorce and marriage. It envisages that the clergyman, conducting the religious marriage, shall be authorized, shall be “valid”, as otherwise the marriage shall be considered void.¹¹⁴

In Russian Church, the clergyman shall, prior to the religious marriage, verify existence of impediments for marriage.¹¹⁵ Similar reservations cannot be found in the official documents of Georgian Apostolic Church, which makes implementation of legal recognition of the religious marriage impossible on the secular legislative level.

The hard Soviet past left the deep trace on the Orthodox church, which shall hold the reforms in canon law first of all: it is necessary to develop and define new, due provisions, the terms and standards, important for marriage and divorce, their canonic legal aspects shall be developed, and the most important is to partially, as far as possible, harmonize the canon law with the secular legislation in terms of minimal terms lodged to marriage and divorce and basics thereof.

2. Collision of the Secular and Canon Norms

2.1. Age

The age of the parties of the marriage is always a central topic in the family law. Georgian civil legislation names the nominal age of the parties of the marriage as one of the cumulative terms. The age is defined as to be 18.¹¹⁶ As an exclusion, marriage is permitted in the age of 16 on the basis of the written preliminary consent by the parents or guardians.¹¹⁷

The state does not recognize marriage of the persons under 16, moreover, sexual intercourse with a person under 16 is criminalized and shall entail punishment under the criminal law.¹¹⁸

The minimal marital age in the Christian dogmatics for women is mainly 14 and 16 for men, which is conditioned with physiological readiness for consummation.¹¹⁹ Hereof minimal age differs according to the churches. It is presumable that it shall coincide with the minimum, defined under the state civil legislation.

“Agelessness of the marriage parties” in the old Georgian law was also considered as impediment for marriage.¹²⁰ Ruis-Urbnisi mural scripts defined 12 years as the minimal age for women to wed, and full age in general.¹²¹ In the modern era, the provision of 1921 on “Marriage” of the Georgian Church permitted marriage for the men of 17-70 and for women of 15-60.¹²² Unfortunately, Georgian church does not have systematized and uniform approach to the marital age,

¹¹⁴ Civil Code of the Hellenic Republic, Art.1371.

¹¹⁵ Reference book of the clergyman, Vol. IV, Publication of the Patriarchy of Moscow, Moscow, 1983, 297.

¹¹⁶ § 1 of the Article 1108 of the Civil Code of Georgia.

¹¹⁷ Ibid, § 2.

¹¹⁸ Article 141 of the Criminal Code of Georgia.

¹¹⁹ Orsy L., Marriage in the Code of Canon Law, Law and Justice, 1988-1989, 13.

¹²⁰ Georgian Customary Law, part IV, ed., by Kekelia M. Tbilisi, 1993, 147.

¹²¹ Ruis-Urbnisi Mural Scripts, Law 10.

¹²² The Comment to the Constitution of Georgia, Chapter II, Citizenship of Georgia, Fundamental Human Rights and Freedom, edited by P. Turava, Tbilisi, 2013, 439.

correspondingly, it is neither prescribed under any legal acts. The clergymen are verbally entitled to inspect the marital circumstances, though during the last thirty years, there can be found hundreds of similar cases when clergymen wedded the persons under 16, which is the violation of the civil legislation. In this event, the question is how the state shall recognize the legal consequence of the religious marriage when it contradicts with the current legislation.

It is necessary, within the church on the level of the canon law, to officially determine the minimal age for marriage taking the regulation of the civil legislation into account and to assign the clergymen conducting the religious marriage to inspect the age and other circumstances. If it is not regulated under the law, it appears impossible for the state to assume recognition of the religious marriage in any form.

2.2. Impediments for Marriage

The church, during the centuries, have developed and defined the impediments for marriage.¹²³ They more or less coincide with the impediments to the secular marriage, though there are still evident differences, conditioned with the religious nature of the marriage. The Georgian customary law also established quite severe restrictions and impediments for marriage, which often set higher standards to canon laws. According to the material from Pshavi, affiliation to one and the same family name was considered as an impediment for marriage.¹²⁴ This prohibition was provided with the severe punishment.¹²⁵

In Pshav-Khevsureti, not only the representatives of one family name, but the persons residing nearby, were prohibited to wed.¹²⁶ In an ancient Georgian customary law, failure to consider the impediments for marriage should entail severe punishment, with which the people underlined the nature of grave crime of hereof actions.¹²⁷

Nowadays, when the area for relations is vast and it is impossible to inform everyone about marriage in order to exclude human perversions and lies, it is important to have the effective mechanism, enabling the clergyman to in details study the application by the marriage seekers, their inter-relation in terms of relatives, to verify existence of impediments to marriage and solely after these procedures to permit the couple to wed. In this term, the Greek church is a model, which still acts in line with the famous assumption of Ignatius of Antioch: “The marriage seekers, men and women shall be united according to the opinions of the Bishop, in order to wed them under the God instead of their will”.¹²⁸ The members of the Christian church, for the purpose of civil or canonic marriage, shall obtain the consent by the High Priest of the Diocese, the Bishop.¹²⁹

It is important to define the obligation to address to the relevant High Priest, which is to be defined in accordance with the location of the wedding ceremony. In the event of the Dioceses of

¹²³ See *Chikvaidze D.*, Canon Law, Tbilisi, 2008, 115-116.

¹²⁴ Georgian Customary Law, part IV, edited by *M. Kekelia*. Tbilisi, 1993, 145.

¹²⁵ Georgian Customary Law, part III, edited by *S. Khanhaladze*, Tbilisi, 1991, 23.

¹²⁶ *Ibid*, 24.

¹²⁷ *Ibid*, 26.

¹²⁸ *Bumis P. I.*, Canon Law, translated by *I. Garakanidze*, Tbilisi, 2007, 101.

¹²⁹ *Ibid*, 103.

Mtskheta-Tbilisi, as well as Bichvinta and Tskhum-Abkhazia, the authorized high priest, besides the Patriarch, is the Archbishop. The Bishop and the Diocesan Council shall be assigned to in details verify case scenario in regards with every application, to study impediments for marriage and evaluate the degree of protection of minimal standards established for civil and canonic marriage. After these procedures solely the permit shall be issued to wed.

The applicant shall be obliged to attach the certificate from the civil registration body to the application, stating that he/she is not in registered marriage. Deriving from the legal effect of the canonic marriage, the church shall consider the civil registered marriage as an impediment for the religious marriage. Similar practice applies in the Greek church, where on the basis of the decision of the Holy Synod, hereof fact is considered as an impediment for canonic marriage.¹³⁰

2.3. Divorce

Similarly to marriage, legal status, procedure and legal consequences of divorce are as well unregulated. Divorce, as the legal fact, requires careful and responsible approach too. In this event, the most important is to dissociate theological and legal sides of divorce. During centuries, the Orthodox church was intolerant to divorce and was acting on the basis of the Gospel; – “They are no longer two, but one flesh. Therefore God has joined them together, let man not to cast”,¹³¹ the only ground for termination of marriage was considered as decease.¹³²

The position of the Christian church to divorce has eventually alleviated and in the XX century it became quite tolerant,¹³³ which is expressed in establishment of sundry routine, necessary grounds for marriage. It soon occurred to the church that not everyone is capable to overcome some human weaknesses. Correspondingly, in some events, the church allowed termination of marriage.¹³⁴ For example, the extreme difference of the character of spouses was considered as an excuse for divorce by the church.¹³⁵ In the modern era, the Orthodox church allows divorce with the agreement of the spouses as well.¹³⁶

The Eastern church was always severe to the issue of divinity of marriage and considered the loss of virginity as the basis for divorce simultaneously with adultery, sexual incapacity, infertility and Sodom sin.¹³⁷ In opinion of Ivane Javakhishvili, sexual morality was eventually changing, “life and Christianity declared any sexual relations between a man and a woman as a crime. Thus, adultery of the spouses was as well a mortal sin”.¹³⁸

In Italy, divorce was prohibited up to 1970, though activation of secularization process had impact on family relations as well, which further entailed decriminalization of abortion and other

¹³⁰ Encyclical 2320/19-5-82 of the Holy Synod of the Church of Greece.

¹³¹ Mathew’s Gospel, 19, 6.

¹³² Rodopoulos P., An Overview of Orthodox Canon Law, translated by W.J. Lillie, Rollinsford, 2007, 193.

¹³³ Rodes R.E.jr., Natural Law and the Marriage of Christians, The Jurist, №35, 1975, 414.

¹³⁴ Rodopoulos P., An Overview of Orthodox Canon Law, translated by W.J. Lillie, Rollinsford, 2007, 200.

¹³⁵ Nadareishvili G., History of Georgian State and Law, Tbilisi, 2005, 160.

¹³⁶ Bumis P.I., Canon Law, translated by I. Garakanidze, Tbilisi, 2007, 119.

¹³⁷ See Nadareishvili G., History of Georgian State and Law, Tbilisi, 2005, 160.

¹³⁸ See Georgian Customary Law, part III, edited by S. Khanjaladze, Tbilisi, 1991, 82.

important events.¹³⁹ In Spain, only the Ecclesiastical court, the Pope or the civil registration bodies are entitled to abolish the religious wedding.¹⁴⁰ The order of the ecclesiastic court regarding divorce is valid if it is recognized by the state of Spain in order, established under the law.¹⁴¹

In Cyprus, the canon law applies to the religious marriage conducted by the Greek church and divorce shall be conducted in the similar way.¹⁴² In Greece, the civil court is authorized to abolish the religious marriage, - the church participates in the consultations and implements uncrowning procedures after the decision-making but is still prohibited to interfere in activity of the civil court.¹⁴³

The authority to abolish the canonic marriage is solely imposed on the High Priest in the Orthodox Church,¹⁴⁴ who simultaneously exercises the function of the ecclesiastic court. The civil registration body as well is entitled to abolish the religious marriage as a legal fact. However, in this event, the canonic marriage, as a legal fact, shall be abolished for the state while it will remain valid for the church unless the authorized high priest declares it terminated.

In regards with divorce, Georgian church shall develop thorough and comprehensive regulation. Absence of similar provisions significantly hinders legal recognition of the religious marriage and even makes it impossible. Divorce, in its turn, may turn into the impeding circumstance for new marriage and other legal relations. It is necessary, under the numerous *clausus* principles, to define the basics and procedure, the authorized person on decision-making on divorce, as well as legal consequences of divorce, related to abolishment thereof, as of the legal fact.

3. Registration of the Canonic Facts

The significant impediment in the course of recognition of the religious marriage is absence of the uniform registration of the canonic, legal facts, which is the source for the problems of recognition of the religious marriage by the state and of many other aspects as well.

Georgian Apostolic Church does not conduct uniform register of the canonic facts and it is entrusted to the churches themselves. Every church conducts registration of baptism, wedding and other legal facts on its own, though registration is not systematized and strictly controlled. The Georgian Orthodox Church issues the certificate of wedding with the Seal of the Church and the signature of the authorized clergyman, who conducted the wedding ritual.¹⁴⁵

¹³⁹ *Ferrari S.*, State and Church in Italy, Book: State and Church in EU Member States, edited by *G. Robers*, translation of the 2nd ed., Tbilisi, 2011, 244.

¹⁴⁰ *Ibani I.S.*, State and Church in Spain, Book: State and Church in EU Member States, edited by *G. Robers* translation of the 2nd ed., Tbilisi, 2011, 172-172.

¹⁴¹ Civil Code of Spain, Art.80.

¹⁴² *Emilianides A.*, State and Church in Cyprus. Book: State and Church in EU Member States, edited by, *G. Robers*. translation of the 2nd ed., Tbilisi, 2011, 286.

¹⁴³ *Papastathis K.*, State and Church in Greece. Book: State and Church in EU Member States, edited by *G. Robers*. translation of the 2nd ed., Tbilisi, 2011, 153.

¹⁴⁴ The Reference Book of a Clergyman, Vol. IV, Publication of the Patriarchy of Moscow, Moscow, 1983, 300.

¹⁴⁵ <<http://www.orthodoxy.ge/samartali/jvristsera.htm>>, [01.06.2014].

There always were and still are the events in Georgian reality, when one and the same person is in registered marriage and wed on another person at the same time.¹⁴⁶ Much worse and immoral event is when a person is in two canonic marriages at the same time, which is prohibited under the canon law and dogmatics. It is quite possible for the member of the Church to wed in several towns on the same day without letting know to the clergymen or other people.

Unfortunately, the Church completely has to trust to the conscience of an individual and honesty thereof, which cannot be considered as the legal argument in the XX century. The religious marriage mostly is held in the manner that the clergyman does not express his interest if the wedding parties are the members of the church. It is quite possible in practice for unbaptized person to wed, which is the gross and inexcusable violation.

The reason for this can be expressed in two directions: 1. absence of the uniform systematization, register; and 2. impossibility to verify the facts and non-obligation.

Under the civil legislation of Greece, the persons, in view to wed in the Orthodox Church, need to have the license from the Metropolitan, which is equal to the civil legal permit for marriage, practiced in many European countries.¹⁴⁷ Hereof mechanisms prevents sundry complications simultaneously. The high priest and the Diocesan institutions verify membership of the wedding parties to the church, existence of conditions necessary for marriage and existence of impediments to marriage upon issue of the permit, the license to wed.

Georgian church shall inculcate the uniform register of canonic facts, which will allow the church to monitor implementation of canon laws and to prevent the problems entailed with perversion of people, to prevent parallel marriages etc.

V. Conclusion

According to Jelinek, the future is the subject of belief and not of knowledge.¹⁴⁸ Though, without knowledge and commitment the future will not come in the way desired by people or the state. Georgian state and Orthodox church have expressed their will by means of the Constitutional agreement. It is necessary to put any provisions of this will into practice. Despite of the fact that there are lots of problems and solution thereof is not that easy as it seems, it is important to make reasonable steps. At that, the church or the state shall not be imposed with full responsibility. When the public law fails to achieve the goal prescribed under the similar agreements, it is presumed that not the single but both parties bear fault and their contradictive actions entailed stagnation of the situation.

The church and the state shall realize that joint steps are to be made to achieve the objectives outlined in the joint agreement. Correspondingly, they shall express the counter will.

For legal recognition of the religious marriage the following steps shall be made:

1. The Georgian Apostolic Church shall develop and practice the provisions on canonic marriage and divorce, special rule to in details prescribe technical and contextual issues;

¹⁴⁶ <<http://www.orthodoxy.ge/samartali/jvristsera.htm>>, [01.06.2014].

¹⁴⁷ *Papastathis K.*, State and Church in Greece. Book: State and Church in EU Member States, edited by *Roberts G.* translation of the 2nd ed., Tbilisi, 2011, 152-153.

¹⁴⁸ *Jelinik G.*, Fight of the Old Law with New, Translated by *Z. Nanobashvili*, Edited by *B. Zoidze*, Tbilisi, 2006, 66.

2. The canonic legal pre-conditions for the wedding ceremony shall be supplemented with the cumulative conditions, defined under the civil law, in order to let the canonic marriage a priori meet the standards defined for civil marriage;

3. The certificate on marital status shall be mandatory for religious marriage, issued by the civil registration relevant bodies;

4. Prior to implementation of the marriage mystery, the will of the wedding parties and the documentation submitted for marriage shall be studied at the level of Bishops, after which the written permit by the Bishop shall be issued on wedding;

5. Georgian church shall create the register of canonic facts, which will scope all canonic facts and acts into the uniform system, which will simplify the process of study and fact-finding of the circumstances regarding the religious marriage;

6. The state shall reflect sundry norms to the Civil Code of Georgia and to the Law on Civil Acts, which will equalize the religious marriage conducted by the Orthodox church to the civil marriage, at that, shall consider the circumstances for uncrowning upon divorce.

After implementation of hereof amendments, Georgia will become the part of the alternative legal system of marriage along with Spain, Israel, Italy, Denmark, Norway and many other developed countries. However, hereof circumstances are attributed not to the desirable and possible but to the mandatory category, inasmuch as upon their non-cumulative existence, more legislative shortcomings and gaps may appear regarding the legal consequences of the religious marriage in the civil legislation and Georgian canon law.

Beka Dzamashvili*

Socio-Economic Rights: Fundamental Rights or Directive Principles of State Policy?

1. Introduction

Ever since emergence of economic and social rights, comparison of this category of the rights with civil and political rights¹ was always relevant. After universal declaration of human rights and further adoption of two international covenants², neither the representatives of the states nor authors can achieve agreement on similar or different approach to these two categories by the states.³ The subject of the main discussion is whether the socio-economic rights are genuine human rights.⁴ Supporters of equal approach emphasize universal nature of human rights, which means that socio-economic rights shall bear the effect similar to civil and political rights.⁵ The main argument against this approach is that socio-economic rights do not carry the signs, necessary for fundamental human rights and attention is particularly attached to possibility⁶ of executing economic and social rights. According to them, against this approach, socio-economic rights are more the directive principles of state policy than real human rights.⁷

According to the different characteristics, distinction between these two categories of the rights, which is mostly manifested in classification thereof in human rights of the first and second generation⁸, can first of all, have the technical and theoretical dimension. Although, due to the fact that these different signs are provided in the international treaties and other acts of the binding effect, it is

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¹ *Steiner H. J., Alston P., Goodman R.*, International Human Rights in Context: Law, Politics and Morals 3rd ed., Oxford: OUP, 2007, 263.

² Political Treaty on Civil and Political Rights and International Treaty on Economic, Social and Cultural Rights.

³ *Steiner H.J., Alston P., Goodman R.*, International Human Rights in Context: Law, Politics and Morals, 3rd edition, Oxford: OUP, 2007, 264.

⁴ Plant R., Social and Economic Rights Revisited, Kings College Law Journal, 2003, 14, 1.

⁵ *Dennis M.J., Stewart D.P.*, Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?, The American Journal of International Law, 2004, 98(3), 465.a

⁶ *Fabre C.*, Constitutionalizing Social Rights, Journal of Political Philosophy, 1998, 280.

⁷ *Villiers B.*, Directive Principles of State Policy and Fundamental Rights: The Indian Experience, South African Journal on Human Rights, 1992, 8, 29.

⁸ *Morales M.C.P.*, UNESCO's Philosophy of "intellectual and moral solidarity" in attaining peace, <<http://www.onlineunesco.org/UNESCO's%20Philosophy.html>>, [2.02.2012].

necessary to determine the practical impact of existence of the hereof different characteristics.⁹ Accordingly, this article aims at analyzing essential signs of the economic and social rights distinguishing them from the civil and political rights and concluding whether the difference is sufficient to claim that socio-economic rights are not genuine fundamental human rights.

2. Salient Approaches to the Socio-Economic Rights

Social rights can be found in the acts of legally binding effect from the XX century. The first precedents were the Constitution of Mexico of 1917, the Soviet Constitutions and the Constitution of the Weimar Republic of 1919.¹⁰ The first steps at international level were made within the International Labor Organization, established in 1919 and adopting the number of important standards in the very first years in regards with labor rights.¹¹ The Universal Declaration of Human Rights of 1948 was the first international act, enshrining the wide range of socio-economic rights.¹² Though, the universal declaration was adopted by the UN General Assembly and it was not of a binding effect, which became the pre-condition for the adoption of two international covenants of 1966, being the international treaties, thus binding for the states parties. It gave birth to actual discussions on inter-relation between the civil and political and socio-economic rights. The main reason for regulation of these categories under separate treaties is the differentiating characteristics thereof and in particular opinion that socio-economic rights are more program rights and unlike civil and political rights, they cannot be enforced.¹³ Therefore, the issue of implementation of the socio-economic rights in practice is relevant since adoption of the international covenants.

It is noteworthy that universal nature of human rights is recognized under the universal declaration of human rights and this approach has been numerous explicitly recognized, including at the world conference of human rights in 1993 in Vienna, where the states recognized universality of human rights and inter-dependence of the rights of various categories. Thus, the states agreed that it is necessary to have equal approach to the rights of all categories.¹⁴ These principle served as the basis for the UN General Assembly Resolution of 2006 №60/251, setting up the UN Human Rights Council.¹⁵ Nevertheless, the different approaches to recognize the socio-economic rights as the real fundamental rights at international, regional and national levels is obvious. Hence, it is pertinent to duly analyze these approaches.

⁹ <<http://www.iep.utm.edu/hum-rts/>>, [2.02.2012].

¹⁰ *Steiner H.J., Alston P., Goodman R., International Human Rights in Context: Law, Politics and Morals*, 3rd ed., Oxford: OUP, 2007, 269.

¹¹ *Ibid.*

¹² See Article 22 (social protection), Article 23 (labor right), Article 25 (right of adequate living standard), Article 26 (right to education).

¹³ *Steiner H.J., Alston P., Goodman R., International Human Rights in Context: Law, Politics and Morals* (3rd edition, Oxford: OUP, 2007), 272.

¹⁴ Vienna Declaration and Programme of Action (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993), § 5.

¹⁵ A/RES/60/251 Resolution adopted by the UN General Assembly on 15 March 2006, preamble.

2.1. Implementation of Economic and Social Rights at International Level

Considering that there is no International Court of human rights, the oversight function is being exercised by the UN committees, monitoring implementation of human rights treaties.¹⁶ Thus, one of the primary functions of the Committees is consideration of the individual claims by the right-holders against the states. Individual claims are opportunity to restore violated rights and give real practical meaning thereto.¹⁷ In this context, the inability of the committee on economic, social and cultural rights for a long time to consider the individual claims, is rather expressive. This is one of the basic reasons why the issue of justiciability of socio-economic rights and consequently their recognition as real rights was put under doubt.¹⁸

In a view to give the real dimension to economic and social rights, in 2002 the UN Commission on Human Rights set up the ad hoc working group for elaborating the optional protocol to the International Covenant on the individual claims.¹⁹

The developed protocol was adopted in 2008 by the UN General Assembly, being effective since May 5, 2013 after ratification thereby by the 10th state.²⁰ Nowadays, the optional protocol is ratified by 17 states²¹ and the Committee is empowered to consider individual complaints against these states solely.²²

As it seems, quite significant steps have been made recently in view of enforcement of socio-economic rights at international level. Though the fact that the optional protocol at this stage is signed only by 46 states and ratified by 17 states, is self-telling that the most of the states are not ready to undertake the responsibility in regards with socio-economic rights as in regards with civil and political rights.

2.2. Recognition of Socio-Economic Rights at the Regional Level

Economic and social rights are recognized in African, inter-American and European regions under the relevant treaties. The African Charter on Human and People's Rights recognizes the rights to labor, health and education.²³ So-called San Salvador Optional Protocol²⁴ of American Convention on Human Rights covers the wide range of socio-economic rights. In the European region, the European Social Charter was adopted in 1961, which underwent renewal in 1996 and comprises the wide range of social rights. It is noteworthy that the latest covers Council of Europe member states and the states within the European Union have assumed the additional duty within the EU Charter on Fundamental Rights.²⁵

¹⁶ <<http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>>, [06.12.2014].

¹⁷ <<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>>, [06.12.2014].

¹⁸ *Dennis M.J., Stewart D. P.*, Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?, *The American Journal of International Law*, 2004, 98(3), 465.

¹⁹ Commission on Human Rights resolution 2002/24, § 9(f).

²⁰ <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3-a&chapter=4&lang=en>, [06.12.2014].

²¹ *Ibid.*

²² Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Art. 1.

²³ See Articles 15-17.

²⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador").

²⁵ See Articles 30-35.

As it seems, high attention is attached to social rights at the regional level, however the question is whether mentioning of social rights in the regional treaties establishes real practical meaning thereto or they bear declarative nature merely. It has to be emphasized that except for the African Charter, all social rights, recognized under the regional treaties are enforced in selective and collective manner and not on the basis of the individual complaints.²⁶ In particular, on the basis of the Protocol of San Salvador, individual petitions are admitted in regards to the rights of Trade Unions and education solely, and the European Social Charter does not admit individual complaints at all and even more, on the basis of *a la carte* approach, the states are entitled to, at their own discretion select the social rights from the mandatory Charter²⁷ to be recognized. Approach to enforcement of the rights, recognized under the EU Charter on Fundamental Rights is more progressive as all the rights, provided in the Charter are subject to enforcement in the Court of Justice of the EU. Those rights cannot be enforced against the UK and Poland as these countries made the special reservations to this issue upon accession to the Charter.²⁸

2.3. Approaches at the National Level in terms of Recognition of Socio-Economic Rights

In terms of recognition of the economic and social rights at the national level, several models can be outlined: 1) social rights are not considered as the Constitutional rights; 2) separate social rights are directly recognized under the Constitution simultaneously with the social state principle; 3) social rights are explicitly recognized under the Constitution and are fully protected.²⁹

Under the first model, socio-economic rights are being considered not as the fundamental human rights but as the directive principles of state policy. Hence, the state may at a high level meet the social interests of the population, though the infringed rights, are not being restored through the judicial proceedings. The USA and the UK are evident followers of this model.³⁰ Among the states of such Constitutional approach, India is an obvious exception, which not only refuses to recognize social rights as the fundamental rights but, the Constitution of India further declares explicitly that those rights cannot be adjudicated in the Court.³¹ Nonetheless, India is an exception, which managed to enforce those directive principles of the state in practice. In 1985, in the *Olga Tellis* case, Indian Supreme Court underscored the function of the Court in ensuring human interests and recognized justiciability of social rights, for which this category of rights was considered in the context of the right to live.³² This decision was utmost progressive as Indian Supreme Court managed to destroy the

²⁶ *Dennis M.J., Stewart D.P.*, Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?, *The American Journal of International Law*, 2004, 98(3), 505.

²⁷ *Ibid.*

²⁸ Protocol № 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

²⁹ *Sadurski W.*, Constitutional Socio-Economic Rights: Lessons from Central Europe, *The Foundation for Law, Justice and Society in affiliation with The Centre for Socio-Legal Studies (University of Oxford, 2009)*, 3-4.

³⁰ *Ibid.*

³¹ See Article 37 of the Constitution of India.

³² *Olga Tellis v Bombay Municipal Corporation*, [1985] Supreme Court of India, § 37.

stereotypes on enforcement of social rights as early as when the UN Committee on Economic, Social and Cultural Rights had not issued a single general comment.³³ This decision was precedential, manifesting that if direct enforcement of social rights are not possible, this category of rights shall be adjudicated in conjunction with the other rights.

The second model is mainly applied in post-socialist states, the Constitutions of which recognize the principle of social state and explicitly protect separate social rights. In these states, typically, social rights are directly enforced, though the judicial practice is not developed enough to consider enforcement of all socio-economic rights, recognized under the international law.³⁴

The third model is the least applied and the best example of this approach is South Africa, the Constitution of which provides the comprehensive list of the socio-economic rights, recognized under the international law.³⁵ Furthermore, under the Constitution of South Africa, the Constitutional Court, upon interpretation of separate rights, shall take the international law standards into account and is authorized to conduct comparative-legal analysis of the problem.³⁶ Thus, each and every judgment of the Constitutional Court of South Africa is based on the outcomes of the qualified international and mostly comparative-legal analysis. Hence, South Africa can be regarded as the best example for any state, and the relevant judgments will be explored in the sub-chapter 3.4.

3. Practical effect of specific characteristics of Socio-Economic Rights

As already underlined, recognition of the social and economic rights as the fundamental human rights is being questioned due to the specific characteristics thereof, which in opinion of some authors and states, essentially distinguish them from civil and political rights and make justiciability of socio-economic rights impossible.³⁷ Correspondingly, it is expedient to analyze specific elements of socio-economic rights and conclude to what extent differences with civil and political rights entail practical and legal effect.

3.1. Essential Elements of Social and Economic rights

The best source for analysis of characteristics of socio-economic rights is the UN international covenant on economic, social and cultural rights as it is the international treaty, ratified by majority of the states³⁸ and consequently, those states are imposed on the duty to ensure this category of the rights in line with the requirements of this treaty. .

³³ First general comment adopted in 1989.

³⁴ *Sadurski W.*, Constitutional Socio-Economic Rights: Lessons from Central Europe, The Foundation for Law, Justice and Society in affiliation with The Centre for Socio-Legal Studies (University of Oxford, 2009), 4-5.

³⁵ See Chapter 2, Constitution of South Africa.

³⁶ Sub-paragraphs “b” and “c” of the paragraph 1 of the Article 39 of the Constitution of South Africa.

³⁷ *Fabre C.*, Constitutionalizing Social Rights, *Journal of Political Philosophy*, 1998, 280.

³⁸ Ratified by 162 states.

Exploring the international covenant on economic, social and cultural rights, first of all, exposes the phrases like: “The States Parties to the present Covenant recognize the right to.....”,³⁹ “The States Parties to the present Covenant undertake to ensure...”.⁴⁰ It is crystal clear that the Covenant is focused on duty-bearers rather than on the right-holders. Correspondingly, in order to accurately study the specific characteristics of socio-economic rights, the nature of the duties of the states counter to these rights shall be analyzed. For this purpose the most relevant provision is the paragraph one of the Article 2 of the Covenant, which stipulates general duties of the states and envisages:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”.

Analysis of this norm begs several questions, entailed to the essential legal consequences. In particular, the following aspects are to be explored:

- 1) How can fundamental human rights be tangible and realistic when practical implementation thereof totally depends on limited and unforeseen resources?
- 2) How it can be determined whether the available resources are used at maximum extent?
- 3) What does progressive realization of rights mean?
- 4) Is complete realization of socio-economic rights ever possible?⁴¹

The authors have various answers and comments on these questions, though it would be expedient to primarily consider the position of the UN Committee on Economic, Social and Cultural Rights, as it is the body, authorized to officially interpret the norms of the international covenant.⁴² It has to be noted that the nature of the duties imposed on the states under the Covenant is provided in the general comment №3 of the Committee, which, to some extent, echoes the problematic issues outlined above.

The Committee acknowledges that realization of socio-economic rights is directly connected with the state resources and due to limits of these resources, immediate realization of the rights of this category to the fullest extent is impossible. However, in order to give practical effect to economic and social rights and to make them tangible for the holders, the general comment obliges each state to develop the minimal standard (so-called minimum core) to be instantly met and which will consider the needs of particularly vulnerable groups even within availability of limited resources.⁴³ Accordingly, duty to meet the minimal standard grants real effect and practical significance to socio-economic rights despite the resources available in the country.

³⁹ See the Articles 6, 7, 9, 11, 12, 13, 15 of the International Covenant on Economic, Social and Cultural Rights;

⁴⁰ See Articles 8, 16 of the International Covenant on Economic, Social and Cultural Rights;

⁴¹ *Dennis M.J., Stewart D.P.,* Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?, *The American Journal of International Law*, 2004, 98 (3), 464.

⁴² <<http://www2.ohchr.org/english/bodies/cescr/index.htm>>, [7.02.2012].

⁴³ ESCR Committee GC N3 on the Nature of State Parties Duty, § 10, 12.

The Committee, in regards with the available resources, specifies that it refers to both the resources existing within a State and those available from the international community through international cooperation and assistance.⁴⁴

One of the main characteristics, differentiating socio-economic rights from civil and political rights is the progressive nature of duties. The general comment specifies this issue and elucidates that the progressive realization of the rights implies that these rights cannot be realized in short-term. Although, it is necessary to gradually realize the rights, aiming at full implementation thereof.⁴⁵

It is of utmost importance that the Committee considers duty of the progressive realization in the context of complete implementation of the rights, however the question is to what extent full realization of socio-economic rights are realistic. In fact, “yes” or “no” cannot be answer to this question. On the contrary, the most correct answer would be “yes” and “no”. In this context, first of all, it shall be taken into account that the international covenant does not grant the right-holders the capability to demand full realization of their rights. The paragraph one of the Article two obliges the states to undertake measures in a view of full realization of the rights gradually and progressively. Hence, the states shall do their best within capability, though they are not obliged to achieve full realization of the rights. Correspondingly, it is theoretically possible for the state, within capacity, to do its best for full realization of the rights and in this case, the answer to the question will be positive, as the state fully implements imposed duty. Though, this conclusion would be absolutely incompatible with the main characteristic of the duty, implying progressive nature. The progress means advancement to better state, to development, which is a constant process and cannot be expired with any achieved result, as there always will be the possibility for achievement of higher standard.⁴⁶

Thus, progressive realization, with its essence, excludes possibility of full realization. Then the question is how these two contradictory duties, prescribed under the Covenant, can exist in parallel? Is it possible for the state to meet duty of both progressive and full realization? In fact, the states can, within the available resources, do their best to fully implement the requirements of the international covenant and constantly develop the achieved progress, but even in this event it is impossible to conclude that concrete right is fully realized. Therefore, it has to be noted that in this particular case, the right and the counter duties thereto are not in full correlation with each other.

On the basis of analysis of the Article two of the international covenant on economic, social and cultural rights, the socio-economic rights bear indeed quite specific characteristics, though it is obvious that the content thereof can be defined and these rights can be transformed into practice. Thus, it would be pertinent to consider these characteristics and determine how they distinguish them from the civil and political rights and if this difference bears the practical outcomes.

3.2. Analysis of Distinguishing Characteristics of Socio-economic Rights in Comparison with the Civil and Political Rights

⁴⁴ Ibid, §13.

⁴⁵ ESCR Committee GC N3 on the Nature of State Parties Duty, §9.

⁴⁶ <<http://www.thefreedictionary.com/progress>>, [5.03.2012].

Despite the fact that international instruments of protection of human rights recognize universality of human rights and consequently, require similar attitude in regards with all rights,⁴⁷ the issue of separation of economic and social rights from civil and political rights is still an issue. There are number of differentiating signs, due to which it is considered that socio-economic rights can never have real practical effect. Correspondingly, it is expedient to analyze these distinctions in the light of legal and practical consequences.

One of the most common arguments against socio-economic rights is the fact that this category of rights imposes positive duties on the states and unlike civil and political rights, imposing negative duties, their full implementation is impossible.⁴⁸ However, it would be wrong to state that any particular right imposes only one type of duty solely to the state.⁴⁹ According to the human rights law, any fundamental human right imposes negative duty on the state preventing it from violating human rights itself, as well as, positive duties to undertake all relevant measures to ensure the rights.⁵⁰ The positive duty shall be divided into two parts for the state to protect people from violation of their rights from the third parties (duty to protect) and to create conditions necessary for implementing human rights (duty to fulfill).⁵¹ Duty to protect requires of the state undertaking the effective preventive measures, and in case of violation, timely identification thereof and imposition of the relevant responsibility on the offender. It is as well necessary to create proper mechanisms of restoration of violated human rights.⁵² As to the duty to fulfill, it is necessary to create the system, mechanisms, infrastructure and other similar circumstances for realization of the rights.⁵³ The positive duty of both types is an essential characteristic not only for socio-economic rights but for civil and political rights as well. For instance, the measures, undertaken by the state in regards with the suffrage, preventing the third parties from violation of freedom of choice would be realization of the duty to protect, and creation of the electoral infrastructure, composition of administration, printing of the ballot sheets and other similar measures, necessary for ensuring the suffrage, would be realization of the duty to fulfill. Thus, it is groundless to discuss that the civil and political rights impose the negative duties on the state and socio-economic rights – positive.

⁴⁷ See UNGA Resolution A/RES/32/130 (16 December 1970); Vienna Declaration and Programme of Action (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993) § 5.

⁴⁸ Positive Obligations of States and the Protection of Human Rights, *Interights Bulletin*, 2006, 15 (3), 101.

⁴⁹ International Commission of Jurists, Courts and the legal enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability (Human Rights and Rule of Law Series N2) 10 <<http://www.icj.org/dwn/database/ESCR.pdf>> [10.02.2012].

⁵⁰ *Burduli I., Gotsiridze E., Erkvania T. and others*, The Comment to the Constitution of Georgia. Chapter 2. Citizenship of Georgia. Fundamental Human Rights and Freedoms. (Tbilisi, 2013), 58.

⁵¹ *Schutter O. D., Eide A., Khalfan A.*, et al, Commentary to the Maastricht Principles on Extraterritorial duties of States in the Area of Economic, Social and Cultural Rights, *Human Rights Quarterly*, 2012, 34(4), 1090.

⁵² Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31 (21 March 2011), 7.

⁵³ *Green M.*, What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement, *Human Rights Quarterly*, 2001, 23(4), 1072.

Another argument against the economic and social rights is dependence thereof on the resources. However, it is to be noted that neither this sign is exclusively characterizing socio-economic rights. Realization of civil and political rights as well is connected with vast expenses and the best example is still the suffrage, realization of which is one of the most expensive acts for the state.⁵⁴ In addition, administration of state institutions, training of the employees to let them provide implementation of positive duties regarding the civil rights and adequate response in case of violation also requires significant expenses. Hence, it is still wrong to claim that only realization of socio-economic rights depends on state resources.

Some authors consider that economic and social rights are more attributed to the political sphere, and civil and political rights – to the legal sphere.⁵⁵ This assumption also lacks of accuracy, as any legal document is the product of political decision. The legal Act with the highest hierarchy – the Constitution itself is jointly the political and legal document and it well reveals that the political and legal aspects of the legislative process are in close connection with each other.⁵⁶ Hence, neither these criterion are suitable for distinction of two categories of the rights.

The next argument against socio-economic rights is the nature of non-immediate duty, imposed on the state and vague nature of the content of the rights themselves.⁵⁷ It is noteworthy that this assertion is superficial and does not reflect the real essence of economic and social rights. Even though the state is imposed on the duty to gradual and progressive realization of this category of rights, it also imposes various obligations which are of immediate effect which in line with the Article two of the international covenant on economic, social and cultural rights, comprises two aspects: 1) all the states bear the instant duty to undertake the steps for progressive realization; and 2) upon realization of socio-economic rights, there is an instant duty to exclude any discrimination.⁵⁸ As to vague nature, the analysis of the previous sub-chapter revealed that the nature of the duty imposed on the state is absolutely definable. The mere fact that the specific socio-economic rights need further interpretation, does not reveal any particular feature as any civil and political rights need specification and interpretation of the content too.⁵⁹ Ambiguity of the content of the right must not become the impediment for practical implementation of the right and that is the reason the Court exists for to provide specification of the content of human rights in case of necessity by means of interpretation.⁶⁰

⁵⁴ International Commission of Jurists, Courts and the legal enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability, Human Rights and Rule of Law Series, 2008, 2, 83. <<http://www.icj.org/dwn/database/ESCR.pdf>>, [10.02.2012].

⁵⁵ International Commission of Jurists, Courts and the legal enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability, Human Rights and Rule of Law Series, 2008, 2, 73. <<http://www.icj.org/dwn/database/ESCR.pdf>>, [10.02.2012].

⁵⁶ *Ibid*, 90.

⁵⁷ <http://www.srap.ca/publications/porter_the_justiciability_of_social_and_economic_rights.pdf> [10.02.2012].

⁵⁸ ESCR Committee GC N3 on the Nature of State Parties Obligation, § 1, 2.

⁵⁹ International Commission of Jurists, Courts and the legal enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability, Human Rights and Rule of Law Series, 2008, 2, 83. <<http://www.icj.org/dwn/database/ESCR.pdf>>, [10.02.2012].

⁶⁰ *Ibid*, 76.

This approach has been numerous times acknowledged by the international courts.⁶¹ In addition, as already noted, the UN Committee on Economic, Social and Cultural Rights provides the competent interpretation on the socio-economic rights and therefore, the content of these rights is definable indeed.

According to the above-mentioned, it can be stated that economic and social rights differ with their characteristics from the civil and political rights but the difference is not that salient to hinder practical realization of socio-economic rights.

3.3. Do Socio-economic Rights Meet the Pre-conditions Necessary for Classification as the Fundamental Rights?

On the basis of the analysis of state practice and the legal doctrine, it can be stated that the fundamental human right shall necessarily meet the following criterion:

- 1) the right-holder and duty-bearer shall be identifiable;
- 2) the content of the right and the counter duty shall be determined;
- 3) inter-dependence of this specific right on other fundamental rights shall be determined;
- 4) the values protected under the rights shall be outlined;
- 5) the right shall be enforceable in practice.⁶²

Therefore the analysis of socio-economic rights on the basis of the hereof criterion is pertinent.

According to the international covenant on economic, social and cultural rights, the holder of the socio-economic rights is any individual,⁶³ though the minor restriction applies in regards with the non-citizens of the developing countries as the covenant enables the states to at own discretion define the degree of provision of socio-economic rights to non-citizens.⁶⁴ As to the bearers of the duty, obviously the initial addressees are the states, though the positive duty imposed on the state to prevent violation of the rights by the third parties⁶⁵ indirectly requires of the non-state actors non-violation of the rights, prescribed under the Covenant.

In the context of comparison with civil and political rights, as already mentioned, the content of the socio-economic rights is absolutely definable and it can be stated that this criterion is met as well. As to the inter-relation of the socio-economic rights to other rights, similar to the civil and political rights, there is not a preliminarily defined hierarchy and a separate right upon collision shall be granted the supremacy considering the specifics of the case. However, the requirement of the UN Committee on Social, Economic and Cultural Rights shall be always satisfied, according to which one

⁶¹ See *Gorzelik and others v Poland*, App. №. 44158/98 (European Court of Human Rights, 17 February 2004) § 64.

⁶² *Centre For Social Justice Limited By Guarantee, Justiciable Constitutionalisation of Economic, Social and Cultural Rights – A Framework for Action (Being a Contribution to the Planned Review of the Constitution of the Federal Republic of Nigeria 1999)* 17.

⁶³ See Articles 6 (1), 7, 8(1), 9 of the UN Covenant on Social, Economic and Cultural Rights.

⁶⁴ *Ibid*, Article 2(3).

⁶⁵ CESCR Committee GC N14, *The right to the highest attainable standard of health*, E/C.12/2000/4 (11 August 2000) § 33.

right shall be realized so that the attainment and satisfaction of other basic needs are not threatened or compromised.⁶⁶

In regards with the protected values it shall be mentioned that according to the preamble of the International Covenant on Economic, Social and Cultural Rights, the Covenant is based on the principles, protected under the UN Charter and Universal Declaration on Human Rights, and especially on human dignity.

As to possibility of practical implementation, the international covenant explicitly requires of the member states to take all possible steps within the available resources for implementation of socio-economic rights.⁶⁷ In line with the General Comments №3 and №9 of the UN Committee on Economic, Social and Cultural Rights, measures necessary for implementation imply undertaking of judicial, administrative, financial, educational and social measures.⁶⁸ In addition, the general comment №9 explicitly indicates that the necessary and the most effective measure for implementation of economic and social rights shall be justiciability through the judicial proceedings.⁶⁹ Accordingly, it can be noted that the international covenant itself and the Committee not even doubt the issue of justiciability of socio-economic rights but directly require of the states undertaking of these measures. However, the practice in regards with this issue varies and taking into account that the possibility of practical enforcement of rights gives any right the real effect,⁷⁰ in-depth analysis of the justiciability of socio-economic rights would be expedient which is elucidated in the following chapter.

3.4. Justiciability of Economic and Social Rights

As already mentioned, possibility to enforce violated rights through judicial proceedings is the characteristic of fundamental human right, which grants the provisions in the legal act with the practical dimension.⁷¹ In other words, existence of human right in itself means that in case of violation thereof, it can be restored and on the contrary, if it is impossible to adjudicate the right, then human right does not exist in reality.⁷² That is why all main international⁷³ and regional acts on human rights directly stipulate justiciability of the human rights.⁷⁴ As regards to socio-economic rights, the General Comment №3 of the UN Committee on Economic, Social and Cultural Rights directly requires

⁶⁶ See CESCR Committee GC No 4 on the right to adequate housing, § 8(c); CESCR General Comment No 15 on the right to water, § 12(c)(ii).

⁶⁷ Article 2(1) of the international covenant on economic, social and cultural rights.

⁶⁸ ESCR Committee GC N3 on the Nature of State Parties Obligation, § 5 and 7; ESCR Committee GC N9, Domestic Application of the Covenant (3 December 1998) § 9.

⁶⁹ ESCR Committee GC N9, Domestic Application of the Covenant (3 December 1998) § 7.

⁷⁰ *Steiner H. J., Alston P. and Goodman R., International Human Rights in Context: Law, Politics and Morals* (3rd edition, Oxford: OUP, 2007) 313.

⁷¹ *Tomuschat C., Human Rights: Between Idealism and Realism* (2nd edition, Oxford: OUP, 2008), 5.

⁷² *Steiner H.J., Alston P., and Goodman R., International Human Rights in Context: Law, Politics and Morals* (3rd edition, Oxford: OUP, 2007), 263.

⁷³ See Article 8 of the Universal Declaration on Human Rights, paragraph 2, Article 2 of the international act on civil and political rights and sub-paragraph “b” of the paragraph 3.

⁷⁴ Article 13 of the ECHR, Article 2 of the American Convention on Human Rights, Article 1 of the African Charter on Human and People’s Rights.

existence of judicial mechanisms for protection of any social rights and that these rights shall be enforceable.⁷⁵ Furthermore, the Committee, in the General Comment №9 reiterated and specified that there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions at the national level.⁷⁶

However, number of arguments can be found against enforcement of economic and social rights and they shall be duly analyzed.

It is often raised against enforcement of social rights that the judges are not qualified to make the competent decisions on such cases. In particular, it is considered that enforcement of social rights means participation in allocation of state resources, which requires specific skills, obtainment of relevant information and other institutional mechanisms.⁷⁷ However, this argument is not resolute as complication of judicial process is not a characteristic feature for social rights solely and the judges deal with other complex issues too. When the Judge discusses socio-economic rights, he/she is not required to study the social aspects at the expert level but he/she shall be able to evaluate the measures undertaken by the Government from the legal standpoint. Moreover, the Court is not entitled to refuse to consider the case because of its complicated nature. In case of necessity, the Judge is always empowered to engage the expert for aid and thus solve the specific issues.⁷⁸ Therefore, the complications associated with enforcement of socio-economic rights do not characterize this category of rights solely and this circumstance cannot become the ground for refusal of enforcement of socio-economic rights.

According to more common opinion against justiciability of economic and social rights, enforcement of this category of rights by the Court will affect on checks and balances. Realization of socio-economic rights is possible within the margins, allocated by the state per every specific year in view of provision of this right. Drawing the budget is the function of the executive and legislative authorities, thus the decision made by the Court, affecting the expenditure part of the State Budget, raises the question whether the judicial authority will interfere in activity of the legislative and executive bodies.⁷⁹

The issue of enforcement of socio-economic rights in the context of checks and balances, has been in-depth analyzed by the Constitutional Court of South Africa, the arguments of which are enhanced to nullify the questions about this issue. Since 1996, the Constitutional Court of South Africa has numerous times touched upon checks and balances and on the basis of analysis of this decision, one can conclude the following:

⁷⁵ ESCR Committee GC № 3 on the Nature of State Parties Obligation, § 5.

⁷⁶ ESCR Committee GC № 9, Domestic Application of the Covenant (3 December 1998) § 10.

⁷⁷ International Commission of Jurists, Courts and the legal enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability, Human Rights and Rule of Law Series, 2008, 2, 83. <<http://www.icj.org/dwn/database/ESCR.pdf>>, [27.06.2013].

⁷⁸ Nolan A., Porter B., Langford M., The Justiciability of Social and Economic Rights: An Updated Appraisal, 2007, 4, <http://www.srap.ca/publications/porter_the_justiciability_of_social_and_economic_rights.pdf>, [27.06.2013].

⁷⁹ Fabre C., Constitutionalizing Social Rights, Journal of Political Philosophy, 1998, 280.

1) Deriving from the economic and social rights, the duty is to be imposed on the state in total, which automatically means duty of all three Governmental branches. Consequently, the Court is authorized and obliged as well to undertake relevant measures to ensure socio-economic rights;⁸⁰

2) Enforcement of social and economic rights by the Court does not violate the balance between the Governmental branches. On the contrary, one of the main aspects of the checks and balances principle is inter-control. In the event of violation of the socio-economic rights by the legislative and executive authorities, the Court is to be imposed with the duty to react on that.⁸¹ Accordingly, adjudication of the social rights falls within the principle of checks and balances and not in violation thereof;

3) In the event of violation of the economic and social rights, the Court shall strive to restore the violated right, even if it is necessary to invent any mechanism or remedy, though without prejudice to the principle of checks and balances.⁸² More specifically, the Court is authorized to detect the fact of violation, however it shall not issue directive to the political bodies about the method of resource allocation to achieve the aim.⁸³ It means that the Court's influence on resource distribution shall be expressed in passive manner, which is manifested in evaluation of expediency and reasonability of implemented activity. In extreme cases, the Court is entitled to determine the guiding principles solely to restore the violated right.

On the basis of the decisions made by the Constitutional Court of South Africa, it would not be easy for any of the Court to determine specific function thereof in this process and it may need decades. However, it is clear that enforcement of the socio-economic rights by the Court does not contradict with the principle of checks and balances and it is necessary for the Court to make the decisions in view of realization of those rights. Experience of South Africa can be the best example upon solution of the problems in this process.

4. Economic and Social Rights in Georgian Legal Framework

On the basis of analysis of the preceding chapters, it can be said that the economic and social rights meet all pre-conditions, necessary for recognition as the fundamental human rights, though the practice of the states varies and there are the states still not considering them as genuine rights. Therefore, it would be pertinent to study the legal framework of Georgia and make the conclusions how realistic is practical realization of socio-economic rights in Georgia.

4.1. Socio-Economic Rights in the Constitution of Georgia

⁸⁰ Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), § 94.

⁸¹ Minister of Health and Others v Treatment Action Campaign and Others (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002), § 99.

⁸² Ibid, № 102.

⁸³ Ibid, № 38.

The fundamental human rights in Georgia are provided in the Chapter 2 of the Constitution, on the basis of which the separate legal acts have been developed in view of implementation of the Constitutional rights. Some economic and social rights, such as labor rights,⁸⁴ right to education,⁸⁵ medical insurance,⁸⁶ are directly reflected in the Constitution but the number of socio-economic rights are not mentioned thereof. For instance, the Constitution does not enshrine the right to adequate housing,⁸⁷ right to highest attainable standard of health,⁸⁸ right to food,⁸⁹ and right to water.⁹⁰ However, it does not automatically mean that the Constitution does not recognize these rights as the fundamental human rights. The legal construction of the Chapter 2 of the Constitution is formed in the manner that the Constitution recognizes those fundamental rights as well, which are not directly provided under the Chapter 2.⁹¹ In this event, it is necessary to meet the requirements of the Article 39, envisaging that the category solely is considered as the Constitutional right, which: 1) is universally recognized; and 2) derives from the principles of the Constitution. Hence, the socio-economic right, which is not explicitly provided in the Constitution, can be considered as a fundamental human right recognized in Georgia only if both pre-conditions are met.

Those rights are recognized under the international covenant on economic, social and cultural rights⁹² and under the regional instruments.⁹³ Accordingly social rights are to be regarded as universally recognized fundamental rights. In this regard, the position of the Constitutional Court of Georgia is interesting which, in its ruling of June 10, 2009 №1/2/458, determined that the universally recognized rights are those derived from the international obligations,⁹⁴ assumed by the state in human rights sphere. Georgia has ratified the international covenant on economic, social and cultural rights, thus undertook the duty of ensuring the rights, along with the other rights, which are not directly provided in the Constitution.⁹⁵ Georgia is also the party to the Revised European Social Charter, though it is noteworthy that in this case, the state has not recognized all socio-economic rights.⁹⁶ The Social Charter, enables the state at own discretion to select the social rights, for implementation of which the state expresses commitment and mandatorily recognition of all of them is not compulsory.⁹⁷

⁸⁴ See the articles 31-33 of the Constitution of Georgia.

⁸⁵ See the Article 35 of the Constitution of Georgia.

⁸⁶ See the Article 37 of the Constitution of Georgia.

⁸⁷ Recognized under the Article 11 of the international covenant on economic, social and cultural rights.

⁸⁸ Recognized under the Article 12 of the international covenant on economic, social and cultural rights.

⁸⁹ Recognized under the Article 11 of the international covenant on economic, social and cultural rights.

⁹⁰ The right of the adequate water is not directly mentioned in the international covenant but the General Comment № 15 of the UN Committee on economic, social and cultural rights specify that the Article 11 of the covenant, envisaging the right to adequate housing, implies the right to adequate water as well.

⁹¹ Article 39 of the Constitution of Georgia.

⁹² Article 11 of the international covenant on social, economic and cultural rights.

⁹³ See European Social Charter [1961].

⁹⁴ The Ruling of June 10, 2009 N1/2/458 of the Constitutional Court of Georgia, "*David Macharashvili V., Sartania and Alexander the Parliament of Georgia and the Ministry of Justice of Georgia*", §24.

⁹⁵ <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en> [26.05.2013].

⁹⁶ <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=163&CM=8&DF=&CL=ENG&VL=1>> [26.05.2013].

⁹⁷ Article 20 of the European Social Charter.

Perhaps, that is why, upon ratification in 2005, Georgia was not ready for recognition of the number of the rights. This position would be understandable if not the fact that in 1994, with ratification of the international covenant on economic, social and cultural rights, Georgia undertook the duty to ensure all socio-economic rights thereof.

Consequently, it can be said that socio-economic rights are the universally recognized fundamental rights and the duty to ensure their implementation has been assumed by Georgia. As to the second pre-condition, according to the preamble of the Constitution of Georgia, the social state principle is recognized. Establishment of the social state is impossible without recognition of social rights. Thus, recognition of social rights is based on the Constitutional principle. Accordingly, it can be concluded that in line with the Article 39 of the Constitution of Georgia, the socio-economic rights are the fundamental rights recognized under the Constitution. The same approach was taken by the Constitutional Court of Georgia upon discussing the issue of recognition of social rights in Georgia.⁹⁸

4.2. The Position of the Constitutional Court of Georgia Regarding Enforcement of the Social Rights

The Constitutional Court of Georgia had to make the decision on social rights several times. On April 18, 2002, with the decision №1/1/126,129,158, the Constitutional Court elucidated that deriving from the principles of the Constitution of Georgia and from the international acts on human rights, the social rights shall be recognized as the rights, prescribed under the Article 39 of the Constitution and recognized by the state, in view of protection of which the state shall form the enhanced mechanisms within the available resources.⁹⁹ With the decisions of October 15, 2002 №1/2/174,199¹⁰⁰ and of December 30, 2002 №1/3/136, the Constitutional Court reaffirmed that the social rights are protected under the Article 39 of the Constitution.¹⁰¹

Consequently, the Constitutional Court of Georgia recognizes the social rights as the fundamental human rights, though the position of the Court is vague concerning enforcement of those rights, to which no final position exists. This was the issue for discussion by the Constitutional Court of Georgia on August 27, 2009 in the decision №1/2/434, in which the paragraph two of the Article 22 of the Law of Georgia “On Social Aid” was considered as non-Constitutional in regards with the

⁹⁸ The Ruling of the Constitutional Court of Georgia of April 18, 2002 №1/1/126,129,158 in the case of *Bachua Gachechiladze, Vladimir Doborjginidze, Givi Donadze* and others v. the Parliament of Georgia.

⁹⁹ The Ruling of the Constitutional Court of Georgia of April 18, 2002 №1/1/126,129,158 in the case of the citizens of Georgia – (1) *Bachua Gachechiladze, Simon Turvandishvili, Shota Buadze, Solomon Sanadiradze* and *Levan Kvatsbaia*, (2) *Vladimir Doborjginidze, Nineli Andriadze, Guram Demetrashvili* and *Shota Papiashvili*, (3) *Givi Donadze* v. the Parliament of Georgia, 8.

¹⁰⁰ The Ruling of the Constitutional Court of Georgia of October 15, 2002 №1/2/174,199 in the case of the citizens of Georgia – *Tristan Khanishvili, Tedore Ninidze, Nodar Chitanava, Levan Aleksidze, Giorgi Kavtaradze* and others v. the Parliament of Georgia, 6.

¹⁰¹ The Ruling of the Constitutional Court of Georgia of December 30, 2002 №1/3/136 in the case of the citizen of Georgia *Shalva Natelashvili* v. the Parliament of Georgia, the President of Georgia and the Georgian National Energy Commission (GNEC), 19.

paragraph one of the Article 42 of the Constitution of Georgia.¹⁰² According to the annulled norm, the methodology of evaluation of the social-economic situation, as well as the level established by the Government and the monetary social aid amount, was inadmissible to be appealed to the Court. At a glance, in terms of protection of social rights, this decision is very important, though the in-depth analysis may reveal the opposite outcomes. In the context of enforcement, the motivation of the Court decision is important, according to which the norm has been recognized as non-Constitutional not because that in opinion of the Constitutional Court, adjudication of the social rights shall be possible but because “it excludes possibility to appeal to the Court in the event of encroachment of equality and/or other fundamental rights”.¹⁰³ In regards with enforcement of social rights, the votes of the judges were divided and the Court failed to decide on it.¹⁰⁴

Such a position by the Constitutional Court shall be regarded as an utmost negative message in terms of enforcement of socio-economic rights in Georgia. Despite the fact that the Court has never mentioned in the decision that the social rights are inadmissible to be appealed to the Court, when this issue was raised to the Court and the Court failed to express own opinion, it indirectly is equal to the decision made against enforcement of the social rights. In addition, it is noteworthy that the respondent party has directly expressed the opinion against justiciability of the social rights that it could entail violation of the principle of the checks and balances.¹⁰⁵ It has been already discussed that this position is the wrong stereotype, though at this stage it is important to note that the Constitutional Court itself escaped to answer this question.

On the one hand the decision of the Constitutional Court shall be criticized, but on the other hand the dissenting opinion of the Constitutional Court members, *Ketevan Eremadze* and *Besarion Zoidze* is to be appraised. The dissenting opinion explicitly underlines that the right to the fair trial, as one of the tests for the rule of law, implies opportunity to protect all the rights in the court. The paragraph one of the Article 42 of the Constitution of Georgia does not differentiate the rights and none of the branches of the state is authorized to establish distinction in the Court between the justiciable and non-justiciable rights.¹⁰⁶ The very progressive position was also expressed in the dissenting opinion concerning the issue of inter-relation of the principle of checks and balances and enforcement of the social rights. *Ketevan Eremadze* and *Besarion Zoidze* consider the particular role of the Court in complete realization of the principle of checks and balances, though they suppose that other state authorities shall be carefully controlled not to entail imbalance. According to the dissenting opinion, the Court shall not foist its opinion on the legislative and executive authorities upon developing the social and economic policy, though it is necessary to conduct legal oversight on their activities.¹⁰⁷

¹⁰² The Ruling of the Constitutional Court of Georgia of August 27, 2009 №1/2/434 in the case of the Public Defender v. the Parliament of Georgia.

¹⁰³ The Ruling of the Constitutional Court of Georgia of August 115, 2009 №1/2/434 in the case of the Public Defender v. the Parliament of Georgia.

¹⁰⁴ *Ibid*, part II, §5.

¹⁰⁵ *Ibid*, part I, §6.

¹⁰⁶ *Ibid*, the dissenting opinion of the Constitutional Court members, *K. Eremadze* and *B. Zoidze*, §2.

¹⁰⁷ *Ibid*, the dissenting opinions of the Constitutional Court members, *K. Eremadze* and *B. Zoidze*, §17.

Accordingly, the position expressed in the dissenting opinion coincides with the approaches of the Constitutional Court of South Africa regarding enforcement of the socio-economic rights and it is very important step in the context of justiciability of those rights in Georgia .

As to the legal consequences of escaping of the Constitutional Court from the decision-making on this issue, it cannot be considered as an argument against enforcement of the economic and social rights, as the paragraph one of the Article 42 of the Constitution of Georgia grants every person the right to appeal to the Court for protection of own rights and freedoms. As a result of the analysis provided in the previous chapter it can be concluded that socio-economic rights are considered under the Constitution of Georgia as universally recognized human rights.

5. Conclusion

In line with the objectives outlined in the introduction, this Article, first of all, analyzed the international, regional and national approaches to recognition of socio-economic rights as the fundamental human rights.

The research revealed that universal nature of all human rights are recognized at international as well as national level and consequently, the economic and social rights, similarly to the civil and political rights, are legally protected under the binding treaties and conventions. However, practical implementation of social rights still remains the problem, which is manifested in impossibility to file the individual claims for restoration of violated rights. The fact that the optional protocol to the UN international covenant on economic, social and cultural rights, which allows individual claims, is ratified only by 17 states, makes it clear that the most of the states are not ready to undertake the same responsibility in regards with socio-economic rights as it is the case with regard to civil and political rights.

The similar conclusion shall be made in regards with the regional conventions, which does not grant the practical meaning to the social rights enshrined in those conventions and are of the declarative nature solely, as enforcement of social is carried out in a selective manner and collective form instead of the individual claims.

Analysis of the national approaches exposed that socio-economic rights are not mainly recognized under the Constitutions of the states or only separate rights are protected. Even in latter cases, practical realization of social rights in due manner is impossible. In terms of enforcement of the violated social rights through the judicial proceedings, the practice of the Supreme Court of India and of the Constitutional Court of South Africa is a rare exception, which shall be model for any state.

As a result of this overview, it can be said that there is no homogenous approach to recognition of social rights as genuine human rights at the international, regional or the national level. Moreover, despite some positive developments, justiciability of the social rights is still the rare exception in practice. Due to this fact, separate chapter was dedicated to analysis of the specific characteristics of socio-economic rights, which may entail different approaches to this category of rights. The study revealed that the social and economic rights are of quite a specific nature, though the content thereof is definable and it can be realized in practice. In addition, the comparative analysis of the civil and political rights revealed that these two categories of the rights differ with characteristics but this

difference is not essential to the extent to hinder implementation of socio-economic rights in practice. Moreover, the research revealed that the social rights are characterized with all elements necessary for recognition as the fundamental human rights and justiciability is not impossible.

Based on these conclusions, the Chapter three of the article analyzed the approaches existent in regards with social rights in Georgia. On the basis of the analysis of the Constitution of Georgia, it can be conclude that in line with the Article 39 of the Constitution of Georgia, socio-economic rights are the fundamental rights recognized under the Constitution. This position has been affirmed by the Constitutional Court of Georgia in numerous decisions, though the decision of August 27, 2009 №1/2/434 shall be criticized, in which the issue of enforcement of the social rights was directly raised to the Court and the Court failed to elaborate the position. In the light of the provisions of the Constitution and the decisions previously made by the Court, this decision shall be assessed negatively even though the position against enforcement has not been expressed. However, the dissenting opinion of the Constitutional Court judges, *Ketevan Eremadze* and *Besarion Zoidze*, recognizing enforcement of social rights in Georgia, gives the ground that the Constitutional Court of Georgia may in the future be ready to explicitly recognize enforcement of this category of rights.

To summarize, the economic and social rights are distinct with the specific characteristics, though they meet all criterion necessary for recognition as the fundamental human rights. Consequently, the approach of some states, considering socio-economic rights as only directive principles of state policy and not the genuine rights, is groundless. In fact, practical realization of this category of rights requires the will of the state and there is no objective obstacles to put enforcement thereof under doubt.

Goga Kikilashvili*

Problem of Defining Legal Nature of Agreement on Military Contractual (Professional) Service

I. Introduction

Contractual relation is one of the most spread form of legal relationships.¹ That sets, changes or terminates legal relation among parties based on their concurring will.² Besides Civil Contract there is one more form of contract that is regulated with both Public Law and Civil Law. This special form of contract is called an Administrative Contract. The first part of Article 65 of General Administrative Code of Georgia sets that unless otherwise determined by law, an administrative-legal relation may arise from, be changed or terminated, by concluding a contract under public law. An administrative body vested by law with the power to regulate a specific administrative-legal relation through issuing an individual administrative act may regulate the above administrative-legal relation by concluding a contract under Public Law.^{3 4 5} For relationships regarding administrative contract the norms of the General Administrative Code of Georgia and Civil Code of Georgia are used.⁶ The Administrative Body acts, in the private law relations, as the civil law subject and the norms of the Civil Code of Georgia are applied.⁷

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¹ The Bargain is unilateral, bilateral or multilateral expression of will, directed at emergence, alteration or termination of the legal relations –The Civil Code of Georgia (hereinafter referred to as “CCG”), 1996, June 26, N786-IIS, Article 50;

² “The Bargain is the aggregation of actions, when at least one action expresses the will directed to achievement of a particular legal consequence”. See *Kropholler I.*, German Civil Code – training comment, 13th edited publication, erman Civil Code, N104, Tbilisi, 2014, 29;

³ General Administrative Code of Georgia, 25 June 1999, № 2181-IIS, Article 65, part 1.

⁴ “The general norms on administrative contract in Georgia, as on the legal institution, have for the first time provided under the General Administrative Code, at that it is noteworthy that this institution has been mentioned in the initial edition of the General Administrative Code of Georgia as an administrative bargain”. See *Gabaidze D.*, Alteration or Termination of the Administrative Contract, Legal E-Library, 2012, 2. <<http://www.library.court.ge/index.php?id=2940>>.

⁵ “We deal with the administrative contract when: it serves for implementation of the norms of administrative law; it contains obligation to issue the administrative act or to undertake other administrative measures; it defines the public legal authority or obligation of the citizen”. See *Schulze Sh., Schmitz-Justen N., Turava P., Zodelava T., Kapanadze A.*, General Administrative Law –the Manual for the Pedagogues, 2nd Edited Publication, 2012, 63;

⁶ “The administrative bargain in the legal relations takes the intermediate place between the administrative act (which is expression of the unilateral governmental will of the administrative body) and the agreement of the private legal nature (which is based on equality of the parties)”. See *Adeishvili Z., Vardiashvili Q., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Qitoshvili D.*, The Manual on General Administrative Law, 2005, 191.

⁷ Conclusion of the private legal contract by the administrative body is classic case of “obligation ex contractu”, when in case of the administrative contract, besides Civil Law institutions legal elements of Public Law are also introduced.

The Contract in current reality, as one of the forms of legal relations, is being further distributed and correspondingly, the circle of relations is being enlarged, which can be regulated by means of hereof institution. Increasing frequency of application of the contract is characteristic not only for the subject of the private law but for the state, as for one of the largest subject of legal relations. The trend of regulating issues, attributed to the public authority, by means of conclusion of agreement is evident.⁸

Conclusion of the contractual relations by the state can be detected in all spheres actually. For the case of our discussion, the defense sphere, namely the National Army is no exception at from the whole picture. The Agreement on Military Contractual (Professional) Service (so called military service contract) is an agreement under which a natural person assumes responsibility, in return for specific remuneration, to serve in the army and follow the rules set for other military service member on the similar positions.

The military contractual service is one of the most effective means to compose the national army, though at the same time violation of the contract and the consequences thereof are associated with numerous difficulties solution of which requires immense efforts and entails the particular legal consequences.

One of hereof problems is definition of the legal nature of military service contract, to belong it to the circle of civil or administrative contracts. As the dispute consideration process, so the consequences thereof, deriving from the contract, depend on definition of the hereof aspect of the issue.

The practical function of distinction of administrative and civil contracts in the modern law is primarily revealed in defining of the jurisdiction court.⁹ The issue of distinction becomes relevant after appealing to the court on the stage of definition of jurisdiction. Case consideration initially may start in any court, which generally considers similar suits, at that the connection between the particular dispute for consideration and the considering court is not necessary.¹⁰¹¹

⁸ Research of the comparative law and practice in USA show that the contract is one of the diverse means of involvement of the private law subject in the solution process of various public administrative problems. See *Frenzen D.*, *The Administrative Contract in the United States*, *Administrative Contracts – The George Washington Law Review*, 32, 1968-1969, 274.

⁹ It is noteworthy that the problem of distinction of Private and Public Law, in comparison with the Common Law countries, is considered as more important issue in Continental European countries and is regarded as the foundation for the law. See *Merryman J.H.*, *The Public Law Private Law Distinction in European and American Law*, *Journal of Public Law of Emory Law School*, 17 J. Pub. L. 3, 1968, 3.

¹⁰ See *Merebashvili I.*, *Jurisdiction on Civil Disputes*, Magazine “Justice and Law”, №4, (19)‘08, 26.

¹¹ Professor Winter in one of his works notes that “the central issue in Georgian Administrative Law is the subject to jurisdiction of administrative courts. On the one hand, it seems easy to solve this issue by taking the fact into account that in Georgia cases are being considered by one and the same judges. Though, we deal with some organizational competition, where each of them in the separate civil and administrative jurisdiction, tries to protect his/her sphere of jurisdiction and extend it. Though, even in the unitary system there shall exist the clear criterion for jurisdiction. Thus, in Georgia the criterion should be decided, which would serve as the basis for definition of administrative-civil dispute: the norm defining the dispute (public interest), the subject of regulation thereof (subordinated relations) or distinctive nature thereof (special right). Deriving from the fact that the hereof criterion cannot ultimately solve the issue of jurisdiction, the authors of the first edition of the Administrative Code of Practice opted for formal solution of this issue: the administrative law was regulating the relations between the administrative bodies and citizens. This approach solved the issue of definition of the jurisdiction in regards with the administrative acts but entailed lots of difficulties regarding the administrative contracts. For example, the agreement on rent of the flat

This issue is further complicated by the circumstance that the thematic legal literature does not actually exist. It is mostly conditioned with novelty of establishment of the modern military contractual service in Georgia, as of the institution and with the low index of application thereof in comparison with the widely utilized legal institutions. At that, deriving from the specific nature of the issue, it mostly is the subject of military and law-enforcement agencies and rarely becomes the subject of consideration by law theoreticians.

Deriving from the above-mentioned, development of the article implies planning of study and analysis of the current judicial practice. Besides, we plan to use methods, such is research of the legal literature (if any). Along with study of the experience of other similar countries, by means of system and complex analysis of the regulating legislation and through application of the theoretical discussion and foreseeing method, the problematic aspects of separate formulations of legal regulations or particular contracts will be analyzed and some recommendations along with legal conclusions will also be developed.

II. The Essence of the Agreement on Military Contractual (Professional) Service

1. Establishment of Military Contractual (Professional) Service in Georgia

Military contractual service, as one of the forms of military service, has been established in Georgia in the end of the 20th century as a result of military reforms. Necessity to implementation these reforms was entailed with necessity of formation the national army and provision of compliance thereof with Euro-Atlantic standards.¹²

It is noteworthy that the implemented reforms for Georgia is not the essential novelty, inasmuch as existence of similar institutions was apparent in history of Georgia and can be named the examples with similar context. One of the first examples is the military reform by the King David the Builder, which with its scale and strategy is quite identic to modern military arrangement. The reform resulted creation of the constant army, the members of which, in return to some tax and other types of preferences, served in the army.

Establishment of the military contractual (professional) service in the modern form was basically stimulated with necessity of formation the effective professional army, as the mandatory military service failed to provide due quality of defense and capacities thereof did not meet the challenges the country encountered. At that, the military contractual service is a relatively flexible

between the municipality and the individuals was attributed to the administrative law and considered by the administrative chambers (where no special board or chamber existed, then the judge was to consider under the Administrative Code of Practice)". See *Winter G.*, Development of Administrative Law and Legal Consultations on the example of Georgia, as of the transitional country. Magazine "Administrative Law", 2013, 79.

¹² Military Contractual (Professional) services are widely used in USA and Western European countries and are one of the integral parts of the army.

institution, allowing the natural person, to start military professional service at any convenient time. The parties can be entitled, deriving from own interests, to define the particular terms of the contract.

2.The Relations Regulated under the Agreement on Military Contractual (Professional) Service

The parties of the agreement on military contractual (professional) service are the administrative body and the natural person. In line with the Article 3 of the Constitution of Georgia, state defense and security, military forces, military industry and trade of weapon are attributed to the exclusive governance of the supreme state bodies of Georgia.¹³ The particular agency, responsible for composition and functioning of the armed forces¹⁴, is the Ministry of Defense of Georgia.

“The military service is the particular form of the state service and aims provision of defense and safety of Georgia. In line with the Article 2 of the Law of Georgia “On Status of the Military Service member”, the features of the legal status of the military service member shall be defined with the obligation imposed thereon for state armed defense, which is associated to implementation of the outlined tasks under every condition, even under threat to his/her life”.¹⁵

Conclusion of the agreement on military contractual (professional) service is one of the means of composing of the armed forces. Possibly, the form of conscription of the natural person to the contractual service is the agreement but conclusion of this agreement is not uniquely mandatory and the contract in every particular event shall be signed on the basis of the individual decision. Thus, conclusion of the agreement on military contractual service shall be attributed to the discretionary authority of the administrative body.¹⁶

By conclusion of the agreement, the parties agree on the essential terms of the agreement.¹⁷ The citizen shall take responsibility, within the particular period of time, to serve in military subdivisions and implement all the duties imposed to the military service member under the legislation¹⁸ and the

¹³ Constitution of Georgia, August 24, 1995, № 787-RS, Article 3.1“c”.

¹⁴ In line with the paragraph one (hereinafter “p”) of the Article 2 of the Law of Georgia “On Military Obligation and Military Service”, the military service shall be divided into the mandatory, contractual (professional), recruitment service and reserve. Military mandatory service can be served in the form of contractual service or contractual (professional) service as well. The Law of Georgia “On Military Obligation and Military Service”, 1997, № 860-IS.

¹⁵ See the Decision of the Supreme Court of Georgia (hereinafter “DSCG”) № BS-735-729 (K-11), December 20, 2011.

¹⁶ On the basis of the discretionary authority the administrative body is allowed to select the most acceptable legal consequence for the particular situation from sundry events prescribed under the legislation - Beck'scher Online-Kommentar,VwVfG, Hrsg: Bader/Ronellenfitsch, 01.04.2012, VwVfG §40, Rn 4; Voßkuhle, Entscheidungsspielräume der Verwaltung (Ermessen, Beurteilungsspielraum, planerische Gestaltungs-freiheit, JuS 2008, 117, cit. *Giorgishvili Q.*, Mistake in Implementation of Discretionary Authority, Magazine “Administrative Law”, Tbilisi, 2013, 20.

¹⁷ The military service member, upon the military service, shall be considered as the representative of the state authority and under protection of the state. See DSCG № BS-865-8289G-060, November 06, 2006;

¹⁸ According to the Supreme Court of Georgia the person in the contractual service, is at the same time the military service member. Correspondingly, the provisions of all legislative and by-law normative acts shall apply thereto, which concern the military service by the person. See DSCG NBS-33-32 (K-10), May 05, 2010;

state gets obligation to create proper conditions for the service member during the military service.¹⁹ In its turn, the agreement terms, according to the definition rule, may be divided into two categories: terms, imperatively defined under the law; and the terms, defined by the parties with agreement.

III. Definition of the Legal Nature of the Agreement on Military Contractual (Professional) Service

1. Similarity to the Civil Legal Agreement

Difficulty of definition of the legal nature of the agreement on military contractual (professional) service is conditioned with the fact that the administrative and civil agreements are quite alike as in formal-legal so in contextual terms.

The agreement on the military contractual (professional) service, as well as the agreement prescribed under the Civil Code of Georgia, is an expression of the bilateral will directed to setting, changing or terminating of legal state.²⁰ Similarity is logical and inevitable, as according to the sub-paragraph “g” of the part one of the Article 2 of the General Administrative Code of Georgia (hereinafter referred to as “GACG”), the administrative contract is an agreement under public law concluded by an administrative body with a natural or legal person, or with another administrative body for exercising public authority, and according to the part two of the Article 65 of the GACG, the norms of this Code and additional requirements for agreements under the Civil Code of Georgia shall apply when concluding a contract under public law by an administrative body. The fact that one of the parties must be the administrative body, is not the essential circumstance for definition of the legal nature of the agreement, inasmuch as deriving from the Part two of the Article 8 of the Civil Code of Georgia²¹ and the Article 65¹ of the General Administrative Code of Georgia²², the administrative body is empowered to enter civil contractual relations and serve as the private law subject in this relation.

2. Definition of the Legal Nature of the Agreement

Upon dissociation of the legal nature of the agreement, we shall consider not only the formal characteristics thereof but the context of the relations and the legal basis, to regulation of which the particular form of agreement serves.

The rule of military service is regulated under the Law of Georgia “On Military Obligation and Military Service”²³ and under the Resolution of the Government of Georgia of March 18, 2014 N238

¹⁹ See DSCG, NBS-339-335 (K-12), July 3, 2012.

²⁰ A transaction is a unilateral, bilateral or multilateral declaration of intent aimed at creating, changing or terminating a legal relation – CCG, 1996, June 26, № 786-IIS, Article 50.

²¹ Private legal relations of the state bodies and LEPLs with other civil entities are similarly regulated under the civil laws if these relations, deriving from the state or social interests, shall not be regulated under the public law. See CCG, 1996, June 26, № 786-IIS, Article 8.

²² In private legal relations, the administrative body acts as the subject of the civil law. See GACG, June 25, 1999, Article 65-1, part one.

²³ The Law of Georgia “On Military Obligation and Military Service”, September 17, 1997, № 860-IS.

“On Endorsement of the Provision on “Military Service”.²⁴ The subject of regulation of hereof normative acts is the public legal issue, attributed to the state, and if being more precise, to the scopes of authority of the Ministry of Defense of Georgia.²⁵

In view to attribute the agreement on military contractual service to the administrative or civil contracts category, application of any single criterion would not be enough as deriving from the complex nature of the relations, regulated under the agreements and unambiguous definition of the legal nature thereof should be impossible by means of one form of dissociation.

Conclusion by means of the criterion, such are distinction theories, is in fact impossible to be made as these criteria are quite out of date and taking the fact into account that demarcation between the private and public law appears even more difficult, they fail to provide with proper outcomes. In modern reality, there are frequent cases when the administrative body concludes the private legal agreement, and the private²⁶ and public²⁷ interests are close enough to intersect.

Thus, sharp demarcation thereof is associated with complications. As to the agreement on military contractual service itself, at the initial stage it is expedient to define compliance thereof with the requirements stipulated under the distinction theories. Whether application of these criteria is enough to achieve certain outcome.²⁸ According to the theory of the subjects, at least one of the parties of the agreement must be the representative of the state²⁹ (administrative body),³⁰ deriving from the theory of interests, conclusion of the agreement shall serve for implementation of public interests^{31 32}

²⁴ Prior to promulgation of the hereof resolution, the same legal relations were regulated with President Provision on Military Service, October 26, 1998, № 609.

²⁵ The Ministry of Defense of Georgia, within the scope of authority, granted thereto on the basis of the current legislation, provides implementation of state policy in defense sphere. See the resolution of the Government of Georgia of November 22, 2013, № 297 on “Endorsement of the Articles of the Ministry of Defense”, paragraph one, article 1.

²⁶ Regarding the problem of distinction of the public and private interests, the in legal literature can be found a viewpoint that public legal relations often concern not only social masses but are the leverage to protect rights of particular persons and vice versa, lots of private legal norm replace public interests. See *Kardava E.*, Concept of Governance and Attitude of private and public law in the process of governance. Magazine “Justice and Law”, N3 (26), Tbilisi, 2012, 62.

²⁷ The professor *Maia Kopaleishvili* supposes that the theory of interests succeeds only if the law does not provide direct formulation of the administrative agreement upon consideration of the dispute entailed of the agreement in the relevant body (Court) in order to consider the case in civil or public-legal regime, attaches attention to the interests regulated under the agreement. See *Kopaleishvili M.*, Administrative Agreement, Tbilisi, 2003, 22.

²⁸ Theories on the basis of which administrative and civil agreements are distinguished, are the theories differentiating the public and private laws but as discrepancy is made on the basis of the same criterion, they are applied to distinct the legal nature of the agreement.

²⁹ In this event, the representative of the state, as the holder of public authority, implements authority attributed to the competence thereof. See *Crdujan A.I.M., Bucur S.*, Administrative Law, 2nd edition, Lumina Lex”, Bucharest 2007, 393.

³⁰ *Kelsen* considered that from the perspective of theory of subjects the administrative agreement is when at least one party is the administrative body, though it is noteworthy that the administrative body is the party in formal-legal terms, and the real party of the agreement is the state. See *Kelsen H.*, General Theory of Law and State (translated by *Wedberg A.*) 1949, 181.

³¹ Public administration implies not formal but functional concept. The agreement party shall be the entity implementing public authority despite of the fact whether it is the state agency or the entity with delegated authority. See *Grzesiok-Horosz A., Horosz P.*, Contracts in Public Administration, 2011 Acta U. Danubius Juridica, N17, 2011, 25.

and according to the subordination theory, distinction requires the hierarchical nature of the public legal relations. Namely, one part of it is the administrative body (the Ministry of Defense is the representative of the state), the relations between the parties bears the hierarchical nature,³³ inasmuch as the state solely defines the most of the terms of the military service and concluding the agreement serves for increase of defense capacity of the state, which clearly rides the public interests.

Taking the fact into account that the distinction theories solely cannot guarantee problem solution,³⁴ it would be expedient to make the ultimate decision considering the issues, such are the legal basis for relations regulated under the agreement and the purpose of conclusion of the agreement.³⁵

The subject of the agreement for consideration is implementation of works by the natural person and another party is to provide conditions necessary for implementation. After signing the agreement, the natural person assumes responsibility to implement obligations of the military service member imposed under the legislation to serve in the armed forces and to obey to the rules. In its turn, the state (through the authorized proxy) assumes obligation to create the communicated terms to the person for implementation of his/her duties and obligations and to provide him/her with the relevant remuneration. It should be taken into account that despite of the formal similarity to the civil agreement, the subject of regulation of so-called military service contract, with the nature thereof, is the public legal institution due to sundry aspects: as already mentioned, the state defense and security, military forces, military industry and weapon trade are attributed to particular management of the supreme state bodies of Georgia. At that, the contractual (professional) service³⁶ is one of the forms of military service and after signing the agreement on military contractual (professional) service, the natural person obtains status of the military service member,³⁷ which implies aggregation of the rights, freedoms, obligations and responsibilities, prescribed under the law and guaranteed by the state.³⁸

³² In legal literature there is the supposition that in the event if both parties of the agreement are the administrative bodies, the agreement, as a rule, falls under the sphere of public law regulation, if the consequence of the agreement is not private legal – *Sandu A. M., Pagarin M. S., Study on Administrative Contracts*, 4 *Contemp. Readings L. & Soc. Just.* 903, 2012, 906.

³³ Radbruch supposed that public law is the inter-subordinated law, where the individual obeys to the public interest. See *Rescoe P., Public Law and Private Law*, *Cornel Law Quarterly*, 24 N469, 1938-1939, 472.

³⁴ Part of the French specialists in law developed the theory that the administrative agreement implied cooperation of the state and private person(s) for social interests within the contractual relations. This theory failed as it more provided the definition of essence of public administration than definition of administrative agreement. The French law specialist *Conseil d'Etat* considered that domination of public and private interests is not enough for definition of administrative agreement. See *Landrog G., Administrative Contracts a Comparative Study*, *The American Journal of Comparative Law*, 4 *Am. J. Comp. L.* 325, 1955, 329-330.

³⁵ The additional circumstance due to which on basis of the theory of subjects solely dissociation is impossible, is that upon implementation of authority in general (issue of administrative-legal act, real act) the state is under regulation by the public law, and in the event of conclusion of the agreement it simultaneously falls as under public and private law regulation sphere. See *Toma T., Administrative Law Treatise*. Iasi: *Vasiliiana Publishing House*, 2003.

³⁶ The Law of Georgia “On Military Obligation and Military Service”, September 17, 1997 № 860-IS, paragraph 1, Article 2.

³⁷ Military Service member – a citizen of Georgia, a person having the status of stateless person in Georgia or a foreign citizen (in the cases determined by Article 5 of the Law of Georgia on Military Duty and Military

Deriving from the above-mentioned, the subject of the agreement on military contractual service is the public legal relation, attributed to authority of the state bodies, at that, the rule and terms of implementation thereof is to be defined under the normative acts of public law. Hence, it should be supposed that the agreement would not carry the private legal nature.

One of the important and crucial issues, necessary for definition of the administrative agreement, is the purpose of making an agreement. The legislator defines that the administrative body is authorized to regulate the particular administrative-legal relations, empowered to regulate thereof by means of issue of the individual administrative-legal act or by means of administrative agreement.³⁹ Deriving from the context of the hereof norm by concluding an administrative agreement administrative body, should aim implementation of public authority.⁴⁰ Taking the fact into account that composition of the military forces of the country is the exclusive public legal function of the Ministry of Defense of Georgia which is the sufficient basis for consideration of so-called military contract as the administrative agreement,⁴¹ can be concluded that it appears to be a form of implementation of public authority. Regarding the issue Supreme Court of Georgia, elucidates that if the subject to the dispute of suit of the Ministry of Defense is remuneration of the damage, the case should be considered to be a contractual dispute regulated under CCG and Civil Procedural Code of Georgia. The agreement concluded by the administrative body (the Ministry of Defense) in view of

Service) who serves in the military forces of Georgia, in a legal entity under public law within the system of the Ministry of Defence of Georgia or in military agencies, and also persons called up for military reserve duty during their service in the military reserve. See Law of Georgia “On the Status of the Military Service member”, June 25, 1998, №1462-IIS, Article 1, sub-paragraph “a”.

³⁸ The Law of Georgia on “The Status of the Military Service member”, June 25, 1998, №1462-IIs, Article 1, sub-paragraph “a”.

³⁹ GACG, June 25, 1999 № 2181-IIS, Article 65, part 1.

⁴⁰ Upon definition of the purpose of the agreement, the issue of interpretation of the agreement may arise to the agenda. Straru supposes that interpretation of the agreement is the process, comprising precise definition of the terms of the agreement, definition of the will by the parties in line with the real will. See *Straru C.S.*, The Interpretation of Administrative Contracts, Magazine. Juridical Tribune N4, Issue 1, June 2014, 152.

As a rule, interpretation appears necessary in the event when the difference between the real will and the expressed will is impossible to be determined, when the terms of the agreement are ambiguous, vague, contradictive or undesirable. See *Statescu C., Comeliu B.*, Drept Civil., Teoria Generala Obligatorilor, All Beck Publishing House, Bucharest, 2000, 55.

⁴¹ Concerning the purpose of administrative bargain professor *Maia Kopaleishvili* considers that discussing about distinction of administrative and civil legal agreements, first of all it is expedient to outline the purpose of the administrative agreement. If we consider the issue in simple manner, the starting point for definition of the purpose of administrative agreement shall be considered as the concept of the administrative body, prescribed under the General Administrative Code. All the subjects, scoped in the concept of the administrative bodies, enjoy public legal authority. The legislator, in view of attribution of any other person to the administrative body, considers the only circumstance as implementation of their public authority (GACG, sub-paragraph “g”, part 1, Article 2). It is logical that the administrative body acting within the authority granted under the law, upon conclusion of the administrative agreement exercises public legal authority and aims at satisfaction of public interest. See *Kopaleishvili M.*, Administrative Agreement, Tbilisi, 2003, 20. She also notes that the issue is not that simple and it is still disputable if all bargains made by the administrative body aim at satisfaction of public interests. See *Kopaleishvili M.*, Administrative Agreement, Tbilisi, 2003, 20.

implementation of public authority needs to be reviewed by administrative corp. Thus, this is the administrative case, stipulated under the sub-paragraph “b” of the part two of the Article two of the Administrative Procedural Code of Georgia in order of administrative proceedings.⁴²

IV. Conclusion

To sum up the results of high-discussed issues and conclusions made in the Article, it may lead to the question whether existence of the agreement on military contractual service is expedient, if it is possible to accurately define its legal nature and what are the criterions of distinction, serving as the basis for attribution thereof to the civil or administrative agreement’s category.⁴³

Discussing expediency of hereof agreement is a wide topic and is not the subject of the hereby article, though in view to prove expediency of application thereof, the circumstance alone is enough that the modern world highly uses it to compose the professional army and it is quite effective mean in this term.

As to definition of the legal nature of the agreement and attribution to public or private law, we may state that the issue is complicated and there always may be some doubts regarding it. Despite of hereof difficulties and questionable issues, as a result of the survey held within of the article, it became clear that the agreement on military (contractual) service is attributed to the category of administrative agreements, inasmuch as it is the leverage, by which the administrative body exercises own public-legal function, imposed thereon under the public law and in this manner, serves for the public interest.

⁴² SCG №BS-865-8289G-060, November 06, 2006.

⁴³ In legal literature there is the opinion as well that speaking of necessity of accurate distinction, we shall put the question, if deriving from the current state of affairs, it is possible to divide the law, with the wide concept thereof, into two sub-systems, or whether it is preferable to tolerate the opinion on reduction of specialization of the law into systems and consider the issue in this aspect, See, *Leszczyński J.*, *Dogmatyki prawnicze w dobie globalizacji*, [in:] *Filozofia prawa wobec globalizmu*, ed. *J. Stelmach*, Kraków 2003, 121. cit *Beata K.*, *The Topicality of the Law Division into Public Law and Private Law*, *Studies in Logic, Grammar and Rhetoric*, № 26 (39) 2011, 77.

Davit Jaiani*

For International Legal Understanding of Occupation

I. Introduction

The subject of the present work is an inseparable part of the international humanitarian law, *jus in bello* – the international legal regime of military occupation, particularly international norms and rules connected with the course of military occupation. My interest in this issue was caused certainly by Russian aggression upon Georgia and military occupation of its territories. This theme is very actual, as the above mentioned situation has been continuing at present and I think it's very important its legal analysis in the modern international law perspective.

The main emphasis in the theme is made on the grounds of the international legal settlement of military occupation. The work will not be concentrated either on rights-obligations of civilians on the occupied territory or liability instruments of the international law-breakers of occupation. We are more emphasizing the legal situation created in the occupation context with the participation of the occupant force and the persecuted sovereign and also subjects of other states and non-governmental persons involved in the processes connected with the occupation.

In connection with the issues discussed in the work there will be presented the corresponding cases from the political and the international legal reality of the modern world, such as Arabia-Israel conflict, the former Yugoslavia, Iraq, Congo, Ethiopia and other situations important for the international law of occupation, as they are describing the newest institutions and modern developments of the international law of occupation in the best way.

Finally we make compliance of the legal interpretation given in the work with the factual situation. In this case the main purpose is again the evaluation of the existed situations and the effectiveness of the current or future mechanisms basing on the main principles of the occupation law.

II. Origins of International Law of Occupation

1. Period before the Second World War

In the modern sense the formation of the international law regime of military occupation is connected with wars waged in the XIX century and by Napoleon in Europe. The first normative record can be found in so-called Lieber Code of 1863, which represented Instructions for the Government of Armies of the United States. It was followed by a special chapter about military administration of the enemy territory, which entered into the project of Brussels International Declaration of 1874. Just this

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text was the predecessor of 1899/1907 Hague Regulations, in which military occupation law was corroborated as a part of the positive international law.¹

In the period of the I and the II World Wars different territories occupied by belligerents (occupation of Belgium by Germany in the I World War, occupation of Libya by Britain in the II World War) were just under the action of the Hague Regulations. In 1947 the American Military Tribunal within the further procedures of Nuremberg remarked that “undoubtful evidences of the matter show that Germany violated all the principles of the military occupation law.”²

The gravity and the scope of crimes committed during the II World War and the absolute disregard of human rights prompted the acceptance of Geneva Conventions, including the 4th Convention, which rewrote, expanded and even to some extent changed the military occupation laws, providing them with more humanity. Though before coming Geneva Conventions into effect the justice of tribunals connected with the world war basing on the traditional international law confirmed that in the course of war the actions carried out by occupation forces of Nazi Germany and imperialistic Japan were obvious violation of law and a basis of criminal liability.³

2. Post-World War Period

After the world wars there was originated the tendency that states are denying the occupation of certain territories by them, are avoiding a negative label of occupant, which must be the response of the II World War. Cases of military occupation carried out in the second half of the XX century can be grouped in the following way:

1) Feudal, carried out on the basis of the suzerain-vassal relation – for example, Tibet (China, 1950), Goa (India, 1961), also unsuccessful military occupation of Falkland Islands (Argentina, 1982) and Kuwait (Iraq, 1990).

2) Carried out by agreement, consensus (in these cases the authenticity of the will expressed by parties and the nonexistence of enforcement are debatable, generally the existence of mutual agreement between parties is completely changing the legal character of the occupation and it must be qualified not as a military but as a peaceful occupation)⁴ – the intervention of Vietnam in Cambodia (1978), the Soviet intervention in Afghanistan(1979) and American intervention in Grenada (1983) and Panama (1989).

3) Carried out for the purpose of liberation, an example of which is a coalition campaign of 2003, which was ended with a complete occupation of Iraq territory by the United States of America and the United Kingdom, though in this case the mentioned states, as an occupation force, confessed the obligations imposed on the by the international law of occupation on the proper territory.⁵

¹ *Dinstein Y.*, The International Law of Belligerent Occupation, 2009, 8-9.

² Justice Trial – Altstotter et al., cited *Dinstein Y.*, The International Law of Belligerent Occupation, 2009.

³ *Ibid*, 10.

⁴ For example, occupation of Island by America in the period of the Second World War, additionally see *Bothe M.*, Occupation, Pacific, 3 EPIL 776, 1997.

⁵ Additionally see *Benvenisti E.*, the UNSC and the Law of Occupation: Resolution 1483 on Iraq in Historical Perspective. Accordingly, Resolution of Security Council accepted on the basis of Chapter 7 of UN Regulations 1483, 2003, <<http://goo.gl/VBPg>>.

4) Occupation of Palestinian and other Arabian territories by Israel is fairly considered by the international law specialists saying that the case of Israel is unprecedented and is quite different from other cases first of all for its continuing character. Without counting several unimportant factual or legal changes, Israel is carrying out belligerent occupation of Arabian territories after a six-day war in June of 1967.

5) And finally the newest case of occupation law, a case of Georgia – invasion into the territory of the neighboring country and occupation its territory in the XXI century, which shows again that the international legal statutes of occupation don't not only belong to history and unfortunately in today's world there are territories, where the usage of which has a crucial, often a vital importance.

III. Sources of the International Law of Occupation

I. Introduction

Before identifying the sources of the international law of occupation it should be noted that the legal regime is often unconditionally associated with unlawfulness, which is not true. It can be confirmed by formulation of the above mentioned Resolution of the Security Council. In the introduction we have already mentioned that the occupation law is a part of the international humanitarian law, *jus in bello*, and is far from the evaluation of lawfulness or unlawfulness, *jus ad bellum*, of the circumstances causing a conflict. The occupation force itself can be as a wager of an aggressive war, as well as a victim country of aggression (for example, in defensive warfare in case of the persecution of aggressor occupying its territory). In 1948 the American military tribunal within the further procedures of Nuremberg in the resolution on hostages' case declared:

In the relation to the obligations of the occupant's and the occupied territories the international law does not distinguish legal and illegal occupants from each other. There is no connection between the nature of the military occupation of the territory and rights and obligations of the occupant and population to each other, after such relation has been established.⁶

Accordingly the modern international law when using in the relation to the occupation subjects does not distinguish regularity of occupation origin, circumstances and purposes from each other.

2. Sources of the International Law of Occupation

The international law specialists agree that the modern law of occupation is based on the following four sources:

a) Traditional International Law

Traditional international law is a compulsorily admitted practice, as it is interpreted in the international court statute in the most competent list of the international law sources.⁷ *Dinstein* thinks that it is hard to discover and prove a general practice of the state because such practice of states in the

⁶ Case of hostages (List et al.), the same was repeated by Special Court of the Netherlands on Christiansen's case, cited *Dinstein Y.*, *The International Law of Belligerent Occupation*, 2009, 3.

⁷ UN Regulations of 24 October, 1945 and International Court statute.

sphere of military occupation unsystematic. It's true that a general practice is a wide concept and comprises internal legislation, military text-books and others, however even they don't concern everyday connections between the occupation force and civil population on the largely occupied territories. With a broader and more detailed practice is distinguished Israel, though its practice is not often harmonized with the existed traditional law, so called *lex lata*.⁸

b) Hague Regulations

Hague Conventions were accepted at peace conferences of 1899 and 1907. At first norms of military occupations in the form of Part III of Regulations of the rules and laws of land wars (Articles 42 - 56) were added to the II Hague Convention of 1899 and after the further processing they were added to the IV Hague Convention of 1907.⁹ After that the regulations gradually acquired a status expressing norms of the traditional international law, which for the first time was proved by the sentence of the international military tribunal of Nuremberg:

Land war rules [. . .] given in Hague Convention for 1907 were recognized by all the civilized nations and considered to be the declaration of war rules and laws.¹⁰

The remarked decision was supported by many sentences of the international military tribunal of the Far East of Tokyo. In the nearest past the international court twice supported the analogous approach in a *Wall* consultation conclusion¹¹ and in armed activities (Congo/Uganda)¹² in 2004 and 2005, correspondingly. Hence it follows that the above mentioned regulations, as a part of the international traditional law, juristically are compulsory for all the states regardless of the fact they are or not the supporting parties of 1899/1907 Hague Conventions.¹³

In spite of the fact that Hague Regulations are a main support of the Law of military occupation even after a century, we should not forget that they were formulated in the pre-war period. According to *Dinstein* the fact that the regulations are oriented on issues connected with property rights rather than on concrete guarantees of civilians' life and inviolability was clearly seen in the Second World War, when it made us sure in the irrelevance of Hague Conventions in cases of inhuman occupations¹⁴

c) The Fourth Geneva Convention

In 1949 in Geneva there were accepted four Conventions on defense of victims of war.¹⁵ The Fourth Geneva Convention about defense of civilians in wartime unlike the first three ones is not an amendment of the earlier texts.¹⁶ One of its parts concerns norms of treatment to foreigners on the

⁸ *Dinstein Y*, The International Law of Belligerent Occupation, 2009, 4.

⁹ This and other agreements used in the work of the International Humanitarian Law, see <<http://www.icrc.org/ihl.nsf>>.

¹⁰ International Military Tribunal (Nuremberg), cited *Dinstein Y*, The International Law of Belligerent Occupation, 2009.

¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 1994, <<http://goo.gl/C81Kc>>.

¹² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ, 2005, <<http://goo.gl/xATbm>>.

¹³ *Dinstein Y*, The International Law of Belligerent Occupation, 2009, 5.

¹⁴ Ibid.

¹⁵ Thereinafter – Geneva Conventions.

¹⁶ Geneva Convention of October 12, 1949, about the defense of population in civil war; (thereinafter – the Fourth Convention) Georgian texts of Geneva Conventions and their additional protocols are represented from the edition of the International Committee of the Red Cross, Tbilisi, 2008.

territory of a warring party in the course of an armed conflict. Generally the first purpose of the convention is to provide population with strong guarantees of defense in order to avoid horrors of war in the future. Article 154 of Convention Four declares that the mentioned convention supplements resolutions of Hague, somehow broadening the range of its usage and making it structurally clearer. However it does not mean that convention statutes have priority force even if we consider the fact that the individual regulations might be seemed outdated from the point of view of Geneva Conventions.¹⁷

By today's situation Geneva Conventions are of universal usage, as all the states of the world participate in this agreement.¹⁸

d) The First Additional Protocol

In 1997 two Protocols were added to Geneva Conventions; the first additional Protocol is about protection of victims of international armed conflicts, several norms of which concern the occupied territories.¹⁹ Of course legally the First Protocol is not more preferable than Geneva Conventions and only complements them, though in a number of cases it is obvious that individual norms of the Protocol change or annul the appropriate conventional statutes in relation to belligerent occupation.

The First Protocol itself, unlike Geneva Conventions, was not recognized as universal, in spite of the fact that its participant parties are most states; there are some states to be taken into account (for example, the USA, Israel), which don't recognize most part of the Protocol. It should be noted that these states admit the traditional character of individual norms of the Protocol, though not completely. Supreme Court of Israel in some cases (*killings by taking aim; oil and electrical energy*) admitted the existence of such legal norms in the Protocol. In relation to this issue it should be noted that in 2005 the International Committee of the Red Cross presented a large-scale research of the *Traditional International Humanitarian Law*, which is an attempt to define precisely which statutes express the Traditional International Law.²⁰

IV. Basic Legal Principles

a) Legal Elements of Military Occupation

For purposes of the International Law the term "occupation" is used in two meanings: a) Terra nullius, occupying, acquiring the territory by a state, which is not the possession of any other state's territory and b) military occupation derived from Latin term *Occupation bellica*, temporal occupation

¹⁷ Dinstein Y., *The International Law of Belligerent Occupation*, 2009, 6. It should be noted that in the commentary (ICRC, O.M. Uhler and H. Coursier eds., 1958) of the International Committee of the Red Cross on the Fourth Convention there is made a reference to those articles the existence of which loses its meaning after becoming operative the appropriate statute of the Fourth Convention, for example, article 44 of the Regulation and article 31 of the Convention. In addition it is indisputable that this and other articles of Regulation don't lose force, they coexist with the proper norms of the Convention.

¹⁸ Finally ratification of the Convention was made by Montenegro Republic and Nauru in 2006, participant states, <<http://goo.gl/P506P>>.

¹⁹ Hereafter—the First Protocol.

²⁰ Dinstein Y., *The International Law of Belligerent Occupation*, 2009, 7-8. In connection with this issue see Dinstein Y., *ICRC Customary International Humanitarian Law Study*, IYHR, 2006. The mentioned work of the International Committee of the Red Cross <<http://goo.gl/7kase>>.

of the other state's whole territory or its part temporarily, when the established authority is a temporary factual authority lacking sovereignty, which must respect the rights of people living on the occupied territory and the existed laws.²¹

Of course the latter is inseparable from war between states (*bellum*), in this relation military occupation must be on the foreign or enemy territory, accordingly there must be going an armed conflict and not so called civil war or any other kind of conflict, which is not of international nature.

Here it must be noted that according to the second common article of Geneva Conventions all cases of occupation of the whole or part of the territory of the high contracting party are in the sphere of using Convention, "even when against the above mentioned occupation there is no armed resistance". An example of this case is occupation of Denmark by Germany in 1940. So it makes us think that it's quite possible that war can be started by military occupation and not on the contrary – an armed conflict followed by occupation.²²

Even more interesting legal case of occupation without fighting is occupation following an unconditional capitulation. An example of this is occupation of Germany and Japan in 1945 after their unconditional capitulation. According to Hague Regulations the occupation of these countries was not of military character. Correspondingly legally groundless is considering various drastic changes made on these both territories to be inadequate to Hague Regulations current for that time. The position of commentators, who are accentuating a transformative nature of occupation following the capitulation of Germany and Japan, is admissible. From the point of view of some authors the case-law value of these examples is insignificant considering Geneva Conventions accepted in the further period, more particularly the second common article.

In addition to the above mentioned circumstances one of the most important elements for belligerent occupation is its forced, not consensual nature. In case of the armed actions (Congo/Uganda) the International Court pointed out that it was ineffective to justify forcible occupation of a foreign territory by the occupation force. Even the fact that the occupation force as if "liberates" people living on the occupied territory does not change the legal status, because the occupation is not based on the agreement. Besides we must not forget that jurisdictional rights, which the military government has on the occupied territory, are only originated from the fact of effective control, which will be discussed more particularly below. So individual authors' opinion that the occupation force can and must/or govern the occupied territories as a "guardian" must not be considered to be right, while the guardianship, as an institute, is based on trust, in case of military occupation the occupation force by using warfare measures banishes sovereign and occupies its territory, so talking of trust is impossible. Dinstein thinks properly that the basis of the attempt of the occupant purposed for people's welfare is mainly the following: a) obligations imposed by the international Law of belligerent occupation and human rights and b) natural desire to maintain maximal peace and minimal activity of the population on the occupied territory.²³

b) Effective Control

According to Article 42 of the Hague Regulation:

²¹ Modern International Law; Dictionary-Reference Book, *L. Alexidze* (editor-in-chief), 2003, 211.

²² *Dinstein Y.*, The International Law of Belligerent Occupation, 2009, 32.

²³ *Dinstein Y.*, The International Law of Belligerent Occupation, 2009, 38.

Territory is counted as an occupied territory, when it is factually under the authority of the enemy army.

Occupation is spread only on the territory where such authority is established and can be carried out.²⁴

The second part is directly pointing out the necessity of cumulative existence of both elements – the factual establishment and the possibility of carrying out the authority. Occupations can't be fictitious, depended only upon intention or message, or so called occupations on paper. Even the uncoordinated disposition of individual forces on the other state's territory will not be considered as a military occupation, if it is not accompanied by signs of driving out the authority of the refugee sovereign.²⁵

Effective control is an inseparable element, *condition sine qua non*, of military occupation, though it is problematic to define precisely what scope of control will be effective. Of course this issue can't be settled *a priori* by number of occupation force; accordingly it is reasonable to define the above mentioned scope for each case separately, because all occupations and the circumstances connected with them differ from each other. To confirm this, *inter alia*, we can name *Naletilic* case of the tribunal of the former Yugoslavia, in which it was stated that the occupation force must have “enough forces onsite or ability to send them in a reasonable time in order for the authority of the occupation force being felt.”²⁶ Accordingly it becomes clear that to some extent effective control comprises a remote control too.

And finally in order to understand the effective control perfectly we will touch a few differences between military occupations and invade. First of all it should be noted that it is indisputable that invasions must not be counted as a precondition of a military occupation. In this context two facts are essential – occupying a disputed territory and driving out of the sovereign. According to the field hand book of the USA military department a military occupation is “invasion plus the firm possession of the hostile territory with the intention of its further capturing”.²⁷

It should be taken into account that considering the constantly instable, transitional situation on the front lines in the course of the armed conflict the tribunal of the former Yugoslavia on the *Naletilic* case stated that the “battle areal might not be counted as an occupied territory”, though after the military occupation has been established, it will not be ceased by individual acts of the local resistance.²⁸ The same tribunal on the *Rajic* case supported the thought expressed in the commentary of the Fourth Convention that there is no intermediate period between invasion and a stable regime of occupation.²⁹

Discussion of the present elements showed that, as a rule, a military occupation is carried out after invasion. However sometimes by agreement with state “A” its territory is occupied by other state,

²⁴ Auth. Ver. Of the statutes of Hague Regulations.

²⁵ *Dinstein Y.*, The International Law of Belligerent Occupation, 2009, 43.

²⁶ *Ibid*, 44.

²⁷ *Ibid*, 38.

²⁸ *Prosecutor v. Naletilic et al.*, para. 222 (ICTY, Trial Chamber, 2003).

²⁹ Concrete, stated terms of invasion and occupation are not known for the modern Law of a military occupation. Case-law of the international tribunals in this relation is also The discussion non-homogenous; for example see European Court of Human Rights, *Issa v. Turkey*, where a few week s' control is admitted to be enough and in the same of 2004 Eritrea Ethiopia Claims Commission, Claims 2, 4, 6, 7, 8, 22, where this term is reduced to a few days.

which after expiring this agreement or challenging the consent by state “A” is staying on the territory that turns it into the occupation force. The identical situation became the basis of the *armed activities case* discussed by the International Court, where it was stated that Uganda was carrying out military occupation of one of the region of the Democratic Republic of the Congo – Ituri.³⁰ In this relation it is also interesting a case of Georgia, where by the time of starting occupation the most part of the occupation force was the armed forces of the Russian Federation, disposed under the peacekeeping.³¹

c) Sovereignty and Prohibition of Annexation

“Atom of sovereignty is not in the authority of the occupation force” - these words written by Oppenheim at the beginning of the last century today are the basic principle of the modern International Law and the Law of military occupation. It’s the truth that the refugee sovereign *de facto* loses possession of the occupied territories, though it still has *de jure* title on them, but the occupation force acquires the possession, juristic rights – but not the title. It’s the truth that the territorial sovereignty without possession is significantly weak and derogated, though it is important that the refugee sovereign’s authority not only is not ceased, but is not even stopped. Accordingly any one-sided annexation of the occupied territory does not create legal results.³² Such approach is confirmed by number of decisions of the Security Committee of the United Nations and International Court, such as for example, annexation of Kuwait by Iraq or annexation of Jerusalem by Israel.³³ The exception from this rule is defeat, conquest the enemy, *debellation*, which does not represent a peaceful form of ending of the occupation; accordingly it is beyond the theme of our discussion and it won’t be discussed in the present work.³⁴

And finally the issue of title passing is very important. Of course passing the title from the refugee sovereign to the occupation force is possible, when this passing is real and is carried out in

³⁰ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ, 2005, <<http://goo.gl/xATbm>>.

³¹ Missions with peace-keeping mandate, such as the United Nations Forces, as a rule, are given the territory administration power either by consent of a receiving state or as a subject of tutelary relation. According to the opinion developed by modern authors, with some exceptions, such a control on the territory must not be considered as a military occupation. However a different situation is in regard to UN enforcement of measures, the fulfillment of which due to their forcible nature is quite possible to be ended finally by military occupation. See *Wills S.*, Occupation Law and Multi-National Operations: Problems and Perspectives’, BYBIL, 2006; *Bothe M.*, ‘Peace-Keeping’, 1 The Charter of the United Nations: A Commentary (2nd ed., *B. Simma* (ed.), 2002).

³² *Dinstein Y.*, The International Law of Belligerent Occupation, 2009, 49-50.

³³ See appropriate regulations of the Security Council 662 (1990), 478 (1980), 497(1981) decision and the consultation conclusion of the International Court on a Wall case <<http://goo.gl/eO8s7>>.

³⁴ In case of defeating of enemy, *debellation*, the operation of Law of military occupation is terminating and the international-legal norms regulating peoples’ self-determination are advanced. Self-determination is a collective right of peoples to define freely their political status, as it was recognized by the International Pacts of Human Rights in 1966. It is one of the essential principles of the modern International Law, as it was remarked by the International Court in case of East Timor in 1966. In relation to occupation the above mentioned principle emerges when the mutual agreement between the occupant and refugee countries enables the people living on the occupied territory to use this right in the course of occupation. A clear example of it is Arabian territories occupied by Israel and the self-determination right of the Palestinians.

favor of the victim of aggression.³⁵ There is also possible a case of ceding the territory by the sovereign to the third state, *durante bello*.³⁶

Unlike the refugee sovereign the occupation force is unable to devolve the third state its real title, which is relied on a legal principle *nemo dat quod non habet*. Because of the same reason the occupation force can't create marionette states on the occupied territories, as it was attempted without any result by Axial Forces in the Second World War in Czechoslovakia and Yugoslavia.³⁷

V. Conclusion

In the present work we have reviewed a military occupation as an international legal instrument, which is an inseparable part of the modern International Humanitarian Law not only from the theoretical, but also, as it was confirmed by the given examples, from the practical point of view. It's true that all international conflicts are not followed by a military occupation immediately, though the newest occupation of Iraq and of course the current occupation of the territories of Georgia make us sure of the necessity for developing and further studying this field of law. The present review clearly shows that despite not quite so big amount of various sources of international law the modern legal society, its academic or political part, has not finally been developed yet on such basic elements of occupation, such as for example, quality and scope of the control carried out on the territory, the start of the occupation, modularity of management of the occupation process and others. Of course such ill development is due to the objective historical factor, as the accepted means of military politics and warfare accepted at the beginning of the XX century are essentially different from the means existed for today. Besides it is certain that armed conflicts is a very sensitive issue for any state and none of them wants to be subjected to additional obligations in this relation because of this and other subjective reasons. It can be said that in the nearest future it is not expected fundamental changes of norms and principles of the International law in any direction.

³⁵ *Dinstein Y.*, War, Aggression and Self-defense, Fourth Edition, 2005, Cambridge University Press, 40.

³⁶ *Dinstein Y.*, The International Law of Belligerent Occupation, 2009, 51.

³⁷ *Ibid*, 52.

Even in 65 years after creation of European architecture of human rights' protection the situation, with respect of human rights on the European continent is far from perfect.⁸ European Court has become the "victim of its success" long ago as it cannot deal with all claims and they wait for consideration for many years.⁹ The problem is still of significance, though in 2013 decrease of number of claims was recorded for the first time.¹⁰

Jubilee dedicated to the 50th anniversary of the Convention revealed necessity of improvement of the existing system in three respects: Convention implementation at the national level; need of effective procedure at the European Court; execution of the European Court judgments and their supervision by the Committee of Ministers, as confirmed in the Action Plan adopted in 2005 in Warsaw at the third CoE summit.¹¹ Effectiveness of protection of the rights provided for by the Convention is determined by the mechanism of individual application as per Article 34 of the Convention, principles developed by the European Court and techniques applied for protection of human rights. Careful and accurate execution of the judgments made by European Court as the final stage of legal proceedings is of particular importance for restoration of violated rights. At the stage of judgments' execution the effectiveness of the system is tested – determined the specific outcomes of recognition of rights' violation, or simpler: what a victim of violation can receive as a result of violation recognition by the European Court. Proper execution of the judgment is one of the instruments for achievement of the goal (ideal) as stated in Article 1 of the Convention, stating that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." And the Convention intends to protect not theoretical or illusory rights but the specific and effective ones."¹² Irrespective of general positive trend of execution of the European Court decisions, irrespective the attempts of the Committee of Ministers, which has adopted seven recommendations related with these issues since 2000,¹³ the researchers regard that executions are with some defects.^{14 15}

Nalbandov A., Compatibility of Georgian Legislation with the Standards of the European Convention on Human Rights and Its Protocols. Tb. 2005, 13.

⁸ About 50.000 annually. *Ma requête à la CEDH: comment l'introduire et quel en sera son cheminement*, <http://www.echr.coe.int/Documents/Your_Application_FRA.pdf>, [03.11.2014].

⁹ Only in exceptional cases, according to Article 41¹ of the Regulations of European Court, the Chamber of Chairman of the Chamber is entitled to give priority to the case of such "deviation" are justified by the particular circumstances. This occurred in case *Pretty v. Great Britain*, [29.04.2002], European Court discussed whether the right to life had the negative aspect or not – whether the right to life allowed its beneficiary to reject it. European Court gave negative answer to this. The claimant suffered from severe pain but due to his physical condition he was not able to end his life and his spouse would be adjudged for murder, if she provided such "assistance" to him. Rules of Court, § 41¹, Strasbourg, 2014, <http://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules&c=#n1347875693676_pointer>, [10.12.2014].

¹⁰ CM, Annual Report, 2013, 7, <http://www.coe.int/t/dghl/monitoring/execution/Documents/Publications_en.asp>, [01.12.2014].

¹¹ *Ibid*, 25.

¹² Among many other judgments see *Golder v. Great Britain*, [21.02.1975], §35; *Marekx v. Belgium*, [13.06.1979].

¹³ In addition to the activities of the Committee of Ministers, the Organization Committee of the Council of Europe (CDDH) developed two protocols to the Convention following the Brington Conference of 2012. In

Together with satisfaction of the victims, proper execution of the judgments is of practical significance, particularly, with respect of adoption of the general measures¹⁶ - to prevent violation of human rights and reduce the load of the European Court in the future. Thus, in the context of contemporary international law, significant issue of human rights is execution of the judgments of the European Court.

2. Competence of the European Court

The issues of interpretation and applicability of the Convention and the protocols thereof are under jurisdiction of the European Court.¹⁷ Competence of the European Court is to establish whether the article or the Convention/Protocol is complied with or not and in case of presence of the condition specified in Article 41 award to the claimant the compensation (compensation of material and moral damages, as well as the expenditures) as fair satisfaction.

According to the subsidiarity principle, European Court is not authorized to cancel the law or any decision of the national court, adjudge any person etc. European Court does not instruct the states to change the administrative practices and does not give any recommendations to it. Its competence is not also demand reopening of domestic judicial proceedings from any state.¹⁸ This approach is confirmed by the Convention preparatory work, as well as the explanatory note, clearly stating that the Court will not function as the superior cassation court.¹⁹ This approach has not changed with years and it is also confirmed by the case law: "... Convention does not give it [European Court] to demand from the state to reopen the domestic judicial proceeding or cancel the sentence."²⁰

In certain cases, for example, related to Article 6 of the Convention (Right to Fair Trial), together with the statements on violation, European Court regards reopening of proceedings at the instances within the state²¹ as the most acceptable instrument for restoration of the violated rights, though it does not obligate the state to apply any such measure. Neither obligations and nor the views related to reasonability/necessity of case reopening are mentioned in the decisions of European Court, even in case of

Protocol 15 Article 30 of the Convention is reformed for the claimant is deprived of the opportunity to appeal against transfer of case to Grand Chamber, as well as the changes to Article 35, reducing term of submission to the European Court from six to four months. By draft amendments the words: "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal" shall be omitted from Article 35 §3b. As for Protocol 16, it allows the superior domestic courts to apply to the European Court for consultative conclusion in relation with the issues with principal explanation.

¹⁴ *Forst D.*, The Execution of Judgments of the European Court of Human Rights, ICL Journal, Vienna, 2013, 1.

¹⁵ *Ibid*, 24.

¹⁶ E.g. Amendment of the Law, Existence of Which has Conditioned Violation of the Rights under the Convention

¹⁷ Convention, *op.cit*, § 32.

¹⁸ *Pelladoah v. Netherlands*, [22.09.1994].

¹⁹ *Lambert-Abdelgawad, E(1).*, Séance du 5 septembre 1949, Rapport de P.H. Teitgen, *Doc.A290, H(61)4, LE RÉEXAMEN DE CERTAINES AFFAIRES SUITE À DES ARRÊTS DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME*, Rev. Trim. Dr. H, Bruxelles, 2001, 93.

²⁰ *Saïdi v. France*, [20.09.1993], §46; *Pelladoah*, *op.cit*, §44.

²¹ *Gençel v. Turkey*, [23.10.2003].

violation of such significant violations, as e.g. Article 2 of the Convention (right to life), and procedural obligations related to which contains many such rights that are stated by Article 6 of the Convention.

Irrespective of general rule, European Court has several times specified the measure for restoration of the violated right – in the judgment *Papamichalopoulos and others v. Grece*²², as well as *Assanidze v. Georgia*,²³ *Ilaşcu and others v. Russia and Moldova*,²⁴ *L. v. Lithuania*.²⁵ In case *Broniowski v Poland*, because of absence of effective remedies the European Court has discussed the issue of adoption of the general measures in relation with execution of the judgment,^{26 27 28} these two latter judgments are so called “pilot judgments”, by means of which, unlike the other decisions, European Court more actively participates in discussion of the issues related to execution. Creation of this procedure is associated with repeated cases, originated from one and the same legal problem (long pending periods in Italy).²⁹ In pilot cases, frequently the problem is incompatibility of the law or administrative practices with the Convention.³⁰ In such cases European Court does not consider the other cases related to the same problem and waits for elimination of the structural problem by the state. In resolution of 12 May 2004, the Committee of Ministers proposed to the European Court to deal with such problems in its judgments and in accordance therewith, after decision on case *Broniowski v Poland* the procedure was stated in 2011, in Article 61 of the Regulations of European Court (but not in the Convention text).³¹ Advantage of this procedure is that European Court identifies the systemic problem and as a rule, specifically states the type of general measures to be taken³² and the defendant state is responsible for its practical detailed

²² *Papamichalopoulos and others v. Grece*, [31.10.1995].

²³ European Court Regarded that no any other Measures Could Ensure Achievement of Restoration of Rights Violated by Imprisonment, Except for Liberation of the Claimants. *Assanidze v. Georgia*, [08.04.2004].

²⁴ *Ilaşcu and others v. Russia and Moldova*, [08.07.2004].

²⁵ *L. v. Lithuania*, [11.09.2007].

²⁶ *Broniowski v Poland*, [22.06.2004].

²⁷ *Driza v. Albania*, Appl №33771/02 (13 November 2007), ECHR 2007-V, par 126, quoted, *Forst D.*, op.cit, 18.

²⁸ This activity of the European Court was supported by some researchers regarding its constitutional role and necessity of human rights protection, to ensure the effective instruments for appealing for the individuals. See Nifosi-Sutton (n 192) 68-69, quoted *Forst D.*, op.cit, 18); There was criticism as well, because of absence of any legal basis, as well as because the European Court has no possibility to determine the required measures for execution. See *Renucci J-F.*, Mesures générales et/ou individuelles: l'ingérence de la Cour européenne des droits de l'Homme (année 2010), Recueil *Dalloz* (2011) 193.). Some researchers referred to power abuse, because of establishing of positive obligation carrying budget outcomes for the state. See *Cocchiarella v. Italy*, Appl № 64886/01 (29 March 2006) ECHR 2006-V, para. 101, 19.

²⁹ *Harris et al* (n 8) 851, quoted *Forst, D.*, op.cit, 19.

³⁰ European Court regards that the legislative guarantees regulating expropriation were not sufficient for ensuring rights provided for by Article 6 of the Convention and Additional Protocol 1 thereof, further the Constitutional Court recognized the law as non-constitutional. See *Scordino (№1) v Italy*, Appl № 36813/97 (26 March 2006), ECHR 2006-V, quoted *Forst D.*, op.cit, 19.

³¹ *Leach P.*, Beyond the Bug River-A New Dawn for Redress before the European Court of Human Rights?, 2 EHRLR (2005), 148-164, quoted *Lambert E. A.* (2), The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, 2009, 479.

³² European Court did not specify the measures to be taken *Manole and others v. Moldova*, Appl № 13936/02 (17 September 2009), ECHR 2009, and in case *Yuriy Nikolayevich Ivanov v. Ukraine*, Appl №40450/04 (ECHR 15 October 2009), para 90, entrusted to the Committee of Ministers together with the state.

implementation. In addition, European Court maintains certain control over the process, as it can recommence consideration of so called “frozen cases”.³³

3. General Rule of Execution of the judgments of the European Court, Standard and Enhanced Execution Procedures, Publicity of Processes

Execution of the Court judgment is the final, conclusive stage of violated rights’ recovery. In its absence the document establishing the rights would be of declarative nature only. Binding nature of the judgments shall be ensured by prevalence of international law over the internal national law, in particular, protection of the individual from the state, respect to the obligations under the conventions by the state and participation in fostering of common European values.³⁴ Unlike the documents of the other types (e.g. recommendations, being non-binding document to be taken into consideration) the Court judgments are the acts of legal significance and being the legal documents they become the binding ones.^{35 36}

Within the CoE system, once the decision of European Court becomes the final one, the first, purely legal procedure is performed and the other – international-law and at the same time international-political procedure^{37 38} intended for judgmentexecution commences. In the opinion of CoE Parliamentary Assembly, “Execution of the Court judgments is a complex legal and political process.”³⁹ Basis for obligation of execution of the European Court judgmentis provided by Article 41 §1 of the Convention: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.” The states attempted to implement this function within the countries in different ways: establishment of the governmental or official bodies (Italy, Austria), ministry of justice (Great Britain, Germany), ministry of foreign affairs (Romania, Turkey, France),⁴⁰ in many cases this function is vested in the bodies representing the state in the disputes against the European Court.⁴¹

³³ Forst D., op.cit, 19.

³⁴ Beneş O., L’*autorité de la chose jugée des arrêts de la CEDH*, <<http://studiijuridice.md/revista-nr-1-2-2011/lautorite-de-la-chose-jugee-des-arrets-de-la-cedh>>, [20.11.2014].

³⁵ E.g. According to Article 94 § 1 of the UN Charter, each UN member shall abide by the decisions on International Court of Justice on cases to which it is the party and on the basis of Article 96 of the Charter, the consultation conclusion adopted by the Court as purely consultancy significance.

Charte de Nations Unies, San Francisco, 1945, <<http://www.un.org/fr/documents/charter/>>, [20.11.2014].

³⁶ International Court of Justice associated the effect of decision with two, final and binding aspects see CPJI, *Société commerciale de Belgique, Belgique c/ Grèce*, 15.6.1939, série A/B no78, Rec., 160 et 175, quoted, Beneş O., op.cit.

³⁷ Professor *Fricero N.*, calls it the “Political Echanism of Effectiveness”. see *Fricero N.*, *La mise en application des décisions de la Cour européenne des droits de l’Homme*, AHJUCAF, Paris, <<http://www.ahjucaf.org/La-mise-en-application-des.html>>, [20.11.2014].

³⁸ Professor *Elisabeth Lambert Abdelgawad* calls it “the sphere of politics”. see *Lambert E. A. (3)*, *L’exécution des décisions des juridictions internationales des droits de l’homme: vers une harmonisation des systèmes régionaux*, ACDI, Vol. III, Bogota, 2010, 16.

³⁹ PACE, Résolution 1516 (2006). *Mise en œuvre des arrêts de la Cour européenne des Droits de l’Homme*, §2. <<http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=17472&lang=FR>>, [07.12.2014].

⁴⁰ *Suchkova Maria*, *An Analysis of the Institutional Arrangements within the Council of Europe and within Certain Member States for Securing the Enforcement of Judgments*, *European Human Rights Law Review* (2011), 454, quoted *Forst D.*, op.cit, 11.

⁴¹ *Ibid.*

According to Article 41 §2 of the Convention: The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.^{42 43} Committee of Ministers includes the ministers of foreign affairs of the member states.^{44 45} In 2001, the year, when the active consideration of Convention system reformation commenced, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (hereinafter referred to as Rules), were adopted for judgment execution and friendly agreement and further adopted in 2006.⁴⁶ This document sets the procedure for payment of the amount awarded by European Court and the issue of general and individual measures⁴⁷ at the sessions on “human rights”.⁴⁸ Supervision procedure ends by adoption of the final resolution of the Committee of Ministers.⁴⁹ After adoption of Protocol 14 of the Convention, in 2010, for the purpose of improvement of the convention mechanism, the “Interlaken process”⁵⁰ was initiated and further conferences were held in 2011, in Izmir and in 2012, in Brighton.

In accordance with the plan adopted at Interlaken, in January 2011,^{51 52 53} monitoring of adoption and implementation of the action plan was based on two axes.⁵⁴ Decision on the procedures’ type is made by the Committee of Ministers. Mostly the standard procedures are followed and in certain cases –

⁴² Final judgment is the one regarded as such in accordance with Article 44 of the Convention. See Convention, op.cit.

⁴³ In the inter-American system, from 2001, the term is determined by the court secretariat, normally very tight, for the state to justify compliance of the measures taken with the decision and at the same time, asks the representative of the victim and the commission to assess it within 6-week period. See *Lambert E. (3)*, op.cit, 22.

⁴⁴ EC Charter, op.cit, Articles 14 and 25a.

⁴⁵ Inter-American System is Substantially Different as the Lawyer and Claimant are Actively Involved into the Execution Procedure, while the Party is not Represented in the European model. See *Lambert E. (2)*, op.cit, 473.

⁴⁶ CM. Règles du Comité des Ministres pour la surveillance de l’exécution des arrêts et des termes des règlements amiables, Annexe 4 (Point 4.4), (adoptées par le Comité des Ministres le 10 mai 2006, lors de la 964e réunion des Délégués des Ministres), <http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Docs_a_propos/CMrules2006_fr.pdf>, [03.11.2014].

⁴⁷ Ibid, Article 6.

⁴⁸ Ibid, Article 2.

⁴⁹ Ibid, Article 17.

⁵⁰ *Interlaken Declaration*, High Level Conference on the Future of the European Court of Human Rights, 19 February 2010, <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/euroc/Par.0133.File.tmp/final_en.pdf>, [20.11.2014].

⁵¹ Mesures visant à améliorer l’exécution des arrêts de la Cour européenne des droits de l’homme. Propositions pour la mise en œuvre de la Déclaration et du Plan d’Interlaken, <http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Interlaken/Item_e1100th_FR.pdf>, [13.11.2014].

⁵² CM. Document d’information, CM/Inf/DH(2010)45 final 7 décembre 2010, <[https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH\(2010\)45 final 7 décembre 2010](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH%282010%2945&Language=lanFrench&Ver=final&Site=CM&BackColorIntranet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383), <<https://wcd.coe.int/com.intranet/IntraServlet?command=com.intranet.CmdBlobGet&IntranetImage=1694242&SecMode=1&DocId=1616260&Usage=2>>, [13.11.2014].

⁵³ CM. Document d’information. CM/Inf/DH(2010)37. 6 septembre 2010. <<https://wcd.coe.int/com.intranet/IntraServlet?command=com.intranet.CmdBlobGet&IntranetImage=1694239&SecMode=1&DocId=1616248&Usage=2>>, [20.11.2014].

⁵⁴ CM. Supervision of the execution of judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Modalities for a twin-track supervision system, CM/Inf/DH(2010)37, 6 September 2010, <<https://wcd.coe.int/com.intranet/IntraServlet?command=com.intranet.CmdBlobGet&IntranetImage=1694239&SecMode=1&DocId=1616248&Usage=2>>, [20.11.2014].

the enhanced ones. Committee of Ministers applies the latter type, where individual measures are of urgent necessity or where significant structural problem exists (pilot decisions made on similar cases), as well as in inter-state cases.⁵⁵ It should be noted that among 9521 cases of 11017 ones, pending in 2013, were the repeated cases.⁵⁶

According to Article 6 §1 of the Rules, the Committee of Ministers shall invite the High Contracting Party concerned to inform it of the measures which the High Contracting Party has taken or intends to take in consequence of the judgment. Where the standard procedure is applied, the relevant party shall submit the action plan or report on performed actions, no later, that within 6 months from the date of decision. In case of the standard procedures the Committee's role is limited to checking, whether the government has submitted the action plan or not.⁵⁷ If the action plan is submitted, the Secretariat performs first assessment of the measures to be taken and the schedule⁵⁸ and communicates with the relevant state, if any additional information or explanations are required, within 6 months from the date of plan adoption, the Committee of Ministers, at the first Human Rights Session, makes decision on compliance with the European Court judgment and that the relevant state shall periodically report to the Committee on measures performed in accordance with the plan.⁵⁹

According to Article 7 §1 of the Rules, until the High Contracting Party concerned has provided information on the payment of the just satisfaction awarded by the Court or concerning possible individual measures, the case shall be placed on the agenda of each human rights meeting of the Committee of Ministers, unless the Committee decides otherwise. According to Article 7 §2 of the Rules the case shall be placed again on the agenda of a meeting of the Committee of Ministers taking place no more than 6 months later. Once the concerned state informs the Secretariat on all measures taken and fulfilment of the obligations under Article 46 of the Convention, the action plan will become the report on performed actions. at a time of submission of the action report, i.e. when the execution has taken place and there is agreement on the document contents, between the concerned state and the Secretariat of the Committee (Secretariat, respectively, makes final assessment of the measures taken), the latter submits to the Committee the draft resolution on closing of case at the first Human Rights meeting or further, no later than within 6 months, from the date of report submission.⁶⁰ In such case, the case is completed, the action report is published on the website of the Committee of Ministers and the case is submitted to the Committee of Ministers for closure. In accordance with Article 17 of the Rules the Committee makes final resolution.⁶¹

⁵⁵ According to Article 4.1 of the document, the Committee of Ministers gives priority to the cases related to the structural problems, as well as the cases ended by settlement. Résolution Res(2004)3 According to the Resolution, though the mentioned shall not prejudice execution of those significant cases, the severe outcomes whereof were stated for the party. See: Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables, op.cit.

⁵⁶ CM, Annual Report, op.cit, 37.

⁵⁷ CM, Inf/DH(2010)37, op.cit, §14.

⁵⁸ Human Rights Directorate has Close Communication with the State Government to Examine the Measures to be Taken for Proper Execution of the European Court Decision.

⁵⁹ CM,Inf,DH (2010)37,op.cit, §17.

⁶⁰ CM, Inf, DH (2010)37, op. cit, §15.

⁶¹ E.g., on 12 November 2014, the Committee of Ministers Adopted the Final Resolution Giving Positive Evaluation to the Measures Implemented in 2013-2014 at the Penitentiary Institutions, the pending cases

If required, the Committee of Ministers may support execution of judgment in different ways, including intermediate recommendations in accordance with Article 16 of the Rules. Department of Judgments' Execution may offer to the state concerned additional support in a form of various programs (e.g. legal expertise, arrangement of the round tables or training workshops).^{62 63} Support may be offered through HRTF as well.

Among other measures, promotion of the friendly settlements should be mentioned. Explanatory note to Protocol 14 (paragraph 93) states that friendly settlement may be useful in cases where repeated violations are stated.⁶⁴ By entry of Protocol 14 into force, the area of monitoring of the Committee of Ministers increased. Article 15 of Protocol 14 provided amendment of Article 39, according to which, after 1 November 2010, the Committee of Ministers monitors the decisions of European Court on friendly settlements.⁶⁵

According to Article 9 §3 of the Rules, the Secretariat shall bring any communication received to the attention of the Committee of Ministers. It shall do so in respect of any communication received in reference to paragraph 2 of this Rule. Their activities may be as follows: monitoring of the decisions' implementation, pressure over the government, to make institutional reform more effective, better informing of the local politicians on the issues of judgments execution, publishing of the judgments by mass media, among the professionals etc.

Procedures related to execution are public, with the exceptions specified in Article 8 of the Rules. Session of the members of the Committee of Ministers is confidential, in accordance with Article 21 of the EU statute,^{66 67} though according to Article 8 §4 of the Rules, after each meeting the annotated agenda of the meeting of Committee of Ministers shall be published, unless the Committee otherwise decides. Since 2013, 3-4 weeks before the meeting of the Committee of Ministers, the indicative list of the cases to be considered is posted on the website of the Committee of Ministers.⁶⁸

related to this were closed and the Ministry of Correction made the special announcement, See <<http://topnews.mediamall.ge/?id=127373>>, 15 November 2014, [01.12.2014].

⁶² In 2011 two round table meetings were arranged in relation with the specific issues. See Committee of Ministers, *Annual Report 2011* (n 2) 99, *FORST D.*, op.cit, 14.

⁶³ In the work document of the Convention System Reform Group specifies, regarding the aim of thematic debates and execution, if required, invitation of the representatives of CEPEJ and Venice Commission. See CM. *Ministers' Deputies, Working Parties* GT-REF. ECHR Ad hoc Working Party on Reform of the Human Rights Convention system. Measures to improve the execution of the judgments and decisions of the Court. II-B-2-f, <<https://wcd.coe.int/ViewDoc.jsp?Ref=GT-REF.ECHR%282013%292&Language=lanEngli-sh&Ver=rev2&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>>, [08.12.2014].

⁶⁴ In 2009, European Court approved 460 friendly settlements, in 2008 and 2007-464 and 360, respectively. See CE. Entry into force of Protocol №14 consequences for the supervision of the execution of judgments of the European Court by the Committee of Ministers, 18.05.2010, <http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/EntryProtocole14_Exec2010_1_EN.pdf>, [13.11.2014].

⁶⁵ CM. Res(2002)59 Concerning the Practice in Respect of Friendly Settlements, 18 December 2002, <<https://wcd.coe.int/ViewDoc.jsp?id=331569&Lang=en>>, [01.12.2014].

⁶⁶ Rules, op.cit, Article 8.1.

⁶⁷ According to Article 82 of the Rules the procedure is public, unless the Committee otherwise decide, regarding the public and private interests, See also Articles 46 § 2 and 3 of the Convention.

⁶⁸ CM, Annual Report, op.cit, 20.

of the Committee of Ministers there is described the practices of the Committee of Ministers dealing with execution of the decisions of the European Court. List of the applied individual measures was last updated in April 2006, at 960th meeting of the Committee of Ministers.⁷⁸

Just Satisfaction

Payment of the amount awarded as just satisfaction is the clear and well determined obligation of the state and failure to perform this obligation within the period specified by European Court causes imposition of the penalties by virtue of Article 75.1§3 of European Court Regulations.⁷⁹ States cannot refer to the specific features of the internal state legislation for liberation from these obligations or for delay of their fulfillment.⁸⁰ Fulfillment of this obligation cannot always adequately recover the negative outcomes resulting from violation of the rights,⁸¹ though, for certain violations, full reparation is hard or even impossible, such, as e.g. non-compliance with the reasonable terms or unlawful deprivation of liberty. In such case only possibility of fair compensation as individual measure is left, naturally, not preventing adoption of general measures to eliminate further similar violations, if violation of the relevant article of the convention is caused by the defective law. Payment of the awarded amount may take several weeks or even months, depending on seeking of the required information, bookkeeping, technical delays, bank operations etc. From 1991, European Court directly specifies the term of payment.⁸²

Reopening of the Proceedings

Freedom of instruments used by the state in execution of European Court judgments under the supervision of the Committee of Ministers, in certain cases, actually does not provide to the states freedom of choice. Recommencement of procedures at the internal state instances may be the effective instrument for elimination of Convention violations, if Convention violation was caused by unfair

<<http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%7B%22fulltext%22:%5B%22Metropolitan%20Church%20of%20Bessarabia%22%5D,%22documentcollectionid%22:%5B%22RESOLUTIONS%22%5D,%22itemid%22:%5B%22001-98240%22%5D%7D>, [04.12.2014].

⁷⁷ CM. Documents d'information, CM/Inf/DH(2008)7 final 15 janvier 2009, <<https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH%282008%297&Language=lanFrench&Ver=final>>, [14.11.2014].

⁷⁸ CM. Mesures Individuelles : Informations Relatives à des Affaires Closes, H-Exec(2006)2, <http://www.coe.int/t/dghl/monitoring/execution/Documents/MIindex_fr.asp>, [14.11.2014].

⁷⁹ European Court makes decision at its own discretion, on consideration of the fair satisfaction issue together with the issue of possible violation of the Convention/protocol or gives the state time and further makes second decision.

⁸⁰ Justification of non-fulfillment of international obligations undertaken by the state referring to the domestic law provisions is regarded as violation of international law, giving rise to international - law responsibility of the violator. Levan Aleksidze, *Contemporary International Law*, Tb, 2010, 22 .

⁸¹ M E.g. in case of violation of the property rights of the claimant, the compensation of market value provides restoration of the violated right. See *Brumarescu v. Rumania*, [23.05.2001], §22; *Baragan v. Rumania*, [01.10.2002], §45.

⁸² In some cases the European Court Focused on Necessity of Particular Care (e.g. claimant with fatal illness), see *Richard v. France* (judgment of 22/04/1998, application №33441/96), Mesures Individuelles : informations relatives à des affaires closes. op.cit.

consideration of case.⁸³ This mechanism may be followed by cancelation of the judgment incompliant with the Convention by the national court.

Where execution of the European Court decision is impossible without reopening of domestic judicial proceedings, the conflict emerges, between the state's general freedom – to select the measures on one hand and restoration of the claimant's violated rights - on the other. This conflict is resolved in favor of the claimant – though specific individual specific measure of case review was not imposed on the state in a form of clear obligation, the states' general obligation of the decision execution may result in obligation of the case recommencement. Thus, revision of the internal state procedure, as the only effective instrument for elimination of the Convention violation, in certain cases, is of fundamental significance for execution of the European Court decisions an generally, for effectiveness of the European system. Conclusions of the Committee of Ministers show two types of violations providing basis for case review: the *procedural*⁸⁴ and *substantial*⁸⁵ ones.

List of the cases where the measure of reopening of cases under the supervision of the Committee of Ministers was deemed adequate is indeed very long: reopening of proceeding at the national courts by the reason of unfair trial at the national courts to prevent the outcomes of Convention violation;⁸⁶ to change the national court decision on prohibition of information publication;⁸⁷ to allow the interested person returning to the defendant state or staying there, if exile was not executed yet⁸⁸ etc. Reopening of the proceedings was problematic after European Court judgment on case *Enukidze and Girgvliani v. Georgia*.⁸⁹ After change of the government, in the end of year 2012, Georgian government confirmed the obligation of reopening of the case procedures and as a result number of persons, including former president Mikheil Saakashvili was brought to court.⁹⁰

Initially, the states were not enthusiastic with respect of the increasing trend of requirements of case review though they had had no any arguments against this as refusal would mean that the

⁸³ CM. Barberà, Messegué et Jabardo c. Espagne (10588/83), Résolution DH (94) 84), <http://www.coe.int/t/dghl/monitoring/execution/Documents/Reopening_fr.asp>, [13.11.2014].

⁸⁴ The violation giving rise to serious doubts with respect of the procedure outcomes. See *Unterpertinger v Austria*, 24.11.1986 and CM.ResDH(89)2 18 January 1989 concerning the judgement of the European Court of Human Rights of 24 November 1986 in the Unterpertinger case, <<https://wcd.coe.int/ViewDoc.jsp?id=710333&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>>, [04.12.2014]. *Barbera, Messegué et Jobardo v. Spain*, [06.12.1988] and [13.06.1994] (Article 50) and CM. Barbera, Messegué et Jobardo v. Spain, op.cit.

⁸⁵ E.g. regarding Article 10 -freedom of expression (see case *Sürek et Özdemir v. Turkey*, 08.07.1999), regarding Article 8 –violation of respect to the personal and family life, by disclosing of te information about health by Helsinki Court of Appeal. See *Z v. Finland*, [25.02.1997], Rés. DH (96)368.

⁸⁶ E.g. see Barberà, Messegué et Jabardo, Résolution DH (94) 84), op.cit.

⁸⁷ CM. Open Door et Dublin Well Woman, Résolution DH (96) 368, <http://www.coe.int/t/dghl/monitoring/execution/Documents/Reopening_fr.asp>, [13.11.2014].

⁸⁸ E.g. CM.D. c. Royaume-Uni, Résolution DH(98)010), <http://www.coe.int/t/dghl/monitoring/execution/Documents/Reopening_fr.asp>, [13.11.2014].

⁸⁹ Case *Enukidze and Girgvliani v. Georgia* (Application № 25091/07) Judgment, Strasburg, 26 April 2011 <https://matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=1496930>, [08.12.2014].

⁹⁰ Whether Georgia has executed the European Court decision or not. Netgazeti, 30.03.2012, <<http://www.netgazeti.ge/GE/98/law/9003/>>, [01.12.2014]; Girgvliani case and defendant Mikheil Saakashvili. *Radio Freedom*, 27.11.2014, <<http://www.radiotavisupleba.ge/content/girgvlianis-sakme-dasaakashvili/26713229.html>>, [01.12.2014].

Convention was violated and nevertheless, the state has no desire to eliminate such violation and this would make questionable the state's loyalty to the values providing basis for European Commission. European Court recognized the right on execution of the national court judgments as the right protected by the Convention. Thus, it would not be logical to recognize violation of Article 6§ 1 of the Convention by the European Court for non-execution or improper execution of the judgments of the national courts by the national authorities and at the same time, tolerance to the ineffective execution of the European Court judgments. Decision on case *Hornsby v. Greece*⁹¹ is of significance, its continuation was the trend of decision made on case of *Older* – right to fair trial includes the right to execution of the final judgment, though the Convention text says nothing about this right. “Supremacy of the court as one of the fundamental principles of the democratic state, is indivisible from the Convention articles (...) and implies the obligation of the states and public governments to abide the decisions abide against them,⁹² and these shall be executed in full, properly and not partially.⁹³

In the most cases, the national legislations did not contain the norms dealing with reopening of case procedures and by this reason the Committee of Ministers has adopted the relevant recommendation⁹⁴ to ensure human rights and effectiveness of the decisions. Recommendation requires from the High Contracting parties to ensure adequate opportunities, including that for reopening of trials. This recommendation provides two alternatives: first, case reopening by the judicial authorities and second – by the administrative authorities. Irrespective its reopening nature, this document became the guiding one.

Currently, the legislations of more and more European countries contain the provisions on reopening of proceedings. Specific rules always deal with the criminal cases and covers relatively poorly the administrative and civil spheres (exclusions include: Bulgaria, Lithuania, Norway, Switzerland etc.). According to Article 310(e) of Georgian Criminal Procedure Code, establishing the fact of violation of the Convention by the European Court provides basis for case recommencement. There are some specific differences as well. E.g. Swiss legislation provides for recommencement of the procedures only on the basis of the application of the interested parson (rather than automatically).

As a rule the democratic states, distinguished by loyalty to human rights, voluntarily take measures for the judgments execution, they make legislative changes, launch new investigations – such governments do not need any special appeals for protection of human rights and fulfill the obligations under international agreements, they are driven by the desire to recover the claimant's violated rights. Such actions are performed not only after making decisions and transfer thereof to the Committee of Ministers but also before that.⁹⁵ All states, having similar “problems” in their legal systems, considered

⁹¹ *Hornsby v. Greece*, [19.03.1997].

⁹² *Antonetto v. Italy*, [30.09.2009], §35.

⁹³ *Sabin Popescu v. Romania*, [02.03. 2004].

⁹⁴ CM. Recommendation №R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, <<https://wcd.coe.int/ViewDoc.jsp?id=334147>>, [13.11.2014].

⁹⁵ E.g. Supreme Court of Sweden Made Decision on Recommencement of Case *Andersson v. General Prosecutor's Office* on 21 November 1988, based on decision of European Court on the case of similar type see *Ekbatani v. Sweden*, [26.05.1988]. CM. Reopening of Judicial proceedings. Examples of requests for the reopening, <http://www.coe.int/t/dghl/monitoring/execution/Documents/Reopening_en.asp>, [10.12.2014].

by the European Court in relation with the other countries, should rather improve such problem and do not wait for the judgment of guilt.⁹⁶ E.g., for the legislation on telephone tapping Spain was charged for the case identical to *Malon v. Great Britain*,⁹⁷ in case *Modinos v. Cyprus*,⁹⁸ Cyprus was charged because it had not changed the laws penalizing homosexual relations while similar violation was identified by the European Court in case *Dudgeon v. Ireland*⁹⁹ etc. Though the decisions of European Court have *inter partes* effect (judgment execution is binding for the state participating in case, only states, participating in case are obligated),¹⁰⁰ impact of this case shows that in certain cases the European Court decisions have *erga omnes* effect¹⁰¹ as well. Three major institutes of European Council have developed the doctrine relying on Article 1 of the Convention, as specified by the European Court,¹⁰² Committee of Ministers welcome the states examining compliance of the laws and administrative practices with the Convention;¹⁰³ Parliamentary Assembly also confirms that the judgments made by European Court create the collection of laws binding for the states.¹⁰⁴

6. General Measures

General measures may include legislative changes, required for elimination of violations, practical changes – institutional reforms, trainings, dissemination of the European Court judgments etc.¹⁰⁵ Their purpose is to prevent similar violations in the future or eliminate the continuing violations, e.g. in certain cases the materials to case clearly show that the stated violation results from the law incompliant with the Convention, in some cases violation of Convention is conditioned by the absence of relevant legal regulations.¹⁰⁶ In such cases, the state to execute the judgment shall implement effective changes through adoption of general measures:¹⁰⁷ amend the law or adopt the new one¹⁰⁸ or even constitution.¹⁰⁹ In case

⁹⁶ *Valenzuela Contreras v. Spain*, [30.07.1998], § 60.

⁹⁷ *Malon v. Great Britain*, [01.08.1985].

⁹⁸ *Modinos v. Cyprus*, [22.01.1993], § 20-24.

⁹⁹ *Dudgeon v. Irland*, [22.10.1981].

¹⁰⁰ Constitutional Court of Germany explained, in its decision on case of *Görgülü*, that the European Court judgments are of *inter partes* rather than *erga omnes* effect see *Tomuschat Ch.*, The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court, German Law Journal, Vol 11, № 5, 520.

¹⁰¹ *Barkhuysen, Van Emmerik* (№ 16) 19; *COHEN Jonathan, Gérard*, Quelques considerations sur l'autorité des arrêts de la Cour Européenne des Droits de l'Homme in Cohen-Jonathan, et al., *Liber Amicorum Marc André Eissen* (Bruylant 1995) 53, quoted, *Forst D.*, op.cit, 8.

¹⁰² *Maestri v. Italy*, 17.02.2004, ECHR 2004-I, § 47.

¹⁰³ CM. Recommendation to the Member States on the Verification of the Compatibility of Draft Laws, Existing Laws and Administrative Practice with the Standards Laid down in the ECHR, Rec(2004)5, 12 May 2004, <<https://wcd.coe.int/ViewDoc.jsp?id=743297>>, (last consultation on 3 July 2012).

¹⁰⁴ *Ibid*, 9.

¹⁰⁵ Experts Committee Established by the Committee of Ministers, in Relation with the 50th Anniversary of the Convention Prepared the List of General Measures for Improvement of Human Rights Procedures, which is Regularly updated by General Directorate for Human Rights and Provided to the Committee of Ministers. CM. Mesures Générales: information relatives à des affaires closes, <http://www.coe.int/t/dghl/monitoring/execution/Documents/MGindex_fr.asp>, [13.11.2014].

¹⁰⁶ *Ibid*.

¹⁰⁷ *Tysiq v. Poland*, [20.03.2007].

of legislative changes the transition period may be required¹¹⁰ though European Court regards that the transition period should not cause or maintain the discriminative situation and the national judges shall give full effect to application of the Convention standards.¹¹¹

Analysis of the European Court judgments clearly show that violation of the rights provided for by the Convention is not the result of clear incompatibility between the law texts and Convention, rather, this could be seen in the national court judgments, interpretation given by them to the national law and the Convention.¹¹² This is the change of national courts approach adding effectiveness to the Convention system.

On 18 December 2002, for the purpose of popularization of the European Court judgments at the national level, the Committee of Ministers adopted recommendation and resolution¹¹³ stating familiarization with the European Court decisions, their publication for various bodies, including police, penitentiary system, social services and judicial authorities as one of execution instruments. It is regarded that regular news publications with the notations by the constitution courts of some countries is of significance as well.¹¹⁴

„Abide” of the national judges to the Convention has long history and it does not include only knowledge of the case law of the European Court. On this way, one of the most significant aspects was the issue of direct application of the Convention. Incorporation of the Convention into the internal state law was the “problem” of the countries with dualist legal system and unlike the monist system, international agreement does not become the part of national legislation automatically, requiring adoption of the additional act by the legislative authority.¹¹⁵ According to the dualist theory the international law and internal state law are two separate systems and no supremacy of any of them is excluded.¹¹⁶ It is significant that currently Convention is the part of the legislation of all contracting parties.^{117 118 119 120 121 122}

¹⁰⁸ *Kudla v. Poland*, [26.10.2000].

¹⁰⁹ *Incal v. Turkey*, [09.06.1998]; *Kiss v. Hungary*, [20.05.2010].

¹¹⁰ *Paraskeva* (n 25) 90, quoted, *FORST D.*, op.cit, 8.

¹¹¹ *Fabris v France*, [07.02.2013], § 75, Ibid.

¹¹² CM. Mesures Générales: Information relatives à des affaires closes, op.cit.

¹¹³ CM. Recommendation on the publication and dissemination in the member states of the text of the ECHR and of the case - law of the ECtHR’, Recommendation Rec(2002)13, 18 December 2002, <<https://wcd.coe.int/ViewDoc.jsp?id=331657&Sector=secCM&Language=lanEnglish&Ver=original>>, [13.11.2014].

¹¹⁴ Draft CDDH Report on Measures Taken by the Member States to Implement Relevant Parts of the Interlaken and Izmir declarations, DH-GDR(2012)R2 Addendum I, (n 105) para 72, quoted, *Forst D.*, op.cit, 12.

¹¹⁵ *Lord Lester of Herne Hill QC and al.*, Human Rights Law and Practice, LexisNexis, Third Edition, 2009, 27-106.

¹¹⁶ *Kurdadze I.*, Stages of Development of the Scientific Conceptions on Correlation between the International and Domestic Laws and Contemporary Situation, Magazine of International Law, 1, 2008, Tbilisi, 7.

¹¹⁷ Ireland is the last EU member state which has incorporated the Convention into the national legislation in. See *Sweet Alec Stone and Keller Helen*, Assessing the Impact of the ECHR on National Legal Systems, Faculty Scholarship Series, New Haven, 2008, 685.

¹¹⁸ *Daudet H*, A propos de l'obligation faite aux Etats de se conformer aux décisions et arrêts de la Cour européenne, Rapports droit interne et droit international ou européen, <<http://m2bde.u-paris10.fr/content/>

Court is delayed by the reason of problem related to judgment explanation, it is authorized, by two thirds of the votes, request explanation from the Court^{127 128} and if the contracting party avoids execution of the decision, apply to the European Court in accordance with Article 46 § 4 to consider the issue of lack of respect and non-execution of the –judgment from the side of contracting party. This article provides for the state’s obligation to ensure to all the rights and freedoms specified by the Convention. The purpose of such application may be that, in so called “frozen state”, where the state has no desire to execute the judgment,¹²⁹ the European Court assisted the Committee by specifying the detailed measures¹³⁰ and the European Court judgment became the trigger for making steps against the state necessary for judgment execution.¹³¹ In such trials it is significant that the claimant’s rights were protected as formally, his/her participation is not provided by the procedure though the claimant is not prohibited to participate as a third party on the basis of Article 36 §2 of the Convention.¹³² Committee of Ministers has not used this solution yet.¹³³

According to Article 46 §5 of the Convention, of the European Court finds that the state has not abided by the judgment, it refers the case to the Committee of Ministers for consideration of the measures to be taken.¹³⁴ As the extreme measure of political and diplomatic pressure, the Committee of Ministers is entitled to suspend the representation rights of the member state or even decide that the state ceased to be a member, by virtue of Article 8 of Statute of the Council of Europe.

¹²⁷ According to the explanatory note, the Committee of Ministers shall apply this authority in exceptional cases, upon formal notification of the High Contracting party. This may be made at any stage of execution procedures. See: CM. Protocol №14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. Explanatory Report. § 97, 100. <<http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>>, [13.11.2014].

¹²⁸ *Harris David et al* (n 8) 836, quoted *Forst D.*, op. cit, 15.

¹²⁹ *Lambert A.*, 2005, *L’exécution des arrêts de la Cour Européenne des Droits de l’Homme* (n 11) 90, *Ibid*, 16.

¹³⁰ *Ibid*.

¹³¹ *Ruedin* (n 9) 416, *Ibid*.

¹³² *Ruedin* (n 9) 404, *Ibid*.

¹³³ Due to Public Opinion, Great Britain Refused to Implement the Decision Related to Giving Voting Rights to the Convicted from 2005 (*Hirst (№2) v the UK*, 6 October 2005, ECHR 2005-IX.), and from 2000 – refused to execute the pilot decision (*Greens and M.T. v. the UK* (n 71). Irrespective of the demands from the NGOs, the Committee of Ministers has not applied to the European Court, *Ibid*.

¹³⁴ In the regional system of African human rights, in case of non-execution of the Court judgments it is transferred to the conference to determine the further measures (Protocol on African Court of Justice, Article 46.4. See Protocol portant statut de la Cour Africaine de Justice et des Droits de l’Homme, <http://www.google.ge/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.african-court.org%2Ffr%2Fimages%2Fdocuments%2Ffr_gen_docs%2FProtocole%2520de%2520la%2520Cour%2520de%2520Justice%2520et%2520des%2520Droits%2520de%2520l%2527Homme.pdf&ei=Ua5vVPOUC6TpywOsmICgAQ&usg=AFQjCNFIZnMX-mjZ7r8d4U-L-li8VC5HtQ&bvm=bv.80185997,d.d2s>, In the Inter-American system such authority is General Assembly, See American Convention on Human Rights, 1969, § 65, <<http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>>), [25.11.2014].

8. Other Institutes of the Council of Europe and Control over Judgments

European Court as such is not competent *ratione materiae* to consider the issue of execution of the judgment by High Contracting party¹³⁵ on the basis of the application, though this does not imply that the Court has no such authorities at all. In particular, where a “new unsolved problem” emerged upon the judgment by European Court the latter is entitled to consider such problem.¹³⁶ E.g. in case *Vermeire v. Belgium*¹³⁷ the European Court controlled execution of the judgment made earlier, where it established violation of articles 8 and 14 of the Convention and specified as the basis for this non-execution of the judgment in relation with the same problem with its earlier decision – *Marckx v. Belgium*, dealing with the different approach to the “legitimate” and “illegitimate” children.¹³⁸ In the decision *Lions and others v. Great Britain*, the European Court refused to regard the refusal to reopen the case by the national instances as a new circumstance and this was changed in the other case, where there was mentioned that refusal of the federal court to recommence the case comprised the newly opened circumstance not considered by the Committee of Ministers and the case should be considered.¹³⁹ The latter trend shows the desire of the European Court to participate in the issues of execution more actively.

From 2000 the Parliamentary Assembly participates in monitoring of judgments’ execution through adoption of resolutions¹⁴⁰ and recommendations¹⁴¹ as well as questions to the Committee of Ministers.¹⁴² On the basis of articles 46 §§ 2-5 and 39 §4 of the Convention the Committee of Ministers shall prepare the annual report, which shall be the public report and submits it to the CoE General Secretary, Parliamentary Assembly and Commissioner for Human Rights.¹⁴³ First report was published in 2008. In the same year the Commissioner for Human Rights met with the representative of nine states for sharing of the best practice.¹⁴⁴ The latter participates in these processes through submission of the

¹³⁵ *Oberschlick v Austria*, 16.05.1995 (19255/92 da 21655/93).

¹³⁶ *Mehemi v. France* (n2), §43, CEDH 2003-IV; *Wasserman v. Russian Federation* (n2), [10.04.2008], § 37.

¹³⁷ *Vermeire v. Belgium*, [29.11.1991], quoted in *Forst D.*, op. cit, 21.

¹³⁸ *Ibid.*

¹³⁹ *Verein Gegen Tierfabriken Schweiz (VGT) (№2) v. Switzerland*, Appl №32772/02 (30 June 2009), ECHR 2009, para 67; Hertig, Ruedin (n 234) 658, *Ibid.*

¹⁴⁰ Parliamentary Assembly of the Council of Europe, ‘Resolution on the Implementation of Judgments of the European Court of Human Rights’, PACE/Res(2011)1787, 26 January 2011, <<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17953&Language=EN>>, (last consultation on 3 July 2012), *Ibid.*, 23.

¹⁴¹ Parliamentary Assembly of the Council of Europe, ‘Recommendation to the Committee of Ministers on the Implementation of judgments of the European Court of Human Rights’, PACE/Rec(2011)1955, 26 January 2011, <<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17954&Language=EN>>, (last consultation on 3 July 2012), *Ibid.*

¹⁴² Written Question №402 from *Clerfayt Mr.*, (Doc. 9272) Regarding Turkey’s non-compliance with judgments concerning violations of Article 5 of the Convention and the Committee’s reply dated 16 January 2002, Doc. 9327 of 21 January 2002 in *Lambert E.* (2), op.cit, 484.

¹⁴³ Règles du Comité des Ministres pour la surveillance de l’exécution des arrêts et des termes des règlements amiables, op.cit.

¹⁴⁴ *Lambert E.A.* op.cit, 486.

opinions, recommendations to the Parliamentary Assembly.¹⁴⁵ After entry into force of Protocol 14, he is also entitled to apply to the Committee of Ministers as the third party in relation with the issues of decisions' implementation.¹⁴⁶

9. Conclusion

The process of implementation of the European Court judgments shows that it is a complex procedure requiring efforts from the involved parties for selection of the best measures to eliminate the Convention violations. Regarding that the states submit the action plan and administer implementation thereof, integrity of the governments is a significant element for timely and effective implementation.

European Court judgments on pilot cases comprise a real challenge for the European system of human rights as their execution requires implementation of the structural and systemic changes. As the "problems" in such cases are related to the wide circles of the claimants, also because these "problems" are many-sided and the most cases regarded by the Committee of Ministers are the pilot ones, it would be reasonable to realize the opinion expressed many times – creation of the system of the mechanism of collective claims' submission, as provided for, e.g. by the European Social Charter. Such mechanism would allow the European Court to timely identify the problem and regarding various individual cases, discuss the possible solutions in one decision, taking into account the opinions of NGOs interested in knowledge of the relevant problems. For the same reason, their involvement would be of significance at the execution stage of this category of cases.

It is significant to improve the states' sensitivity to proper execution of the judgments. Analysis of the judgments' execution show that irrespective of recognition of Convention violation by any one state, the same problem may persist in the other state and this results from the Convention as the judgments of European Court are binding for the states parties to the case (*inter partes*). Giving *erga omnes* effect to the decisions of European Court would be problematic as a result the states would be deprived of possibility of protecting their positions at European Court. Approach of the European Institutes shows that irrespective of the *inter partes* effect of the judgments it would be reasonable that the European Court decisions were taken into consideration by the states not participating in the procedures to prevent the approaches different from the "minimal European standard". In this respect, it would be desirable that the Committee of Ministers developed thematic recommendations on the basis of European Court cases.

With respect of cases where execution is associated with the particular difficulties, due to absence of the political will, it would be reasonable to exercise more active pressure over the states, as well as increase of involvement of the Parliamentary Assembly into this process. Imposition of monetary sanctions over

¹⁴⁵ E.g. Failure to Investigate Case of Gongadze in the Report Following Visit to Ukraine (*Gongadze v Ukraine*, Appl №34056/02 (28 November 2005), ECHR 2005-XI.), Hammarberg, "Report following its visit to Ukraine", (n 258) para 99, quoted, *Forst D.*, op.cit, 23.

¹⁴⁶ Such interventions have taken place few times only. See Commissioner for Human Rights of the Council of Europe, "List of third party intervention", <http://www.coe.int/t/commissioner/Activities/3PIntervention_.asp>, (last consultation on 3 July 2012), (*M.S.S. v Belgium and Greece*, Application №30696/09 (21 January 2011), ECHR 2011), *Ibid*.

the states for failure to provide execution in a timely manner with no good reasons thereof, may also improve execution effectiveness.

Non-involvement of the claimant into the execution process could be regarded as the weakness of European system. Though the information and documents submitted to the Committee of Ministers by the state are public and though the claimant is entitled to apply directly to the Committee of Ministers, the claimant is not represented at the meetings of the Committee of Ministers where the execution modalities are discussed with the state representatives. Because of this gap, the execution procedure, as the obligatory mechanism for restoration of rights, accompanying the trial procedure, particularly, with respect of selection of individual measures, is not of a competitive nature and this harms fairness of the procedure. Hence, it would be reasonable that the materials of state were submitted to the claimant for comments and his/her role in this process was expanded.

Otar Gamkrelidze*

Conclusion on Temur Tskitishvili's Thesis Work: Delict Creating Danger for Human Life and Health

The named work of Temur Tskitishvili is a comparative law research. The existed situation in Georgian criminal law connected with delict creating danger for human life and health is compared with German criminal law. This kind of work is the first one written in Georgian. This work is also remarkable because it throws light on literature and legislation of such developed country as Germany.

The work consists of eleven chapters. In the first place the author discusses the history of the issue. Here the situation existed in Roman law and old Georgian law is shortly given. "For the law at low development stage, – remarks T. Tskitishvili pointing to the proper literature, - it was unknown a concept of an inchoate crime and such an action which did not cause the infringement of goodness was punished as a completed crime" (see page 13). After this the author shortly explains the reason of introduction of delict of danger into legislation and remarks that this issue, according to the literature, is a result of the gradual development of technique.

On the next page the author describes today's situation of the issue. From this point of view he does not agree on the opinion of those authors, who are dividing delicts into two groups – resulting delicts and danger creating delicts. T. Tskitishvili shares the point of view developed in Georgian literature, according to which delicts must be divided into three groups: 1) delict of abstract danger, 2) delict of concrete danger and 3) delict of infringement.

The second chapter of the present work is dedicated to the research of the nature of delicts of abstract danger. Here the author discusses differentiation between the abstract danger delict and the concrete danger delict. Finally he comes to the conclusion that the delict of concrete danger is when a law-maker is obliging the judge to state a causal connection between a human action and danger (see page 22). After this the author gives the general characterization of the abstract danger and discusses opinions of German and Georgian scientists and gives their comparative analysis.

The author discusses in detail such issues developed in German literature, as delicts of "abstract-concrete" danger, reduced corp.del as delicts of abstract danger, delicts of floating abstract danger; delicts of aimed (purposeful) abstract danger, delicts of motivated abstract danger (see page 69) and others.

After an extensive research comprising over eighty pages the author is giving a summary. Delicts of abstract danger are "abstractive" because resulting from their nature and life experience, - remarks he, - they are dangerous for goodness protected by law and can cause damage of legal goodness (see page 88).

Though it does not mean that when committing delicts of abstract danger "the existence of a concrete danger or the damage of legal goodness must be excluded" (ibid). The same must be said

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about the territorial principle of committing a crime. As an example of it the author gives the Article 317 of criminal code of Georgia – appeal for overthrowing a state government or changing it by violence. This appeal, in the author’s opinion, can be observed on television or the internet and spread also on the territory of the other state. It might create the danger of coup d’état on the territory of Georgia (see page 89).

Chapter 3 of the present work is devoted to the delicts of concrete danger. In the first place the author discusses “the concept of danger”. First of all he differentiates dangers from objective and subjective points of view. Of course the author is right when for substantiation of a concrete danger he is emphasizing two circumstances. The first is such incorrect human action, which is a precondition of a concrete danger and the second one is a victim’s state. The victim must be also within the breach of law.

As an example of a delict of concrete danger in the work there is named the composition described by Article 127 of the criminal code of Georgia, according to which responsibility is caused by “putting somebody who is unable to defense into a dangerous condition”. As it is seen there are two circumstances emphasized here: action dangerous for life and the behaviour of the victim under the danger created by this action.

As it is remarked by the author, the empire court of Germany did not share such recognition of a concrete danger before, but later this opinion was changed gradually. “The modern justice of Germany – writes the author – thinks that the existence of a concrete danger can be admitted when the object of a legal goodness is in a dangerous zone” (see page 100).

Despite this in German science of criminal law there were different opinions for clarification of this issue, “the definition offered by justice on a concrete danger must be transformed in order to give it more practical importance” (see page 101). Next the author discusses critically considerations expressed in German literature, which are connected with the concept of a concrete danger.

In the following paragraphs there is sequentially given the objective estimation of the danger caused by a certain action and is discussed a question of causal connection in delicts of a concrete danger.

In chapter 4 of the work there is discussed “intention and recklessness in delicts of danger” and critically are represented opinions of Georgian authors. Finally the author concludes that “delicts of abstract danger can be carried out as on indirect purpose, as well as presumptuously (see page 144).

Chapter 5 of the work is dedicated to “protection of legal goodness”. In the first paragraph there is discussed a concept of a legal goodness. According to the author interpretation of this concept has been started in German literature since the thirties of the 19th century. As for Georgian juridical literature there was established a concept of object of crime in it. Crime was divided into four features: an object, a subject, an objective aspect and a subjective aspect. This system came into the Georgian juridical literature from the Soviet Russian literature. As it is seen in Russian juridical literature it was worked up from the ideological view-point in order to bypass a three-feature concept of crime developed in so-called bourgeois countries. The author is quite right when he denies “the object of crime” and demands to establish a concept of “legal goodness” instead of it. A criminal is impinging not on the object protected by law, but on the “legal goodness”. This term, as the author remarks, has been established in the Georgian legislative practice. The author is quite right, when as examples of it

names the texts of articles 28, 30 and 31 of criminal code of Georgia dated on the 22nd of 1999, where this term is used (see page 152).

After this the author discusses a legal goodness as individual and super individual goodness. The legal goodness in the work is clarified from the philosophical point of view. The author briefly discusses opinions of Georgian philosophers – S. Avaliani, G. Tevzadze, Sh. Nutsbidze, also of the famous lawyer I. Surguladze, German philosopher N. Gartman and others. Finally after estimating critically the German philosopher G. H. Veltzel's thought, the author shares the opinion, according to which "behind the legal goodness there is always its carrier, which might be an individual, society or state. Division of the legal goodness into individual and common legal goodness is resulting from it (see page 161).

Finally the author concludes the following: by a victim must be meant an individual, a concrete human, who was damaged, or under danger because of the crime, "though the concept of victim can be used with two – broad and narrow meanings. With the narrow meaning by victim must only be meant an individual, while with the broad meaning by victim might be meant society and state" (ibid).

In paragraph 8 of this chapter there is discussed a question of interrelation between value, legal goodness and right. In philosophical literature goodness is considered to be an abstract phenomenon, but the author does not agree on this point of view and thinks that "if life is a target of a legal standard, the idea of life is meant, which is abstractive. By life, as by goodness, we mean concrete people's life, the criminal infringement of which is possible (see pages 173-174). The author differentiates value and goodness and basing on the opinion of the Georgian philosopher, G. Tevzadze, he writes the following: "Value does not exist in reality, but goodness as a valuable thing really exists" (see page 174).

From it the author concludes that value as well as goodness belongs to the sphere of essence, because there are two kinds of essence, existence – real and ideal. Value is an objective category which is perceived by a human being and just this perception is subjective. Finally the author concludes that "unlike a value a legal goodness is concrete, but it must be noted that the legal goodness does not always have a concrete (not abstractive) character, for example, public moral, as goodness protected by criminal law (see page 175).

Next the author starts to research the relation between the legal goodness and right, particularly he puts a question: "Whether is the legal goodness the right or not?" (See page 176). After a brief review of the question it is read in the work: "If the right belongs to an individual, it means that the right exists in a certain period of time. After running out the certain period of time the right might be abolished and just it indicates that its nature is not evel-lasting. Does not it talk that the right might not be a value? The comprehensive studying of this question is beyond the present work and requires additional research" (see page 177).

Chapter 6 of the work is dedicated to interrelations of crime attempt and danger creating delicts. This question is much written about in German. Quite enough literature about it is also in Georgian. The most disputable is interrelation between attempts and concrete danger delicts. This dispute started in Switzerland in the 19th century, when it was concluded that attempt is possible only with a direct intent. Under the influence of this theory by Article 128 of Georgian criminal code of 1960 there was set that danger for human life would be created, if a criminal acted with an indirect intent and the

result was not carried out (see article 127 of criminal code). By means of it a legislator filled up the gap, which was created by not realization of the result at the time of an indirect intent.

In connection with this question the author of the present work discusses in detail the situation created in Georgian juridical literature. In Georgian literature professor M. Turava was the first to support the idea of attempt with indirect intent, but article 127 of criminal code was impeding him to solve this question. So he attempted to substantiate that by article 127 of criminal code can be qualified such an action, which could cause the result (human death) presumptuously (recklessness). In the work there are also given other Georgian authors' opinions. The author is quite right, when concludes that attempt is only possible with the direct intent. His consideration in connection with this issue is quite significant. T. Tskitishvili writes: basing on German scientist K. Binding's opinion "it's true that according to criminal code of Georgia eventual intention is also a kind of intention, but when an action is carried out with eventual intention it can't be said that the criminal had intended to cause an unlawful result. The word "intended" means the direct intention" (see page 210).

After this T. Tskitishvili discusses opinions of the Swiss criminalist K. Shtos of the 19th century and German scientists, which are denying the possibility of the attempt of crime with indirect intent, but he is not satisfied with discussion of only German literature and remarks, that "the idea of the attempt of crime with eventual intention is also denied in American, French, Italian and Russian science of criminal law" (see page 212).

Finally T. Tskitishvili concludes that "when a criminal does not want to infringe the legal goodness and considers the result only to be possible, the action must be qualified by the article, which envisages punishment of the danger creating delict" (page 230).

Chapter 7 of the work is dedicated to the attempt of delict creating the result-qualified danger. Here the following question is obvious: When the action is considered to be intentional? Generally we know that an action is intentional, when a person has realized his outwardly expressed physical movement, for example, a driver drives a car intentionally because he knows what he is doing, but it is not so when the action is connected with a result. In such a case differentiation between action and result must not be made.

The author is quite right, when he approves that "the matter of violation of safety rules when making a fire in the forest is followed by fire must be settled like the case of breaching traffic regulations. It's true that making a fire is a conscious action but it can't be counted as an intentional action, because a fire in the forest was made for the purpose of warming and not for the purpose of producing fire" (see page 239).

Making a fire will be counted as an intentional action if only we discuss it independently from producing fire in the forest. So the corp.del of the action, its subjective aspect in a similar case is defined by the result. Only after this the author starts to study the issue – whether the attempt of the delict creating the result-qualified danger is possible or not.

T. Tskitishvili discusses the corp.del described by article 131 of the Georgian criminal code (AIDS-contamination). By part 2 of this article the responsibility is placed for "deliberate contamination of AIDS to the other person", but by part 4 for deliberate contamination of AIDS to two or more people is punished. How to qualify the action when the criminal's intention comprised AIDS contamination to two or more people, but the result was not carried out and instead of two only one

person was infected?: In the opinion of Tskitishvili, “perhaps it would have been more reasonable to qualify the action by the corp.del attempt foreseen by part 4 of article 131 of the Georgian criminal code, as the criminal’s intention comprised contamination of two or more people with AIDS” (see page 240). Here the author gives the example of court practice where the matter is settled analogously (see footnote of page 809).

In the opinion of the author such a case when the criminal’s intention comprised contamination of AIDS to two or more people but neither of them was infected must also be qualified as an attempt, though “unlike the above mentioned case of attempt of the result-qualified corp.del the judge in this latter case must give the criminal a mitigated punishment within sanction envisaged by the criminal code, because there is not only a qualifying, but even the main corp. del-founding result (see page 241).

Next along with the other issues the author discusses in detail subjective aspect of article 11 a new manner. According to the first part of article 11 “If a criminal law foresees the increase of sentence because of the accompanying result, which was not the criminal’s intention, such increase will be possible, when the person carries out this result by recklessness and such crime will be considered as intentional crime”. The analogous article was included in the Georgian criminal code of 1960, but in the formulation of the article there were not the words “such crime will be considered as intentional crime”.

Basing on this regulation T. Tskitishvili writes: “Q. Mchedlishvili-Hedrikh and I. Dvalidze are properly denying the idea of attempting delict qualified by a real result (see pages 249-250). As an example he takes article 133 of the Georgian criminal code, where responsibility is set for illegal abortion. For example, a doctor performs an abortion of a pregnant, but the woman dies. How to qualify this action? I think the author is absolutely right, when he qualifies this action in such a way: as “the result is not covered by the criminal’s intention, the statute of attempt can’t be extended in relation to the corp. del foreseen by part 3 of article 133 of the Georgian criminal code, in spite of the fact that the basis of causing the result is an intentional action and the action must be qualified as a combination of crimes, namely by article 19 and the first part of article 133 of the Georgian criminal code (attempt of illegal abortion) and article 16 of the Georgian criminal code (killing by recklessness)” (see page 249).

In the following (8) chapter there is discussed abjuration of crime voluntarily and effective repentance in danger creating crimes. Here the issue is discussed comparatively briefly. Finally the author comes to conclusion that abjuration of crime voluntarily in danger-creating delicts can be carried out, “because it is possible to prepare and attempt these delicts” (see page 264), though it does not concern all kinds of danger delicts, for example, in delicts of pure ineffectiveness danger, as the author notes, preparation and attempt the crime is impossible that excludes the opportunity of abjuration of crime voluntarily in these delicts (see page 264

In chapter 9 there is discussed “complicity in danger delicts”. Here very important is the issue of punishability ground of complicity, according to which joint offenders are carrying out united injustice. But it is impossible for the joint offenders to carry out the united injustice without the same subjective attitude of all the participants in relation to the result. By the same subjective attitude to the result is meant that all the participants must be acting with the direct intention to the result. Basing on

this statute T. Tskitishvili writes: “On carrying out danger-creating delicts a joint offender must realize that he/she is participating in such an action, which is creating danger to the goodness protected by law” (see page 277).

Next the author discusses in detail the issue concerning it is possible or not the joint offender’s responsibility for the result caused by the recklessness of the crime committer (article 11 of the Georgian criminal code). T. Tskitishvili shares the opinion expressed in the Georgian criminal law and approves that the joint offender bears responsibility for the result caused by recklessness of the offender.

When a danger creating intentional action carried out by complicity is followed by a heavy result – T Tskitishvili writes – which establishes a qualifying corp.del and is not covered by the criminal’s intention, the joint offenders must be charged with the main danger-creating intentional delict carried out by complicity, but for the qualifying result caused by recklessness a punishment must be imposed independently as the individual committer of a crime” (see page 283).

To justify this opinion the author points to article 133 of the Georgian criminal code. By first part of this article responsibility is set for “illegal abortion”, but by the third part the doctor is punished, if his/her action caused “the woman’s death”.

An instigator bears responsibility by article 24 and the first part of article 133 of the Georgian criminal code, but causing the death of the woman will be imputed to him/her as a crime by recklessness. By the third part of article 133, as the author remarks, responsibility will be imposed to the joint offender, as “an individual perpetrator of a crime” (see page 286).

This issue is analogously settled in German criminal legislative literature. In the opinion of the German scientists “Responsibility is imposed on a joint offender for criminal complicity - writes the author of the work, - for participation in the main intentional delict, but for the result, in relation to which there is a careless attitude, as a perpetrator of the crime, as well as a joint offender will be punished, for so called parallel perpetration of the crime (page 284).

Finally the author concludes that the punishability ground for complicity in danger creating delicts is the criminal wrongfulness. The wholeness of the criminal wrongfulness is not only defined by the casual connection with the effect of the joint offender’s action, but also by the wholeness of subjective aspect”(see page 286).

In chapter 10 T. Tskitishvili discusses the issue of wrongfulness in danger creating delicts. In this chapter there are quite extensively described different circumstances of wrongfulness, connected with intentional delicts, as well as with danger creating delicts committed by recklessness. There is separately discussed such a question as “reference to wrongfulness as a corp.del sign of the action in danger delicts”. In this chapter there is also discussed a question concerning the circumstances excluding wrongfulness in danger creating delicts”.

First of all there is discussed the situation of an inevitable repulse in danger creating delicts. Self-defender can repulse an attack by such an action, -- writes the author, - which causes health damage and creates danger to the assaulter’s life, but if the correlation of assault and defense is observed, the wrongfulness of the action will be excluded (see page 301).

Next in connection of this issue in the work there is discussed extreme necessity, jeopardizing own life, conflict of duties, lawful risk. There is also researched an issue of wrongfulness in danger

creating delicts committed by carelessness. The author also separately discusses a subjective aspect of circumstances excluding the wrongfulness. After analyzing German and Georgian literature and court practice the author concludes that "as for the circumstances, such as jeopardizing other person's life at his own consent, some scientists consider it as the wrongfulness excluding circumstance, that can't be shared" (see page 320).

Quite extensive is the last chapter (11) of the work, comprising about a hundred pages, where there are discussed separately corp.del of delicts creating danger to human health and life. First the author discusses article 127 of the Georgian criminal code. The author is right when he remarks that the action described by article 127 of the Georgian criminal code is a delict creating a concrete danger and does not share the opinion as if this article foresees the delict creating abstract danger. In the present work there is criticized the point of view according to which qualification of the action by article 127 of the Georgian criminal code is only possible, when "the offender has the attitude to killing not with an eventual intention, but with recklessness, namely presumptuously (see pages 323 – 342).

Next the author discusses paragraph 221 of the German criminal code, where there is described the corp.del analogous to article 127 of the Georgian criminal code, though paragraph 221 of the German criminal code is more spacious compared to article 127 of our code and apart from human life it comprises human health too. At the same time German scientists' approach to this article is different. It must be said that T. Tskitishvili thinks that the defect of article 127 of the Georgian criminal code is that it only comprises creating danger for human life and not for human health. "As health – writes he – is an important lawful goodness punishable must be not only health impingement but also creation the danger of such impingement (see page 325).

Quite extensively is discussed a problem of abandoning somebody in jeopardy (article 128). According to this article to abandon somebody in danger without help causes responsibility, if the person was obliged to take care of the abandoned person. One of the disputable questions such a case of a road accident, when a person gets into a life-threatening position because of the driver's or own reason. There is a question arises: Is the driver charged with obligation to help the person who is in a life-threatening position? After discussing opinions of different authors T. Tskitishvili concludes the following: "If the collision happened neither by the driver/s nor the victim's reason, it happened by the other reason (for example, because of disorder of the brakes system) in spite of the unguilty action the driver is a subject of a legal duty". To justify this statement he gives the example from Supreme Court practice of Georgia (see page 331).

With regard to the case "when the offender creates danger by intentional action and does not take measures to neutralize it, responsibility will be imposed on him/her for activity and not for inactivity, for abandoning the victim in danger" (see page 332). Here is important the author's following judgment: "When the driver violates the road safety rules, acts recklessly, hits a pedestrian unintentionally, inflicts a serious harm to his/her health and leaves the victim without help and disappears, the first action – hitting - is an unintentional crime but the following inactivity is an intentional crime (abandoning in danger)".

In the present work there is discussed in detail the following issue: is a man obliged to help a person, who jeopardized his own life (attempt of suicide)? In literature there is an opinion that if a man

has decided to commit suicide not helping him for saving his life can't be considered as a crime. T. Tskitishvili does not agree on this point of view. He notes: "When talking of not helping and abandoning in danger we must consider that it does not matter by what reason one has found oneself in danger because of own or someone else's action. In both cases there is arisen an obligation of taking care of the one who is in danger" (page 336).

In the work there is given the reference to the text of article 38 of Public Health Code, according to which a doctor is obliged to provide a patient with medical assistance and continual treatment, if there is life-threatening state including the state due to the attempt of suicide (see page 337). Basing on this text the author quite justly concludes: "The doctor must not be discharged from taking care of the patient who is in a dangerous state for life under the pretext that the patient has jeopardized his/her own life by attempting suicide" (ibid). Exclusion is admitted only by article 148 of the named law, when a patient has incurable and deadly disease and is in deathbed, which means that there is no chance of curing, recovering the patient" (ibid). Besides, the author refers to the case of euthanasia, "when a patient has an intolerable pain" (ibid).

"In abandoning a person, - concludes the author, - just as on putting a person into a dangerous for life position, it is impossible for the criminal to have a careless attitude to committing murder. Though abandoning somebody in peril is a delict of abstract danger, but the danger in relation to the victim, is concrete" (see page 342).

After this the author discusses article 129 of the Georgian criminal code. Responsibility for not helping, unlike responsibility for abandoning a person in danger, is wider and according to article 129 the one, who had a solidary responsibility of taking care of the person in danger will be punished. The author shares the opinion that not helping is an abstract danger delict and "it is considered as completed crime, when an obligatory action is not fulfilled" (see page 347). Here is also critically discussed court practice and legislation of Georgia and Germany.

In the work there is also discussed a case of abandoning a sick person (article 130 of the Georgian criminal code), AIDS infection (article 131), particularly dangerous diseases infection (article 132). In the work there is extensively discussed illegal abortion, but before starting directly this issue the author discusses legal status of fetus. He studies in detail the issue about starting life and concludes that for Georgian criminal law it is unknown starting life from the moment of fecundation. The author does not share the opinion, according to which "Georgian criminal law protects life and health of fetus/embryo indirectly, establishing severe responsibility for infringement upon life and damage of a pregnant woman" (see page 372). This statement is evidently justified by the author basing on the current Georgian legislation.

In the work there is given in detail punishability of abortion by Georgian and German legislations.

After reviewing this work it can be concluded that it deserves the positive evaluation. The author fundamentally understands the problematique under review; sheds light on Georgian as well as on German literature, gives quite enough examples of Georgian and German court practice. However in spite of such positive appraisal I would like to express several notes.

First of all I would like to pay attention to the authorial understanding of one of the signs of the concept of crime – wrongfulness. T. Tskitishvili does not agree to German scientist K. Binding's point

of view and basing on the Georgian scientists' considerations concludes: "Wrongfulness can't be existed without corp.del of action and can't get ahead of corp.del of action" (see page 293). To justify this statement he gives an example from Georgian legislative practice. By article 173 of the Georgian criminal code of 1928 responsibility was set for incest, i.e. for sexual relations between closely related people. It was not brought into the code of 1960. Such action does not cause responsibility by today's legislation either. Despite its legal nature of this action has not been changed. It is estimated as negatively in society as then, when it was declared as a crime.

In the work the author does not agree to this opinion, though does not deny the existence of normative facts. "A fact can really have a normative force, - writes T. Tskitishvili, - which can turn us authorized or obliged, but G. Naneishvili himself, who developed the theory of normative acts, remarks that in case of recognizing the existence of normative acts they must not be counted as source of positive law, because the positive law has its source" (page 290).

Relying on this judgment T. Tskitishvili shares the opinion of G. Naneishvili, according to which "There are existed normative facts, which have similar features as law, but are neither law nor law source" (see *ibid*).

By the same point of view in the work there is estimated the theory of culture norms of the German scientist M.E. Maier, according to which an offender violates the norm of culture, which is beyond the criminal law (*ibid*).

Finally the author leads us to recognition of Kelzen's theory of positive law. This theory, which is basing on Neo-Kantian philosophy, is not recognized by G. Naneishvili and we can't rely on it either. Here it must be taken into account that G. Naneishvili is discussing the issue from the position of civil law, but we deal with the problematique of criminal law, where of course we partly share understanding of normative facts according to Naneishvili, but we are mainly emphasizing K. Binding's theory of norms. It is because purposes of civil and criminal law don't always coincide with each other

It must be taken into account that K. Binding's theory in Georgian and generally in Soviet literature was rejected, but it was due to political and not scientific approach to the issue. K. Binding's theory as a result of bourgeois thinking was considered to be incompatible with Marxist-Leninist ideology then, however Soviet scientists practically recognized this theory in the masked form. In the Soviet juridical literature instead of wrongfulness was used a concept of social danger. This concept was included in the code of 1960. The social danger was considered as an action sign. A legislator chose the action by this sign and declared it as a crime. Just by this sign was chosen "incest" and declared it as a crime by the Georgian criminal code of 1928.

To the advantage of K. Binding's theory there are also considered those articles of criminal legislation, which are called blanket articles. In these articles the wrongfulness of the action is based on the rules stated by administrative law. A criminal is violating the norm stated by administrative law. Here the wrongfulness of the action is beyond the criminal law again.

Such solution of the issue has a great practical importance. If the norm, violated by the offender, had not been beyond the criminal law, we should have demanded from the offender to know that he had violated a criminal law. In such a case we would not have punished any offender, as we would not have been able to prove him that he had read the criminal law.

The author refers to article 179 of the Georgian criminal code according to which robbery is an assault in order “to misappropriate another person’s movable thing” (see page 294). The same reference to the wrongfulness is also observed in article 177 (stealing) and article 178 (burglary). Unfortunately putting the “wrongfulness” sign into these articles is a law-maker’s mistake. In these articles there are described classical delicts, the corp.del of which does not require reference to the wrongfulness, otherwise we should have formulated the text of article 108 of the Georgian criminal code as follows: “intentional murder wrongfully” and others.

The delicts discussed here by their legal nature don’t require reference to the wrongfulness sign in the text of the law. From this point of view the criminal code is divided into two parts. In the first part there is described corp.del of classical delicts, in the second one there are given blanket delicts. The main characteristic for classical delicts is that the whole action is evaluated negatively with the exception of the case when there is some circumstance excluding the wrongfulness. As for blanket delicts the action described here by legislation is generally positive from the legal point of view, but in an exceptional case it might damage legal goodness unless it is committed by observing the proper rule (driving a car, abortion and etc.). Resulting from this construction it can be concluded that in classical delicts the wrongfulness is stated negatively, i.e. by the method of excluding the wrongfulness of the action. As for blanket delicts, the wrongfulness is mainly stated positively, though the author does not share this opinion. “As the reference to the wrongfulness of the action given in the corp.del of the action (for example, illegal abortion), - writes the author, - is a sign of the corp.del of the action and not a sign of wrongfulness, in such (blanket) delicts the wrongfulness is stated not positively, but negatively (excluding the circumstance which excludes the wrongfulness)” (page 319).

Reference to unlawfulness of the action in corp.del that it is seen in blanket delicts (lawful abortion), does not mean that the wrongfulness here “is stated not positively, but negatively”.

What does stating the wrongfulness “negatively” mean? It means that when corp.del signs of the action described by law are stated, it means that this action is unlawful in itself and does not require special proving, unless there is observed a sign of any circumstances excluding the wrongfulness. Only after this court starts special or positive proving whether the action described by law is unlawful or not. Such delicts are for example, murder, bodily injury, stealing, robbery, burglary and others. So court does not require special proving in the sentence whether the thief knew or not that he/she violated the norm: “Don’t steal”. So in sentence for committing murder there are not seen words, that the killer violated the norm: “Don’t kill” and etc. Here committing an action (stealing, murder and etc.) means in itself that the person violated the rules of conduct and it does not require special proving. Such is stating a negative sign of wrongfulness, i.e. stating without special proving in classical delicts.

This question quite differently is settled in blanket delicts. In this case court must prove specially (positively) in sentence which norm of law is violated by the offender. As for the case when wrongfulness is excluded, here we also deal with the positive stating of wrongfulness. Here court must prove specially or positively whether the norm is violated or not. If the wrongfulness is not excluded, it will be stated positively that action is unlawful.

We can’t agree to the author’s opinion, according to which he offers the corp.del described by article 128 of the Georgian criminal code in a new manner. Article 128 imposes a responsibility for

abandoning in danger, if the abandoning person "could give assistance" to the person in danger. In the opinion of T. Tskitishvili this article must be formulated as follows: "Leaving somebody in a life-threatening state without giving assistance, if the abandoning person was obliged to take care of him". According to the author: "The reference to the existence of the action possibility must not be made in the description of article 128 because it can't be counted as a *corps.del* sign of the action" (page 335).

If the words "could give assistance" are to be taken out of the text of article 128 of the Georgian criminal code, why does not the author say anything about article 129 of the Georgian criminal code, in the text of which there are just the same words - "could give assistance"? Besides, the named words don't cause any uneasiness. On the contrary these words make the *corps.del* text described by article 128 of the Georgian criminal code more perfect and are admissible from the practical point of view. These words oblige court to prove in the sentence that the abandoning person could give emergency assistance to the person being in danger.

In spite of these comments we can conclude that the work of T. Tskitishvili presented in candidacy for an academic degree of Juris Doctor deserves positive evaluation and its author must be granted the scientific degree of Juris Doctor. T. Tskitishvili

T. Tskitishvili's doctoral thesis finally must be evaluated by 94 *summa cum laude credits*.

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